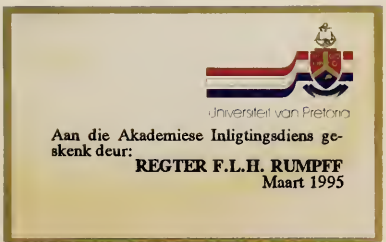

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'n Kritiese beoordeling van die prosessuele regte van die pasiënt by onvrywillige hospitalisasie van geestesongesteldes*

JL Snyman
BA LLM LLD
Professor in die Prosesreg aan die Universiteit van die Oranje-Vrystaat

SUMMARY

The Procedural Rights of the Mentally Ill Patient in Involuntary Civil Commitment Proceedings

In this article a critical analysis is made of the procedural rights afforded to the mentally ill patient in involuntary civil commitment proceedings. Owing to the vagueness surrounding the applicability of the rules of natural justice, the author suggests that provision should be made in the Mental Health Act 18 of 1973 for the following procedural rights of the patient: (i) Notice regarding his pending commitment; (ii) the right to be present at the commitment hearing; (iii) the right to put his case before the institutionalizing authority, and (iv) the right to legal representation.

1 INLEIDING

Die regsproblematiek verbonde aan siviele opneming van geestesongesteldes of van vermeende of beweerde geestesongesteldes is uitgebreid en moeilik. Ofskoon die gemeenskap se benadering tot geestesongesteldheid in die moderne tyd veel meer simpatiek is as ooit tevore, heers daar nog aansienlike onkunde en vooroordeel by die algemene publiek. Die geestesongestelde is bowendien – ongelukkig – dikwels 'n probleem en 'n bron van verleentheid vir sy familielede. Siviele opneming word soms beskou as 'n gerieflike metode om van 'n "moeilike" familielid of eggenoot ontslae te raak. Daar bestaan in 'n mate 'n gevaar van misbruik van die instelling van siviele opneming – wat ook al die voordele wat dit, en psigiatriese behandeling, vir die betrokkene mag inhou. Daarby kom nog die faktor van "mediese mag;"[1] die psigiatrie beskik vandag oor potensiële

* Dié artikel is gebaseer op die skrywer se ongepubliseerde proefskrif: *Die Siviele Opneming van Geestesongesteldes: Regte en Regsbeskerming van die Betrokkene* (1981).

1 in die woorde van Van den Berg *Medische Macht en Medische Ethiek* (1969).

middele van diep ingrypende aard, byvoorbeeld breinchirurgie en psigiotropiese artsenymiddels wat 'n radikale persoonlikheidsverandering van 'n pasiënt tot gevolg kan hê. Teenoor mediese mag van dié aard, hoe goed dit ook al in die belang van die mensdom bedoel is, asmede die moontlikheid van misbruik van die stelsel van siviele opneming, moet die beskermende skild van die reg steeds staan. Dit is om dié rede dat die regsbeskerming van pasiënte by siviele opneming – ten spyte van die relatief min aandag wat dit tot op hede by ons regskrywers en -kommentatore geniet het – noodwendig tot die vlak van aktualiteit verhef moet word. Veral skyn die uitstippeling van die prosessuele regte en regsbeskerming wat aan die pasiënt verleen – of behoort verleen te – word, van belang te wees. In die onderstaande bespreking word 'n poging hiertoe aangewend.

2 DIE BEGRIP "SIVIELE OPNEMING" EN DIE PROSEDURE VIR OPNEMING

Siviele opneming van geestesongesteldes dui op die opneming (met uitsluiting van die verwysing van geestesongesteldes na 'n inrigting deur 'n geregshof soos dit in die strafprosesreg voorkom) van geestesongesteldes in 'n inrigting vir geestesongesteldes.[2] In Suid-Afrika word hierdie instelling deur die Wet op Geestesgesondheid 18 van 1973 gereël.[3] Hierdie wet maak voorsiening vir twee vorme van siviele opneming: vrywillige opneming[4] en opneming uit hoofde van 'n aanvanklike opnemingsbevel van 'n landdros,[5] soos opgevolg deur 'n regtersbevel vir die verdere aanhouding van die pasiënt[6] (die sogenaamde onvrywillige opnemings).[7] Vir doeleindes van hierdie artikel word egter slegs op onvrywillige hospitalisasie gelet: Vrywillige opneming van geestesongesteldes bied vanweë

2 Die begrip "siviele opneming" is ontleen aan die Engels- en Amerikaansregtelike begrip "civil commitment" – 'n begrip wat in gemelde regstelsels as alternatief vir die "institutionalization" of "hospitalization" van geestesongesteldes gebruik word. In Afrikaans kan na lg twee terme as die institusionalisering of hospitalisasie van geestesongesteldes verwys word. In hierdie artikel word die begrippe "siviele" opneming, "institusionalisering" en "hospitalisasie" van geestesongesteldes as sinonieme begrippe gebruik, met dien verstande dat al drie begrippe op die opneming van 'n geestesongestelde in 'n inrigting vir geestesongesteldes dui.

3 Vgl a 2.

4 Sien a 3 en 4 van die Wet op Geestesgesondheid.

5 a 9.

6 a 19.

7 In dié verband kan net daarop gewys word dat die gewone geval waar die pasiënt onvrywilliglik opgeneem word nie noodwendig as "onvrywillig" of "bestrede" bestempel behoort te word nie (vgl Slovenko 1971 *Journal of Public Law* 21). Hoewel gevalle mag voorkom waarin die pasiënt aktief sy dreigende hospitalisasie opponeer (vgl bv Landis 1974 *De Paul Law Review* 1279 en Rock *et al Hospitalization and Discharge of the Mentally Ill* (1968) 155–157), is dié vorm van hospitalisasie nie soseer onvrywillig as wat dit sonder protes of sonder die wil van die pasiënt geskied nie – vgl Slovenko *loc cit*; Ellis 1974 *California Law Review* 846; Kittrie 1960 *Ohio State Law Journal* 37. Die afwesigheid van protes by die pasiënt beteken nie noodwendig dat sy hospitalisasie ôf in samewerking ôf teen sy wil sal geskied nie. (Die teenoorgestelde is regtens ook waar – nl dat heftige uiterlike protes vanweë geestes-(wils-)onvermoë nie as onwilligheid beskou kan word nie.)

die vrywilligheid daarvan[8] geen noemenswaardige probleme nie en word in ieder geval op dieselfde grondslag as die opneming van pasiënte met fisiese siektes in gewone hospitale benader.[9]

Die prosedure wat in die Wet op Geestesgesondheid vir die onvrywillige of gedwonge hospitalisasie van 'n geestesongestelde voorgeskryf word, is soos volg: Enige persoon ouer as 18 jaar wat glo dat 'n ander persoon dermate geestesongesteld is dat hy na 'n inrigting verwys behoort te word, kan by 'n landdros aansoek doen om 'n bevel dat die betrokkene in 'n inrigting opgeneem en aangehou moet word.[10] Die landdros is verplig om vir doeleindes van oorweging van die aansoek die hulp van twee geneeshere van wie een, indien moontlik, die distrikgeneesheer moet wees, in te roep.[11] Genoemde geneeshere moet die pasiënt ondersoek en 'n verslag betreffende hul ondersoek aan die landdros oorhandig.[12] In hul verslae moet die geneeshere onder meer ook sertifiseer of die pasiënt, volgens hulle oordeel, behandeling nodig het maar onwillig is om homself daaraan te onderwerp en derhalwe deur middel van 'n opnemingsbevel tot 'n inrigting toegelaat moet word.[13] By ontvangs van hierdie verslae oorweeg die landdros die applikant se aansoek om 'n opnemingsbevel. Die getuienis met betrekking tot die pasiënt se geestestoestand wat voor die landdros sal of kan dien, is die volgende: (i) die (beëdigde) inligting vervat in die applikant se aansoek om 'n opnemingsbevel; (ii) die verslae van die sertifiserende geneeshere; (iii) getuienis verkry deur die landdros by die pasiënt self (in dié verband kan die landdros een van twee weë volg: (a) hy kan die pasiënt by sy woon- of werkplek besoek en hom ondersoek,[14] of (b) hy kan 'n polisiebeampte aansê om die pasiënt

8 Dié stelling mag moontlik 'n oorvereenvoudiging daarstel: Vanweë dwang wat op 'n pasiënt uitgeoefen mag word, ontstaan die vraag of daar in sulke gevalle werklik van vrywillige hospitalisasie sprake kan wees. Dié moontlikheid het Szasz (soos aangehaal deur Katz/Goldstein/Dershovitz *Psychoanalysis, Psychiatry and Law* (1967) 475) bv genoop om die volgende te verklaar: "What is called voluntary admission is really not voluntary. It is perhaps quasi-voluntary. What we call voluntary admission to a mental hospital doesn't resemble voluntary admission to a medical hospital, for example, for pneumonia. It is rather a kind of voluntary involuntary admission. This so-called voluntary admission to a mental hospital is a procedure which more often than not, could be paraphrased as follows: It is as if the patient were told: 'If you don't go to the hospital by signing this piece of paper, then we'll get you in by having someone else to sign another piece of paper.' " Sien ook Szasz 1970 *Washburn Law Journal* 236; Dewey 1972 *Capital University Law Review* 3–4; Schlesinger 1971 *Bulletin of the Menninger Clinic* 393–395; Saphire 1976 *Florida State University Law Review* 234–238. Beïnvloeding van 'n pasiënt om homself te laat hospitaliseer bring nie noodwendig 'n "onvrywillige hospitalisasie" mee nie. Wat egter wel vasstaan, is dat daar regtens van (vrywillige) toestemming by die pasiënt net sprake is as die beïnvloeding slegs van so 'n graad is dat dit eerder op oortuiging as op 'n wilsonderskuiwing neerkom: 'n gedwonge wil is tog geen wil nie.

9 Vgl die verslag van die Kommissie van Ondersoek na die Wet op Geestesgebreken RP80/1972 (Die Van Wyk-verslag) 3 8 2.

10 a 8(1).

11 a 9(1).

12 *ibid.*

13 Vgl vorm G2/2 van die Algemene Regulasies soos uitgevaardig in RK 2127, gedateer 27/3/75.

14 a 9(1).

in bewaring te neem en voor hom te bring ten einde ondersoek te word);[15] (iv) getuienis verkry uit enige verdere ondersoek wat die landdros nodig mag vind om te doen. Die landdros het naamlik 'n diskresionêre bevoegdheid om enige sodanige bykomende ondersoek te doen en hy kan vir dié doel enigiemand oproep om as getuie voor hom te verskyn om met betrekking tot die geestestoestand van die pasiënt te getuig.[16] Dit is opvallend dat getuienis in (iii) en (iv) genoem nie noodwendig voor die landdros sal dien nie. Die inligting in (i) en (ii) genoem, daarenteen, dien noodwendig voor die landdros.

Indien die landdros na oorweging van bogenoemde oortuig is dat die pasiënt in so 'n mate geestesongesteld is dat dit noodsaaklik is dat hy aangehou, onder toesig gehou, beheer en behandel moet word (of dat hy na vermoede of bewering dusdanig geestesongesteld is), kan hy beveel dat die pasiënt opgeneem, aangehou en behandel word by 'n inrigting in die opnemingsbevel vermeld.[17] Die pasiënt word dan so spoedig moontlik na die betrokke inrigting verwyder.[18] Aldaar moet hy deur die superintendent van die inrigting met betrekking tot sy geestestoestand ondersoek word. Gemelde superintendent stuur dan sy verslag oor die pasiënt se geestestoestand, tesame met die mediese sertifikaat op grond waarvan die landdros sy opnemingsbevel uitgereik het, aan die betrokke prokureur-generaal, synde die amptelike *curator ad litem* van die pasiënt.[19] Die prokureur-generaal gaan die verslae na en kan, indien hy dit nodig vind (maar wat in die praktyk feitlik nooit gebeur nie),[20] verdere verslae aanvra.[21] Hierdie verslae word deur die prokureur-generaal *via* die griffier van die hooggeregshof aan 'n regter in kamers vir oorweging voorgelê.[22] Indien gemelde regter, na oorweging van die verslae, oortuig is dat 'n bevel vir die verdere aanhouding van die pasiënt gegee behoort te word, kan hy so 'n bevel gee vir die tydperk wat hy nodig ag.[23] Om hom behulpsaam te wees om dié besluit te neem, kan die regter die pasiënt en sy *curator ad litem* (die prokureur-generaal) dagvaar om op 'n bepaalde plek en tyd te verskyn ten einde gronde aan te voer waarom die pasiënt nie, onder meer, tot 'n geestesongestelde persoon verklaar en sy aanhouding bevestig moet word nie.[24]

3 DIE REGSTAATLIKE BENADERING: TOEPASSING VAN DIE REËLS VAN NATUURLIKE GEREGTIGHEID

Vanweë die ernstige gevolge wat gedwonge hospitalisasie vir 'n geestesongestelde mag inhou[25] – en *a fortiori* indien die geestesongestelde op ongeregverdigde wyse

15 a 15(2).
16 a 9(2)(a).
17 a 8(3) gelees met die omskrywing van "pasiënt" in a 1.
18 a 9(5).
19 a 18(2) gelees met a 17.
20 Vgl Kruger 1977 *THRHR* 260
21 a 18(3).
22 *ibid.*
23 a 19(1)(a).
24 a 19(1)(b).
25 So bv mag die pasiënt vir lang tydperke in aanhouding verkeer (vgl 1973 *Northwestern University Law Review* 585), ja, in sommige gevalle selfs vir die res van sy lewe (vgl Farrell

aldus gehospitaliseer word – is dit duidelik dat vanuit 'n regstaatlike[26] oogpunt beskou, daar in dié verband gewaak moet word teen 'n outoritêre, eensydige uitoefening van sy mag deur die staat. Die toepassing van die regstaatidee maak die moontlikheid van 'n arbitrêre staatlike optrede teen die geestesongestelde – as sou hy *ex hypothesi qua* geestesongestelde altyd tot hospitalisasie gedwing moet word – onhoudbaar. In die besonder kom dit daarop neer dat die oppergesag van die reg as die grondliggende idee van die regstaatbeginsel aan te merk is.[27] Derhalwe is dit die reg se taak om die masjinerie te skep waarvolgens bepaal kan word of die staat in die uitoefening van sy mag (dit wil sê die gedwonge hospitalisasie van die geestesongestelde) op geregverdigde wyse die persoonlike grondregte van die betrokke pasiënt inkort; of die staat in die dwangmatige hospitalisering van die pasiënt uit hoofde van, en in ooreenstemming met, 'n bepaalde wet optree; en of die staat se genoemde optrede die nagestreefde doel dien.[28]

Die formele regstaatbegrip het in dié verband ook tot inhoud dat die reg in die proses van bepaling of daar aan die maatstawwe vir opneming voldoen is, die minimum standaarde van geregtigheid moet vereis.[29] In die besonder sou dit meebring dat in hierdie proses aan die individuele pasiënt die geleentheid gebied moet word om sy kant van die saak te stel en om van regsverteenwoordiging gebruik te maak.

Indien daar van die standpunt uitgegaan word – en myns insiens moet daar van dié standpunt uitgegaan word[30] – dat die vraag van die siviele opneming

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1975 *Idaho Law Review* 141–142). Sy hospitalisasie bring minstens mee dat hy nie sy normale lewenswyse ongestoord kan voortsit nie; dit bring noodwendig 'n inbreukmaking op sy bewegingsvryheid mee (vgl bv Shah 1975 *American Journal of Psychiatry* 501). Hospitalisasie mag ook inbreuk maak op die pasiënt se privaatheid (1974 *Harvard Law Review* 1194–1197), sy huwelik mag vanweë sy hospitalisasie op die rotse loop, die pasiënt mag dit ook problematies vind om vanuit die hospitaal met persone in die buitewêreld te kommunikeer en in besonder om regsbystand te kry. Hierbenewens is die stigma wat (op ongeregverdigde wyse) aan 'n gehospitaliseerde geestesongestelde kleef 'n veel groter maatskaplike sanksie wat die pasiënt opgelê kan word as wat dit oënskynlik voorkom (vgl Jackson 1974 *University of Chicago Law Review* 826; Rosenhan 1973 *Science* 253–254). So bv noop die probleme wat 'n pasiënt mag ondervind om na ontslag 'n betrekking te bekom, 'n kommentator om te verklaar dat "[i]n the jobmarket it is better to be an ex-felon than an ex-mental patient" (Keen 1974 *Kentucky Law Review* 770).

26 Vir 'n bespreking van die regstaatidee (spesifiek mbt Suid-Afrika) vgl Van Wyk 1980 *TSAR* 152–169.

27 Van Wyk *op cit* 159.

28 Van Wyk *op cit* 157.

29 Hierdie standpunt word soms met skeptisisme bejeën. Daar word nl soms geredeneer dat aangesien die staat se oogmerk met die hospitalisasie van die pasiënt "benevolent" is, hierdie sg "benevolent theory of state action" (sien bv Remington 1973 *Marquette Law Review* 82–83) nie die erkenning en toepassing van prosessuele regte van die pasiënt duld nie (vgl bv 1973 *Duke Law Journal* 731–732). Hierdie standpunt skyn vir my aanvegbaar te wees. In Amerikaanse konteks wys Flaschner (1974 *ABAJ* 1372) dan ook daarop dat die regsbeginsels in die moderne (siviele) opnemingswetgewing (net soos dit in die strafreg die geval is) bestem is "to remove the shackles of raw state power and to replace them with a more humane and sensitive balance from the Bill of Rights."

30 *sed contra* 1974 *Loyola of Los Angeles Law Review* 95: "Civil commitment has often been characterized as one of concern only to the medical profession and therefore not of interest to the law."

van geestesongesteldes 'n juridiese vraag is en dat die landdros en regter se onderskeie funksies in die opnemingsprosedure beide judisieel van aard is,[31] verkry die vraag na die prosessuele regte van die pasiënt opnuut betekenis. So sou die bepaling van die aard en inhoud van die pasiënt se prosessuele regte grootliks bepaal word deur die vraag of die reëls van natuurlike geregtigheid (of "due process,"[32] soos dit in die VSA bekend staan) tydens die pasiënt se opnemingsverrigtinge toegepas moet word. Indien wel, moet dan vasgestel word in welke mate uitdrukking aan dié reëls in die opnemingsproses verleen word of behoort te word.

Dit is na my mening duidelik dat genoemde reëls in die onderhawige prosedure toepassing behoort te vind. Dié afleiding volg nie alleen daaruit dat die landdros en regter judisiële handelinge verrig nie, maar ook daaruit dat die opnemingsbevel en bevel vir die verdere aanhouding van die pasiënt verreikende gevolge vir die pasiënt (byvoorbeeld inbreukmaking op bewegingsvryheid, moontlike verandering van status, ensovoorts) inhou.

Hierdie beginsel is ook positiefregtelik te verantwoord: Daar word byvoorbeeld in *Kudo v Cape Law Society*[33] gesê:

> "By 'n beregbare diskresie veronderstel ek 'n diskresie wat uitgeoefen moet word en wat bestaande regte, bevoegdhede, voorregte en vryhede raak en wat onder andere vereis dat natuurlike regverdigheid toegepas behoort te word."

Dit is egter so dat 'n bepaalde wet die aanwending van die reëls van natuurlike geregtigheid vir die doeleindes van toepassing van daardie betrokke wet in die ban kan doen.[34] So 'n afleiding uit 'n betrokke wet moet egter onontwykbaar wees[35] – die vermoede bestaan immers dat 'n betrokke wet stilswyend bedoel dat die reëls van natuurlike geregtigheid – of ten minste dan die *audi alteram partem*-reël – nagekom moet word[36] tensy "the clear intention of Parliament negatives and excludes the implication."[37] Myns insiens kan daar nie so 'n "clear intention of Parliament" uit die Wet op Geestesgesondheid afgelei word nie. Trouens, die teendeel blyk eerder waar te wees. Aan die landdros word ingevolge hierdie wet byvoorbeeld die bevoegdheid verleen om die pasiënt voor hom te

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31 Vgl *De Villiers v Minister of Justice* 1916 TPD 463 465 waar die volgende tov die landdros se handeling (en, *a fortiori*, dus ook tov van die regter s'n) gesê word: "and in so far therefore he may be said to act in a judicial capacity."

32 Dié begrip word soos volg deur Birnbaum (1965 *Archives of General Psychiatry* 40) beskryf: "[T]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comforts with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause . . . In applying such a large untechnical concept as 'due process' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

33 1977 4 SA 660 (A) 667A–B.

34 Vir 'n voorbeeld hiervan sien *Koekoe v Regering van die RSA* 1980 1 SA 464 (O).

35 Vgl *Publications Control Board for Central News Agency* 1970 3 SA 479 (A) 489B–D.

36 *ibid.*

37 *ibid.*

laat verskyn of om die pasiënt te besoek, terwyl die regter 'n ooreenstemmende bevoegdheid het om die pasiënt en dié se *curator ad litem* aan te sê om redes aan te voer waarom 'n bevel vir die verdere aanhouding van die pasiënt nie gegee behoort te word nie.

Met die aanvaarding van die beginsel dat die reëls van natuurlike geregtigheid inderdaad tydens die siviele opnemingsverrigtinge van toepassing is, kan vervolgens vasgestel word in welke mate dié reëls in die genoemde prosedure beliggaam word of beliggaam behoort te word.

4 VOORGESTELDE PROSESSUELE REGTE VAN DIE PASIËNT

Alvorens die onderskeie voorgestelde prosessuele regte van die pasiënt behandel word, moet daarop gelet word dat dit juis die beweerde of daadwerklike geestesongesteldheid van die pasiënt is wat in dié verband 'n kompliserende faktor kan wees – 'n faktor wat soms die aanwendbaarheid van bepaalde beskermingsmaatreëls in die wiele kan ry. Daar kan egter nie goedsmoeds van die standpunt uitgegaan word dat die pasiënt vanweë sy geestesongesteldheid nie in staat sal wees om die opnemingsverrigtinge te begryp nie en bygevolg nie beskerm hoef te word nie. In die onderstaande bespreking sal telkens gewys word op die invloed wat die pasiënt se geestestoestand op die aanwendbaarheid van 'n bepaalde beskermingsmaatreël mag hê. Vervolgens word die onderskeie reëls van natuurlike geregtigheid *seriatim* in behandeling geneem. Langs dié weg kan dan vasgestel word welke beskermingsmaatreëls op die opnemingsprosedure toegepas behoort te word.

4 1 Kennisgewing aan die Pasiënt betreffende die Beoogde of Dienende Opnemingsverrigtinge teen Hom

Met die aanvaarding dat die gedwonge hospitalisasie van die pasiënt 'n regsvraag is, blyk verpligte inkennisstelling van die pasiënt betreffende die beoogde of dienende verrigtinge teen hom in beginsel niks minder as billik te wees nie.[38] Die voordele wat so 'n kennisgewing vir die pasiënt inhou, spreek vanself: Die pasiënt – of iemand namens hom – word hierdeur die geleentheid gebied om hom, indien hy die aansoek wil – en kan – opponeer, vir die beregting van die aansoek voor te berei, byvoorbeeld om sy verweer of verwere in orde te kry. Veral in Amerikaanse kringe word sterk hieroor gevoel: Die amptelike standpunt van die *Special Committee on the Rights of the Mentally Ill* van die *American Bar Association* is byvoorbeeld:

> "Any person, before he is committed to a mental hospital ... should be served with notice and given full opportunity to be heard. On this we, the Committee, insist as a constitutional requirement."[39]

38 'n Oorsig van die literatuur en regspraak op dié punt in die VSA skep die indruk dat so 'n kennisgewing aan die pasiënt wel 'n vereiste vir "due process" is. Vgl Richardson/Barbor 1978 *Tulane Law Review* 551; 1974 *Harvard Law Review* 1274–1275; HJG 1970 *New York Law Forum* 177.

39 Sien Brakel/Rock *The Mentally Disabled and the Law* (1971) 51.

Daar moet egter daarop gewys word dat die psigiatrie soms krities staan teen die erkenning en toepassing van hierdie vereiste. Die standpunt van die psigiatrie is soms dat so 'n kennisgewing, vanweë die trauma wat dit vir die pasiënt mag meebring, eerder 'n anti-terapeutiese uitwerking op die pasiënt kan hê.[40] Dit geld veral ten opsigte van die paranoïese of depressiewe persoonlikheid wat by ontvangs van die kennisgewing moontlik mag probeer vlug of selfs self-moord pleeg.[41] Aansluitend hierby word aangevoer dat regsdokumente slegs angs en verwarring in die pasiënt se geestestoestand sal meebring[42] en dat dit gevolglik sy prognose sal benadeel.[43] Dié argument dra ook soms die goedkeuring van regskrywers weg. So voer Guttmacher/Weihofen[44] byvoorbeeld aan:

> "[W]here the person is mentally incapable of understanding the nature of the proceedings or preparing therefor, or is so deranged that notice would do him harm, the purpose of protecting his interest can be more effectively accomplished in some other way than by serving him with legal papers."

As teenargumente teen hierdie psigiatriese besware voer juriste aan dat ontvangs deur die pasiënt van sy kennisgewing hom nie meer kan benadeel as om hom skielik as 'n aangehoudene in 'n geesteshospitaal of voor die hof te bevind nie.[45] Die betekening aan die pasiënt van dokumente wat hom meedeel dat hy prosessueel beskerm sal word, kan, volgens kommentatore, eerder meebring dat sy angs sal verminder.[46] Szasz is selfs van mening dat kennisgewing aan die pasiënt terapeuties tot sy voordeel is.[47]

Om dié probleem te oorkom, is ook al aangevoer dat ten einde die potensiële trauma van 'n formele kennisgewing vir die pasiënt te vermy, dit raadsaam sou wees om 'n geneesheer of ander bevoegde persoon die pasiënt te laat besoek om aan hom die dokumente te verduidelik.[48] Die beswaar teen so 'n siening is dat medici meer begaan mag wees oor die pasiënt se prognose as oor sy regte. Dit kan daartoe lei dat die medici, weens hul mening van 'n goeie prognose van die pasiënt, ongenee sal wees om aan hom sy regte te verduidelik veral as hul meen dat dit die prognose kan benadeel.[49]

Die reeds genoemde *Special Committee on the Rights of the Mentally Ill* het gevolglik aanbeveel dat, benewens aan die pasiënt self, ook aan sy naaste beskikbare familielid of, in die afwesigheid van so 'n persoon, aan 'n vriend van die pasiënt kennis van die verhoor gegee moet word. Dit sou terselfdertyd ook

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40 Vgl Curran 1967 *American Journal of Public Health* 1566.
41 Sien Segall 1973 *Alabama Law Review* 263.
42 Brakel/Rock *op cit* 51; 1974 *Harvard Law Review* 1274; Kaiser 1973 *Capital University Law Review* 128.
43 HJG *op cit* 176.
44 *Psychiatry and Law* (1952) 290.
45 Sien bv Brakel/Rock *op cit* 51; Keen *op cit* 786.
46 1974 *Harvard Law Review* 1274.
47 Vgl Katz/Goldstein/Dershowitz *op cit* 476 (verklaring van Szasz) en HJG *op cit* 177: "Legislators must come to the realization that prior notice will not be anti-therapeutic in all cases."
48 Guttmacher/Weihofen *op cit* 296; Segall *op cit* 264.
49 1974 *Harvard Law Review* 1274 vn 67; Ellwanger 1974 *University of Florida Law Review* 512.

die probleem oplos wat kan ontstaan indien die pasiënt nie die inhoud of betekenis van die kennisgewing begryp nie.[50]

Verdere kritiek teen die psigiatriese besware bestaan daaruit dat om te beweer dat 'n kennisgewing van die verhoor 'n traumatiese uitwerking op die pasiënt sal hê, outomaties impliseer dat die pasiënt vóór 'n bevinding te dien effekte, as geestesongesteld beskou word.[51] Laasgenoemde vraag is immers 'n aangeleentheid wat juis deur middel van 'n verhoor bepaal moet word.[52] Tereg verklaar 'n Amerikaanse hof dan ook in *In re Welman*[53]:

> "Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice, which cannot be ignored ... It will not do to say that it is useless to serve notice upon an insane person – that it would avail nothing, because of his inability to take advantage of it. His sanity is the very thing to be tried."

In sy geheel gesien, blyk die besware wat die psigiatrie teen so 'n kennisgewing opper, naamlik dat dit 'n anti-terapeutiese uitwerking op die pasiënt se geestestoestand mag meebring of dat dit sy prognose kan benadeel, geldig te wees. Verder moet ook toegegee word dat die pasiënt se geestestoestand sodanig kan wees dat hy nie in staat is om die strekking van die kennisgewing te begryp nie. In hierdie gevalle moet dit dus aanvaar word dat die inkennisstelling van die pasiënt in elk geval geen doel sou dien nie.

Om in dié verband te veralgemeen en te aanvaar dat alle geestesongesteldes dermate geestesongesteld is, is egter gevaarlik. Daar kan nie gesê word dat alle geestesongesteldes vanweë hulle geestesongesteldheid onvermoënd is om 'n begrip van die genoemde kennisgewing te vorm nie. So 'n kennisgewing is ook nie altyd anti-terapeuties of *contra*-prognosties nie. Die psigopaat, byvoorbeeld, mag volkome by magte wees om die aard, strekking en potensiële gevolge van so 'n kennisgewing te begryp. Indien die pasiënt se geestestoestand hom nie onvermoënd maak om die aard van die kennisgewing te begryp nie, sal die genoemde kennisgewing hom dus wel die geleentheid bied om hom vir die beregting van die aansoek teen hom voor te berei. Daar moet onthou word dat dit nie slegs gaan om die vraag of die pasiënt geestesongesteld is nie. Bykomend hiertoe moet ook bepaal word of hy aan die verdere vereistes vir onvrywillige opneming voldoen.[54] Dit is veral ten opsigte van laasgenoemde maatstawwe waar die pasiënt oor aanvaarbare teenbewyse mag beskik. Indien dit egter sou blyk dat so 'n kennisgewing tot die pasiënt se nadeel sou strek, byvoorbeeld dat hy nie in staat is om die betekenis en uitwerking daarvan te begryp nie of dat dit vir hom terapeuties tot nadeel sal wees, hoef daar nie noodwendig van die nakoming van dié vereiste afstand gedoen te word nie. Betekening van die

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50 Brakel/Rock *op cit* 51; Ross 1955 *Michigan Law Review* 969.

51 Vgl *In re Wellman* 3 Kan App 100, 45 P 726; Kaiser 1973 *Capital University Law Review* 128–129; Becnel 1970 *Louisiana Law Review* 155.

52 Vgl Segall *op cit* 263; Ellwanger *op cit* 511.

53 *supra* 103 727.

54 Geestesongesteldheid is nie die enigste vereiste vir opneembaarheid nie. Alvorens die pasiënt kan kwalifiseer vir hospitalisasie moet sy geestesongesteldheid ook meebring dat hy 'n gevaar (hetsy vir homself of andere) inhou, of dat hy 'n behoefte aan sorg en behandeling openbaar.

kennisgewing aan iemand wat namens die pasiënt kan intree, bly selfs in dié geval 'n moontlike uitweg wat gevolg kan word.

Vir sover dit die Suid-Afrikaanse opnemingsprosedure betref, blyk dit nie uit die Wet op Geestesgesondheid of die pasiënt dusdanig in kennis gestel moet word of nie. Die wet swyg hieroor. Die afleiding skyn egter te wees dat die pasiënt nie omtrent die dienende aansoek om opneming in kennis gestel hoef te word nie. Dit is, myns insiens, 'n leemte in die wet. Daar word dus aan die hand gedoen dat voorsiening in die wet gemaak behoort te word om die pasiënt in kennis te stel betreffende die hangende aansoek om onvrywillige opneming teen hom. Insgelyks behoort ook voorsiening gemaak te word vir omstandighede (soos hierbo genoem) waaronder van dié vereiste afstand gedoen kan word. In die voorgestelde wetswysiging behoort ook voorsiening gemaak te word vir die inhoud van so 'n kennisgewing. Myns insiens behoort die kennisgewing die volgende inligting te bevat: (a) die feit dat daar aansoek om die opneming van die pasiënt gedoen word; (b) die gronde waarop dié aansoek berus en (c) die datum en plek van die aanhoor van die aansoek. Die kennisgewing behoort, in laaste instansie, 'n redelike tydperk voor die beregting van die aansoek die pasiënt te bereik.

4 2 Die Reg om Teenwoordig te Wees by die Beregting van die Aansoek

Die pasiënt se teenwoordigheid by die verrigtinge, indien dit hom gegun sou word, mag hom in etlike opsigte tot voordeel strek, byvoorbeeld dat hy deur sy teenwoordigheid en deelname sekerheid kan verkry dat sy belange beskerm word.[55] Insgelyks sou dit hom in staat stel om die hof of sy raadsman op enige foutiewe getuienis met betrekking tot sy geestestoestand of algemene gedrag te wys.[56] Verder sou die hof deur die pasiënt se teenwoordigheid in die geleentheid gestel word om self met die pasiënt te kommunikeer en sy toestand waar te neem.[57]

Kritici wys egter ook in dié geval daarop dat sy teenwoordigheid 'n traumatiese ervaring vir die pasiënt mag wees wat 'n nadelige uitwerking op sy behandeling kan hê.[58] As teenargument voer voorstanders van die erkenning van dié reg ook aan – myns insiens tereg – dat dit vir die pasiënt nog meer traumaties mag wees as hy hom ewe skielik in 'n inrigting bevind uit hoofde van 'n opnemingsbevel wat in sy afwesigheid teen hom uitgereik is.[59]

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55 1974 *Harvard Law Review* 1282; Kalcheim 1976 *Family Law Quarterly* 167.

56 Vgl die voorbeeld wat Segall *op cit* 263–264 noem: "The testimony in a hearing to determine whether the respondent is mentally ill reveals the recent onset of severe depression. Unknown to anyone at the hearing, however, is the fact that 2 days before the depression began, the respondent learned that he had terminal cancer. This fact, of course, could be determinative but it is likely that it will be disclosed only if the respondent is present."

57 Sien vn 55.

58 Vgl Ross 1959 *Michigan Law Review* 966 970; 1973 *Duke Law Journal* 732 vn 23. Segall *op cit* 263 stel dit so: "These psychiatrists . . . object also to a prospective patient's presence at a judicial hearing, fearing for example, that a paranoid who witnesses his family and friends testifying 'against' him may suffer irremedial regression."

59 Segall *loc cit*.

Hierdie verskil van mening betreffende die beweerde traumatiese uitwerking wat die pasiënt se teenwoordigheid vir hom mag meebring, verloor myns insiens uit die oog dat 'n *reg* om teenwoordig te wees nie 'n *verpligting* om teenwoordig te wees, meebring nie. Hier word nie betoog dat die pasiënt verplig moet word om die aanhoor van die aansoek om sy opneming by te woon nie. Wat wel betoog word, is dat aan die pasiënt minstens die *reg* om teenwoordig te wees, verleen behoort te word. In baie gevalle kan dit miskien inderdaad gebeur dat die pasiënt van die opnemingsverhoor afwesig sal wees juis omrede hy vrees vir die potensiële trauma wat sy aanwesigheid vir hom mag meebring, of omrede hy bloot nie daartoe in staat is om die verrigtinge te volg nie. In sodanige gevalle sou egter nie gesê kon word dat hy sy reg om teenwoordig te wees, verloor nie. Sy afwesigheid spruit nie uit 'n ontsegging van sy reg om teenwoordig te wees nie, maar berus bloot op doelmatigheidsredes. Sy afwesigheid is met ander woorde 'n nie-uitoefening (en nie 'n ontsegging nie) van genoemde reg.

Die Wet op Geestesgesondheid verleen nie uitdruklik aan die pasiënt die reg om teenwoordig te wees nie. Dit ontneem hom ook nie uitdruklik dié reg nie. Gesien vanuit 'n beskermingsoogpunt van die pasiënt, en veral vanweë die voordele wat sy teenwoordigheid by die aanhoor van die aansoek om sy opneming vir hom inhou – voordele wat 'n elementêre gevoel vir natuurlike geregtigheid hom nie durf ontsê nie – behoort daar myns insiens by duidelike wetsduiding aan die pasiënt ook dié reg verleen te word.

4 3 Die Reg om sy Kant van die Saak te Stel

Hierdie reg – die *audi alteram partem*-reël – vorm die kern van die reëls van natuurlike geregtigheid en is dus om dié rede by uitstek die reg wat aan die pasiënt verleen behoort te word. Daaroor hoef geen groot betoog gelewer te word nie. Dit is erkende reg.

Maar kom die (vanselfsprekende) erkenning van dié reg van die pasiënt in die Wet op Geestesgesondheid tot uitdrukking? Soos in paragraaf 2 hierbo daarop gewys is, staan die landdros onder geen verpligting om die pasiënt te besoek of om hom voor hom te laat verskyn nie. Die landdros word egter wel verplig om die mening van die sertifiserende geneeshere in te win.[60] Hieruit blyk dat die wetgewer vir doeleindes van die uitreiking van die opnemingsbevel die klem sterker op die mening van die sertifiserende geneeshere as op dié van die pasiënt – om wie dit per slot van sake gaan – plaas. Indien die geneeshere *ad idem* is in hul bevindings en aanbevelings, blyk hul verslae van deurslaggewende belang

60 Gevalle van lakse optredes deur landdroste in dié verband het in die praktyk al voorgekom. So het dit al gebeur dat die applikant om 'n opnemingsbevel met sy aansoek deur 'n beheerlanddros na 'n klerk, belas met administratiewe werk mbt sodanige aansoeke, verwys is (sien *Rutland v Engelbrecht* 1957 2 SA 338 (A)). Benewens die feit dat die landdros self nie die aansoek oorweeg het nie, het dit *in casu* geblyk dat die betrokke klerk die applikant nie die vereiste aansoekvorm laat invul het nie maar bloot eenvoudig die pasiënt direk deur die distrikgeneesheer laat ondersoek het en outomaties op laasgenoemde se aanbeveling gehandel het.

te wees.[61] In die afwesigheid van die aanhoor van die pasiënt se kant van die saak, blyk dié toedrag van sake 'n ietwat te eensydige prentjie te wees om 'n objektiewe besluit aangaande die uitreiking van 'n opnemingsbevel moontlik te maak.[62] Hierbenewens is daar ook nog ander faktore wat hierdie "rubberstempeling" van die geneeshere se aanbeveling in 'n swak lig stel. Noemenswaardig in die verband is veral die kritiek wat – weliswaar in Amerikaanse kringe – teen die gemaklike aanvaarding van 'n algemene praktisyn se opinie betreffende 'n pasiënt se geestestoestand uitgespreek word. Segall,[63] byvoorbeeld, verwys na die algemene praktisyn as 'n persoon "who has had little or no training in the area of mental health." Sonder om die pasiënt die geleentheid te bied om sy kant van die saak te stel, bestaan die gevaar dat op die mening van 'n geneesheer staat gemaak kan word in omstandighede waarin daardie mening self op foutiewe inligting berus. Die geneesheer kan byvoorbeeld op grond van inligting wat deur andere aan hom ten opsigte van die pasiënt se geestestoestand meegedeel is[64] tot die gevolgtrekking kom dat die pasiënt geestesongesteld is en (gedwonge) behandeling nodig het. Aanvaar die landdros dié gevolgtrekking van die geneesheer, aanvaar hy hoorsê-getuienis. Hierdie potensiële benadeling van die pasiënt kan alleenlik uit die weg geruim word deur aan die pasiënt nie alleen die geleentheid te bied om sy kant van die saak te stel nie, maar deur hom ook toe te laat om die geneesheer te kruisvra ten einde die juistheid van die feitelike

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61 Hierdie opvatting word ook deur die volgende oorwegings versterk: (i) Gesprekke gevoer met landdroste in dié verband het aan die lig gebring dat dit geen ongewone verskynsel is vir 'n landdros om suiwer op grond van wat die geneeshere aanbeveel, op te tree nie. In die uitoefening van hul diskresie tree hulle in dié verband dus dikwels as 'n "rubberstempel" van die geneesheer se aanbeveling op. (ii) Deurdat 'n blote "vermoede of bewering" van die vereiste graad van geestesongesteldheid (sien die woordomskrywing van "geestesongesteldheid" in a 1) by die pasiënt voldoende grond vir die landdros bied vir die uitreiking van 'n opnemingsbevel, kan die afleiding gemaak word dat (veral) 'n eenvormige aanbeveling van hospitalisasie deur die sertifiserende geneeshere (behalwe miskien vir die konsensieuse landdros) landdroste nie maklik mag noop om van hul diskresionêre bevoegdhede tov die inwin van bykomende getuienis gebruik te maak nie.

62 'n Verdere probleem is dat die vaagheid van die regskriteria by siviele opneming maklik daartoe kan lei dat medici inhoud en betekenis aan dié kriteria moet verleen. Op dié manier word juridiese aangeleenthede afhanklik gestel van die persoonlike opvatting van die geneeshere. Vgl bv Weihofen 1960 *Ohio State Law Journal* 10; Farrell 1975 *Idaho Law Review* 152. Trouens, in die VSA is die afskaffing van die uitreiking van 'n opnemingsbevel gebaseer suiwer op die mediese verslae van die geneeshere – sonder enige onpartydige beregting daarvan – al by geleentheid bepleit (vgl Ennis/Litwack 1974 *California Law Review* 747; Dershowitz 1970 *Journal for Legal Education* 40). 'n Oproep om 'n behoorlike ondersoek na die feite ten einde te bepaal of 'n opnemingsbevel uitgereik moet word al dan nie word ook deur Lord Goddard in *R v Board of Control: Ex Parte Rutty* 1956 1 All ER 769 776 gedoen.

63 *op cit* 227.

64 welke inligting self op hoorsê gebaseer of andersins foutief kan wees. Insgelyks kan 'n invloedryke suggestie van geestesongesteldheid 'n besliste positiewe uitwerking op 'n daadwerklike diagnose van "geestesongesteldheid" hê. So meen Ennis Litwack *op cit* 722–723 dat so 'n "prestige suggestion . . . may have profound effect upon a subsequent diagnosis by influencing interpersonal perception, whether or not the (initial) diagnostic label refers to a disease which actually exists. In other words, clinicians often perceive what they expect to perceive and the impact of suggestion or clinical perceptions may be profound."

grondslag van sy gevolgtrekking na behore te toets.[65] Aan die pasiënt behoort ook die geleentheid gebied te word om weerleggende getuienis aan te bied en om vir dié doel getuies te roep.[66]

Wat die verrigtinge voor die regter in kamers betref, gebeur dit egter selde – indien ooit – dat die regter die amptelike *curator* van die pasiënt oproep om redes aan te voer waarom 'n bevel vir die verdere aanhouding van die pasiënt nie gegee moet word nie.[67] Die neiging onder regters skyn eerder te wees om 'n bevel te gee vir die verdere aanhouding van die pasiënt, hoofsaaklik uit hoofde van die geneeskundige verslae wat voor hulle dien.

Die indirekte wyse waarop die Wet op Geestesgesondheid voorsiening maak vir die pasiënt om sy kant van die saak te stel, is myns insiens onaanvaarbaar. Die uitgangspunt van die wetgewer behoort net andersom te wees: Terwyl die uitgangspunt tans daarop neerkom dat die pasiënt slegs indien die regter (of landdros) dit versoek die geleentheid gebied word om sy kant van die saak te stel, behoort die uitgangspunt eerder te wees dat die pasiënt in beginsel dié geleentheid gebied moet word tensy die regter (of landdros) anders gelas. Reeds in 1945 het die appèlhof[68] verklaar:

> "It is most disturbing to find that . . . a citizen can be deprived of his liberty and rushed in to a mental institution without having been afforded a proper opportunity of putting his side of the question adequately before the Court."

Dié woorde blyk vandag nog waar te wees. Wetgewersaktiwiteit om dié gebrek uit die weg te ruim, is dus dringend noodsaaklik.

4 4 Die Reg op Regsverteenwoordiging

Die Wet op Geestesgesondheid bevat twee belangrike bepalings betreffende die pasiënt se reg op regsverteenwoordiging. Eerstens bepaal artikel 17(a) onder meer dat die prokureur-generaal binne die regsgebied waarvoor hy aangestel is die amptelike *curator ad litem* is van 'n pasiënt wat aangehou word kragtens 'n landdros se opnemingsbevel. Tweedens word in algemene opmerking 2 van die algemene regulasies[69] wat ingevolge artikel 77 van die Wet op Geestesgesondheid uitgevaardig is, spesifiek bepaal dat psigopate (let wel, slegs psigopate) hul reg op regsverteenwoordiging behou. Uit dié twee bepalings kan die afleiding na my mening gemaak word dat die wetgewer minstens nie bedoel het om geen reg op regsverteenwoordiging aan die pasiënt te bied nie. Trouens, die bedoeling skyn

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65 Dit impliseer egter nie dat psigiaters of medici noodwendig in elke geval sal moet getuig nie. Die verlening aan al die partye van die reg om gemelde psigiaters of medici vir doeleindes van kruisverhoor op te roep behoort voldoende te wees. Uiteraard sal dié reg slegs in gevalle waar daardie party die juistheid van die psigiater se bevinding bevraagteken, deur 'n betrokke party uitgeoefen word.

66 In die VSA is in *Lessard v Schmidt* 349 F Supp 1078 (ED Wis 1972) 1091 ook beslis dat die prosedure tydens die verhoor adversaries moet wees en dat beide die staat en die pasiënt die geleentheid tot kruisverhoor gebied moet word.

67 Vgl Kruger *Mental Health Law in South Africa* (1980) 68.

68 In *Penrice v Dickinson* 1945 AD 6 21.

69 soos vervat in GK R565 gedateer 27/3/75 (*SK* 4627).

eerder te wees om inderdaad aan die pasiënt 'n reg op regsverteenwoordiging (hetsy direk of deur 'n amptelike *curator ad litem*) te verleen.

Maar hoe bevredigend is genoemde wetteregtelike reëlings in dié verband? Myns insiens nie baie nie. Vir sover dit die prokureur-generaal as amptelike *curator ad litem* van die pasiënt betref, is dit opmerklik dat hy nie in dié hoedanigheid optree namens 'n pasiënt ten opsigte van wie aansoek om 'n opnemingsbevel by 'n landdros gedoen word nie. Eers as die landdros die opnemingsbevel uitreik, word die prokureur-generaal die pasiënt se (amptelike) *curator ad litem*. Dit beteken dat as die pasiënt nie 'n psigopaat is nie, hy voor uitreiking van die landdros se opnemingsbevel ingevolge die Wet op Geestesgesondheid nie op regsverteenwoordiging geregtig is nie. In die lig daarvan dat die landdros se opnemingsbevel die aanhouding van die pasiënt vir 'n maksimum tydperk van ses weke[70] magtig, asmede die feit dat die wetgewer oënskynlik van die standpunt uitgaan dat die pasiënt op regsverteenwoordiging geregtig is, blyk dié toedrag van sake onbevredigend te wees.

Andersyds is dit 'n ewe ope vraag of die aanstelling van die prokureur-generaal as amptelike *curator ad litem* die pasiënt voldoende beskerming bied. Betreffende die aanstelling van 'n *curator ad litem* het 'n Amerikaanse hof in *Lessard v Schmidt*[71] beslis dat so 'n *curator* sy rol nie sien nie

> "as an advocate for the prospective patient, but as a traditional guardian whose function is to evaluate for himself what is in the best interests of his client-ward and then proceed, almost independent of the will of the client-ward, to accomplish his (own will)."

Deurdat die prokureur-generaal die amptelike *curator ad litem* van alle pasiënte binne die gebied van sy jurisdiksie is, is dit ook moeilik in te sien hoedat daar, prakties gesproke, enigsins konsultasies tussen hom en 'n bepaalde pasiënt kan plaasvind. Op dié wyse verval die moontlikheid dat inligting, feite of getuienis waaroor die pasiënt mag beskik en wat ter weerlegging van inkriminerende feite kan dien, voor die regter geplaas word. Die gebrek aan kommunikasie tussen die pasiënt en sy *curator ad litem*, asook die pasiënt se moontlike onbewustheid van feite wat teen hom gehou word maar waarvan sy *curator* kennis dra, kan net tot een gevolg lei: die *curator ad litem* behartig die belange van die pasiënt volgens dit wat hy dink in die belang van sy "kliënt" sou wees.[72]

Wat die pasiënt dus nodig het, is 'n verteenwoordiger wat selfs, indien hy dit sou verkies, deur die pasiënt self aangestel kan word en wat sy taak as dié van 'n *adversarius* van die staat sal beskou. Op dié wyse kan die belange van die pasiënt ten beste beskerm word. 'n Verdere faktor wat die beskerming van die pasiënt se belange nadelig tref, is juis die beginsel dat die prokureur-generaal wat in die diens van die staat staan, in strafverhore die staat se belange dien, en by implikasie by siviele opneming die staat se belange behoort te beskerm,

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70 Vgl a 11(1) van die Wet op Geestesgesondheid.

71 *supra* 1098.

72 Hierdie nie-adversariese rol van die *curator ad litem* impliseer dat die behoefte tot opneming die beste deur geneeskundige deskundiges bepaal kan word en dat die gevolge van opneming uit 'n suiwer terapeutiese oogpunt beoordeel word. Vgl Berkau 1974 *North Carolina Law Review* 622; Sullivan 1974 *Loyola University Law Journal (Chicago)* 584–585.

as *curator* van die pasiënt laasgenoemde se belange teen ongemagtigde staatsoptrede moet beskerm. Die botsende rolle – altans regtens gesien – behoort nie in een persoon te setel nie.[73]

Die volgende vraag duik gevolglik op: is die pasiënt gebonde aan die dienste van die prokureur-generaal as *curator ad litem* of kan hy aandring daarop dat 'n regsverteenwoordiger wat hy self aanstel sy sake moet behartig? Alvorens dié vraag enigsins beantwoord kan word, moet bepaal word of die pasiënt in die afwesigheid van die wetteregtelike aanstelling van die prokureur-generaal as *curator ad litem* 'n reg op 'n regsverteenwoordiger sou hê. 'n Oorsig van die regspraak dui daarop dat die pasiënt nie oor so 'n reg beskik nie.[74] Gemeenregtelik het hy ook nie so 'n reg gehad nie.[75] Handboekskrywers erken insgelyks nie so 'n reg nie.[76] Uit die Wet op Geestesgesondheid is voorts af te lei dat ook die wetgewer nie so 'n reg van die pasiënt erken nie. Dit blyk enersyds daaruit dat spesifiek bepaal word dat die prokureur-generaal as *curator ad litem* van die pasiënt aangestel word en andersyds daaruit dat spesifiek bepaal word dat psigopate hul reg op verteenwoordiging behou. Ingevolge die *inclusio unius est exclusio alterius*-reël van wetsuitleg is dit dus duidelik dat slegs psigopate, en nie ander geestesongesteldes nie, hul reg op verteenwoordiging behou.

Die spesifieke behoud van die psigopate se reg op verteenwoordiging deur die wetgewer dui daarop dat hy geestesongesteldes, anders as psigopate, as onbevoeg beskou om self of deur middel van 'n verteenwoordiger hulle sake te behartig. Die probleem met so 'n siening van die wetgewer is dat hy geestesongesteldheid aan die kant van die pasiënt *prejudiseer*.[77] Wat in die proses uit die oog verloor word, is dat die pasiënt se geestesongesteldheid al dan nie juis eers deur die regter bepaal moet word. Dit is immers 'n jurisdiksionele feit wat objektief moet vasstaan alvorens die regter sy diskresie kan uitoefen. Om vooraf te veronderstel dat die pasiënt geestesongesteld is en ten gevolge daarvan nie in staat is om hom te verdedig nie, is om die kar voor die perde te span. Daar kan nie vooraf van 'n feit uitgegaan word as daardie feit eers later bepaal moet word nie. Buitendien, deur wie en hoe word bepaal dat die pasiënt 'n "psigopaat" is sodat hy op regsverteenwoordiging geregtig is? Blykbaar nie deur die landdros of regter nie. Dié anomalie kan veral tot probleme lei as die aansoek om 'n landdros se opnemingsbevel nog hangende is. Verdere probleme sou ook kon ontstaan as regsverteenwoordiging aan die pasiënt verleen word uit hoofde van die pasiënt se diagnose as "psigopaat" en dit later blyk dat hy inderdaad nie 'n

73 Vgl Kenrick 1972 *Duquesne Law Review* 613; Kruger 1977 *THRHR* 259–260.

74 Vgl *Feinstein v Taylor* 1961 4 SA 554 (W) 560H: "No such right existed"; *Dabner v SAR&H* 1920 AD 583 589: "No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know none"; *Balamenos v Jockey Club of SA* 1959 4 SA 381 (W) 389G–390E: *Bell v Van Rensburg* 1971 3 SA 693 (K) 717H (waar dié reg oa as "sogenaamd" beskou word); *Beier v Minister of the Interior* 1948 3 SA 409 (A) 451; *Director of Education v Lekhethoa* 1949 1 SA 183 (T) 197.

75 *Dabner v SAR&H supra.*

76 Sien Steyn *Die Uitleg van Wette* (1974) 258; Wiechers *Administratiefreg* 220; Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 171.

77 Sien Wiechers *op cit* 228.

psigopaat is nie, maar byvoorbeeld 'n skisofreen. Die uitsondering wat slegs ten opsigte van die psigopaat met betrekking tot die reg op verteenwoordiging gemaak word, blyk dus nie houdbaar te wees nie. Die beste standpunt skyn te wees om aan alle pasiënte vir die doeleindes van die bepaling van hul moontlike geestesongesteldheid en hospitaliseerbaarheid deur die landdros en regter, 'n reg op regsverteenwoordiging te bied. Die verlening aan die pasiënt van dié reg behoort by wyse van duidelike wetsduiding te geskied. Die leemte wat daar tans in dié verband in ons Wet op Geestesgesondheid bestaan, behoort aangesuiwer te word. In dié verband behoort die volgende opvatting van Wiechers[78] (ten opsigte van administratiewe verhore) ook te geld:

> "[I]ndien die aangeleentheid . . .van uiters tegniese aard is, of heelwat ingewikkelde regsaspekte behels of ingrypende gevolge ten opsigte van die status, leefwyse en aansien vir die onderdaan mag hê, . . .is dit waarskynlik niks anders as billik en regverdig nie dat die geleentheid tot regsverteenwoordiging wel aan die onderdaan gebied word."

So 'n reg van die pasiënt is ook 'n grondliggende beginsel van die Amerikaanse opnemingsprosedure.[79] Langs dié weg kan die belange en regte van alle pasiënte beskerm word en kan dit die regter in staat stel om "vir redes van gerief, billikheid en dienstigheid"[80] sy diskresie na behore uit te oefen.[81]

Anders kan met vrug gekyk word na die *Mental Health Information Service* (MHIS) wat in 1964 in New York met die wysiging van *Mental Hygiene Law* (artikel 88 van dié wet) in die lewe geroep is.[82] Dié diens het byvoorbeeld onder andere ten doel

> "[t]o inform . . .patients and in proper cases others interested in the patient's welfare concerning procedures for admission and retention and of the patient's right to have judicial hearing and review to be represented by legal counsel and to seek independent medical opinion."[83]

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78 *ibid.*

79 Sien bv Brakel/Rock *op cit* 54; McGarry/Kaplan 1973 *American Journal of Psychiatry* 628; Ellwanger 1974 *University of Florida Law Review* 523–524.

80 *Bell v Van Rensburg supra* 717B–C.

81 Vgl Flaschner 1974 *ABAJ* 1373 wat meen dat "judges must be prepared to rely less on qualified experts and to assume considerably greater discretion in making determinations of commitability."

82 Vir 'n bespreking van dié diens vgl Andalman/Chambers 1974 *Mississippi Law Journal* 64–72; HJG 1970 *New York Law Forum et seq* veral 174–175; Chayet 1968 *American Journal of Psychiatry* 790; Schneider 1972 *ABAJ* 1063; Rosenzweig 1971 *American Journal of Public Health* 123–124. 'n Soortgelyke diens, die *Mental Health Advocacy Service*, is in Louisiana in die lewe geroep. Vir 'n bespreking hiervan vgl Richardson/Barbor 1978 *Tulane Law Review et seq.*

83 HJG *op cit* 174 vn 46. Die pasiënt word in New York, net soos in SA, nie by aanvanklike hospitalisasie ingelig omtrent die feit dat aansoek om sy opneming gedoen is nie. Kennis moet egter binne 5 dae na toelating aan die pasiënt, die MHIS, die naaste familielid van die pasiënt en hoogstens drie ander persone deur die pasiënt aangewys, gegee word (vgl HJG *op cit* 179; Brakel/Rock *op cit* 48). Enige van pasgenoemde persone kan binne 60 dae na die toelating van die pasiënt 'n verhoor aanvra ten einde die behoefte ("need") vir hospitalisasie te bepaal (HJG *op cit* 180). 'n Volle verhoor moet binne 5 dae na sodanige versoek gehou word. Indien geen verhoor binne 5 dae versoek word nie kan die hof 'n *ex parte* bevel uitreik wat hospitalisasie vir ses maande magtig. Hierdie bevel kan *de novo* hersien word na aansoek ("petition") daarom binne 30 dae na die uitreiking daarvan deur enige van bg groepe persone. Sodanige hersiening moet die vorm van 'n jurieverhoor aanncem tensy daarvan deur die pasiënt afstand gedoen word. As 'n bykomende beskermingsmaatreël moet die pasgenoemde prosedure aan die end van die eerste 6 maande, 1 jaar en clke 2 jaar daarna heringestel word (vgl Brakel/Rock *op cit* 48).

Met behulp van dié diens word die pasiënt in staat gestel om – vir sover dit psigies moontlik is – op die hoogte van sy regte en ander inligting te kom, want die pasiënt moet nie alleen onmiddellik by toelating in die hospitaal van die bestaan van dié diens ingelig word nie, maar is ook geregtig om te eniger tyd na opneming daarvan gebruik te maak.[84] Dit is 'n doeltreffende metode om die pasiënt se regte te beskerm.[85] Die moontlike instelling van 'n soortgelyke diens aan pasiënte in Suid-Afrika is 'n oorweging wat beslis owerheidsaandag behoort te geniet.

5 SAMEVATTING

Die siviele opneming van geestesongesteldes kan vir die betrokkene drastiese gevolge inhou. Gesien vanuit 'n regstaatlike oogpunt is dit van die allergrootste belang dat aan die betrokke pasiënt genoegsame prosessuele beskerming verleen behoort te word om die potensiaal van outoritêre eensydige uitoefening van sy mag deur die staat, aan bande te lê.

'n Beginpunt in die verband – so word aan die hand gedoen – sou wees om aan die opnemingsverrigtinge 'n sterker adversariese ("adversary") kleur te gee as wat tans die geval is. Langs dié weg kan die besluit om 'n geestesongestelde teen sy wil te institusionaliseer in 'n groter mate gebaseer word op 'n proses van individualisering van elke geval – 'n proses wat die strewe na die erkenning van die vereiste van objektiewe noodsaaklikheid van institusionalisering grootliks kan bevorder.

Vir sover die prosessuele regte van die pasiënt tydens die opnemingsverrigtinge in 'n wolk van onsekerheid gehul mag wees, word aan die hand gedoen dat aan die pasiënt minstens die volgende regte verleen behoort te word: (i) die reg om in kennis gestel te word van die dienende verrigtinge teen hom; (ii) die reg om teenwoordig te wees by die beregting van die aansoek; (iii) die reg om sy kant van die saak te stel; (iv) die reg op regsverteenwoordiging. Hoewel die geestesongesteldheid van die pasiënt soms mag meebring dat van hierdie regte nie altyd afgedwing kan word nie, beteken dit nog nie dat die erkenning van en verlening aan die pasiënt van hierdie regte nie as beginselsake deur die wetgewer oorweeg behoort te word nie.

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84 Vgl a 88 van die *Mental Hygiene Law* – HJG *op cit* 174 vn 46. Dit is 'n statutêre judisiële agentskap met die "duty to review the admission and retention of involuntary patients, inform them of their rights, assemble information for judicial scrutiny whenever a hearing is requested, and advise the patients upon request." Vgl Brakel/Rock 48 vn 131 en sien Kenrick 1972 *Duquesne Law Review* 614.

85 Vgl Flaschner 1974 *ABAJ* 1374.

Seduction in Zulu Law

CRM Dlamini
B Proc LLB LLD
Senior Lecturer in Law, University of Zululand

OPSOMMING

Seduksie in die Zoeloereg

In die tradisionele Zoeloe-gemeenskap, soos ook die geval in ander patriargale gemeenskappe, is maagdelikheid die hoogste kwalifikasie vir die huwelik. Die vader van 'n maagd is geregtig op die volle *lobolo* met haar huwelik. Gevolglik gee die seduksie van 'n maagd aanleiding tot 'n aksie nie deur die meisie self nie, maar deur haar vader of voog. Die meisie het volgens die inheemse reg geen verskyningsbevoegdheid nie. Vir die blote seduksie, eis die vader die *ngquthu*-bees, nie as kompensasie vir die vermindering van *ilobolo*-waarde nie want die bees behoort aan die moeder van die dogter, maar hy eis namens sy vrou, omdat hy oor die nodige verskyningsbevoegdheid beskik. In gepaste omstandighede is die moeder self geregtig om te eis. Die bees is kompensasie vir die dogter se moeder vir die pyn en leed gedurende geboorte, haar beskerming van haar dogter se maagdelikheid en ook vir haar bydrae in die opvoeding van haar dogter. Deesdae is die beskerming van maagdelikheid 'n blote fiksie en die kompensasie is nominaal. Dit is 'n erkenning van die moeder se bydrae in die opvoeding van haar dogter. Die bees word betaal nie alleen as gevolg van seduksie nie, maar moet by huweliksluiting deur die bruidegom betaal word indien dit nie vroeër deur hom of 'n derde betaal is nie. Dit is veronderstel om betaal te word deur die eerste man wat die maagdelikheid beëindig; of dit die bruidegom is of 'n derde. Aangesien die *ukuhlola*-gebruik in onbruik verval het, is blote seduksie vandag moeilik om te bewys. Gevolglik is dit gewoonlik nie die man wat maagdelikheid beëindig wat die *ngquthu*-bees moet betaal nie, maar die man wat met die meisie trou.

Seduksie gevolg deur swangerskap is normaalweg die delik wat deesdae aanleiding gee tot 'n eis. In die geval van swangerskap eis die vader *ingquthu*- en *imvimba*-beeste. Die *mvimba* word geëis omrede die vermindering van *ilobolo*.

In die Suid-Afrikaanse gemenereg is dit die vrou self wat geregtig is om te eis as gevolg van seduksie en nie die vader nie. Sy moet 'n maagd wees, en daar is 'n vermoede dat sy 'n maagd is. Die kompensasie wat sy kan eis is nie beperk tot die gebruiklike kompensasie nie. Verskeie faktore word in ag geneem voordat sy kan slaag.

As gevolg van die bestaan van twee aparte aksies is dit moontlik dat sowel die vader as die dogter kan eis, die vader volgens die inheemse reg en die dogter volgens die gemenereg. Hulle kan egter nie in een aksie eis nie. Buitendien, as die dogter geëis het, kan die vader nie meer vir gebruiklike kompensasie eis nie. Dit veroorsaak probleme as die vader later *ilobolo* eis en dit lei ook tot regskonflik. Die bestaan van twee aksies is ook onregverdig teenoor die delikpleger omdat hy twee maal vir dieselfde daad moet betaal. Dit is wenslik dat òf die gemeenregtelike aksie behou word terwyl die inheemsregtelike een afgeskaf word, òf dat die twee aksies saamgesmelt word. Dit sal die situasie vereenvoudig en onnodige konflikte elimineer. Die behoud van die twee aparte aksies is ook onversoenbaar met die verhoging van die status van die Zoeloevrou.

1 INTRODUCTION

In the early Jewish community, as in the early Zulu society, virginity was regarded as the most important qualification for marriage. So great was the pre-

mium placed on virginity that the *mohar* (marriage consideration) was, amongst other things, regarded as the *pretium pudicitiae* (the price for virginity).[1] If a man violated the chastity of a virgin, the rule was *aut ducere aut dotare*[2] (to marry or to endow her).

In traditional Zulu society a virgin was regarded as *intombi egcwele* (a full maiden) which earned her the esteem of her age-group and the community at large, and enabled her on marriage to fetch full *ilobolo* value. The emphasis placed on virginity has led some writers to consider *ilobolo* as a means of protecting virginity and preventing immorality in that every girl would desire to protect her virginity so that when she married her father could obtain full *ilobolo* for her.[3] Despite the cogency of this argument, *ilobolo* cannot be regarded as the panacea for pre-marital immoral behaviour. The increase in seduction despite the continued popularity of *ilobolo* is evidence of this. Virginity before marriage today is on the wane. This by no means implies that *ilobolo* has nothing to do with virginity, but that it is no longer a safeguard against seduction. Even in early Zulu society is was not the only consideration.

In early Zulu society the loss of a woman's virginity had social, legal and religious consequences. The woman lost her maidenhood and assumed the status of wifehood where she found herself unacceptable because she did not meet all the requirements. She was ostracised by her age-group or even ill-treated. Moreover, her misconduct earned her the displeasure of *amadlozi* (the ancestral spirits). Labuschagne states that this religious sanction was to reinforce the inferior position of women in traditional society.[4] She could even be unceremoniously given in marriage to an elderly man.

During the reign of the early Zulu kings the idea was that every unmarried woman was *isitsha senkosi* (the king's bowl). Any violation of the woman's chastity was therefore not only a serious criminal offence, but the woman's father could also institute an action for damages against the wrongdoer for the injury caused to him by the seduction of his daughter.[5]

The aim of this article is to analyse the action for seduction in Zulu law to determine whether it still has a role to play under modern conditions. This is necessary because the Zulu society is undergoing varying social changes. Moreover, the Code of Zulu Law has been amended to elevate the legal status of Zulu women.[6] Although the new Act applies only in Kwa-Zulu, it still retains the customary-law action for seduction. It is, however, not possible to deal

1 Neufield *Ancient Hebrew Marriage Laws* (1944) 95, 100–106.
2 Deuteronomy 22: 28–29
3 Marwede and Mamabolo *Shall Lobolo Live or Die? (1945) 12.*
4 Labuschagne *"Regspluralisme Regsakkulturasie en Deflorasie in die Inheemse Reg" 1983 TSAR* 6.
5 Schoeman "Gevalle van Ontwettige Bevrugting by die Zoeloe" 1940 *Annale van die Universiteit van Stellenbosch* 10.
6 by the KwaZulu Act on the Code of Zulu law 6 of 1981 (hereinafter referred to as the KwaZulu Act).

exhaustively with the action within the scope of this article. Only a few salient features will be examined.

2 DEFINITION OF SEDUCTION

Seduction has been defined as sexual intercourse between a male and a virgin with her consent outside the confines of lawful matrimony[7] or what the parties, because of their religious convictions, regard as a binding marriage.[8] In South African law seduction means the defloration of a virgin. This definition is narrower than in customary law as it relates only to the physical ravaging of the hymen. This does not imply that at common law only the physical element is required for seduction, because a woman whose hymen has been ravaged without her consent may still be regarded as a virgin.[9] It only means that the emphasis at common law is on the leading astray of the woman from her path of virtue. In customary law seduction includes not only the defloration of a virgin, but also the pregnancy of an unmarried non-virgin, and, especially among the Zulus, the law provides for a claim for each and every pregnancy of an unmarried woman.[10] Among some Black tribes, however, only the seduction of a virgin is actionable and not the subsequent pregnancies.[11] In yet others it is only for the first pregnancy and not for the subsequent ones that an action lies as this is regarded as a means whereby a man may profit from his daughter's indiscretions.[12] In Zulu customary law such a rule never developed owing to the fact that it was relatively rare that an unmarried woman became pregnant more than once. As was said above, in early Zulu society a woman who was seduced would be given in marriage even to an elderly man. As a result the possibility that a woman would procreate many children outside marriage was excluded. In recent times the requirement of the woman's consent to a marriage has rendered such "forced marriage" illegal. It is therefore possible for a woman to bear a number of children outside marriage. In terms of Zulu law there is no rule against an action for the subsequent pregnancies. In practice, however, a man will only claim for one or two pregnancies.

The question may well be posed whether it is appropriate to describe the customary-law delict as seduction because it bears differences from the common-law seduction. For this reason Labuschagne[13] prefers to use the term "defloration" instead of seduction when referring to the customary-law delict. Although

7 *Stander v Rudy* 1908 EDC 7, *McDonald v Stander* 1935 AD 325.
8 *Sanicharee v Madho* 1956 2 SA 94 (N).
9 Labuschagne 8.
10 Bekker and Coertze *Seymour's Customary Law in Southern Africa* (1982) 339. This is also the position among the Pondo and the Tsonga.
11 Bekker and Coertze 339.
12 Schapera *A Handbook of Tswana Law and Custom* (1955) 264; Comaroff and Roberts "Marriage and extra-marital sexuality: the dialects of legal change among the Kgatla" 1977 *Journal of African Law* 100.
13 Labuschagne 13.

the customary-law seduction is different from the common-law one, it is not necessary to use a different expression as long as it is understood that customary-law seduction bear peculiar features. There is, however, no quarrel with the use of the word "defloration". Yet in this investigation the term "seduction" will be used subject of course to the qualification mentioned above.

3 SAFEGUARDS AGAINST SEDUCTION

Various methods were adopted in early Zulu society to protect virginity and prevent seduction. It will not be possible to discuss all of them here. Only a few will be mentioned. During the reign of the early Zulu kings, marriage was not possible without the king's permission. Unmarried women were precluded from pre-marital sexual intercourse that could lead to loss of virginity. To ensure that this rule was adhered to, unmarried women were regularly inspected by elderly women for signs of seduction. This custom was known as *ukuhlola* (to inspect). Proof of virginity was the presence of the hymen which was in a sense arbitrary because the hymen could be lost in other ways than through seduction. Because of the fear of the consequences, seduction seldom occurred.

Besides *ukuhlola*, young girls (*amatshitshi*) were under the strict surveillance of their elder counterparts (*amaqhikiza*). Although pre-marital sexual intercourse accompanied by penetration was regarded as being anathema, marriageable girls were allowed external sexual intercourse with their lovers. This practice is known as *ukusoma*[14] (some call it *ukuhlobonga* and in Xhosa it is *ukumetsha*). Although this was not the ideal, it was connived at as a lesser evil because it did not lead to loss of virginity. This was no delict and therefore not actionable. Seduction accompanied by penetration led to collective action by the woman's age-group against her, as her defloration was an affront not only to her personally, but also to all members of her age-group, for which they sought ritual purification and revenge.[15] This was a form of self-help. This custom is dying out and can be found in a few isolated areas only.

The custom of *ukuhlola* has fallen into disuse owing, no doubt, to the influence of Western civilisation and consequent individualism. Although no statutory provision has abrogated it, it is doubtful whether, if a dispute relating to it came before the court, the court would not be inclined to declare it to be contrary to public policy and natural justice.[16] In *Mvubu v Chiliza*[17] the court did not regard this practice as being *contra bonos mores.* However, the question whether this practice was contrary to public policy was not in issue. What was in issue was whether to declare that an unmarried girl was *umfazi* (used in derogatory sense for married woman implying loss of virginity) was defamatory

14 De Clercq *Die Familie-, erf- en opvolgingsreg van die abakwa-Mzimela, met Verwysing na Prosesregtelike Aspekte.* Unpublished D Phil thesis, Pretoria, (1975) 216; Olivier *et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1982) 225.

15 De Clercq 221–222.

16 in terms of s 11(1) of the Black Administration Act 38 of 1927.

17 1972 BAC (N–E) 66.

when this had been uttered during the course of a customary inspection, it having later appeared that the woman was in fact a virgin. The court decided that the presence of *animus iniuriandi* could not be proved because the words had been uttered during an accepted customary inspection, and that they had been uttered by the woman in the execution of her duties, and according to her knowledge and experience. It is doubtful whether this is an oblique recognition of the custom by the court.

The Code of Zulu law[18] does not refer specifically to this practice. Yet there is no reason why the court cannot take cognisance of it in terms of Section 144(3) of the Code which gives the court the discretion to take cognisance of any custom if it is not in conflict with principles of public policy or natural justice. The disappearance of *ukuhlola* custom has led to increased seduction and pregnancy. Seduction not followed by pregnancy has become difficult to prove. Pregnancy provides irrebutable proof of seduction although it is a known fact that pregnancy can ensue even without penetration, and the court will award damages for this.[19] Such cases are, however, exceptional.

4 THE ACTION FOR SEDUCTION

In Zulu customary law seduction entails pre-marital sexual intercourse accompanied by penetration (*ukumekeza*). In Zulu law, as in Germanic law, it is the father and not the girl herself who is entitled to sue for seduction. In Germanic law the right of the father to sue derived from the extensive power (*mundium*) over his wife and children by virtue of which he could sell or kill them with impunity. The price for which he would give his daughter on marriage was known as the *pretium nuptiale.* As a result the seduction of his daughter was an injury to him for which he had to claim damages.[20]

The Code provides that the seduction of an unmarried woman founds an action against the seducer in damages for *ingquthu* beast.[21] As in South African law, this action is anomalous in that the consent of the woman is no defence. This is because an unmarried woman in customary law is not competent to consent to such a matter. It is her father, by virtue of his comprehensive power of guardianship, who has the capacity to consent to anyone having sexual intercourse with her. This consent is obtained and is implicit in the father's stipulation and receiving of *ilobolo.* In early customary law the termination of virginity would be procured by the slaughter of a goat called *umeke,* immediately after marriage.

18 Proc R195 of 1967.
19 *Mntambo v Ndaba* 1950 NAC (N–E) 149.
20 Labuschagne 1–2.
21 s 137 of the Code; s 102(1) of the KwaZulu Act.

5 DAMAGES FOR SEDUCTION

There is a difference of opinion about the beast payable for seduction. The Code stipulates that it is an *ingquthu* beast whereas some writers[22] assert that it is definitely not an *ingquthu* beast but *inhlawulo* (a fine) and *ingezamagceke* (literally the cleanser of the premises), a beast for ritually purifying the homestead of the evil spell caused by the seduction.

We must ascertain what beast is payable for seduction as that will enable us to know who actually has the right to sue for this beast. Is it the father of the seduced woman or her mother, the father merely suing on her behalf? This is particularly important if one bears in mind that the Code also provides that the mother is entitled to an *ingquthu* beast if it has not already been paid for seduction.[23] The question then is: does an *ingquthu* beast belong to the father when paid as damages for seduction, and to the mother when delivered in contemplation of marriage?

To understand this notion, it is essential to clarify what the word *ingquthu* itself means. This word was, in the past, a euphemism for the female sexual organs. It was also used for the beast given to the girl's mother. The beast became known as *inkomo yengquthu* (*ingquthu* beast) or simply *ingquthu.* Today however, it is no longer a euphemism more especially among Christian Blacks. As a result they refer to this beast as merely *inkomo kanina* (mother's beast). Other names for this beast are *inkomo yohlanga* (beast of the reed for administering enema, *uhlanga* being a reed for administering enema to a child, symbolically signifying the mother's labours in administering therapeutic treatment to the girl) or *inkomo yesifociya* (literally a beast for the pregnancy belt which was also used for meting out chastisement to children).[24] The word *ingquthu* here refers to the mother's sex organs.[25] The importance of this is that it enables one to find out who is being protected, the mother or the girl. That in turn leads to a finding of the basis of the action for seduction in customary law.

Besides the *ingquthu* beast, a beast is payable for every pregnancy.[26] The court will not award more damages than those fixed by the Code even if there has been an agreement between the parties that more should be payable,[27] or on the basis of a local custom,[28] the girl's education[29] or even the rank of the girl's father.[30] The latter view has had a fossilising effect on the law and has prevented it from adapting to the changing conditions.[31] This attitude has been offset by the fact that a seduced woman is entitled to claim damages in terms

22 De Clercq 218.
23 s 96 of the Code; s 71 of the KwaZulu Act.
24 De Clercq 226.
25 227.
26 s 137(1) of the Code; s 102(1) of the KwaZulu Act.
27 *Mcunu v Mapumulo* 1943 NAC (N & T) 53.
28 *Nxumalo v Nzuza* 1936 NAC (N & T) 36.
29 *Kambule v Kunene* 1932 NAC (N & T 18.
30 *Dhlamini v Sibeka* 1939 NAC (N & T) 80.
31 The courts have generally adopted the attitude that customary law does not change.

of South African law and if she claims in terms of that law she is not restricted to customary damages[32] even if the father has already claimed his customary damages, although in that event damages claimed by the father will be taken into account when assessing damages for the woman.[33]

The use of the term damages in the Code appears to be a misnomer when it describes the *ingquthu* beast. This is because if this beast is delivered by the intending bridegroom and the termination of virginity takes place within the confines of a customary marriage, there can be no question of a delict for which damages are claimable. If the seduction takes place pre-maritally, a delict is committed. There are also peculiar features of this beast: the damages are limited to one beast, and there is no assessment of damage which normally takes place in an action for damages. Such damages take the form of a fine.[34] Moreover, in terms of s 162 (1) of the Code seduction is regarded as an offence.[35] Some Zulu non-traditionalists even use the word *amademeshe* (damages), thus avoiding the traditional Zulu terms.

Although the notion of "damages" as used in Roman-Dutch law does not fit into the sphere of customary law, it must be borne in mind that in early Zulu customary law the beast payable was quite substantial in value. It was taken to have adequately compensated the injured person. As a result, it became unnecessary to take into account a number of considerations. Moreover, there was a tendency in customary law to standardise the private-law claims. This is to be attributed to the absence of mathematical methods of calculating damages in a simple tribal society. However, this does not imply that if the society changed, there would be no change in the law. But the existence of the common-law action for seduction has prevented this development. Although the *ngquthu* beast is also payable even in the absence of seduction, this is not a serious problem. If it is paid as a result of seduction, it constitutes damages more particularly because the seducer may not even marry the woman, but if it is paid in contemplation of the marriage, it is a token of appreciation to the mother for the proper upbringing of the intended bride. It is paid by the first man who terminates the virginity of the woman, be it the seducer or the bridegroom.

The beast that is payable for every pregnancy is known as *imvimba* (which literally means to close up). It is aimed at compensating the father for the diminished *ilobolo* that he will receive for his daughter.[36] When *ilobolo* is delivered, the bridegroom may either deliver full *ilobolo* in which case a beast will be given to him by the father, or he may deliver *ilobolo* cattle less one beast for the child born.[37] The latter is more convenient and simpler. The close relationship between *ilobolo* and seduction and pregnancy is also responsible for the

32 *Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 1 SA 338 (A).
33 *Kumalo v Zungu* 1969 BAC (N–E) 18.
34 Olivier 266; Bekker and Coertze 339.
35 s 120 (e) of the KwaZulu Act.
36 *Msonti v Dingindawo* 1927 AD 531.
37 De Clercq 229.

demanding of the maximum number of cattle provided for in the Code.[38] This is because to demand less implies that the woman is no longer a maiden. Thus implying that she has borne a child.

If a child is born during the course of an engagement, no claim for damages is allowed except if the marriage falls through.[39] Should the seducer marry the woman, payments other than that of an *ingquthu* beast made in respect of the seduction are deemed to form part of *ilobolo*.[40] This is entirely understandable since such payments compensate the father for the prospective diminution of *ilobolo*.

In addition to damages for seduction, parents in certain areas in KwaZulu and Natal claim an *umgezo* or *ingezamagceke* beast.[41] This beast is not mentioned in the Code. In other areas this is not a beast but a goat or a fee. In the case of *Sithole v Ngcobo*[42] it was held that the *umgezo* fee will be allowed only if there is a recognised local custom of which the court may take cognisance under section 144 of the Code. As a result evidence must be led of the existence of a recognised custom in a particular area that the *umgezo* fee is payable. This is treated as something apart from the *ingquthu* payable for seduction.

The decision in *Sithole v Ngcobo* is in conflict with earlier decisions where the view was that damages for seduction will not be inflated to exceed those provided for in the Code, and that a local custom which allows greater damages will not be recognised.[43] It is consequently doubtful whether this decision will be followed in later cases. If the guardian or father sues for damages for seduction in terms of customary law the weight of authority is in favour of the view that the court cannot exceed the amount fixed by the code.[44] Should the guardian claim more than is provided for, the court will deprive him of his costs.[45]

It appears that a distinction is not clearly made by the court between damages for seduction and damages for diminished *ilobolo* value of the woman; such damages are payable in customary law for the pregnancy and not for mere seduction. It has also been decided that there is no claim in Zulu law for loss of services of a girl while she was staying with the seducer,[46] nor can it include claims based on common law.[47] Nevertheless damages may be paid in cattle or in cash. As damages are aimed at compensating the father for the potential loss of *ilobolo*, and not for the cost of upbringing, since according to customary law no legal duty rests on a man to support his illegitimate child, which responsibility

38 s 87 of the Code, s 65 of the KwaZulu Act.
39 Proviso to s 137(1) of the Code; s 102(1) of the KwaZulu Act.
40 Proviso to s 137(1) of the Code; see also *Mthembu v Mngwaba* 1940 NAC (N & T) 67.
41 De Clercq 225.
42 1948 NAC (N & T) 12.
43 *Nxumalo v Nzuza* 1936 NAC (N & T) 36; *Mseleku v Majola* 1937 NAC (N & T) 67; *Mcunu v Mapumulo* 1943 NAC (N & T) 53.
44 *Kambule v Kunene* 1932 NAC (N & T) 18; *Nkuta v Maakane* 1943 NAC (N & T) 47.
45 *Mcunu v Mbata* 1943 NAC (N & T) 95.
46 *Ntuli v Xulu* 1945 NAC (N & T) 95.
47 *Yapi & Yapi v Mququ* 1974 BAC (S) 298.

is incumbent upon the mother's guardian, it may be inequitable nowadays to refuse to allow the recovery of such costs owing to the high cost of bringing up a child. Whereas in traditional society the upbringing was inexpensive, and the child contributed by way of services, and in the case of a girl, claim for *ilobolo,* which advantages far outweighed the inconvenience involved, this is not so today. This may be mitigated only by the fact that the woman may sue in terms of South African law for the maintenance of the child. Thus the father is able to sue for his reduced *ilobolo*, and the woman for maintenance of the child.

In *Mthiyane v Ndaba*[48] the plaintiff, an unmarried non-virgin who had admitted previous pregnancies by other men, claimed, for her impregnation by the defendant, damages for expenses incurred in transport to hospital, hospital charges, clothing for the expected child and loss of earnings or alternatively maintenance. It was decided that despite the fact that the woman was no longer a virgin, the defendant was not exempt from liability for expenses for the confinement and maintenance of the child. But as the plaintiff was no longer a virgin, she could no longer claim loss of wages as personal damages, though this could be used as a basis for calculating the maintenance to be paid as part of lying-in expenses for a reasonable period after confinement, but the amount payable as lying-in expenses need not be commensurate with wages or income lost. Such an award is based on the interests of the child because the health of the mother is essential to that of the child. If the child dies at birth, no maintenance is claimable for the period after confinement. This claim was, however, based on common law and not on customary law.

6 THE BASIS OF THE ACTION FOR SEDUCTION

What is the basis of this claim? Does the woman's father claim the beasts for himself or for his wife? Moreover, is his claim based on the infringement of a personality property right, or is it an infringement of a proprietary right, namely the right of guardianship and the consequent diminishing of *ilobolo* for his daughter?

This question is important because the answer to it will bring out clearly the distinction between a claim for seduction and one for pregnancy. To answer this question, it is necessary to identify the beasts payable for seduction, as this will in turn lead to the answer as to the proper basis of the action. Because the custom of *ukuhlola* has fallen into disuse, the impression may be created that the action for seduction unaccompanied by pregnancy has equally fallen into desuetude in Zulu law. This was denied in *Mbhele v Mthethwa.*[49] Although there was no customary inspection of the seduced girl by women, the father had had her medically examined after she had reported the seduction, and the examination confirmed that she had been seduced. No pregnancy resulted, but the girl's father was held to be entitled to claim damages for seduction, and although

48 1979 ACCC (N–E) 250.
49 1979 ACCC (N–E) 220.

the seduction had not been promptly reported to the defendant, this was not regarded as entirely prejudicing the plaintiff's claim in favour of the defendant. In coming to this decision the court took into account the circumstances of the parties, namely that they were residing in an urban area where strict adherence to tribal custom is not always possible. This was also evidenced by the plaintiff's taking of his daughter to a doctor and not for examination by women. This trend demonstrates that customary law is changing and adapting to altered circumstances. Labuschagne[50] has correctly pointed out that there is no simple and general explanation for the action for seduction in customary law because it is not based on the diminished *ilobolo* value of the woman as the beast payable for seduction does not form part of *ilobolo*; nor can it be regarded as infringing the right of guardianship of the father because in some tribes the beast belongs not to the father of the woman but to her mother, and under certain circumstances she can sue for it.

According to some writers the beast payable for seduction is not *ingquthu* but *inhlawulo*, because, the argument goes, the *ingquthu* beast is given to the mother as a token of appreciation for the pain and suffering experienced by her in giving birth to the seduced girl and for the discomfort experienced during pregnancy, hence the other name *inkomo yesifociya* (the beast for the pregnancy belt). According to this view, *ingquthu* beast is not given to the mother of the girl for the protection of her virginity, which in any case was never the duty of the mother but that of the *amaqhikiza.* Support for this view is further found in that, according to customary law, *ingquthu* was not delivered with *ilobolo,* but later.[51]

Although this is a cogent argument, there is an equally forceful argument to the effect that to single out one function of *ingquthu* and to exclude others is dangerous and erroneous. It cannot be accepted that the *ingquthu* beast has no relevance to the protection of the girl's virginity and her seduction because the girl's mother, according to customary law, did have a role to play in the protection of the virginity of her daughter although according to custom this was delegated to the *amaqhikiza.*[52] That according to customay law the *ingquthu* beast was delivered later than *ilobolo* may be attributed to the rarity of seduction. The better view is therefore that the *ingquthu* beast serves both purposes, namely as compensation to the mother for the pain and suffering during pregnancy and at child-birth as well as for the protection of her virginity, although, needless to say, the protection of her virginity is merely a fiction today.

According to the view that regards *ingquthu* as irrelevant to virginity and seduction (even if a woman has been seduced, and customary damages have been paid in consequence) when the woman subsequently marries, her mother is entitled to receive her *ingquthu* beast. The contention that holds that *ingquthu*

50 Labuschagne 4.
51 De Clercq 225–227.
52 Sibiya *Contemporary Trends in Marriage and its Preliminaries among the Abakwa-Mkhwanazi* Unpublished M A Dissertation UZ (1981) 232–233.

does form part of damages for seduction, postulates that once the mother has received this beast for the seduction of her daughter, she can no longer receive it later on when *ilobolo* is delivered.

Owing to the disappearance of *ukuhlola* custom, it is not necessarily the seducer who pays the *ingquthu* beast but the person who marries the woman. The seducer only pays the *ngquthu* beast when seduction has been followed by pregnancy or when he also marries the woman. The possibility that the bridegroom has to pay the *ingquthu* beast although the woman has been seduced by somebody else means that he not only marries the woman but also that he bears the responsibility for her "sins." According to customary law, therefore, in the event of seduction unaccompanied by pregnancy two beasts were payable, to wit, the *ingquthu* beast and the *ingezamagceke* which was slaughtered for ritual purification of the homestead from the defilement caused by the seduction.[53] The Code recognised the *ingquthu* beast only and not the other.

If it is accepted that the *ingquthu* beast is the one that is claimable for seduction, this means that the provisions of the Code are not entirely incorrect. Similarly, if the *ingquthu* beast is claimable for seduction, the person who is entitled to that beast is the mother and the father is merely claiming on her behalf (naturally, because in terms of customary law he is the person having the necessary capacity to do so). If the mother of the seduced girl has been duly assisted, she is competent to sue for this beast.[54] The object of her claim is the compensation for the protection of the girl's virginity, the pain and suffering she experienced during pregnancy and at child-birth and for her contribution in the education and upbringing of the girl. No doubt the compensation is nominal by today's standards but in the past it was quite substantial. It is merely a token of appreciation and not compensation in any real sense. Perhaps the real reason for this is that according to traditional law the mother had no right to *ilobolo* for her daughter, and her contribution in the upbringing of her daughter had to be recognised somehow.

Seduction accompanied by pregnancy is the delict normally actionable today in Zulu law. According to the Code two beasts are payable for the latter, namely *ingquthu* and *imvimba* or *imvala*.[55] According to the view that *ingquthu* is not the beast claimable for seduction, the two beasts claimable for seduction followed by pregnancy are *inhlawulo* and *ingezamagceke*. The *ingezamagceke* is slaughtered outside the homestead for purposes of ritual purification of the homestead, and it is only elderly women and men who are entitled to partake of its meat. This is because of the belief that, should young women partake of it, they could suffer the same fate of the seduced girl (because of *umkhokha* or contagious ill-luck). The other beast belongs to the father, being compensation for the prospective loss of *ilobolo*.[56] *Ingquthu* beast is not involved.

53 Sibiya 149.
54 *Mbutho v Cele* 1977 BAC (N–E) 247.
55 s 137(1) of the Code; s 102(1) of the KwaZulu Act.
56 *Dhalisa v Mdhlalose* 1952 NAC (N–E) 24.

The view which was accepted above is that the *ingquthu* beast cannot be regarded as irrelevant. According to this view three beasts should be payable in terms of customary law, namely *ingquthu, imvimba* and *ingezamagceke.*[57] The last-mentioned is slaughtered for purposes of ritual purification. The *ngquthu* and *imvimba* belong to the mother and father of the woman respectively. Although three beasts are supposed to be given, in practice today fewer are given owing to the decline of the traditional religion and because the Code only recognises two. Moreover, according to early custom the beast to be slaughtered was forcibly taken by young men of the injured group without the consent of the owner. This is not permissible today.

Another question is why there is an action for seduction of a woman and not of a man. According to Labuschagne,[58] this is to be attributed to various considerations. He contends that in a simple, technologically poor society it is likely that men because of the physique, subdued women and subjected them to rules with which men themselves did not have to comply. Moreover, the reproductive function depends on the man's initiative whereas the woman has to comply. Because of the motherly instinct, according to which a woman desires having a baby, she is placed in a weaker position, dependent on the man's care. Furthermore, man's selfishness and jealousy have also contributed to man's requiring that a woman should be sexually intact. These factors have been reinforced by religious sanctions. Although this has greatly diminished among Westernised women, it still applies to traditionalist women.

7 THE ACTION AT COMMON LAW

At common law the action for seduction is available to the woman and not to her father. When this action is instituted by a person in his capacity as father and natural guardian of the girl, the presumption is that the common law will apply, and the action is the girl's and not the father's.[59] But this claim will not include claims from Zulu law such as *ingquthu* and *imvimba.*[60] When the woman herself sues, she cannot sue in a chief's court because its jurisdiction is limited to cases involving customary law.[61] She is entitled to sue the seducer only and not his family head, because the joint liability of the family head for the delicts of his wards is a principle of customary law and not common law.[62] She cannot succeed unless she was a virgin,[63] but her chances of success are enhanced by the heavy onus cast on the seducer to rebut the presumption of virginity.[64]

57 De Clercq 225.
58 Labuschagne 5–6.
59 *Mvemve v Mkatshwa* 1950 NAC (N–E) 284; *Mkize v Makatini* 1950 NAC (N–E) 207.
60 *Yapi & Yapi v Mququ* 1974 BAC (S) 398; *Jama v Sikosana* 1972 BAC (S) 21; Olivier 266.
61 *Jeni v Jaca* 1953 NAC (N–E) 31.
62 *Mokgohloa v Senomadi* 1951 NAC (N–E) 325.
63 *Kanye v Ngubane* 1938 NAC (N & T) 147.
64 *Mnyapa v Hlongwana* 1933 NAC (N & T) 26; *Mcunu v Gumede* 1938 NAC (N & T) 6; *Hlongwa v Ncane* 1939 NAC (N & T) 69; *Mbgade v Zuma* 1949 NAC (N–E) 128.

The seducer is liable to compensate the victim by way of damages for the loss of her virginity and the consequent impairment of her marriage prospects.[65] The damages are sentimental as the woman is entitled to compensation without any calculable pecuniary loss having been suffered,[66] although she is also entitled to claim for lying-in expenses.[67] Factors to be taken into account in assessing damages are: the age of the plaintiff, her style of life, the extent of resistance she put up, the method adopted by the defendant to break down her resistance, whether seduction took place under a promise of marriage, and whether the plaintiff has been impregnated by the defendant.[68] Reservations have already been expressed about the anomalous position of the action for seduction in South African law.[69] Because of the liberated status of the woman, the action has come to be regarded as being out of touch with the present mores, and as merely permitting revenge to a jilted woman. The action seems justifiable only when seduction was procured by fraud.[70]

8 THE CHOICE OF ACTIONS

Because of the parallel existence of two separate actions, the father and the daughter may have to decide who will sue. Their choice of actions is limited. If the father is married by customary law, he is entitled to sue.[71] But if he is a partner to a civil marriage the status of the girl is determined by common law, and as a result she is the one competent to sue for the seduction and not the father.[72] In practice, however, the position is not so clear-cut.

The question is whether both father and daughter can sue at the same time, one at common law and the other at customary law. In earlier cases, the appeal court had taken the view that this was permissible, and if damages had already been awarded to the father, this would be taken into account when awarding damages to the woman, but if the woman had sued first, the father would be precluded from suing later.[73] More recently, the view taken by the court is that where a customary law action for seduction and pregnancy has been instituted, a common law action for damages flowing from it cannot be allowed at the same time.[74] This is aimed at preventing the combining of the two actions. In theory there is no reason why both the customary-law and common-law damages cannot be claimed in one action.[75] Although it is "inequitable that the seducer

65 McKerron *The Law of Delict* (1970) 162.
66 *Botha v Peach* 1939 WLD 153.
67 *Marudu v Langa* 1949 NAC (N–E) 106; cf *Qubu v Jaca* 1973 BAC (S) 352.
68 *Miya v Msomi* 1954 NAC (N–E) 118.
69 Van der Merwe & Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 461–462.
70 Pauw "Aspekte van Seduksie" 1978 *De Jure* 84–85.
71 Bekker and Coertze 47.
72 Olivier 243; cf Bekker and Coertze 53 footnote 68.
73 *Gwayi v Gwija* 1 NAC 235 (1909); *Vilapi v Molebatsi* 1951 NAC (C & O) 8; *Kumalo v Zungu* 1969 BAC (N–E) 18.
74 *Yapi & Yapi v Mququ* 1974 BAC (S) 398.
75 Labuschagne 11.

should be twice mulcted in damages for the same offence,"[76] there is no decision precluding the father and daughter from suing separately, although in practice the two actions should not be combined. There is also no bar against the father's claiming for seduction and pregnancy in terms of customary law while the woman sues for maintenance of the illegitimate child in terms of the common law.[77] Visser[78] has suggested, however, that only one action should succeed. If the personal law of all the parties is the same, that law must be applied. In the event where the father's or guardian's and the girl's personal law is the same, but that of the tortfeasor differs, or where the personal law of the father differs from that of the girl, the law of the place where the delict was committed should be decisive. This approach is to be preferred.

9 ILOBOLO CLAIMS AND THE ACTION FOR SEDUCTION

It is an open question whether the father should be entitled to claim full *ilobolo* if his seduced daughter who claimed damages herself later on marries by civil rites. Here one must distinguish between two possibilities, to wit, where the daughter marries the seducer and where she marries someone else.

Regarding the first possibility, the question whether a woman can sue a man if there is still a prospect of his marrying her, may seem academic. The Code does not allow an action for seduction during the subsistence of an engagement.[79] But the Code refers to a customary-law action and not one in terms of the common law. It is quite possible that a man might seduce a woman on promise of marriage, but afterwards fail to honour his promise, in which case the woman can sue for seduction. But the man may later repent, forgive the woman and decide to marry her. According to customary law the damages claimed by the father for seduction and pregnancy are deemed to form part of *ilobolo* when it is claimed. *Ingquthu* does not form part of *ilobolo*.[80] But on what principle can damages claimed by a woman herself be treated as forming part of *ilobolo*?

The question is whether the father should forfeit his *ilobolo* beast if his daughter has sued for damages or whether he should claim in full. This approach may be justified on the ground that the two actions are based on separate grounds: the woman claims for injury done to her personality and for diminished marriage prospects, and the father sues for the diminished *ilobolo* he will receive for his daughter. If the woman marries the same man, the question is: if damages are calculated as part of *ilobolo*, on what basis are they supposed to be calculated, on the basis of common law or customary law? In other words although, for

76 Seymour Wood "Olivier": Die Privaatreg van die Suid-Afrikaanse Bantoe" 1968 *Speculum Iuris* 69–70.
77 *Kumalo v Zungu* 1969 BAC (N–E) 18.
78 Visser *Die Suid-Afrikaanse Interne Aanwysingsreg* Unpublished LLD Thesis UP (1979) 375.
79 proviso to s 137(1) of the Code; proviso to s 102(1) of the KwaZulu Act.
80 proviso to s 137(1) of the Code; proviso to s 102(1) of the KwaZulu Act.

instance, the woman sued and obtained R500 as damages, should, the father when he receives *ilobolo* for her, claim full *ilobolo* minus one beast for seduction and pregnancy or should there be a calculation of the value of *ilobolo* as a whole and the R500 be set off against *ilobolo* to be received?

The problem is that *ilobolo* is an institution based on customary law while a civil marriage is based on common law. The courts have taken the view that when *ilobolo* is delivered in contemplation of a civil marriage, its principles will be modified by those applicable to a civil marriage if these principles are in conflict with those of civil marriage.[81] Unfortunately there does not seem to be any principle of civil marriage to deal with this problem. *Ilobolo* is not an essential requirement of a civil marriage. Furthermore, at common law the seduction and subsequent pregnancy do not diminish the *ilobolo* value of a woman because none is required. Seeing that *ilobolo* is an institution essentially based on customary law,[82] the principles of customary law must apply. Two approaches suggest themselves.

The one approach is that the father should not claim full *ilobolo* because his daughter has already claimed damages for seduction. Although the father has not strictly speaking received anything, but because his family has benefited, he has indirectly benefited, and this must be taken into account when he eventually demands *ilobolo*. Support for this has to be found in the fact that in customary law the emphasis is not so much on the individual as on the group. In line with this reasoning, it is argued that the father has benefited and should forego his claim for full *ilobolo*. His *ilobolo* will be reduced by one beast for the pregnancy as would be the case in customary law. Moreover, it should mean that the mother should forfeit her *ingquthu* beast even though she did not receive anything because according to the Code that beast is payable for seduction together with *imvimba* for the pregnancy. Whether that is correct is difficult to say because cases where this is the issue have not come before the courts.

According to the second approach, which is more radical, the father should claim full *ilobolo* if the woman marries the seducer where the father has not claimed in terms of customary law. The underlying reason is that the father has not sued for anything. In any case the child born is the seducer's.

Of the two approaches, the first one is more in accord with the spirit of customary law where the emphasis is on the equitable solution of the problem rather than on purity of principle. Yet it may be wrong to sacrifice principle to provide an equitable solution unless one is able to justify that action. The second approach seems to be clear on principle, but it is a harsh principle: the father has not claimed anything and should not have his *ilobolo* diminished: the bridegroom cannot complain because the child is his.

If one questions this approach as being in conflict with the one stated earlier that if the father sues, the daughter should be precluded from suing and vice

81 *Fuzile v Ntloko* 1944 NAC (C & O) 2.
82 *Hlengwa v Maphumulo* 1972 BAC (N–E) 58.

versa, because it is one and the same seduction, the answer is that in this latter problem, the facts are entirely distinguishable from the case where both father and daughter sue, basing their claims on the same seduction, but deriving their rights from two separate legal systems. In this particular instance the father is not suing for seduction, but for his *ilobolo*. The daughter claims damages for satisfaction.

The Code provides that if damages are claimed from the seducer who eventually marries the woman, the damages should be treated as forming part of *ilobolo*.[83] But the Code refers to damages claimed by the father and not by the woman. In this case it is the woman who has sued. To extend the interpretation of damages to include damages claimed by the woman, would be to stretch the meaning of this term beyond the context which was intended by the legislator. Another alternative may be to apply a fiction to the effect that the damages received by the woman are deemed to have been received by the father. Yet there may still be a problem. According to customary law, the father is entitled to receive only two head of cattle or their equivalent whereas a woman who claims under common law is not confined to damages fixed by customary law. This problem may be resolved by resorting to another fiction, namely that damages claimed by the woman are deemed to have been equivalent to customary law damages, and as a result the father should forfeit only two head of cattle or their equivalent in money. Yet this does not seem quite acceptable.

A question may further be asked whether allowing the father to claim full *ilobolo* is not tantamount to punishing the seducer who marries the girl more than the seducer who decides not to marry her. Obviously this approach is inclined in that direction. Since marriage is of more importance than the father's claim for *ilobolo,* it is submitted that the father should reduce his *ilobolo* claim by taking into account that the woman has already claimed damages. This has been the approach of the courts where both father and daughter sue for seduction.[84] To do otherwise may discourage marriage, and any discouragement of marriage is contrary to public policy.[85]

If the seduced woman marries somebody else, the father cannot claim full *ilobolo* from the bridegroom because she is no longer a maiden. This is so even if the father has not claimed anything for the seduction and pregnancy.

As regards the approach to be followed in reducing *ilobolo*, it is submitted that the court should use the customary law approach of subtracting the monetary equivalent of two head of cattle. Any other approach would in effect deprive the woman of her damages, thus making her action at common law futile.

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83 proviso to s 137(1) of the Code; proviso to s 102(1) of the KwaZulu Act.
84 *Kumalo v Zungu* 1969 BAC (N–E) 18.
85 Hahlo *The South African Law of Husband and Wife* (1975) 29–33.

10 CONTRACEPTION

Seduction under customary law is today generally actionable if followed by pregnancy, whereas at common law only seduction is actionable and not pregnancy, although a woman may claim for lying-in expenses. This means that the person who eventually pays for the seduction under customary law is the bridegroom. With the advent of contraception among Blacks it means that pregnancy will take place only when it is desired. If one assumes that a person who desires pregnancy will neither sue personally nor enable her father to sue, this may spell the death of the action for seduction and pregnancy in customary law. However, the practice of contraception has not yet become totally acceptable among traditionalists. It is mostly non-traditionalists who make use of the "pill."[86] The wide acceptability of contraception will result in women being free "to sin" without the inconvenience of pregnancy, and fathers will receive full *ilobolo* for their daughters irrespective of their state of chastity. It would also appear that, especially among non-traditionalists, contraception is taking the place of *ukusoma.*

11 CONCLUSION

Virginity, which was always so highly valued in early Zulu society is no longer regarded as the highest attribute for a marriageable woman to have. Although the *ingquthu* continues to be paid, it is paid for reasons other than the mother's protection of her daughter's virginity. Seduction not followed by pregnancy is rarely actionable except in isolated instances; this is due to the difficulty of proof, as a woman will not readily expose her private life simply to enable her father to claim an *ingquthu* beast for her mother. Although seduction followed by pregnancy continues to be actionable, the wider use of contraception will be a prelude to the death of the action. Moreover, although *ilobolo* is reduced by previous pregnancies, the expedient of contraception prevents the father's claim for *ilobolo* from being reduced, irrespective of the woman's state of chastity.

The common-law action for seduction is also available to a Zulu woman. The existence of the two separate actions leads to problems of conflicts of law and is also unfair to the wrongdoer. It is undesirable that the wrongdoer should be made to suffer twice for the same wrong, although the courts may mitigate the damages. To advocate the abolition of the action for seduction may be premature, but the unnecessary duality should be phased out. Although the two actions bear striking differences, the customary-law action has been greatly influenced by the common-law rules,[87] with salutary effect.

The right of the father or guardian to sue for the seduction of his daughter or ward in traditional society was perfectly explicable as the woman had no capacity to sue under those circumstances, and the father or guardian, as the

86 Sibiya 160.

87 This is so especially in the law of procedure and evidence – see Labuschagne 16–21 for a discussion of these.

case may be, did have the necessary capacity. But the retention of the customary action despite the elevation of the legal status of Zulu women[88] is no longer justifiable. Only the woman should be entitled to sue. Alternatively, the two actions should be fused into one, a solution that is both simple and convenient. The problems that may arise from such a fusion can be sorted out later.

88 s 16 of the KwaZulu Act.

The burden of proof and exemption clauses

J L van Dorsten
BA LLB LLM
Legal Adviser, Old Mutual

OPSOMMING

Die Bewyslas en Vrystellingsbepalings

Die ligging van die bewyslas is dikwels 'n belangrike geskilpunt wanneer dit oor die inhoud van kontrakte gaan. Dit geld veral waar standaardvormkontrakte, kennisgewings met kontraktuele inhoud of vrystellingsbepalings ter sprake kom. Die algemene reëls dat hy wat beweer, moet bewys, en dat hy wat 'n spesiale verweer opwerp, die bewyslas ten opsigte van die verweer dra, verskaf nie in alle gevalle 'n regverdige of duidelike oplossing nie. Die aandag word veral gevestig op kontrakte waarin die kontrakterende partye nie ekonomiese gelykes is nie, en die voorwaardes dus as't ware op die swakkere party afgedwing word, en ook waar die partye nie, wat ondervinding en kundigheid betref, gelykes is nie. Daar word aan die hand gedoen dat wetgewing aangeneem word om die swakkere kontraktuele party 'n mate van beskerming teen uitbuiting te bied wat die ligging van die bewyslas betref.

INTRODUCTION

In disputes about the contents of contracts it is important to establish which party must ultimately prove the presence or absence of particular provisions. The incidence of this burden of proof, or *onus probandi*, is a matter of substantive law,[1] it being logical that rules which attach legal consequences to a fact must stipulate which party is required to establish that fact.

A clear understanding of the rules of incidence is particularly relevant where exemption clauses are involved, because the use of such clauses (which limit or exclude rights that the parties would, but for the clauses, have been entitled to) is widespread; they are to be found, *inter alia*, in standard form consumer contracts, in notices on walls and signboards, in hotel registers, and in travelling agreements. Moreover, because the persons who make use of such provisions employ a variety of means of incorporating or imposing them on an often unwary public, special problems of incidence arise.

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1 *Tregea v Godart* 1939 AD 16 32; *Pillay v Krishna* 1946 AD 946 951; *Chetty v Naidoo* 1974 3 SA 13 (A) 20.

In this article it is proposed first to examine the meaning of the expression onus or burden of proof, and then to discuss briefly the general principles regulating its incidence and the application of these rules in the law of contract with particular reference to exemption clauses.

ONUS

The term onus has been used in various senses to denote, *inter alia*, two concepts which must be clearly distinguished: the burden of proof and the evidential burden. The original or true meaning of onus is the former, meaning

> "the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be . . ."[2]

The onus proper or "overall onus"[3] therefore comes into operation and determines the outcome if the court, after examining the relevant evidence, is unable to reach a decision because there is an inadequate balance of probabilities on either side.[4] This burden of proof is determined by the pleadings; it is fixed once the issues are established, and is not transferred in the course of the trial.[5]

The second meaning of onus is the duty borne by either litigant to furnish evidence in order to combat the opponent's evidence.[6] In this sense it is merely a matter of introducing evidence and has more accurately been referred to as the "burden of adducing evidence in rebuttal."[6] It arises as soon as a *prima facie* case has been made and is borne by the litigant who risks failure if the case is not answered. The evidential burden may therefore shift during the course of the proceedings, depending upon how the measure of proof furnished by each litigant shifts the risk of failure.[7]

Of the two concepts only the first one, the burden of proof, will be considered here.

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2 *Pillay's* case *supra* 952–953. See also Huber *Heed Recht* 5 25 2–6; *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 2 SA 706 (A) 710F; *Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) 548B.

3 *Brand v Minister of Justice* 1959 4 SA 712 (A) 715; *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 615G.

4 *Van Aswegen v De Clercq* 1960 4 SA 875 (A) 882E. See also *Vengatsamy v Scheepers* 1946 NPD 84 85; *Twigger v Starweave (Pty) Ltd* 1969 4 SA 369 (N) 372B–C; *Stocks and Stocks (Pty) Ltd v TJ Daly and Sons (Pty) Ltd* 1979 3 SA 754 (A) 766C–D; *LAWSA* vol 9 566.

5 *Mans v Union Meat Company* 1919 AD 268 271; *Smith's Trustee v Smith* 1927 AD 482 487; *Pillay's* case *supra* 953; *Klaassen v Benjamin* 1941 TPD 85; and the *Southern Cape Corporation* case *supra* 548B. See CWH Schmidt *Bewysreg* 2nd ed Butterworth's 48 *et seq* and *LAWSA* vol 9 566–570. The burden of proof must be distinguished from the right or duty to lead evidence first. See *HA Millard and Son (Pty) Ltd v Enzenhofer* 1968 1 SA 330 (T) 333 and Supreme Court Rules Rule 39(11).

6 by Corbett JA in the *South Cape Corporation* case *supra* 548; also the "weerleggingslas," *ibid.* Here it is a matter of "introducing evidence" as opposed to "establishing a case." See *Tregea's* case *supra* 28.

7 *ibid* and *Pillay's* case *supra* 953. See generally the discussions on onus in *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 961–964; *Coch v Lichtenstein* 1910 AD 178 192; *Klaassen's* case *supra* 85–89; *Friedlander v Hodes Brothers* 1944 CPD 169 172–173; *Mechin's* case *supra* 710–713; Schmidt *op cit* 34–55; *LAWSA* vol 9 566–570.

GENERAL RULES RELATING TO INCIDENCE

Various rules, which are ultimately based upon "broad and undefined reasons of experience and fairness,"[8] have been developed to regulate the incidence of the burden of proof.[9]

A separate onus arises in respect of each issue which is raised in any particular case; individual burdens may be incident upon either party and these are not transferred in the course of the proceedings.[10]

The general rule is that the onus rests upon the person who makes an assertion: "[S]emper necessitas probandi incumbit illi qui agit."[11] Thus a person who seeks a remedy must establish the grounds for it and satisfy the court that he is entitled to whatever he claims.[12] Normally the plaintiff bears this onus and if the balance of probabilities does not favour either side the court generally finds for the defendant.[13]

Where the plaintiff fails to give evidence, the defendant need not give any to be absolved. Consequently, in the absence of legal presumptions to the contrary, the defendant need not disprove anything if the plaintiff is unable to establish his assertions.[14] The defendant may, however, renounce this right and voluntarily shoulder the burden of proof. Thus if he is confident of the merits of his case and wishes to terminate the legal proceedings without delay, he may offer to lead evidence first to prove that the plaintiff's claim is unfounded.[15]

Another basic rule states that the onus is on the party (either plaintiff or defendant) who affirms a fact, i e makes the positive assertion, and not on the party who denies it: "Ei incumbit probatio qui dicit, non qui negat."[16] However, this rule is not consistently applied. If the denial is one of law or one of fact, which is qualified or supported by references to place or time, then the party

8 *Wigmore on Evidence* par 2486, quoted in *Pillay's* case *supra* 954 and *Nydoo v Vengtas* 1965 1 SA 1 (A) 21H. See also *Stocks's* case *supra* 765F–G.

9 For a detailed discussion see Schmidt *op cit* 34–55.

10 *Heneke v Royal Insurance Company Ltd* 1954 4 SA 606 (A) 611A.

11 Inst. 2 20 4. See also D 22 3 21; C 4 30 10; C 8 43 25; Voet 22 3 9, 10; *Smith's Trustee v Smith supra* 485; *Smit v Bester* 1977 4 SA 937 (A) 942F; *Stocks's* case *supra* 765.

12 *Mechin's* case *supra* 711D; *Pillay's* case *supra* 951; *Naik v Panday* 1952 1 PH A3 (A); *Cotler v Variety Travel Goods (Pty) Ltd* 1974 3 SA 621 (A) 629; Pothier *Obligations* 3 6 1 (section 620) and part 4 (section 694).

13 See D 50 17 125; Wessels *Law of Contract in SA* vol 1 par 1963; Schmidt *op cit* 34; and Van Zutphen *Practycke der Nederlantsche Rechten, Van de Dagelijcksche so Civile als Crimineele Quaestien* (Groningen 1680) "Bewijs" 5: "Als het bewijs van den eischer ende den ghedaeghde gelijck is, so moet tot voordeel van den ghedaeghde ghepronuncieert worden."

14 C 2 1 4; C 4 19 2 and 23; C 8 (35)36 9; Voet 22 3 9; Van Leeuwen 5 20 pr; *Kunz v Swart* 1924 AD 618 662.

15 D 22 3 14 (middle) and Voet 22 3 9 (end).

16 D 22 3 2. The reasoning behind this rule is that in the nature of things a person who denies a fact cannot prove it. See C 4 19 23; C 4 30 10; and Voet 22 3 10. See further D 22 3 12; C 4 19 1; Matthaeus *De Prob* 8 1 ("Affirmanti, ut vulga dicitur, incumbit probatio . . . qui dicit se solvisse . . . necesse est, ut id probet"); *Pillay's* case *supra* 952 and 956 (and authorities there cited).

making it must prove the affirmative proposition contained in the denial.[17] Also, where a negative assertion constitutes an essential element of one party's claim or defence, the onus of proving it rests upon that party.[18]

It may be seen, therefore, that the burden of proof does not rest only on the plaintiff and may frequently be borne by the defendant. Another such instance is where the defendant confesses and avoids, viz when he does not deny the plaintiff's claim but sets up a special defence which raises a fresh issue. He is then regarded as a claimant and consequently bears the onus of proof in respect of the defence, which will only be upheld once sufficient evidence has been furnished.[19]

The burden of proof is also borne by any party against whom a rebuttable presumption of law operates. The presumption prevails until met by counter-evidence or by a stronger presumption.[20]

From the above it is clear that no single rule can be applied without exception to all cases and that considerations of fairness and equity sometimes require a departure from the general rules.[21]

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17 Inst 3 19 12; C 8 (37)38 14; Huber *Heed Recht* 5 25 7; Voet 22 3 10. See also *R v Nhlanhla* 1960 3 SA 568 (T) 570F.

18 This is illustrated in *Havenga v De Lange* 1978 3 SA 873 (O). The appellant had allowed the respondent to leave a platform, which could be fitted to a truck, in a passage-way on his premises; the appellant accepted no responsibility for the platform and when it disappeared he relied on a notice with an "owner's risk" clause, the wording of which clearly covered the situation in question (884). The respondent, who had successfully sued the appellant for the value of the platform in the court *a quo*, argued that he was not aware of the notice board. The court accepted the appellant's version and held that the respondent had failed to discharge the onus of proving that the parties had not entered into a consensual risk arrangement (883–884). See further *LAWSA* vol 9 570; Schmidt *op cit* 36–37; *Dave v Birrel* 1936 TPD 192 at 196; *Kriegler v Minitzer* 1949 4 SA 821 (A) 828; *Wessels v Wessels* 1950 3 SA 852 (O) 857C–D; *Eagle Star Insurance Company Ltd v Willey* 1956 1 SA 330 (A) 335–336; *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 3 SA 470 (A) 474. *Kunz's* case *supra* 663; *Stocks's* case *supra* 762H and 767 B–C; *Electra Home Appliances (Pty) Ltd v Five Star Transport (Pty) Ltd* 1972 3 SA 583 (W) 585A; *Nel v Nelspruit Motors (Edms) Bpk* 1961 1 SA 582 (A) 584B–C.

19 D 22 3 19; D 44 1 1; C 8 (35) 36 9; Voet 22 3 9 and 10; Van Leeuwen 5 20 pr; Pothier *Obl* 3 6 1 (sec 620); *Pillay's* case *supra* 952; *Kunz's* case *supra* 662–664; *Avis v Verseput* 1943 AD 331 345 363 and 377; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Ltd* 1965 3 SA 150 (A) 167; *MB Investments Limited v Oliver* 1974 3 SA 269 (RA) 272–273; *Cotler's* case *supra* 629C. Confession and avoidance must be distinguished from cases where the dispute revolves around terms which the defendant alleges should form part of the contract which the plaintiff is suing on. The plaintiff must still prove the terms of his contract, since the defendant does not confess the contract as a whole. *Stocks's* case *supra* 766F. See also *De Wet v Habig Brothers* 1912 OPD 67 68.

20 Voet 22 3 15; Huber *Heed Recht* 5 28 6; *Shepherd v Farrell's Estate Agency* 1921 TPD 62 66; *Rex v Jolly* 1923 AD 176 188–189; *Kunz's* case *supra* 663; *Nelson v Marich* 1952 3 SA 140 (A) 145–146; Schmidt *op cit* 48 *et seq.* Also see the discussion in *Tregea's* case *supra* 28 *et seq.* The law is undecided whether a legal presumption determines the incidence of the onus of proof. See *LAWSA* vol 9 570 footnote 6. Presumptions of fact are not relevant here as they merely affect the evidential burden: *LAWSA* vol 9 570 footnote 7. An example of a rebuttable presumption of law is that a contract of sale does not include a voetstoots clause. See *Boere Handelshuis (Edms) Bpk v Pelser* 1969 3 SA 171 (O) 173B; *Schwarzer v John Roderick Motors (Pty) Ltd* 1940 OPD 170; and D Rosenthal "Voetstoots and the Onus of Proof" (1968) 85 *SALJ* 240 242.

21 See note 8 above; Schmidt *op cit* 52–54; and the *Electra Home Appliances* case *supra* 584.

The foregoing was a brief review of some of the more important general rules of incidence which are relevant to the topic under discussion. What must now be considered is the application of these rules to the law of contract and in particular to exempting provisions.

INCIDENCE IN THE LAW OF CONTRACT

The general rule in the law of contract is that the onus of proving the existence and the contents of a contract, rests on the party who relies on the contract.[22] Similarly, where breach of contract is concerned, the plaintiff must prove that the defendant failed to perform or that he committed the breach in question; and conversely, the defendant must prove that he fulfilled his contractual obligations.[23]

Contractual provisions may be agreed to, incorporated or imposed in a variety of ways; consequently, only those rules of incidence that relate to the most commonly used means – contractual documents and signs or notices with a contractual import – will be discussed here because they cover the areas where problems are most frequently encountered.

Contractual Documents

The plaintiff may discharge the onus of proving a contract by tendering a signed contractual document which reflects the agreement.[24] If the document is not obviously of a contractual nature the plaintiff must prove that the signatory signed *animo contrahendi* and that the document in fact embodies a contract.[25] In other words, if the document is not one in which a reasonable man would expect to find contractual terms, the plaintiff must establish that the defendant knowingly put his signature to a document which embodies, in whole or in part, an obligation-creating agreement.[26]

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22 See generally *Mabentsela v Booth* (1908) 18 CTR 810 811; *Faber v Schneider* 1925 GWL 54 57–58; *Blaker v Freedman* 1930 TPD 230 232; *Dave v Birrel* 1936 TPD 192 196–197; *Kriegler's* case *supra* 827–828; *Myers v Lesch* 1954 2 SA 487 (C) 490; *Stewart v Zagreb Properties (Pvt) Ltd* 1970 4 SA 542 (R) 546A; *Stocks's* case *supra* 762H 765A and 766H. Express or implied terms may be proved from the contract itself or from the surrounding circumstances: *Van der Merwe v Viljoen* 1953 1 SA 60 (A) 65D; *George Municipality v Freysen* 1976 2 SA 945 (A) 955.

23 See *Kriegler v Minitzer supra* 827; *Pillay v Krishna supra* 951; *Sarkin v Koren* 1949 3 SA 545 (C) 556; *Resisto Dairy v Auto Protection Insurance Company* 1963 1 SA 632 (A) 645; *Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd* 1977 3 SA 941 (C) 947.

24 *Mans v Union Meat Company* 1919 AD 268 271; *Patel v Le Clus (Pty) Ltd* 1946 TPD 30; *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470; Hunt "Caveat Subscriptor" (1963) 80 *SALJ* 457 461.

25 *Gordon Wilson (Pty) Ltd v Barkhuizen* 1947 2 SA 244 (O) 248 and 251; Turpin "Contract and Imposed Terms" (1956) 73 *SALJ* 144 150.

26 *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 2 SA 717 (C) 725 (warehouse invoice); *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 2 SA 709 (W) 717 (invoices and credit notes); *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 90. This point is illustrated in *Mans v Union Meat Company supra* where it was held that the plaintiff failed to discharge the onus of proving that a memorandum written on the counterfoil of a cheque constituted a contract between the parties; the defendant alleged that he was under the impression that he was merely signing a receipt, instead of guaranteeing the weight of the sheep being bought, as was alleged by the plaintiff.

Where one party alleges that the terms of a written contract differ from prior representations or verbal explanations concerning the contents of the document, he must convince the court that he was misled;[27] the party who subsequently relies on the contract then bears the onus of proving that the other party knew the actual terms of the contract and the extent to which they differ from the representations – in other words, that the impression created by the misdescriptions or misrepresentations had been removed from the other party's mind at the time of contracting.[28]

If the defendant disputes the terms contained in a signed document he bears the onus of proving one of the following: that it does not represent the true or complete agreement;[29] that he did not sign with the intention of binding himself;[30] or that he reasonably did not understand the contractual nature of the document, i e *iustus error*.[31] Where mistake is raised the approach of the courts is to ask whether the party who is trying to resile has given the other party reasonable grounds to believe that he was binding himself; if he is to blame, in this sense, his defence fails.[32] However, if the mistake is due to the other party's misrepresentation then the first party is not bound.[32] These principles were discussed and applied in the case of *George v Fairmead (Pty) Ltd.*[33] The appellant had entered into a verbal agreement with the respondent company, through the latter's receptionist, to stay at the hotel; a deposit was paid but no documents were signed. Later, when the appellant moved in, he was asked to sign the hotel register; he filled in certain parts of it and signed without reading the printed provisions or having his attention drawn to anything specific in them. Subsequently, personal effects of his were stolen from his hotel room and he sued the hotel for their value. The hotel disclaimed liability on the grounds that the hotel register incorporated a provision which excluded such liability. Absolution from the instance was granted in both the magistrate's court and the Cape Provincial Division. On appeal the court accepted the appellant's argument that the respondent bore the onus of proving that the initial verbal agreement had been varied with the appellant's concurrence, subject to the qualification that this onus was discharged "when the document was put in evidence and the appellant's signature was admitted"[34] unless some further fact was disclosed in the evidence that legally entitled the appellant to repudiate the document.

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27 *George v Fairmead (Pty) Ltd supra* 471–472.

28 *Shepherd v Farrell's Estate Agency* 1921 TPD 62 68 (misleading advertisement); *Rosettenville Motor Exchange v Grootenboer* 1956 2 SA 624 (T) 630 C.

29 *Cunningham v Holcroft* 1907 TS 251; *Regal Mineral Waters (Pty) Ltd v Lichter* (TPD 1937 April 2) Digest of Cases in (1937) 54 *SALJ* 381; *Patel's* case *supra* 32; *Andrianatos v Carados's Estate* 1946 CPD 455 458; *Schmidt v Dwyer* 1959 3 SA 899 (C).

30 See *Beaton v Baldachin Brothers* 1920 AD 312 315; Turpin *op cit* 150; Aronstam *Consumer Protection, Freedom of Contract and the Law* 1979 Juta and Co 37–38.

31 *Lindberg v Deetlefs* 1926 CPD 123 128; *Bhikagee v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E) 109; *George v Fairmead (Pty) Ltd supra* 470–472; *Van Wyk v Otten* 1963 1 SA 415 (O) 419; *Papadopoulous v Trans-State Properties and Investments* 1979 1 SA 682 (W) 689.

32 *George v Fairmead (Pty) Ltd supra* 471.

33 *Supra.*

34 470.

The appellant also raised the point of *iustus error* by submitting that he was under the "reasonable misapprehension" that he was merely signing a register and not a contract, and that no new terms would be introduced into his contract by his doing so; however, no allegation of misrepresentation was made. Fagan CJ held that under the circumstances the appellant's failure to acquaint himself with the terms to which he had signified his assent by his signature was not excusable; consequently, he could not be heard to say that his ignorance of the terms (including the exemption clause) was a *iustus error.*[35]

In English law the signatory's defence that he did not appreciate the document's contractual nature is known as the defence of *non est factum.*[36] However, a heavy burden of proof lies on the party who raises this plea as a defence.[37]

If the genuineness of a signature is disputed the party relying on it must prove that it is in fact the other party's signature and that it has not been forged.[38] In practice this onus is always borne by the party who produces the document.[39] And, finally, if one party claims rectification[40] of the contractual document or demands that one or more of the provisions should be deleted[41] he must establish the grounds for having this done.

Incorporation and Notification

Where an attempt is made to incorporate exemption clauses, or any other provisions, by implication or by reference (for example, by way of documents or tickets referring to standard terms or regulations, or by way of a sign or noticeboard) the approach of the courts is as follows: if it is established that the person

35 471–473.

36 See *Muskham Finance Ltd v Howard* (1963) 2 WLR 871 (CA) and *United Dominions Trust Ltd v Western* (1975) 3 All ER 1017 (CA).
The defence appears to have been accepted as part of South African law by Wille and Millin *Mercantile Law of South Africa* 17th ed JF Coaker and WP Schutz (1975) 91, and by AJ Kerr *The Principles of the Law of Contract* 3rd ed 1980 Butterworths 23–24. See also *Musgrove and Watson (Rhod) (Pvt) Ltd v Rotta* 1978 2 SA 918 (R); *Novick v Comair Holdings Ltd* 1979 2 SA 116 (W) 123. Cf *OK Bazaars (1929) Ltd v Universal Stores Ltd* 1973 2 SA 281 (C) 287. Although the Latin expression was not used, a similar plea was raised in *Preuss and Seligmann v Prins* (1864) 1 Roscoe 198. *Non est factum* was equated with *iustus error* in *National and Grindlays Bank Ltd v Yelverton* 1972 4 SA 114 (R) 116.

37 *Saunders v Anglia Building Society* (1971) AC 1004 (HL) 1016.

38 *Bright v Durwood's Executors* (1894) 11 SC 357; *African Banking Corporation v Sahib* (1910) 31 NPD 320; *Standard Bank v Kaplan* 1922 CPD 214 217–218.

39 *Naidoo v Amacunoo* (1910) 2 Leader LR 147 (Innes CJ and Mason J).

40 *Bardopoulous and Macrides v Miltiadous* 1947 4 SA 860 (W) 864. See also *Spiller and others v Lawrence* 1976 1 SA 307 (N).

41 The position is analogous to the deletion of restrictive conditions from title deeds. See *Ex parte Cliffside Flats (Pty) Ltd* 1941 CPD 449 453 and *Swiss Hotels (Pty) Ltd v Pedersen* 1966 1 SA 197 (C) 202–203. See generally concerning rectification: De Vos "Mistake in Contract" 1976 *Acta Juridica* 177 (*Festschrift* in honour of Prof B Beinart) 186–188; Aronstam *op cit* 39; *Mouton v Hanekom* 1959 3 SA 35 (A); *Otto v Heymans* 1971 4 SA 148 (T). What must be established is that the parties had a common continuing intention which they intended to express in a written document but owing to a mistake their intention was not correctly expressed. If the mistake resulted from one party's fraudulent action rectification will also be allowed: *Grootenboer's* case *supra.*

who received the document knew that there was writing on it containing terms relative to the agreement, he is bound whether he reads them or not; if he knew that there was writing but did not know that it contained relevant terms, he is not bound, unless it can be shown that the other party has done what is reasonably sufficient to bring the terms to his notice.[42]

The courts, in addition, distinguish between documents which a person ought reasonably to suppose to contain terms (such as bills of lading and tickets for travelling) and documents which a person cannot reasonably be held to suppose to contain terms (such as cloakroom tickets and warehouse or other invoices).[43] Persons who rely on the latter type of document bear a heavier onus with regard to the notice requirement.

This was illustrated in the *Micor Shipping* case.[44] The issue before the court was whether a note at the foot of certain invoices and credit notes incorporated the plaintiff's "standard trading conditions" which included an exemption clause. This was denied by the defendant who claimed that he was unaware of the endorsement and that he had not received a circular with a copy of the standard terms from the plaintiff, an allegation which the latter did not prove.[45] A significant fact was that other documents (the statements of account against which payment was made) did not contain a similar note or endorsement. Franklin J found that the note at the foot of the abovementioned documents was "not so prominent as being calculated immediately to attract the attention of the recipient of such documents, who would be [and was, according to the evidence] only concerned with the facts and figures appearing in the body of the documents."[46] Consequently, having regard to the nature of the documents – which were not contractual documents on which a person might reasonably suppose to see terms[47] – it could not be said, "objectively, that [the plaintiff] did all that was reasonably necessary to bring the conditions to the notice of the defendant."[48]

Where signs or notice-boards are used to impose or incorporate exemption clauses or other provisions, they must also reasonably be brought to the other party's (or the public's) attention. In *Essa v Divaris*[49] it was sufficient to point out one of two "owner's risk" notices painted conspicuously on the walls; and in *Bristow v Lycett*[50] to have a "large notice prominently displayed" at the entrance to the wild animal farm.

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42 See *CSAR v McLaren* 1903 TS 727 733; *Frocks Ltd v Dent and Goodwin supra* 725; *Kings Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 643–644; *Kemsley's* case *supra*; *Meyer v Kirner* 1974 4 SA 90 (N) 96–97; *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 2 SA 709 (W) 714 and 717–718; *Havenga v De Lange supra*.

43 *McLaren's* case *supra* 734; the *Frocks Ltd* case *supra* 725; the *Micor Shipping* case *supra* 714 and *Meyer v Kirner supra* 96–97 (words on the back of a cheque).

44 *supra*.

45 715D.

46 717F.

47 716 A.

48 717G.

49 *supra*.

50 1971 4 SA 223 (RAD).

What is reasonably sufficient will obviously vary according to the circumstances of each case. In *King's Car Hire (Pty) Ltd v Wakeling*[51] Harcourt J formulated an objective test which requires the party who bears the onus to take steps sufficient to notify "persons acting reasonably".[52] A restricted interpretation of the notification requirement is to be found where, in terms of the *naturalia*, the common law imposes a strict liability on certain classes of persons (such as hotel-keepers); express personal notice must be given, if this is practicable, and other forms of notification are then not regarded as reasonable.[53] However, where the signs or notices are so conspicuous that a reasonable man could not help but see them, the court will readily draw the inference that they were in fact seen by the customer or contracting party.[54]

Another significant factor relating to notification is the requirement of contemporaneousness. The contracting parties must be notified of or referred to all the relevant contractual provisions at the time the contract is concluded, and not subsequently; this prevents the unilateral imposition or alteration of terms without the necessary concurrence. For example, a contractual document which embodies the agreement, in whole or in part, must be produced before or at the time of contracting. Thus in *Peard's* case[55] the court upheld the plaintiff's argument that an exemption clause in a "freight ticket," which was issued after the contract to ship a box had been concluded (and after the ship had sailed), did not form part of the original agreement and, therefore, did not free the defendant from responsibility.[56]

The requirement of contemporaneousness is satisfied where the clause is printed in a hotel register which must be completed and signed by the customer,[57] but not if the same provision is only to be found in a notice displayed in the hotel bedrooms.[58]

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51 *supra.*

52 "In judging what is reasonably sufficient, the party bearing the onus of establishing the incorporation of the condition in question should bear in mind the degree or magnitude of the risk that the steps he has taken may not prove sufficient to convey the necessary notice to persons acting reasonably. He must (as in cases of negligence) bear in mind the extent of the risk of non-observation by the other party in relation to the steps which he has taken and the degree of probability that such steps will bring to the notice of such other party, if acting reasonably, the existence of the condition sought to be implied in the contract" (644A). This formulation was cited with approval by Franklin J in *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd supra* 714.

53 *Davis v Lockstone* 1921 AD 153 162 and 167; *Weiner v Calderbank* 1929 TPD 654; Turpin *op cit* 155.

54 *ibid.*

55 *Peard v Rennie and Sons* (1895) 16 NLR 175.

56 183.

57 *George v Fairmead (Pty) Ltd supra.*

58 *Olley v Marlborough Court Ltd* (1949) 1 All ER 127; Turpin *op cit* 146; see also *Meyer v Kirner supra.*

It is not necessary for the party who bears the onus, to prove that, at the time of contracting, the other party correctly understood all the legal consequences that flow from the provisions incorporated by implication or by reference.[59] It is submitted that this principle should not be rigidly applied; in a heterogeneous society like that in South Africa, it would not always be reasonable or equitable to expect all persons to understand either or both of the official languages, especially where legal phraseology is involved. The courts have in some cases gone further (than the objective requirement of reasonably sufficient notice) by holding that the party relying on the notice must prove that the other party not only saw but also understood that the notice had some legal significance – not necessarily its exact meaning – and agreed to it.[60] This is a step in the right direction but may not prove adequate in all cases; in addition to the possible injustice that could result from the enforcement of terms not properly understood by the parties concerned, it also offends against the consensual basis of contracts.

It is further submitted that in circumstances that warrant it, the approach adopted by De Wet AJ in *Mzobe v Prince Service Station*[61] should be adopted. In this case the garage owner sought to bind a black person with a limited knowledge of English to an "owner's risk" clause. The learned judge held that it must be proved that the other party "not only saw, but understood the notice"[62] thereby requiring proof that the provision's actual meaning be understood.[63] This is a welcome extension of the rules and fits in well with the ultimate basis of the rules of incidence: fairness.

The requirement of reasonably sufficient notice is aimed at preventing contracting parties from being unfairly surprised by provisions that limit or exclude the rights and duties of the respective parties. This procedural check is more effective where the contents or wording of the provisions in question are readily available so that the parties can, if they are sufficiently aware or concerned, establish the ambit of their contractual obligation.

It is submitted, therefore, that where exemption clauses are concerned, the requirement of reasonably sufficient notice should be stricter and that where they are incorporated by reference it would be insufficient to meet the requirement. The public would be better protected if all exemption clauses were conspicuously printed in contractual docments[64] or reproduced in clear signs or

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59 See *Essa v Divaris supra* 763 (owner's risk clause) and *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468 480.

60 See *Weiner v Calderbank* 1929 TPD 654 662 (must be aware of the notice and its contents); *Davis v Lockstone supra* 162 167; *Kemsley's* case *supra* 123–125.

61 1946 NPD 138.

62 163.

63 This may be compared with the position which formerly prevailed when a person, who alleged renunciation of *beneficia* by a woman, had to prove that the renunciation was made with the knowledge of the nature of the *beneficia*. See *Knocker v Standard Bank of SA Ltd* 1933 AD 128 131.

64 See Coetzee J's comments in *Western Bank Ltd v Sparta Construction Company* 1975 1 SA 839 (W) 840.

notices at places where tickets incorporating such provisions are sold; mere reference to complex or prolix rules or regulations does little to inform the public of their rights or duties.

EXEMPTION CLAUSES

Not all the terms of a contract need to be proved specifically, but only those which originate in the contractual consensus, namely, the *essentialia* and the *incidentalia* (or *accidentalia*). Terms which arise by operation of law, the *naturalia*, do not have to be proved; they are normal incidents of a contract and remain part of it until the parties agree otherwise.[65] Consequently, the party who relies on a particular *naturale* need only prove the existence of the category of contract to which it applies.[66] If the other party puts the existence of a *naturale* in issue he must plead and prove its absence. To do this he must establish that another agreement had specifically been entered into, which varied or excluded the *naturale*.

Thus the burden of proof rests on the party who relies upon terms which vary the normal incidents of a contract.[67] However, once this has been done, the party relying on the *naturale* bears the onus of proving its existence, even if this involves proving a negative, namely that the parties had not entered into an agreement which varied or excluded the *naturale*.[68]

Exemption clauses that originate in the contractual consensus must obviously be proved by the parties who rely on them. What must usually be established is whether or not the clause covers the act that constitutes the breach or caused the loss in question. It is clear, therefore, that the problem of who bears the onus may significantly affect the outcome of the litigation.

Where an exempting provision is relied upon and raised as a defence it usually amounts to a confession and avoidance. The party relying on the provision admits the contract but seeks to avoid one or more of its legal consequences by setting up the exemption clause. The onus rests on such party to plead and prove that it was incorporated into the contract[69] and that its terms cover the situation in respect of which exemption is claimed.[70]

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65 This applies to *naturalia* that are directory; peremptory ones may not be excluded: *LAWSA* vol 5 169. See *A McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531F–H. Cf *Stocks's* case *supra* 763G–H.

66 See *Stocks's* case *supra* 766A; and *Essa v Divaris supra* 769.

67 *Stocks's* case *supra* 762 *et seq*; *Rosenthal v Marks* 1944 TPD 172 176; *Essa v Divaris* 1947 1 SA 753 (A) 769; *Government of the RSA v Fibre Spinners and Weavers* 1978 2 SA 794 (A) 802.

68 *Stocks's* case *supra* 767B–C; *Havenga v De Lange* 1978 3 SA 873 (O) 883–884.

69 See *Davis v Lockstone* 1921 AD 153 162 and 167; *Wakeling's* case *supra* 643–644; *Mzobe v Prince Service Station* 1946 NPD 138 140; *George v Fairmead (Pty) Ltd supra* 470A; if more than one contract is involved the onus arises in respect of each contract. See *Kemsley v Car Spray Centre (Pty) Ltd* 1976 1 SA 121 (SE).

70 See for the onus of: (a) carriers – *Oxford v Donald Currie and Company* (1881) 2 NLR 227 229-230; *Union Steamship Company Ltd v James Brickhill* (1888) 9 NLR 225 228–229; *Clan Line of Steamers v Alcock and Company* (1898) 13 SC 104 112–113 and *LAWSA* vol

In *De Wet's*[71] case an insurance company undertook to make good any loss or damage caused by fire but excluded liability for loss caused by explosion. When the plaintiff brought a claim for loss by fire against the company, the latter denied liability, alleging that an explosion had caused the fire. The court held that as the defence constituted an exception to the general liability, the onus of proving facts which would bring it into play (namely, that the fire had been caused by explosion) rested on the defendant company.

Once the existence of an exempting provision has been established, the party who disputes it bears the onus of disproving the provision. This is clearly illustrated in *Stocks's* case.[72] In terms of an oral agreement the respondent company (a transport and haulage contractor) had undertaken to convey the appellant company's crane from Johannesburg to Pretoria. The crane was damaged in the process of transportation; the appellant sued the respondent in the Transvaal Provincial Division where absolution from the instance was ordered. On appeal Corbett JA stated that the dispute related essentially to the terms of the contract of carriage; the appellant alleged a "simple, ungarnished contract"[73] whereas the respondent alleged an additional "owner's risk" term which emanated from an earlier agreement (entered into in 1950). In terms of the latter agreement, which was not disputed or disproved, an owner's risk clause would be incorporated into all future contracts of carriage between the parties. Corbett JA held[74] that the court *a quo* had correctly placed the onus of disproving the owner's risk clause on the appellant and that it had failed to do so.

Another significant question regarding exemption clauses is whether their effect is substantive or merely procedural in nature.[75] If the effect is substantive the liability excluded by the clause does not arise; if it is procedural the liability arises but may not be enforced because the clause provides a procedural defence. Concerning the former – substantive exemption clauses which define the contractual obligation – the party who claims damages for breach should, strictly speaking, prove that the act in issue fell within the obligation as qualified by the clause;[76] in other words, that the breach relates to liabilities not affected by the exemption clause. In practice, however, the onus in both cases is usually borne by the party relying on the exemption clause to prove that the clause

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2 177; (b) depositaries or bailees – *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803D–E 806G 807B; (c) insurance contractors – *Law Union and Rock Insurance Company Ltd v De Wet* 1918 AD 663 667–668; *Nathan v Ocean Accident and Guarantee Corporation Ltd* 1959 1 SA 65 (N) 68C; *Madzibanane v Santam Insurance Company Ltd* 1974 4 SA 839 (W) 840–841; *Nel v Incorporated General Insurance Ltd* 1976 3 SA 776 (W) 779D.

71 *supra* (note 70).

72 *supra.*

73 762G.

74 767B.

75 See Coote *Exception Clauses* (1964) 1–18.

76 Coote *op cit* 15.

covers the act in question.[77] This, it is submitted, is the more satisfactory approach and does not warrant any change; it ensures that the party who imposes or incorporates the clause bears the onus instead of the other party who, for example, as consumer, is usually the economically weaker one and, where standard form contracts are concerned, has had little say over the contents of the contract which is usually presented on a take-it-or-leave-it basis.[78]

Having considered some general rules, it will now be necessary to examine various types of exemption clauses that are commonly resorted to in specific transactions and the application of the rules of incidence by the courts in such cases.

Negligence and Gross Negligence

Where an exemption provision that modifies or excludes liability on the grounds of negligence is established, the party protected by the provision need not disprove such liability.[79] If the other party alleges further grounds for liability, such as gross negligence or *dolus*, which are not covered by the exempting provision, he bears the onus of establishing them.

The case of *Essa v Divaris*[80] affords a clear example. The appellant (a car owner) had entered into a contract with the respondent depositary in terms of which the latter undertook, for consideration, to take care of the former's car in his garage. An "owner's risk" clause was incorporated into the contract by way of conspicuous notices painted on the walls. Tindall JA held[81] that the effect of the clause was to free the bailee from liability for ordinary negligence. The "owner's risk" clause left open the question of the bailee's liability for gross negligence. The court held[82] that if, despite the clause, gross negligence rendered the bailee liable, the onus of proving gross negligence rested on the appellant, an onus he failed to discharge.[83]

Strict Liability

Where, in terms of the *naturalia*, strict or absolute liability is imposed on one of the parties, for example by operation of the praetorian edict *de nautis cauponibus et stabulariis*,[84] he must, to avoid liability, prove either that the loss of

77 See note 70 above.
78 See Turpin *op cit* and Kahn "Standard Form Contracts" 1971 *BML* 49.
79 *Wakeling's* case *supra* 643A.
80 *supra*.
81 767, Schreiner JA concurring, and Greenberg JA dissenting at 774.
82 769.
83 773. See also *Rosenthal v Marks supra* 180; *Wakeling's* case *supra* 643; *Stocks's* case *supra*760E–F (*obiter*); and generally Kerr "Owner's Risk Clauses in Contract: The Onus of Proof and Sufficiency of Notice" (1979) 96 *SALJ* 177.
84 See D 4 9 1; D 4 9 3 1; Inst 4 5 3; Voet 4 4 9 1; Voet 4 9 2 and 7; Grotius *Inl* 3 38 9; *LAWSA* vol 2 170; *Tregidga and Company v Sivewright* (1897) 14 SC 76.

or damage to the goods given into his custody falls within one of the acknowledged exceptions,[85] or that the parties had entered into a specific contract which modified or excluded the absolute liability.[86]

Similarly, a depositary (or bailee for reward), who is under a duty to exercise reasonable care with regard to the goods entrusted to him, must prove either that the damage or destruction occurred without *culpa* or *dolus* on his part[87] or that his liability had been modified or excluded by agreement. This is usually done by incorporating an "owner's risk" clause in the contract of bailment or *depositum*.[88] In *Essa v Divaris*[89] Tindall JA stated[90] that the onus which lies on the depositary (bailee) "arises as an inference from the nature of the contract" because he is placed under an obligation to return the deposited article or to establish the reason why this was not possible.

However, this inference does not arise if an "owner's risk" clause is incorporated, because a "radically different contract" arises.[90] Thus where the nature of the contract determines which party bears the burden of proof, one *sequela* of changing the normal consequences of the contract by agreement is that the burden of proof is shifted; the plaintiff must then establish a ground for liability which is not excluded by the exempting provision.

Purchase and Sale

In contracts of purchase and sale the seller must plead and prove the existence of provisions which limit or exclude liability for latent defects (voetstoots clauses)[91] and for eviction (*pacta de evictione non praestanda*).[92] If, in the absence of the

85 viz *casus fortuitus*, *damnum fatale* or *vis maior*, latent defect or inherent vice in the goods, negligence of the consignor. See *LAWSA* vol 2 170 174–176; *Stocks's* case *supra* 761–762 and *Hall-Thermotank Africa Ltd v Prinsloo* 1979 4 SA 91 (T) 94.

86 See, generally, Voet 4 9 7; *Naylor v Munnik* (1859) 3 Searle 187 191; *Davis v Lockstone* 1921 AD 153; *LAWSA* vol 2 177 (carriers). Statutory limitations may also affect a party's strict liability. In *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 327, reference is made to the limitations placed on the innkeeper's liability by the provisions of sec 112 of Act 30 of 1928.

87 *Prinsloo v Venter* 1964 3 SA 626 (O).

88 See *Rosenthal v Marks* 1944 TPD 172 176–177; *Essa v Divaris supra* 762 767; *Kemsley's* case *supra* 123F; *Stocks's* case *supra* 762.

89 *supra*.

90 769.

91 Bynkershoek *Observationes Tumultuariae* I obs 749; Wessels *op cit* par 7431; Rosenthal "Voetstoots and the Onus of Proof" (1968) 85 *SALJ* 240; 1968 *Annual Survey* 125; *Schwarzer v John Rodericks Motors (Pty) Ltd* 1940 OPD 170; *Boere Handelshuis (Edms) Bpk v Pelser* 1969 3 SA 171 (O) 173A. Cf *Pretorius v Van der Merwe* 1968 2 SA 259 (N). The existence of the voetstoots provision (or *venditia simplaria* – D 21 1 48 8) may be established from the terms of the agreement (*Greyling v Fick* 1966 3 SA 579 (T)); the conduct of the parties and the circumstances surrounding the sale (*Stevens v Benningfield* 5 NLR 282; *Bosman Brothers v Van Niekerk* 1928 CPD 67; *Van Wyk v Otten* 1963 1 SA 415 (O); and *Pelser's* case *supra*); but not necessarily from the fact that the purchaser had the opportunity to examine the sales goods (*Nelson v Townsend* 35 NLR 267; *Wilcken and Ackerman v Klomfass* 1904 TH 91).

92 This clause is valid only if the seller acted in good faith: *Kleynhans Brothers v Wessels Trustees* 1927 AD 290. If fraud is alleged by the buyer, it must be proved by him.

latter provision, a purchaser has been evicted, he is entitled to recover the purchase price and damages after discharging the onus of proving both the contract of sale and the eviction.[93] Should the seller raise the *pactum de evictione non praestanda* as a defence to both claims he must prove that it in fact excludes liability on both counts, as such a pact is usually construed as excluding only the buyer's right to claim damages, leaving intact the right to reclaim the purchase price.[94] The parties may, no doubt, agree to exclude both the right to claim the purchase price and the right to claim damages,[95] in which case the onus of proving such agreement is borne by the seller.[96]

Letting and Hiring

In contracts of lease the landlord bears the onus of proving that an exemption clause relieves him of his common law-duty to maintain the leased premises.[97] He must similarly prove that the lessee's common law right to remove improvements before the expiration of the lease had been excluded by agreement.[98]

Special Defences

Where a special defence, such as fraud, mistake, misrepresentation or a *pactum de non petendo*, is relied upon, without the intention of resiling from the contract, it amounts to a confession and avoidance. The party setting up the special defence does not dispute the contract but seeks to avoid some of its legal consequences and obviously bears the onus of proof.[99] Defences relating to non-fraudulent misrepresentation[100] and, in certain limited cases, mistake,[101] may be met by proof that the right to rely on either had been excluded by agreement.

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93 D 19 1 45 1; Voet 21 2 25 and 26; Grotius *Inl* 3 14 6 and 3 15 4; *Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A).

94 D 19 1 11 8; Voet 21 2 31; Van Der Keessel *Prael* 3 15 4; De Wet en Yeats *op cit* 293; and Mostert "Uitwinning by die Koopkontrak in die Suid-Afrikaanse Reg" 1968 *Acta Juridica* 5 52.

95 Mostert *ibid.*

96 It would then amount to the sale of a hope: Voet 18 1 13. See also *Gengan v Pathur* 1977 1 SA 826 (D&C) (the purchaser must prove that the passing of risk has been delayed by agreement).

97 *Poynton v Cran* 1910 AD 205 214; *Sarkin v Koren* 1949 3 SA 545 (C) 552.

98 *De Beers Consolidated Mines v London and South African Exploration Company* (1893) SC 359 374; (1895) 12 SC 107 111 cited with approval in *Poynton's* case *supra* 214–215.

99 See, for example, *Karoo and Eastern Board of Executors and Trust Company v Farr* 1921 AD 413 415; *Rosettenville Motor Exchange v Grootenboer* 1956 2 SA 624 (T) (fraud); *The Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) 588 (misrepresentation); Herbstein and Van Winsen *The Cvil Practice of the Superior Courts in South Africa* 2nd ed by Van Winsen, Thomas and Cilliers 304–305.

100 See *Trollip v Jordaan* 1961 1 SA 238 (A) 256; *Joubert v Faure* 1978 3 SA 1025 (C).

101 The mistake must not be induced by fraud or go to the root of the contract: *Wells v SA Alumenite Company* 1927 AD 69 72–73 (honest mistake) (*obiter*); *Sisson v Lloyd* 1960 1 SA 367 (SR) 370 (mere mistake). In *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D) 171–172, it was stressed that if the mistake is an essential or mutual one and the contract is void *ab initio* then the exemption clause is also inoperative, with the result that the party sought to be bound by the exemption clause may ignore it and set up the mistake as a defence.

However, if the mistake is such that a valid contract did not come into existence, the party relying on exemption clauses in the contract will not be assisted by them. Thus in *Papadopoulos's* case,[102] the fact that the sale was voetstoots and that the effects of representations had been excluded did not avail the applicant because the contract in question was void *ab initio* as a result of the mistake.[102]

The consequences of fraud may not be excluded.[103] The onus of proving the existence and scope of a *pactum de non petendo* rests on the defendant[104] and if this special defence is subsequently disputed, the onus of disproving the pact is borne by the plaintiff.[105]

Unconscionable or Unreasonable Terms

In South African law a contracting party who relies on a lawful contract is not required to prove that its provisions are reasonable or conscionable. In the absence of fraud the parties are bound by the terms of their contract, which are generally enforceable whether or not they are harsh or onerous.[106] A distinction must be drawn between provisions that are unconscionable, and the unconscionable reliance upon provisions, which may or may not be unconscionable in nature.

Prima facie it cannot be unconscionable for a party to rely on the terms of his contracts and the courts will not enquire into the conscionableness or unconscionableness of his doing so.[107] However, such reliance may become unconscionable in the light of extrinsic circumstances;[108] the onus is then on the party who alleges unconscionable or unreasonable conduct to prove it.[109] Certain guide-lines as to what is regarded as unacceptable have been laid down by the courts.

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102 *supra* 688. See also *Maritz v Pratley* 11 SC 345 and *Allen's* case *supra*.

103 D 50 17 23; *Wells v SA Alumenite Company* 1927 AD 69 72–73; the *Fibre Spinners and Weavers* case *supra* 803A 806C.

104 *Standard Bank of SA Ltd v Kerbel* 1957 1 PH A29 (W) 89–90; *Union Free State Mining v Union Free State Gold* 1960 4 SA 547 (W).

105 *Roux v Executors of Roos* (1847) 1 Menzies 89 90.

106 *Colonial Government v D Mills and Sons* (1907) 24 SC 91 (no right to complain if unreasonable); *Wells v SA Alumenite Company supra* 73; *North Vaal Mineral Company Ltd v Lovasz* 1961 3 SA 604 (T) 607–608; *Venter v Venter* 1949 1 SA 768 (A) 771 (no equitable jurisdiction to override a clear provision). Cf *Baines v Piek* 1955 1 SA 534 (A) 545.

107 *Human v Rieseberg* 1922 TPD 157 163 165 166; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company Ltd* 1962 3 SA 565 (C) 571H; *Oatorian Properties (Pty) Ltd v Maroun* 1973 3 SA 779 (A) 785C.

108 *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292–293; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 536–537; *Rand Bank Ltd v Rubenstein* 1979 2 SA 849 (W).

109 *South British Insurance Company Ltd v Patel and Company* 1959 4 SA 500 (SR) 505F; *North Vaal Mineral Company Ltd v Lovasz supra* 612–613; *Paddock Motors (Pty) Ltd v Igesund* 1975 3 SA 294 (D).

In *Morrison v Angelo Deep Gold Mine Limited*[110] Innes CJ stated that "the law will not recognize any arrangement which is contrary to public policy"[111] and added further on that

> "it must be shown that the arrangement necessarily contravenes or tends to induce contravention of some fundamental principle of justice . . . or that it is necessarily to the prejudice of the interests of the public."[112]

Examples of conduct that the courts will refuse to sanction as contrary to public policy include illegal acts, *male fide* acts, and fraudulent or intentionally wrongful acts related to the performance of contract.[113] The case of *Rand Bank Limited v Rubenstein*[114] provides a clear example of unconscionable conduct: the court held that the plaintiff had acted in bad faith by attempting to use a deed of suretyship for a purpose for which it was not intended; had it been enforced, it would have resulted in "gross injustice or great inequity" towards the defendant.[115] In the *Resisto Dairy* case[116] Rosenow J gave another example: where an insurer accepts liability and clearly indicates this to the insured, the insurer will not be allowed to rely on a written waiver clause if it subsequently changes its mind to the insured's prejudice.

Provisions that are against public policy include those which exclude liability for criminal or fraudulent acts.[117] Public policy, however, does not prevent contracting parties from excluding liability for loss caused by negligence or gross negligence.[118]

In the *Fibre Spinners and Weavers* case[119] Wessels ACJ refused to restrict the construction of the following widely phrased exemption clause: ". . . you are hereby absolved from all responsibility for loss or damage however arising . . ."[120] stating that:

> "there is no justification for so restricting the plain meaning of the words of the exemption clause, nor is there any reason founded on public policy, why it should be held that, in so far as the clause refers to loss or damage caused by defendant's gross negligence, it is not enforceable."[121]

Therefore the position in our law at present is that contracting parties may limit or exclude any liability that arises from an unintentional act or wrongdoing, provided they act within the law. This makes the burden of proof a difficult one

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110 1905 TS 775.
111 779.
112 785.
113 See the *Patel and Company* case *supra* 505E; *Wells v SA Alumenite Company supra*; and *Sisson v Lloyd supra*.
114 *supra*.
115 849; the court upheld the defendant's reliance on the *exceptio doli*. See also Viljoen "The Exceptio Doli: Its Origin and Application in South African Law" (1981) 160 *De Rebus* 173.
116 *supra* 571.
117 See the *Fibre Spinners and Weavers* case *supra* 806 and Aronstam *op cit* 42–43.
118 *Essa v Divaris supra* 769 and the *Fibre Spinners and Weavers* case *supra* 807.
119 *supra*.
120 806F–G.
121 807D.

to discharge, outside the narrow confines of fraud and illegality. However, if it can be established that gross injustice will result, despite the absence of fraud, the courts, at least in the Transvaal, will uphold the defence of *exceptio doli* because fraud is not a necessary element in such cases.[122]

A person who wishes to establish that a contractual provision contravenes a fundamental principle of justice faces the problem that the ground to be established is so general; a grossly inequitable provision does not lend itself to succinct definition. However, characteristics that are commonly encountered are unfair surprise and oppression.[123]

The former has been dealt with under the heading of reasonably sufficient notice; it was seen that the courts readily intervene to assist parties where they are reasonably unaware of provisions. The problem therefore centres around oppressive contractual provisions. As mentioned above, the tendency of the courts is not to intervene where the parties act within the law, regardless of how harsh the terms are. It is submitted that this tendency fails to take cognisance of the economic realities where inequality of bargaining power is to be found in the majority of consumer transactions taking place daily.[124] A statutory step to redress the balance is the power given to the courts, in terms of Section 3 of the Conventional Penalties Act,[125] to reduce to an equitable amount a penalty that is out of proportion to the prejudice the creditor has suffered as a result of the breach or contingency taking place for which the penalty was stipulated.[126] This is a welcome step, but because it is limited to penalty stipulations its operation is greatly restricted and it cannot serve as a general remedy.

In view of the reluctance of the courts to become involved in the question of contractual fairness,[127] it must be left to the legislature to provide a solution. In this respect the English Unfair Contract Terms Act 1977 may provide guidance. Section 3 of the Act applies where exemption clauses are incorporated into consumer transactions or standard form contracts, and requires the provision to satisfy "the requirement of reasonableness" to be enforceable. The Act

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122 See the full-bench decision in *Otto v Heyman* 1971 4 SA 148 (T); *Rand Bank Limited v Rubenstein supra* and Viljoen (1981) 160 *De Rebus* 173.

123 See Von Hippel "The Control of Exemption Clauses: A Comparative Study" (1967) 16 *ICLQ* 591 and Aronstam *op cit* 192–193, both citing the comment to section 2–302 of the Uniform Commercial Code in the American Law Institute "Uniform Laws Annotated." See also Viljoen (1981) 160 *De Rebus* 173.

124 There are a few exceptions, though: see, for example, *Linstrom v Venter* 1957 1 SA 125 (SWA) 127 and *Western Credit Bank Ltd v Kajee* 1967 4 SA 386 (N) 390; and the cases dealing with the *exceptio doli* – note 122 above.

125 Act 15 of 1962.

126 See *LAWSA* vol 5 244. In *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N) it was held that where the monetary loss incurred as a result of the breach cannot be accurately ascertained, the debtor bears the onus of establishing that "the amount fixed on by agreement between the parties was unfair to the debtor" (63–64). See further *Cous v Henn* 1969 1 SA 569 (GW); *Van Staden v Central South African Lands and Mines* 1969 4 SA 349 (W).

127 See, with regard to the now abolished equitable doctrine of *laesio enormis*: *Botha v Assad* 1945 TPD 1 4 and *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A). Cf *Otto v Heymans supra* and *Rand Bank Ltd v Rubenstein supra.*

furthermore provides for the onus to be placed upon the party who claims that the other does not deal as a consumer to establish this;[128] and where misrepresentation is concerned, upon the party who claims that a clause, which limits or excludes liability for misrepresentation, satisfies the reasonableness requirement to show that it does.[129]

If provisions similar to the above were to be adopted, it would not constitute a radical departure from our law, in view of the fact that restraint-of-trade clauses must be shown to be reasonable to be enforced.[130]

What is suggested is that the reasonableness requirement be extended only to cases, such as consumer transactions, where there is a marked inequality of bargaining power, and that in such cases the onus be shifted to the economically stronger party to prove either that the exemption clause is reasonable or that the transaction is not a consumer one or one marked by inequality. Between relatively equal contracting parties no interference is warranted.[131]

Third Parties

A person who is not a party to a contract and who contends that the protection of an exemption clause extends to him must establish this fact.

What must be established is whether on general principles there is authority for vicarious immunity. Moreover, as contractual liability arises only between parties to a contract, a third party cannot be liable contractually; liability in this respect must therefore be based on delict. The question which arises is whether two contracting parties can agree contractually to exclude a third party's delictual liability? It is trite law that an employer or master can by agreement exclude his own contractual and delictual liability. Can he also exclude his employee's

128 s 12(3).

129 s 8(1) which is substituted for s 3 of the Misrepresentation Act 1967.

130 *Van der Pol v Silberman* 1952 2 SA 561 (A). The case law dealing with the burden of proof is not entirely harmonious. The established view is that, as these agreements are *prima facie* unenforceable, the party relying on the agreement bears the onus of proving that it is reasonable. (See for example *Nachthseim v Overath* 1968 2 SA 270 (C) 271.) However, once this is established, the other party must prove that it is against the public interest: *Brend Hairstyles (Pty) Ltd v Marshall* 1968 2 SA 277 (O) 280. See also *Highlands Park Football Club Ltd v Viljoen* 1978 3 SA 191 (W) and the full-bench decision in *National Chemsearch SA (Pty) Ltd v Borrowman* 1979 3 SA 1092 (T) 1101 (but cf the dictum at 1099H). However, there is a new trend in favour of the view that public policy does not generally condemn restraint-of-trade agreements and that only covenants which unreasonably restrict trade are unenforceable. The onus is then on the party that contests the validity of the agreement to prove that it is unreasonable. See *SA Wire (Pty) Ltd v Durban Wire Plastics (Pty) Ltd* 1968 2 SA 777 (D) 787 (*obiter*); *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 4 SA 494 (N); *Poolquip Industries (Pty) Ltd v Griffin* 1978 4 SA 353 (W) 359–360 (*obiter*); *Madoo (Pty) Ltd v Wallace* 1979 2 SA 957 (T); and *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 3 SA 399 (C). See also *African Theatres Ltd v D'Oliviera* 1927 WLD 122 129.

131 which is in keeping with the court's approach where restraint agreements are entered into between equal contracting parties. See *Van der Pol's* case *supra* and *Spa Food Products Ltd v Sarif* 1952 1 SA 713 (SR).

or servant's delictual liability, although there is no contract between the employee/servant and the other party?

Possible ways in which this can be done are: (a) agency – the principal, who is protected by an exemption clause, may ratify the delictual act of his agent to become personally "liable;" this, however, is an artificial and highly unlikely method; (b) *stipulatio alteri* – one party enters into an agreement with another not to sue a third party; two problems arise here, first, that the third party does not acquire a benefit (which usually takes the form of positive performance) unless the immunity is considered to be a benefit; and secondly, as the third party must accede to the contract in some way to accept the benefit, it is not clear whether reliance upon the exemption clause will be construed as acceptance, and very doubtful whether such acceptance may take place after the commission of the delict.

To avoid the above problems it seems the most logical approach to argue that if the intention of the contracting parties is clear then the third party is protected. Thus in *Pan American World Airlines Incorporated v SA Fire and Accident Insurance Company Ltd*[132] Steyn CJ found that the agreement in question did not extend immunity to the airline (a third party) and that if this had been intended it would have been provided for specifically.

Where a contractual document contains a clause that clearly binds the parties to a third party, then all the signatories to such document are so bound, whether they have read the document or not.[133] Another instance where a third party may be protected is where a *pactum de non petendo in rem* is entered into; this is an agreement that no action will be brought against anyone and therefore provides a defence for all who may be liable on the obligation in question.[134] For example, such an agreement between a creditor and the principal debtor will avail the surety.[135]

However, despite a clear intention, a *pactum de non petendo* between a breadwinner and another party may not be raised as a defence against the dependants of the breadwinner if such party wrongfully causes the death of the breadwinner. The reason for this is that the breadwinner's action (to claim compensation for loss of support) is independently conferred upon the dependants and enables them to enforce their claim directly against the wrongdoer in their own name.[136] The action is not derived from the deceased or through the

132 1965 3 SA 150 (A) 160E.
133 *Phillips v Aida Real Estate (Pty) Ltd* 1975 3 SA 198 (A).
134 D 2 14 17 5.
135 D 2 14 21 5 and D 2 14 32. See also D 2 14 17 5 (buyer and seller); D 2 14 14 and D 2 14 25 pr (partners); and *African Banking Corporation v Blauwklip Garden Company Ltd* (1908) 25 SC 946 949–950 (cessionaries of debtor). For as long as, and to the extent that, a temporary or limited agreement not to sue a principal debtor operates, the surety is also protected: Grotius *Inleidinge* 3 41 9 and Van der Linde's note to Voet 2 14 13. However, the agreement may be worded so as not to benefit the surety: Voet 2 14 14.
136 *Jameson's Minors v CSAR* 1908 TS 575 584–585.

deceased's estate and cannot therefore be affected by the deceased's contractual relations with the wrongdoer.[137]

It may be concluded that, apart from the above exception, a third party who is delictually liable may rely on an exemption clause in a contract to which he is not a party if the intention of the contracting parties to this effect is clear; the onus of establishing this is obviously borne by the third party.

CONCLUSION

The complexity and the divergence of the rules of incidence relating to exemption clauses is an indication of the difficulties and uncertainties that sometimes arise when it is left to the courts to extend existing principles to counter undesirable aspects of new economic phenomena, such as the widespread usage of standard form contracts and exemption clauses. It may be seen from the foregoing that the courts are aware of the possible injustices that could result if exemption clauses are imposed without restriction and that they are prepared, in some cases, to intervene to check the excesses of contractual freedom; they are limited, however, by powerful precedents and the doctrine of *stare decisis*. It is submitted, therefore, that the legislature should intervene, as suggested, to provide a remedy (restricted to cases where a marked inequality of bargaining power exists) that requires exemption clauses to be reasonable and that they be incorporated in a clear and conspicuous manner; also, that the burden of proof be borne by the party who imposes the exemption clause, to establish its reasonableness.

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137 *ibid* and 588. See further Voet 9 2 11; Grotius *Inl* 3 32 16, 3 33 2 and 5, and 3 35 4; Schorer Note 467; Van der Keessel *Prael* 3 33 2; and *Ex parte Oliphant* 1940 CPD 537 542–544.

Gevolgsveroorsaking en gevolgsaanspreeklikheidsbegrensing in die Duitse strafreg*

FFW van Oosten
BA LLD
Professor in die Strafreg aan die Universiteit van Pretoria

3 DIE TEORIEË VAN GEVOLGSAANSPREEKLIKHEIDSBEGRENSING

Teorieë wat hier onderskei kan word, is dié van *wederregtelikheid* en *skuld, relevansie* en *objektiewe toerekening.*

3 1 Wederregtelikheid en Skuld[62]

Volgens hierdie teorieë vind die *conditio sine qua non*-toets sy noodwendige beperking in wederregtelikheid en/of skuld as misdaadvereistes. Wat wederregtelikheid betref, word die wederregtelikheid van beide die handeling *en* die gevolg, of 'n *wederregtelikheidsverband* tussen handeling en gevolg, of die "*Vermeidbarkeit*" van die gevolg, in die sin van die moontlikheid van verhindering of voorkoming daarvan, vir gevolgsaanspreeklikheid vereis. Wat skuld betref, is die vereiste by opsetsmisdade dat die beskuldigde, benewens die *betrokke ingetrede gevolg,* ook die *aard van die oorsaaklike verloop in die breë*[63] voorsien het en by nalatigheidsmisdade dat die gevolg en die aard van die oorsaaklike verloop voorsienbaar was. Besware teen wederregtelikheid en skuld as maatstawwe vir die begrensing van gevolgsaanspreeklikheid is dat dit geen behoorlike onderskeid tussen hierdie misdaadvereistes en oorsaaklikheid as misdaadvereiste tref nie en dat skuld in gevalle van 'n onbeheerbare of onstuurbare oorsaaklike verloop, aanspreeklikheid net so wyd as oorsaaklikheid kan stel. Dit sal byvoorbeeld die geval wees waar 'n man sy vrou tydens 'n donderstorm vir 'n wandeling neem in die hoop dat 'n weerligstraal haar sal doodslaan, of waar

* Sien 1983 *THRHR* 383.

62 Aanhangers van wederregtelikheid en skuld as maatstawwe om die draagwydte van oorsaaklikheid te beperk, is bv Heimann-Trosien 47–48; Baumann *Strafrecht* 222 227 228 233 235; 1962 *JZ* 46–48. Aanhangers van skuld as beperkingsmaatstaf, is bv Kohlrausch en Lange 5; Stratenwerth *Strafrecht* 84; Krause en Thoma 48; Welzel *Strafrecht* 45–47, by opsetsmisdade; Wegner 103–104; Berner 484; Von Buri *Causalität* 13–66.

63 Sien oor 'n wesenlike afwyking van die werklike oorsaaklike verloop van die voorgestelde oorsaaklike verloop *Oorsaaklikheid by Moord en Strafbare Manslag* 339 ev.

'n brandarm erfgenaam sy skatryk oom oorreed om 'n vliegtuigreis te onderneem in die hoop dat die vliegtuig sal neerstort. Dat die man en die erfgenaam hier in geval van die verwesenliking van hulle wense aan beide die oorsaaklikheidsvereiste en die opsetvereiste voldoen, kan nie betwis word nie. Nietemin word dit allerweë aanvaar dat hulle nie aan moord of doodslag skuldig is nie.[64]

3 2 Relevansie[65]

Hierdie teorie, waarvan die *resultaat* in 'n groot mate ooreenstem met dié van die adekwasieteorie, maar wat in *metode* daarvan verskil, onderskei skerp tussen *logiese natuurwetenskaplike oorsaaklikheid* en *objektiewe juridiese aanspreeklikheid.* Dit aanvaar *conditio sine qua non* as toets vir oorsaaklikheid, maar bepaal dan aanspreeklikheid vir die betrokke gevolg aan die hand van die *strafregtelike relevansie* van die konkrete oorsaaklike verloop. Die teorie erken dus die natuurwetenskaplike gelykwaardigheid van die voorwaardes vir 'n gevolg vir die doeleindes van oorsaaklikheid, maar ontken die juridiese gelykwaardigheid daarvan deur te onderskei tussen strafregtelik relevante en strafregtelik irrelevante voorwaardes vir die doeleindes van aanspreeklikheid. Strafregtelike aanspreeklikheid vir 'n gevolg word dan beperk tot die voorwaardes wat algemeen die neiging het om daardie gevolg te bewerkstellig, met inagneming van die "*Tatbestandsmässigkeit des Erfolgs und Art seiner Herbeiführung*" en die "*Grundsatzen der tatbestandlichen Unrechtslehre.*" Of strafregtelike aanspreeklikheid vir 'n gevolg opgedoen sal word, sal dus afhang van die sin en doel van die misdaadomskrywing en die wederregtelikheid van die beskuldigde se optrede in die lig van die misdaadomskrywing. Net soos die adekwasieteorie, stel die relevansieteorie dus ook 'n objektiewe generaliserende normatiewe maatstaf vir die begrensing van die *conditio sine qua non*-toets daar, maar waar die adekwasieteorie met 'n "*Wahrscheinlichkeitsurteil*" te werk gaan, werk die relevansieteorie met "*Tatbestandsmässigkeit*" as maatstaf. Aan die ander kant bestaan daar tussen die relevansieteorie en die teorie van objektiewe toerekening geen teenstrydigheid nie. Inderdaad word hulle as versoenbaar met mekaar beskou,

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64 Schönke Schröder en Lenckner 153; Rudolphi *Kommentar* 20; Heimann-Trosien 47–48; Kohlrausch en Lange 5; Jescheck 229; Maurach en Zipf 254, wat egter verklaar: "Die Tatsache, dass der Täter einen tatbestandsmässigen Erfolg *verursacht* hat, besagt noch nichts darüber, ob er ihn auch *schuldhaft* verusacht hat"; Baumann *Strafrecht* 228 233 238, waarvolgens adekwasie en relevansie die gevaar loop om as maatstawwe enersyds te eng te wor of andersyds op sigself skuldmaatstawwe te word; 1962 *JZ* 46–48; Bockelmann 65–6 Welzel *Strafrecht* 45–46, waarvolgens objektiewe voorsienbaarheid as maatstaf geld waa daar by opsetsmisdade 'n afwyking van die werklike oorsaaklike verloop van die voorgestelde oorsaaklike verloop is (46–47); Von Hippel *Lehrbuch* 96; *Strafrecht* 145, wat verklaar: "Es ist ein wissenschaftlich unklares und unbeholfenes Verfahren, zunächst einen zu weiten Kausalitätsbegriff aufzustellen, der grundsätzlich auch strafrechtlich Gleichgültiges mit umfasst, um dann die erforderliche Einschränkung erst mittelbar bei der Schuldlehre zu versuchen"; Von Hinüber 27–28; Merkel 127–128, Berner 484; Von Buri *Causalität* 13–66; Von Bar *Causalzusammenhange* 18–22 30–53; *Gesetz* 167–181 192–205; Birkmeyer 1885 *GS* 258–261 270–272. Vgl ook Geilen *Welzel Festschrift* 655–682, ivm die vereiste van 'n onmiddellike oorsaaklike verband by die gevolgsgekwalifiseerde misdade.

65 Aanhangers van die relevansieteorie is bv Blei 78 80–81; Mezger *Strafrecht* 116–117 121–127; 1958 *JZ* 281 282; Wessels *Strafrecht* 38; 1967 *JZ* 451–452.

veral vir sover die besondere meriete van die relevansieteorie die feit is dat dit die gevolgstoerekeningsvraag buite die raamwerk van adekwasie en gevolglik ook buite die raamwerk van oorsaaklikheid plaas. Besware wat teen die relevansieteorie geopper word, lui dat dit te vaag is, dat dit eintlik onder skuld tuishoort en dat dit tot verkeerde resultate lei in gevalle van atipiese oorsaaklike gebeure, omdat dit strafregtelike aanspreeklikheid in sodanige gevalle ontken.[66]

3 3 Objektiewe Toerekening[67]

Hierdie teorie onderskei eweneens skerp tussen *empiriese gevolgsveroorsaking* en *normatiewe aanspreeklikheidsbegrensing.* Volgens die voorstanders van die objektiewe toerekeningsteorie, wat op sy beurt weer uit die teorieë van adekwasie en relevansie ontwikkel het, moet die strengheid van die *conditio sine qua non*-toets vir gevolgsveroorsaking ("*Erfolgsverursachung*") versag word met 'n verdere selfstandige en afsonderlike maatstaf van juridiese gevolgstoerekening ("*Erfolgszurechnung*"). Daarvolgens is die vraag *of die konkrete veroorsaakte gevolg die beskuldigde regtens as sy daad toegereken kan word.* Dit gaan hierby om die belang van 'n oorsaaklike verband volgens die *conditio sine qua non*-toets vir die regsorde gemeet aan maatstawwe van die regsorde self.[68] Een van 'n aantal min of meer gelykluidende omskrywings van die teorie *in sy omvattende sin* lui:

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66 Schönke Schröder en Lenckner 155; Lackner 42; Rudolphi *Kommentar* 22; Heimann-Trosien 57; Jescheck 230; Maurach en Zipf 260–261; Baumann *Strafrecht* 238; *Grundbegriffe* 61; 1962 *JZ* 46; Blei 80–81, waarvolgens die relevansieteorie geensins 'n blote variasie van die adekwasieteorie is nie (81); Eser 60; Geilen *Strafrecht* 56–57; Wessels *Strafrecht* 37–38; Schmidhäuser 226 227; Laube en Wiefels 31–32; Sauer *Strafrechtslehre* 83; Wegner 101; Mezger *Strafrecht* 122–127, wat verklaar: "strafrechtliche Haftung begründet nur der adäquate Kausalzusammenhang. Denn auch wenn feststeht, dass die Handlung für den Erfolg kausal ist, kann der Handelnde nur dann für den Erfolg gestraft werden, wenn der Zusammenhang relevant, d.h. *rechtlich erheblich* ist" (122) (my kursivering), en waarvolgens relevansie, naas oorsaaklikheid en skuld, 'n vereiste vir strafregtelike aanspreeklikheid is; 1958 *JZ* 282; Hall *Grünhut Erinnerungsgabe* 222–223, wat verklaar: "Kausalität und Gesetzmässigkeit des Kausalverlaufs sind zweierlei. Gesetzmässigkeit setzt Kausalität voraus, aber Kausalität setzt nicht Gesetzmässigkeit voraus" (214), asook: "Die Kausalität ist niemals zu verneinen. Die Tatbestandsmässigkeit und Rechtswidrigkeit sind nur selten zu bejahen" (222); Triffterer *Bockelmann Festschrift* 212 vn 27; Henkel 1956 *NJW* 1451; Lampe 1959 *ZStrW* 595–603, waarvolgens die relevansieteorie 'n kombinasie van die *conditio sine qua non*- en adekwasieteorieë is (596–597); Schlüchter 1976 *JuS* 313; Wolter 1977 *GA* 257–274; Ebert 1979 *Jura* 566–567.

67 Voorstanders van objektiewe toerekening as maatstaf om die draagwydte van oorsaaklikheid te beperk, is bv Schönke Schröder en Lenckner 149–153; Rudolphi *Kommentar* 17–20 22–35; 1969 *JuS* 549–557; Jescheck 222–224 230–232; Eser 60 76 77–81; Geilen *Strafrecht* 50 57–59; Schmidhäuser 219–222 226–228; Otto *Grundkurs* 73–82; *Maurach Festschrift* 91–105; 1980 *NJW* 417–424; Mayer H 72–74; Samson *Kausalverläufe* 18–21 37–48 96–108 116–159; Kahrs 1–16 19–68 114–133 206–255; Honig *Frank Festgabe* 174–201; Kaufmann *Schmidt Festschrift* 200–231; Oehler *Schmidt Festschrift* 236–240; "Das Erfolgsqualifizierte Delikt als Gefährdungsdelikt" 1957 *ZStrW* 503 515–517; Roxin *Honig Festschrift* 133–150; "Zum Schutzzweck der Norm bei Fahrlässigkeitsdelikten" *Gallas Festschrift* 241 244–259; 1962 *ZStrW* 411–444; Schaffstein *Honig Festschrift* 169–173; Triffterer *Bockelmann Festschrift* 201–217; Naucke 1964 *ZStrW* 424–431; Hertel 1966 *NJW* 2148–2149; Ulsenheimer 1969 *JZ* 364–369; Jakobs 1977 *ZStrW* 1–35; Ebert 1979 *Jura* 561–576.

68 Schönke Schröder en Lenckner 155–156; Lackner 45; Rudolphi *Kommentar* 22–35 wat verklaar: "Grundlage für die Erfolgszurechnung bildet zunächst das Bestehen eines ursäch-

Vervolg op bladsy 60

> "Objektiv zurechenbar kann ein durch menschliche Handlung (im Sinne der Bedingungstheorie) verursachter Erfolg nur dann sein, wenn die Handlung eine *rechtlich missbilligte Gefahr geschaffen* und diese Gefahr sich *in dem tatbestandsmässigen Erfolg verwirklicht hat*."[69]

Om te bepaal of *bepaalde spesifieke oorsaaklike gebeure* juridiese relevant is in dié sin dat die konkrete veroorsaakte gevolg die beskuldigde regtens as sy daad toegereken kan word, word daar vervolgens met 'n verskeidenheid maatstawwe te werk gegaan, te wete: Eerstens die sogenaamde "*Beherrschbarkeit (Steuerbarkeit) des Geschehens,*" waarvolgens die veroorsaakte gevolg die beskuldigde nie toegereken kan word as hy geen beheer oor die oorsaaklike verloop gehad het nie. Dit is immers nie die sin en doel van strafregnorme dat oorsaaklike gebeure wat buite die beheer van die beskuldigde lê, of sover buite die algemene lewenservaring val dat dit geheel en al onvoorsienbaar is, die beskuldigde as sy daad toegereken moet word nie. So verklaar Otto:

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lichen Zusammenhanges zwischen dem tatbestandsmässigen Verhalten und dem Unrechtserfolg. Denn die Möglichkeit, *einen bestimmten Erfolg als das Werk eines Menschen zu betrachten,* besteht von vornherein nur dort, wo dieser Erfolg in irgendeiner Weise auf das Handeln oder Unterlassen des Menschen *zurückführbar* ist. Doch ist die Kausalität nicht die einzige Voraussetzung für die Zurechnung eines Erfolges. Erforderlich ist vielmehr zusätzlich, dass der festgestellte Kausalzusammenhang auch den einzelnen *normativen,* sich aus dem jeweiligen Tatbestand und der allgemeinen Unrechtslehre ergebenden Anforderungen genügt. Entscheidend für die Erfolgszurechnung ist allein der strafrechtlich relevante, d.h. *tatbestandsmässige Kausalzusammenhang.* Im Rahmen der tatbestandlichen Erfolgszurechnung ist daher streng zwischen der Verursachung des Erfolges und der allein anhand normativer Kriterien zu entscheidenden Frage der objektiven Zurechnung des Erfolges zu unterscheiden" (15) (my kursivering); Heimann-Trosien 50; Jescheck 230–232; Maurach en Zipf 266–268; Eser 60; Geilen *Strafrecht* 57; Stratenwerth *Strafrecht* 84; Wessels *Strafrecht* 38–39; Schmidhäuser 219–222 226–228, waarvolgens daar met oorsaaklikheid as vereiste by gevolgsmisdade weggedoen kan word ten gunste van objektiewe toerekening; Kahrs 1–16 19–68 114–133 206–255; Honig *Frank Festgabe* 174–201, wat verklaar: "Hat man . . . dafür entschieden, dass mit der Handlung auch der Erfolg entfallen müsste, dan ist über die Kausalität kein Wort mehr zu verlieren. Vielmehr tritt zum Kausalurteil als weiteres selbständiges Urteil das über die objektive Zurechnung hinzu, welches die axiologische Frage zu prüfen hat, nämlich *die Bedeutsamkeit des Kausalzusammenhanges für die Rechtsordnung, gemessen an Massstäben, die mit der Rechtsordnung selbst gegeben sind*" (179–180) (my kursivering); Schaffstein *Honig Festschrift* 170; Triffterer *Bockelmann Festschrift* 202–203; 208–209; Ebert 1979 *Jura* 568–569, wat verklaar: "Sinn der Lehre von der objektiven Zurechnung ist, 'Unrecht' von 'Unglück' zu scheiden. Ein handelnder Täter und ein strafrechtlich missbilligter Erfolg machen noch keine Unrechts-Tat" (562).

69 Jescheck 231 (my kursivering). Sien ook Schönke Schröder en Lenckner 156; Rudolphi *Kommentar* 22; 1969 *JuS* 552 554; Geilen *Strafrecht* 57; Stratenwerth *Strafrecht* 81; Schmidhäuser 219, wat verklaar: "Der Erfolg kann dem Täter objektiv zur Tat nur dann zugerechnet werden, wenn sich im Erfolg das Rechtsgutsverletzende, nämlich die spezifische Gefährlichkeit der Handlung . . . niederschlägt. In diesem Sinne muss bei allen Erfolgsdelikten zum Handlungsunwert . . . aus Gründen der Strafwürdigkeit jeweils nicht nur der Erfolg, sondern der durch die besondere Beziehung begründete *Erfolgsunwert* hinzukommen," asook: "Grundlegend für die Unrechts*begründung* ist also immer der *Handlungsunwert* (als Verstoss des Handelns gegen einen Rechtsgutsanspruch), nicht der *Erfolgsunwert* (als objektiv zurechenbarer Eintritt eines Schadens oder einer Gefahr). Es gilt immer: Schon im Augenblick des Handelns hätte dem Täter müssen gesagt werden können, dass er ein Rechtsgut . . . verletzc. Der Erfolgsunwert begründet oder steigert lediglich die Strafwürdigkeit" (238); Otto *Maurach Festschrift* 101; "Grenzen der Fahrlässigkeitshaftung im Strafrecht – OLG Hamm, NJW 1973, 1422" 1974 *JuS* 702 705–706.

> "Mitt der Statuierung der Pflicht, bestimmte Erfolge zu vermeiden, wendet sich der Gesetzgeber in seiner Rechtsnorm unmittelbar an *die Fähigkeit der Person, ein Kausalgeschehen in bestimmter Weise zu steuern,* d.h. den eigenen Willen den Geboten oder Verboten der Rechtsordnung entsprechend – final – einzusetzen. Dem *Prinzip der Steuerbarkeit* des Verhaltens kommt demgemäss in einer personalen Unrechtslehre zentrale Bedeutung zu: Die Grenzen des Willens markieren auch die Grenzen der strafrechtlichen Haftung."[70]

Tweedens sogenaamde "*Intensivierung der Rechtsgutsbeeinträchtigung,*" waarvolgens die veroorsaakte gevolg die beskuldigde nie as sy daad toegereken kan word waar hy wel 'n ingreep op die betrokke regsgoed gemaak het, maar die regsgoed nie meetbaar slegter daaraan toe is as gevolg daarvan nie. Die sin en doel van strafregnome is veeleer die verhindering van 'n skending van regsgoed en nie soseer die verhindering van 'n blote ingreep daarop sonder meetbare skade nie. Ofskoon die gevolg in hierdie gevalle dus wel ingetree het, is dit eenvoudig nie wederregtelik nie. Ebert laat hom soos volg daaroor uit:

> "Ist eine Rechtsgutsbeeinträchtigung bereits in einem vom Täter unabhängigen Geschehen angelegt, so muss das Verhalten des Täters die Beeinträchtigung intensivieren. Fehlt es hieran, so wird dem Täter der Erfolg nicht zugerechnet."[71]

Derdens 'n sogenaamde "*Rechtswidrigkeitszusammenhang,*" waarvolgens die veroorsaakte gevolg die beskuldigde slegs as sy daad toegereken kan word as sy handeling pligstrydig of wederregtelik was. So verklaar Ebert:

> "Der Erfolg ist objektiv nur dann zuzurechnen, wenn er nicht nur auf dem Verhalten des Täters, sondern auch auf der Pflichtwidrigkeit dieses Verhaltens beruht. Die Bedingungstheorie ist also weiter durch das Erfordernis eines 'Rechtswidrigkeitszusammenhanges' einzuschränken."[72]

Ingevolge die sogenaamde "*Vermeidbarkeitsprinzip*" is die sin en doel van strafregnorme juis die verhindering of voorkoming van regtens verbode gevolge deur pligmatige of regmatige optrede en dit is derhalwe nie genoegsaam dat die beskuldigde 'n strafregtelike relevante gevolg veroorsaak het en *daarmee* 'n "*Verhaltensvorschrift*" of "*Sorgfaltsnorm*" geskend het nie. Die gevolg moet juis *deur* die skending van 'n gedragingsvoorskrif of sorgvuldigheidsnorm veroorsaak word. Sou die gevolg dus ook ingetree het as die beskuldigde pligmatig of regmatig opgetree het (sogenaamde "*rechtmässiges Alternativverhalten*"), kan dit hom nie as sy daad toegereken word nie. Vanweë die feit dat die beskuldigde die gevolg nie deur pligmatige of regmatige optrede kon vermy het nie, ontbreek daar in so 'n geval 'n wederregtelikheidsamehang tussen sy handeling en daardie gevolg.

Vierdens sogenaamde "*Risikoerhöhung (Risikoschaffung, Risikoverringerung),*" waarvolgens die veroorsaakte gevolg die beskuldigde slegs as sy daad toegereken kan word as hy deur sy pligstrydige handeling die risiko of gevaar van die intrede van die betrokke gevolg geskep of verhoog het, maar nie waar hy die risiko of gevaar van die gevolg verminder of uitgestel het nie. In dié verband verklaar Otto:

> "*Verpflichtet,* die Verletzung oder Gefährdung eines Rechtsguts *zu vermeiden,* ist jeder, *der den ihm rechtlich eingeräumten Handlungsspielraum dadurch erweitert, dass er eine*

70 *Grundkurs* 74.
71 1979 *Jura* 570.
72 1979 *Jura* 571.

> *Gefahr für die Rechtsgüter anderer begründet oder erhöht.* Ob eine Begründung oder Erhöhung einer Gefahr für Rechtsgüter anderer eingetreten ist, ist wertend ex post zu ermitteln, wobei alle dann bekannten Umstände in die Wertung mit einzubeziehen sind."[73]

'n Probleem wat hier opduik en waaroor daar aansienlike meningsverskil bestaan, is of dit met sekerheid moet vasstaan en of dit bloot moontlik of waarskynlik moet wees dat die ingetrede gevolg deur pligmatige optrede vermy kon gewees het.

Vyfdens sogenaamde "*Gefahrrealisierung (Risikozusammenhang),*" waarvolgens die veroorsaakte gevolg die beskuldigde slegs as sy daad toegereken kan word as die gevaar wat deur die beskuldigde geskep of verhoog is, verwesenlik word. Lei die gevaar wat deur die beskuldigde geskep of verhoog is, langs die ompad of deur die toeval van 'n bykomende gevaar tot die ingetrede gevolg, kan toerekening nie plaasvind nie. Insgelyks kan die gevolg die beskuldigde nie as sy daad toegereken word as sy gevaarskepping regmatig of geoorloof (sogenaamde "*rechtens erlaubte Risiko*") was nie. Slegs 'n wederregtelike of ongeoorloofde gevaarskepping (sogenaamde "*rechtlich missbilligte Gefahr*") kan toerekening tot gevolg hê. In dié verband verklaar Otto:

> "*Der Erfolg beruht dann auf der Verletzung der Vermeidepflicht,* wenn die begründete oder erhöhte Gefahr sich in der Verletzung des Rechtsguts realisiert hat. Ob diese oder eine andere Gefahr sich in dem relevanten Erfolg realisiert hat, ist ... wertend zu ermitteln."[74]

Sesdens die sogenaamde "*Schutzzweck der Norm,*" waarvolgens die veroorsaakte gevolg die beskuldigde nie as sy daad toegereken kan word nie as dit nie binne die "*Schutzbereich der verletzten konkreten Sorgfaltsnorm*" val nie. Alleen indien dit die sin en doel van die betrokke misdaadomskrywing is om gevolge van hierdie aard te verminder, kan sodanige gevolg die beskuldigde as sy daad toegereken word. Rudolphi laat hom soos volg daaroor uit:

> "Schutzzweck der Norm ist es, jeden durch ein erhöhtes Risiko verursachten Erfolg zu verhindern. Dies besagt aber, dass jede Erfolgsverursachung, die sich als Verwirklichung dieser unerlaubten Gefährdung darstellt, im Schutzbereich des übertretenen Sorgfaltsgebotes liegt."[75]

Dit gaan hier dus nie om die sin en doel van *strafregnorme in die algemeen* nie, maar om die sin en doel van die *betrokke misdaadomskrywing.* Word die gevolg nie deur 'n regtens ongeoorloofde risiko uit hoofde van die sin en doel van die

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73 *Grundkurs* 74. Vgl Rudolphi *Kommentar* 27, wat verklaar: "Zustimmung verdient die Risikoerhöhungslehre. Ausgangspunkt der Überlegungen muss der Umstand bilden, dass die Rechtsordnung in den erörterten Fällen die Eingehung eines massvollen Risikos aus überwiegenden Gründen sozialer Nützlichkeit erlaubt, die strafrechtlichen Verhaltensnormen sich also ausschliesslich gegen solche Verhaltensweisen richten, die einen über das erlaubte Mass hinausgehenden Gefährlichkeitsgrad aufweisen."

74 *Grundkurs* 75.

75 1969 *JuS* 554. Hy voeg hieraan toe: "Gewiss – der Gedanke vom Schutzzweck der Norm – das ist seinen Kritikern zuzugeben – enthält noch keine fertigen Lösungen in sich. Er gibt uns aber einen ersten wichtigen sachlichen Richtpunkt und das methodische Prinzip an, nach dem das fahrlässige Unrecht zu präzisieren ist. Es gilt daher den Gedanken vom Schutzzweck der Norm in seinen verschiedenen Aspekten und Anwendungsbereichen herauszuarbeiten und an Hand einer umfassenden Analyse des Fallmaterials und der gesetzlichen Wertvorstellungen konkretere Entscheidungssätze zu entwickeln" (557).

betrokke misdaadomskrywing verwesenlik nie, maar deur 'n ander risiko, kan toerekening nie plaasvind nie.

Ten slotte, die sogenaamde leerstuk van "*Regressverbot*" in gewysigde vorm, waarvolgens die vraag nie is of daar 'n *oorsaaklike verband* bestaan, waar die gevolg nie sonder die opsetlike medewerking van derdes of die slagoffer self sou ingetree het nie, maar wel of daar in sodanige gevalle volgens die "*Schutzzweck der Norm*" of "*Steuerbarkeit*" as maatstaf 'n *toerekeningsamehang* tussen die handeling van die beskuldigde en die ingetrede gevolg bestaan. Weer eens word empiriese gevolgsveroorsaking hier as uitgangspunt aanvaar en is die enigste vraag of die veroorsaakte gevolg die beskuldigde as sy daad toegereken kan word in die lig van sodanige opsetlike optrede deur derdes of die slagoffer self. Hiermee word die leerstuk van "*Regressverbot*" dus buite die raamwerk van die oorsaaklikheidsvraag en binne die raamwerk van die leerstuk van objektiewe toerekening geplaas.[76] Otto laat hom soos volg daaroor uit:

> "Eine *Unterbrechung des ... Zurechnungszusammenhangs* liegt vor, wenn die wertende Würdigung des Sachverhalts zu dem Ergebnis führt, dass sich in der Rechtsgutsverletzung nicht die von der als Täter in den Blick genommenen Person begründete Gefahr realisiert hat, sondern eine Gefahr, die auf eine andere Person als verantwortlichen Urheber zurückzuführen ist."[77]

Dit is dus meteen duidelik en word bowendien algemeen aanvaar dat hierdie toerekeningsmaatstawwe, ten spyte van hulle onderlinge verskil in uitgangspunt en klemlegging, tot op sekere hoogte saamval en mekaar aanvul. Tussen die maatstawwe van wederregtelikheidsamehang en risikosamehang enersyds en "*Steuerbarkeit*" en "*Gefahrrealisierung*" andersyds, bestaan daar 'n groot mate

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76 Schönke Schröder en Lencker 151; Rudolphi *Kommentar* 19 30; 1969 *JuS* 555–556; Eser 64–66; Wessels *Strafrecht* 36–37; Schmidhäuser 230; Otto *Grundkurs* 75–76, wat verklaar: "Ein Erfolg wird dem Täter als sein Werk zurechnet, wenn gerade er verpflichtet war, diesen zu vermeiden. Die *Vermeidepflicht* setzt die *Vermeidemöglichkeit* voraus. – *Vermeidbar sind Erfolge, deren Eintritt oder Ausbleiben der Täter durch Einsatz kausaler Geschehensverläufe steuern kann.* Die Steuermöglichkeit begründet den Zusammenhang dessen, was für den Täter vermeidbar ist. Der Zurechnungszusammenhang wird unterbrochen, wenn der Täter von einer Person, die sich des Risikos in vollem Umfang bewusst ist, von der Herrschaft über das Geschehen ausgeschlossen wird, oder wenn der Täter selbst – auf Grund neu gefassten Entschlusses – neue, andere Gefahren für das Rechtsgut des Betroffenen begründet"; *Maurach Festschrift* 96–101; 1974 *JuS* 706, wat as voorbeeld van 'n onderbreking van 'n toerekeningsamehang die geval noem waarin een persoon aan 'n ander 'n dosis langsaamwerkende gif toedien en eersgenoemde kort daarna uit berou oor sy daad vir laasgenoemde 'n teengif aanbied om sy lewe mee te red, maar laasgenoemde weier om dit te neem omdat hy reeds lank al besluit het om selfmoord te pleeg en omdat sy godsdiensoortuigings dit verbied (*Maurach Festschrift* 99; 1974 *JuS* 707 vn 27 en vgl Roxin *Gallas Festschrift* 248–249); Mayer H 73–74, wat verklaar: "Die Handlung reicht immer nur soweit als die Willensherrschaft reicht. Sie endet daher dort, wo ein anderer vorsätzlicher Täter die Tat in die Hand nimmt" (73); Roxin *Honig Festschrift* 144 vn 28; *Gallas Festschrift* 244–246; Lampe 1959 *ZStrW* 615–616; Naucke 1964 *ZStrW* 409–440; Jakobs 1977 *ZStrW* 1–35, wat verklaar: "bei einer Kritik der Lehre vom Regressverbot kann es nur darum gehen, ob diese Einschränkung unter Zurechnungsaspekten brauchbar ist, nicht aber darum, ob sie ohne Modifikation der Äquivalenztheorie durchgeführt werden kann; denn die Äquivalenztheorie ist ein Vehikel der Zurechnung ohne Eigenwert" (6).

77 *Grundkurs* 75.

van ooreenkoms, terwyl daar weer tussen risikoverhoging en risikosamehang pertinente verskille bestaan. In dié verband word verklaar:

> "Weder lässt sich bisher von einer 'herrschenden Meinung' sprechen, noch zeichnet sich die Möglichkeit ab, die miteinander konkurrierenden und einander teils ergänzenden, teils überschneidenden, teils widersprechenden Zurechnungskriterien, die sich in der Literatur zu diesem Thema finden, zu einem Gesamtkonzept zu integrieren."[78]

Die samehang en verskeidenheid van hierdie maatstawwe en hulle wisselwerking word egter treffend saamgevat in die verklaring dat

> "[d]ie Lehre von den Voraussetzungen der objektiven Zurechnung ... sucht dort die Grenze zu bestimmen, an der aufgrund des Schutzzwecks der Norm und unter dem Blickwinkel der objektiven Voraussehbarkeit und Vermeidbarkeit des tatbestandlichen Erfolges, der Beherrschbarkeit des Kausalgeschehens und der Verwirklichung des vom Täter geschaffenen oder gesteigerten Risikos eines Schadenseintritts die Zurechenbarkeit endet."[79]

Die voorstanders van objektiewe toerekening is egter die eerstes om te erken dat hierdie leerstuk nog in sy ontwikkelingsfase is en derhalwe verder in sy konsekwensies uitgewerk moet word, voordat dit tot 'n algemeen aanvaarbare en geldende maatstaf vir gevolgsaanspreeklikheidsbeperking verhef kan word. Dit is dan ook geensins verbasend nie dat hierdie teorie onder meer die algemene kritiek ontlok het dat dit vaag en onduidelik is en geen algemene normatiewe maatstaf vir gevolgstoerekening daarstel nie. Kritiek teen die besondere maatstawwe van objektiewe toerekening het natuurlik ook nie uitgebly nie. Teen die risikoverhogingsbeginsel is die besware: eerstens dat dit "*Verletzungsdelikte*" tot "*Gefährdungsdelikte*" omskep; tweedens dat dit lynreg met die grondbeginsel *in dubio pro reo* bots waar aanvaar word dat die blote moontlikheid of waarskynlikheid van 'n pligmatige vermyding van die verbode gevolg voldoende vir gevolgstoerekening is; derdens dat dit verkeerdelik 'n *ex ante* prognose met 'n *ex post* prognose vervang, wat daarop neerkom dat elke oorskryding van 'n regtens geoorloofde gevaarskepping 'n risikoverhoging daarstel; vierdens dat dit by die toepassing van die *ex post* prognose geen duidelike onderskeid tussen relevante en irrelevante omstandighede of gebeure tref nie; vyfdens dat dit die laagmerk op die skaal van die ongeoorloofdheid van risiko's te hoog stel. Teen die vermybaarheidsbeginsel is die besware: Eerstens dat dit op 'n teenstrydigheid neerkom waar aanvaar word dat die gevolg streng gesproke nie wederregtelik is nie, omdat dit daarop neerkom dat slegs poging tot misdaadpleging verbied word. Tweedens dat die skeiding van sorgvuldigheidspligte van vermydingspligte gekunsteld is, aangesien 'n sorgvuldigheidsplig tog nie sonder 'n vermydingsplig kan bestaan nie. Ten slotte het die "*Normzwecktheorie*" die kritiek ontlok dat dit geen nuwe gesigspunte bied nie, omdat dit enersyds geen uitsluitsel gee oor die vraag of die norm alleen die verhindering van die konkrete, of ook die verhindering van abstrakte gevolg bedoel nie en andersyds geen aanduiding gee of 'n *ex ante* prognose of *ex post* prognose toepaslik is nie.

Aan die ander kant word die voordele van die objektiewe toerekeningsteorie daarin gesien dat dit, net soos die teorieë van skuld en wederregtelikheid enersyds

78 Ebert 1979 *Jura* 561.
79 Wessels *Strafrecht* 39.

en dié van relevansie andersyds, gevolgstoerekening buite die raamwerk van die oorsaaklikheidsleerstuk plaas en dat dit voortbou op die adekwasie- en relevansieteorieë en die gebreke daarvan aansuiwer.[80]

4 DIE PRAKTIESE UITWERKING VAN DIE ENGER GEVOLGSVEROORSAKINGSTEORIEË EN DIE GEVOLGSAANSPREEKLIKHEIDSBEGRENSINGSTEORIEË

Daar is reeds met behulp van praktiese voorbeelde op die onbillike en onbevredigende resultate van die *conditio sine qua non*-teorie vir oorsaaklikheid gewys en aangetoon dat dit die doel van sowel die enger gevolgsveroorsakingsteorieë as die gevolgsaanspreeklikheidsbeperkingsteorieë is om deur middel van 'n *behoorlike teoretiese begronding* sodanige onbillike en onbevredigende resultate uit die weg te ruim. By 'n blote teoretiese begronding van die enger ge-

80 Schönke Schröder en Lenckner 155–156; Preisendanz 14–15; Dreher en Tröndle 12; Lackner 43–44; Rudolphi *Kommentar* 22–23; 1969 *JuS* 552–557; Maurach en Zipf 267–268, wat verklaar: "Bei der Überprüfung der Zurechenbarkeit des Erfolges zum Täterverhalten geht es dabei darum, ob der *eingetretene Erfolg* in den *rechtlichen Verantwortungsbereich des Täters* fällt" (207); Baumann *Strafrecht* 229 vn 19, waarvolgens die "*Lehre vom Risikobereich*" en die "*Normzweckttheorie*" inderdaad op 'n gedeeltelike herlewing van die leerstuk van *"Regressverbot"* neerkom; Blei 81–83; Eser 60 74–75 76 77–81; Geilen *Strafrecht* 57 59; Wessels *Strafrecht* 38–42; Stratenwerth *Strafrecht* 84–86; "Bemerkungen zum Prinzip der Risikoerhöhung" *Gallas Festschrift* 227–239; "Literaturbericht" 1975 *ZStrW* 935–944; Schmidhäuser 219–239, waarvolgens objektiewe toerekening egter sonder voldoening aan die oorsaaklikheidsvereiste kan plaasvind en omgekeerd (227); Otto *Grundkurs* 73–76; *Maurach Festschrift* 91–105; 1974 *JuS* 705–706; 1980 *NJW* 417–424; Mayer 72–74; Samson *Kausalverläufe* 18–21 96–108 116–159; Honig *Frank Festgabe* 174–201, wat verklaar dat "das für den Erfolg kausale menschliche Verhalten rechtserheblich nur dann ist, wenn es in Hinblick auf die Bewirkung bzw. Vermeidung des Erfolges als zweckhaft gesetzt gedacht werden kann. Erst mit der zur Kausalität hinzutretenden objektiven Zweckhaftigkeit ist demnach die Grundlage für die juristische Bedeutsamkeit des menschlichen Verhaltens gegeben" (188); Oehler *Schmidt Festschrift* 236–240; 1957 *ZStrW* 515–517; Roxin *Honig Festschrift* 133–150; *Gallas Festschrift* 244–259; 1962 *ZStrW* 411–444; "Literaturbericht" 1966 *ZStrW* 214–222; Schaffstein *Honig Festschrift* 169–173; Triffterer *Bockelmann Festschrift* 201–217, wat verklaar dat "objektiv nicht voraussehbare *Erfolge* und objektiv nicht voraussehbare *Kausalverläufe*" ontoerekenbaar is en dus nie strafbaar nie (218), asook dat "der Begriff der *objektiven* Voraussehbarkeit bei vorsätzlichen und fahrlässigen Delikten inhaltlich gleich verwendet wird" (220); Naucke 1964 *ZStrW* 409–440; Hertel 1966 *NJW* 2148–2149; Ulsenheimer 1969 *JZ* 365–369; Herzberg 1971 *MDR* 882–883, wat egter die risikoverhogingsbeginsel verwerp aan die hand van 'n voorbeeld van 'n beskuldigde wat saam met vier ander persone op die slagoffer skiet en slegs een patroon die slagoffer in die hart tref, maar dit nie vasgestel kan word wie die doodskoot afgevuur het nie – in welke geval dit volgens hom weliswaar gesê kan word dat die slagoffer se kanse om te bly lewe verhoog sou gewees het as die beskuldigde nie sy skoot afgevuur het nie, dog by ontbrekende bewys daarvan dat dit die beskuldigde se koeël was wat die slagoffer getref het, dit nog geensins beteken dat hy die dood van die slagoffer veroorsaak het nie; Bindokat 1977 *JZ* 549–552, waarvolgens die leerstuk van objektiewe toerekening dit met die *versari in re illicita*-leerstuk gemeen het dat daar "zwischen Handlung und Erfolg nicht nur ein kausaler, sondern ein normativer Zusammenhang" moet bestaan (551); Wolter 1977 *GA* 257–274; Schlüchter 1977 *JuS* 106–108; Jakobs 1977 *ZStrW* 1–35; Ebert 1979 *Jura* 565 569 570–575, wat verklaar: "Nach der Risikoerhöhungslehre ist der Zentralbegriff der Erfolgsdelikte nicht die *Verletzung*, sondern die *Gefährdung* des Opfers" (572) (my kursivering), asook: "Das Risikoerhöhungskriterium sollte also das Kausalitätskriterium nicht *ersetzen*, sondern nur *ergänzen*" (573) (my kursivering); Puppe 1980 *ZStrW* 883–911.

volgsveroorsakingsteorieë en gevolgsaanspreeklikheidsbeperkingsteorieë het die Duitse skrywers dit egter nie gelaat nie. Inteendeel, hulle het hierdie teorieë telkens aan die hand van dieselfde praktiese voorbeelde waarmee die gebreke van die *conditio sine qua non*-teorie blootgelê is, getoets om vas te stel of sodanige gebreke daarmee aangesuiwer is. Maar ook hierby het dit nie gebly nie. Namate die verskillende enger gevolgsveroorsakingsteorieë en die gevolgsaanspreeklikheidsbegrensingsteorieë ontwikkel het, het die Duitse skrywers verdere praktiese voorbeelde gevind om te toets of hierdie teorieë tot billike en bevredigende resultate lei. Gevolglik is die praktiese voorbeelde nie beperk tot die probleemgebiede wat die *conditio sine qua non*-teorie uitwys nie, maar sluit dit ook voorbeelde in wat die gebreke van die teorieë van indiwidualisering, adekwasie, skuld en wederregtelikheid en relevansie blootlê. Omdat hierdie voorbeelde die *uiteindelike praktiese uitwerking* van die verskillende enger gevolgsveroorsakings- en gevolgsaanspreeklikheidsbeperkingsteorieë illustreer, is dit nie alleen insiggewend nie, maar ook nuttig om te bepaal tot welke uiteenlopende resultate, indien enige, die aanwending van die verskillende enger gevolgsveroorsakings- en gevolgsaanspreeklikheidsbeperkingsmaatstawwe lei by dié kategorieë feitekomplekse wat nie deur middel van die *conditio sine qua non*-toets (of die "*Formel von der gesetzmässigen Bedingung*") billik en bevredigend opgelos kon word nie. Hierby moet in gedagte gehou word dat die Duitse skrywers, soos trouens ook die Duitse regspraak, 'n prinsipiële benadering tot die oorsaaklikheids- en gevolgsaanspreeklikheidsvraag volg. Gevolglik is die enigste wyse waarop vasgestel kan word hoe bepaalde kategorieë feitekomplekse in die Duitse reg behandel word, 'n ondersoek na die voorbeelde van skrywers en gevalle waaroor die regspraak moes beslis. Die voorbeelde wat die Duitse skrywers verskaf om die werking van die verskillende gevolgsveroorsakingsteorieë en gevolgsaanspreeklikheidsbegrensingsteorieë te verduidelik, kan enersyds verdeel word in dié waarin daar *eenstemmigheid* bestaan dat die beskuldigde geen gevolgsaanspreeklikheid behoort op te doen nie of wel gevolgsaanspreeklikheid behoort op te doen, teenoor dié andersyds waarin daar *meningsverskil* bestaan of die beskuldigde gevolgsaanspreeklikheid behoort op te doen of nie. Belangrik is egter om in gedagte te hou dat in al hierdie voorbeelde die handeling van die beskuldigde minstens *conditio sine qua non* vir die ingetrede gevolg is.

Onder dié gevalle waaroor daar eenstemmigheid bestaan dat die beskuldigde geen gevolgsaanspreeklikheid behoort op te doen nie, val eerstens dié waarin die beskuldigde die betrokke gevolg inderdaad wil bewerkstellig en sy handeling ook *conditio sine qua non* daarvoor uitmaak, maar *die uiteindelike intrede van die gevolg afhang van toevallige bykomende faktore buite sy beheer.* Reeds genoemde voorbeelde is dié waarin 'n man sy vrou tydens 'n donderstorm vir 'n wandeling neem in die hoop dat 'n weerligstraal haar sal doodslaan, of waar 'n brandarm erfgenaam sy skatryk oom oorreed om 'n vliegtuigreis te onderneem in die hoop dat die vliegtuig sal neerstort en die man en die erfgenaam se wense dan ook vervul word. Volgens die objektiewe toerekeningsteorie sal gevolgs-

aanspreeklikheid hier vanweë ontbrekende regtens ongeoorloofde gevaarskepping of onbeheerbaarheid van die oorsaaklike verloop nie kan plaasvind nie,[81] terwyl skuld as begrensingsmaatstaf gevolgsaanspreeklikheid hier op grond van 'n ontbrekende opsetswil ontken.[82] Die adekwasieteorie ontken weer 'n oorsaaklikheidsverband in hierdie gevalle op grond van 'n buitengewone oorsaaklike verloop volgens algemene menslike ervaring,[83] terwyl die indiwidualiserende teorieë oorsaaklikheid op grond van die "*Generationstheorie*" van die "*Übergewichtstheorie*" ontken.[84] Daarteenoor verval hierdie besware teen gevolgsaanspreeklikheid of gevolgsveroorsaking as dit sou blyk dat die man sy vrou vir 'n wandeling geneem het in 'n gebied waar donderstorms 'n alledaagse verskynsel is en mense gereeld deur weerligstrale gedood word, of waar die erfgenaam weet dat daar 'n bom versteek is in die vliegtuig waarin sy oom sal reis. Bogenoemde geld nie alleen by opsetlike optrede nie, maar ook by nalatige optrede aan die kant van die beskuldigde.[85]

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81 Schönke Schröder en Lenckner 154 156, wat verklaar: "In beiden Beispielen fehlt es an einer Tötungshandlung, wobei es nach der hier vertretenen Auffassung, die einen vortatbestandlichen Handlungsbegriff für unergiebig hält ... keine Rolle spielt, ob man schon eine *Handlung* oder eine *Tötungs*handlung verneint"; Rudolphi *Kommentar* 25, wat verklaar: "Zwar fehlt es hier nicht an der Begründung eines wenn auch noch so geringen Lebensrisikos, wohl aber an einem rechtlichen Verbot, solche Risiken für andere zu begründen," asook oor die vraag wat nou juis 'n regtens geoorloofde risiko daarstel: "Allgemeine Aussagen darüber sind ... nicht möglich. Das Mass des erlaubten Risikos ist vielmehr jeweils unter Abwägung der einander gegenüberstehenden Interessen gesondert für die einzelnen Straftatbestände zu ermitteln. Abhängig ist es nicht zuletzt von dem Rang und dem Wert des jeweils betroffenen Rechtsgutes sowie davon, ob der Täter vorsätzlich gehandelt hat oder nicht" (25); Jescheck 231; Eser 60, wat verklaar: "Kennzeichnend für alle diese Bemühungen und in Ansatz wohl auch zutreffend ist der Gedanke der Beherrschbarkeit des Kausalgeschehens"; Geilen *Strafrecht* 58; Wessels *Strafrecht* 40–41; Stratenwerth *Strafrecht* 86; Otto *Grundkurs* 73 77–78 82; *Maurach Festschrift* 99–100; 1980 *NJW* 418–419 421–423; Samson *Kausalverläufe* 16 vn 4; Honig *Frank Festgabe* 186–187; Roxin *Honig Festschrift* 135 137 148; Schaffstein *Honig Festschrift* 170; Ebert 1979 *Jura* 569–570.

82 Mezger *Strafrecht* 127, op grond van ontbrekende "zum Vorsatz genügendes Wollen."

83 Maurach en Zipf 263–264; Baumann *Strafrecht* 231–233, waarvolgens die adekwasietoets hier by wyse van uitsondering van toepassing is, aangesien skuld en wederregtelikheid as aanspreeklikheidsbeperkingsmaatstawwe hier tot verkeerde resultate lei; Bockelmann 68; Engisch *Kausalität* 49; Traeger *Kausalbegriff* 169–171 186–187.

84 Mayer ME 56–57 76–78, ingevolge sy "*Generationstheorie*"; Binding *Normen* II 475 vn 4, ingevolge sy "*Übergewichtstheorie*"; Givanovitch 1910 *ZStrW* 576–577, op grond van die besondere feitestel. Vgl verder Rutowsky "Die psychisch vermittelte Kausalität 1952 *NJW* 606 607–608, waarvolgens daderskap hier, net soos by uitlokking tot of medepligtigheid aan selfmoord, ontbreek, nieteenstaande voldoening aan die vereistes van oorsaaklikheid en opset.

85 Sien die aangehaalde gesag in die vorige vier voetnote. 'n Verdere voorbeeld wat hier genoem word, is dié waarin die beskuldigde die slagoffer meedeel dat 'n intieme familielid van hom oorlede is, in die hoop dat hy van skok 'n noodlottige hartaanval sal kry en sy wens eweneens vervul word (sg "*Schockschäden*"). Volgens Rudolphi *Kommentar* 33 behoort gevolgstoerekening hier nie plaas te vind nie, want "die Schutzaufgabe der strafrechtlichen, den Lebens-und Gesundheidsschutz bezweckenden Verhaltensnormen geht ... nicht dahin, andere als den Betroffenen vor den körperlichen Auswirkungen seelischer Erschütterungen zu bewahren." Sien ook Schönke Schröder en Lenckner 156; Jescheck 231; Roxin *Honig Festschrift* 141–142; *Gallas Festschrift* 256–258. Daar kan stellig aangeneem word dat gevolgstoerekening wel sal plaasvind as die slagoffer 'n hartlyer was en dit voorsienbaar was vir beskuldigde, of hy dit inderdaad voorsien het.

Tweedens dié gevalle waarin die beskuldigde deur sy optrede 'n reeds bestaande oorsaaklike verloop *wel beïnvloed het, maar op so 'n wyse dat hy bloot die dreigende ernstiger gevolg verswak of uitgestel het* (sogenaamde "*Risikoverringerung*"). Voorbeeld hiervan is waar 'n deelnemer aan 'n aanval op die slagoffer 'n dodelike hou teen laasgenoemde se kop afweer, sodat die hou die slagoffer teen sy skouer tref, of waar 'n dokter die lewe van die slagoffer red, terwyl hy weet dat die slagoffer in elk geval kort daarna aan kanker sal sterf. Gevolgsaanspreeklikheid word hier op grond van ontbrekende objektiewe toerekening[86] en skuld,[87] en gevolgsveroorsaking op grond van adekwasie[88] ontken.

Derdens dié gevalle waarin die beskuldigde 'n reeds bestaande konkrete oorsaaklike verloop *slegs wysig sonder dat sy eie optrede dit vervang* (sogenaamde "*geringfügige Erfolgsmodifikationen*"). Dit sal byvoorbeeld die geval wees waar 'n treindrywer sy trein na 'n aangrensende spoorlyn laat beweeg, ondanks die feit dat albei spoorlyne sodanig deur 'n rotsstorting versper is dat hy die trein in ieder geval nie meer betyds tot stilstand kan bring om lewensverlies te voorkom nie, of waar die beskuldigde die slagoffer waarsku dat 'n ander persoon op die punt staan om hom 'n dodelike hou teen die agterkop toe te dien en die slagoffer dan omdraai, sodat die noodlottige hou hom teen die kant van sy kop tref. Gevolgsaanspreeklikheid word hier op grond van ontbrekende objektiewe toerekening[89] en wederregtelikheid en skuld,[90] en gevolgsveroorsaking op grond van adekwasie[91] ontken. Daarenteen verval hierdie besware waar die gevolg sonder die handeling van die beskuldigde in elk geval uit hoofde van 'n reeds bestaande hipotetiese oorsaaklike verloop op dieselfde tydstip sou ingetree het, soos in die reeds vermelde voorbeelde waar 'n dokter sy sterwende pasiënt 'n dodelike inspuiting toedien, of die vader van die ter-dood-veroordeelde die laksman opsystamp en self die doodsvonnis voltrek.

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86 Schönke Schröder en Lenckner 156; Rudolphi *Kommentar* 23, wat verklaar: "Denn Sinn und Zweck der strafrechtlichen Verbotsnormen kann es schlechterdings nicht sein, Handlungen zu verbieten, die das Risiko des Erfolgseintritts verringern, drohende Rechtsgutsverletzungen abmildern oder ihren Eintritt zeitlich hinausschieben"; Jescheck 231; Geilen *Strafrecht* 58; Stratenwerth *Strafrecht* 84; Schmidhäuser 229, op grond van "(k)ein Erfolgsunwert ohne vorangehenden Handlungsunwert," en waarvolgens "*Erfolgsunwert*" alleen kan bestaan "wenn *in dem Erfolg sich jene spezifische Gefahr realisiert, die der Täter durch sein, rechtsgutsverletzendes Handeln begründet* (*oder* gegenüber einer Ausgangslage von ursprünglich vorhanden en Gafahren *erhöht*) hat" (221); Otto *Grundkurs* 72–73 81; 1980 *NJW* 418 421–423; Samson *Kausalverläufe* 87; Wolff 17–18 22–23; Roxin *Honig Festschrift* 136; Ebert 1979 *Jura* 570 571 573; Puppe 1980 *ZStrW* 884–885.

87 Schlüchter 1976 *JuS* 519–520.

88 Engisch *Kausalität* 9–11; Traeger *Kausalbegriff* 56–57; Von Bar *Gesetz* 165 vn 10.

89 Schönke Schröder en Lenckner 156; Rudolphi *Kommentar* 23–24, wat verklaar: "Die entscheidende Frage stellt sich daher dahin, ob die strafrechtlichen Normen auch solche Handlungen verbieten, von deren Vornahme nicht das Ob und der Zeitpunkt des konkreten Erfolgseintritts, sondern nur das Wie des Erfolgseintritts abhängen, Handlungen also, durch deren Unterlassen der von der Norm bezweckte Rechtsgüterschutz gerade nicht erreichbar ist" (24); Jescheck 231; Eser 73–76; Stratenwerth *Strafrecht* 85–86; Schmidhäuser 229; Otto *Grundkurs* 72 81 82; *Maurach Festschrift* 93–94 104; Samson *Kausalverläufe* 25 98 100 110–114; Kahrs 131–132; Ebert 1979 *Jura* 570; Puppe 1980 *ZStrW* 863 871 881–882 892–893.

90 Baumann *Strafrecht* 266; Schlüchter 1976 *JuS* 519.

91 Traeger *Kausalbegriff* 43 127–129.

Ten slotte dié gevalle waarin die beskuldigde by nalatigheidsmisdade 'n verbode gevolg veroorsaak het *wat selfs nie deur pligmatige optrede aan sy kant vermy kon gewees het nie.* 'n Reeds gemelde voorbeeld hiervan is waar die beskuldigde te vinnig ry of dronk bestuur en die slagoffer doodry in omstandighede waarin hy die ongeluk nie sou kon vermy het nie, ook al was hy nugter of al het hy ook nie die spoedgrens oorskry nie. Gevolgsaanspreeklikheid word hier op grond van ontbrekende objektiewe toerekening uit hoofde van ontbrekende risikoskeppings of risikoverhoging ontken. Dit is egter geen uitgemaakte saak of dit hier met sekerheid moet vasstaan en of dit bloot moontlik of waarskynlik moet wees dat die beskuldigde die ongeluk deur pligmatige optrede sou kon vermy het nie.[92]

Aansienlike meningsverskil oor gevolgsveroorsaking en gevolgsaanspreeklikheid heers egter in die gevalle waar die gevolg deur 'n *atipiese verloop van gebeure* medeveroorsaak is. In hierdie gevalle staan dit vas dat die beskuldigde se pligstrydige handeling *conditio sine qua non* vir die verbode gevolg is, maar het die oorsaaklike verloop na sy handeling 'n ongewone, onvoorsienbare, onwaarskynlike of onbeheerbare wending geneem, waarsonder die gevolg nie sou ingetree het nie. Hieronder val *buitengewone natuurgebeurtenisse, die optrede van derdes of die slagoffer self* en *die abnormale liggaamlike toestand van die slagoffer.* Wat betref 'n abnormale liggaamlike toestand van die slagoffer, soos byvoorbeeld waar hy 'n eierdopskedel of 'n swak hart het of 'n bloeier is, aanvaar

92 Schönke Schröder en Lenckner 155 156–157; Rudolphi *Kommentar* 26–29; 1969 *JuS* 554–555, waarvolgens die vraag hier is "ob der Täter rechtlich verpflichtet war, die durch sein Verhalten eröffnete Möglichkeit des konkreten erfolgsverursachenden Geschehens in Rechnung zu stellen und um der Vermeidung dieser Möglichkeit willen sein Verhalten notfalls zu unterlassen oder nicht"; Jescheck 232; Schmidhäuser 237–238, op grond van geoorloofde risiko as regverdigingsgrond; Otto *Grundkurs* 79; *Maurach Festschrift* 102–104; 1980 *NJW* 419–423; Samson *Kausalverläufe* 37–48; Kahrs 114–133 206–255; Wolff 25–27; Kaufmann *Schmidt Festschrift* 217–218, wat verklaar: "Trifft die einen deliktischen Erfolg verursachende Handlung des Täters ein Tatobjekt, bei dem in diesem Zeitpunkt eine zu demselben Erfolg hinführende Entwicklung bereits ein solches Mass erreicht hat, dass der Erfolgseintritt unabhängig von dem rechtswidrigen Täterverhalten nach menschlichem Ermessen zu erwarten war, so fehlt es an dem Erfolgsunwert der Tat und damit an einem Teil des Unrechtstatbestandes" (229); Roxin *Honig Festschrift* 138–140 wat verklaar: "Wenn der Gesetzgeber, wie bei vielen Erscheinungsformen des modernen Verkehrs, beim Betriebe gefährlicher Anlagen und in anderen Fällen überwiegender sozialer Nützlichkeit, die Eingehung eines Risikos bis zu einer gewissen Grenze gestattet, so kann eine Zurechnung erst erfolgen, sobald das Verhalten des Täters eine Steiderung des erlaubten Risikos bedeutet. Ist das aber der Fall, so *muss* der Erfolg dem Handelnden zugerechnet werden, und zwar selbst dann, wenn möglicherweise der Erfolg auch bei fehlerfreiem Verhalten eingetreten wäre" (138); 1962 *ZStrW* 430–444; Schaffstein *Honig Festschrift* 172–173; Stratenwerth *Gallas Festschrift* 227–239, wat verklaar: "Sofern man überhaupt Wahrscheinlichkeitsurteile mit Gewissheit aussprechen kann, muss sich auch eine Wahrscheinlichkeits*differenz*, das heisst eine Risikosteigerung oder -minderung, mit Gewissheit feststellen lassen" (234); Spendel 1964 *JuS* 14–20; Wessels 1967 *JZ* 451–452; Hardwig 1968 *JZ* 289–292; Seebald 1969 *GA* 193–214, wat egter die risikobeginsel verwerp (209–213); Ulsenheimer 1969 *JZ* 365–369, wat die risikobeginsel verwerp ten gunste van die "*Normzwecktheorie*"; Schlüchter 1977 *JuS* 104–106; Marxen en Winter 1979 *JuS* 207–208, Ebert 1979 *Jura* 510 571–572.

sommige skrywers[93] dat selfs al sou 'n normale gesonde persoon nie as gevolg van die wederregtelike optrede van die beskuldigde gesterf het nie, die beskuldigde hier wel aanspreeklikheid vir die dood van die slagoffer sal kan opdoen, terwyl gevolgsaanspreeklikheid hier weer deur ander skrywers[94] ontken word, tensy die beskuldigde van die abnormale liggaamlike toestand van die slagoffer bewus was, in welke geval hy wel gevolgsaanspreeklikheid sal kan opdoen. Vir sover dit buitengewone natuurgebeurtenisse en die opsetlike of nalatige optrede van derdes of die slagoffer self, wat volg op die handeling van die beskuldigde, aangaan (sogenaamde "*Folgeverletzungen*" of "*Folgeschäden*"), bestaan daar dieselfde meningsverskil. Waar die slagoffer byvoorbeeld na die handeling van die beskuldigde op pad hospitaal toe in 'n verkeersongeluk omkom, of vanweë 'n brand wat in die hospitaal uitbreek, beswyk, of 'n dodelike infeksie of longontsteking in die hospitaal tydens sy herstel aldaar opdoen,[95] is daar diegene[96] volgens wie die beskuldigde hier geen gevolgsaanspreeklikheid sal kan

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93 Jescheck 232, op grond van objektiewe toerekening; Bockelmann 68, op grond van adekwasie; Schmidhäuser 230, op grond van objektiewe toerekening vanweë "*Handlungsunwert*" en "*Erfolgsunwert*"; Otto *Grundkurs* 72 81, op grond van objektiewe toerekening.

94 Maurach en Zipf 273, op grond van ontbrekende adekwasie; Baumann *Strafrecht* 228–229, op grond van ontbrekende skuld; Sauer *Strafrechtslehre* 80, op grond van ontbrekende adekwasie; Von Hippel *Lehrbuch* 98, op grond van ontbrekende adekwasie. Engisch 1948 *SJZ* 210; 1951 *JZ* 787, op grond van ontbrekende adekwasie; Rudolphi 1969 *JuS* 551 553 554, wat verklaar: "es lässt sich schwerlich leugnen, dass es gerade die Lebenserfahrung ist, die uns lehrt, dass ... Menschen über eine besondere Konstitution verfügen können, die auch schon bei leichten Unfällen oder Verletzungen einen tödlichen Ausgang bewirken können" (551), en waarvolgens gevolgsaanspreeklikheid hier op grond van ontbrekende objektiewe toerekening ontken word; Ebert 1979 *Jura* 569 574.

95 Sg "*noch nicht ausgeheilten Primärverletzung.*"

96 Schönke Schröder en Lenckner 154, op grond van ontbrekende objektiewe toerekening; Rudolphi *Kommentar* 25 31–32, op grond van ontbrekende objektiewe toerekening, nieteenstaande adekwasie, en waarvolgens die beslissende vraag hier is "ob die sich in dem Folgeschaden realisierende Gefahr selbst das erlaubte Mass überschreitet und damit nicht mehr zu den allgemeinen, rechtlich nicht missbilligten Lebensrisiken des Betroffenen gehört" (32), en wat 'n verdere voorbeeld gee van waar die beskuldige die slagoffer sodanig beseer dat sy been afgesit moet word en die slagoffer agv die feit dat hy sy been verloor het, noodlottig val (sg "*zurückgebliebenen Dauerschaden*" of "*Zweitschäden*") (31–32. Sien ook Kahrs 129–131; Roxin *Gallas Festschrift* 253–256; Otto 1974 *JuS* 709); 1969 *JuS* 550 554–555; Jescheck 231–232, op grond van ontbrekende objektiewe toerekening; Maurach en Zipf 267, op grond van ontbrekende adekwasie; Baumann *Strafrecht* 235, op grond van ontbrekende adekwasie by wyse van uitsondering; Geilen *Strafrecht* 58, op grond van ontbrekende objektiewe toerekening in die sin van ontbrekende risikosamehang; Bockelmann 67, op grond van ontbrekende adekwasie; Schmidhäuser 221, op grond van ontbrekende objektiewe toerekening; Von Hippel *Lehrbuch* 98, op grond van ontbrekende adekwasie; Honig *Frank Festgabe* 176, op grond van ontbrekende objektiewe toerekening; Roxin *Honig Festschrift* 137, op grond van ontbrekende objektiewe toerekening in die sin van die afwesigheid van 'n "*rechtlich erhebliches Risiko*"; Schaffstein *Honig Festschrift* 172–173, op grond van ontbrekende objektiewe toerekening, ofskoon hier wel aan die vereistes van oorsaaklikheid en skuld voldoen word; Givanovitch 1910 *ZStrW* 576–577, op grond van indiwidualiserende oorsaaklikheid in die spesifieke gegewe omstandighede; Otto 1974 *JuS* 703 706 709, op grond van ontbrekende objektiewe toerekening, vanweë die afwesigheid van enige "*Steuerbarkeit des Geschehensablaufs*" (706), en wat verklaar: "Wäre das Unfallopfer bei einem anschliessenden *Unfall des Krankenwagens* zu Tode gekommen, so wäre dieser Erfolg dem Angeklagten gleichfalls nicht zurechenbar. Wer dafür verantwortlich ist, dass ein anderer am Strassenverkehr nach den dort massgebenden Regeln teilnimmt, be-

opdoen nie, tensy die infeksie of longontsteking 'n gevolg van die beskuldigde se handeling is, teenoor diegene[97] volgens wie hy hier wel gevolgsaanspreeklikheid sal kan opdoen. Voorts sal die beskuldigde volgens sommige skrywers[98] wel gevolgsaanspreeklikheid kan opdoen, maar volgens ander skrywers[99] nie, waar die slagoffer byvoorbeeld na die handeling van die beskuldigde die lewe laat as gevolg van sy weiering om mediese behandeling te ondergaan, of as gevolg van verkeerde behandeling wat hy homself toegedien het, of as gevolg van verkeerde mediese behandeling wat hy ontvang het.[100] Origens bestaan daar skerp meningsverskil oor dié gevalle waarin die beskuldigde die slagoffer uitlok, aanstig, beweeg of verkry om hom- of haarself te benadeel, byvoorbeeld om hom- of haarself om die lewe te bring. Volgens sommige skrywers sal die beskuldigde

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gründet keine über das allgemeine Lebensrisiko hinausgehende Gefahr für diese Person. Mag der Unfall vorhersehbar sein, mit der Veranlassung der Autofahrt hat der Angeklagte keine rechtlich relevante Gefahr pflichtwidrig für das Unfallopfer begründet. Dat gilt auch für eine Fahrt im Krankenwagen, dessen schnelles Fahren unter besonderen Sicherheitsvorkehrungen erfolgt" (709).

97 Wessels *Strafrecht* 41, op grond van objektiewe toerekening; Engisch *Kausalität* 49 50–52 60–63, op grond van adekwasie; Kion 1967 *JuS* 500, op grond van adekwasie; Ebert 1979 *Jura* 573 575, op grond van objektiewe toerekening:

98 Schmidhäuser 233, op grond van objektiewe toerekening; Engisch *Kausalität* 49 50–52 60–63, op grond van adekwasie; Kion 1967 *JuS* 500, op grond van adekwasie.

99 Rudolphi *Kommentar* 30–31, op grond van ontbrekende objektiewe toerekening, ondanks adekwasie, en waarvolgens die strafregtelike aanspreeklikheid van die beskuldigde hier nie daarvan sal afhang of die foutiewe mediese behandeling gewoon of drasties buite die normale verloop van sake val nie, maar wel "ob und inwieweit die strafrechtlichen Verhaltensnormen, insbesondere also die einzelnen Sorgfaltsgebote überhaupt den Schutz des Opfers auch vor pflichtwidrigen Schädigungen Dritter umfassen. Geht man von ihr aus, so ergibt sich als Konsequenz des allgemeinen Vertrauensgrundsatzes auch hier, dass der Erstschädiger grundsätzlich darauf vertrauen darf, dass Dritte sich pflichtgemäss verhalten, er mit pflichtwidrigen Schädigungen durch Dritte also nur dann zu rechnen hat, wenn dafür im Einzelfall besondere Anzeichen vorhanden sind" (31); 1969 *JuS* 555–556 557, waarvolgens objektiewe toerekening hier alleen sal ontbreek as daar inderdaad mediese behandeling toegedien is wat nie net foutief was nie, maar ook pligstrydig, maar waarvolgens objektiewe toerekening wel kan plaasvind as mediese behandeling pligstrydig nie toegedien is nie of nagelaat is (556); Jescheck 231–232, op grond van ontbrekende objektiewe toerekening; Maurach en Zipf 267–268, op grond van ontbrekende objektiewe toerekening, omdat adekwasie hier verkeerdelik nie sal ontbreek nie; Baumann *Strafrecht* 235, op grond van ontbrekende adekwasie by wyse van uitsondering; Schmidhäuser 233, op grond van ontbrekende objektiewe toerekening; Sauer *Strafrechtslehre* 80, op grond van ontbrekende adekwasie; Von Hippel *Lehrbuch* 98, op grond van ontbrekende adekwasie; Von Bar *Causalzusammenhang* 22–23, op grond van ontbrekende adekwasie; Oehler *Schmidt Festschrift* 237, op grond van ontbrekende "*Tatbestandsmässigkeit*"; Otto 1974 *JuS* 703 706 709, wat verklaar: "Vorhersehbar mag der Kunstfehler eines Arztes sein. Gleiches gilt für ein grob leichtfertiges Verhalten des Verletzten, das zum tödlichen Ausgang einer sonst heilbaren Verletzung führt, oder auch für einen Verkehrsunfall des Krankenwagens, mit dem der Verletzte in die Klinik transportiert wird. Wenn dennoch Bedenken bestehen, diese Folgen dem ursprünglichen Verursacher der Verletzung ohne weiteres zuzurechnen, so deshalb, *weil Zweifel an der Steuerbarkeit dieses Geschehensablaufs durch ihn aufkommen.* Das Prinzip der Steuerbarkeit hat nämlich faktische und normative Grenzen" (706), en waarvolgens objektiewe toerekening enersyds alleen by gering nalatige mediese behandeling nie sal ontbreek nie en andersyds wel sal ontbreek indien die mediese behandeling nie noodsaaklik was nie, maar wel wenslik (709); Ebert 1979 *Jura* 570 572 574, op grond van ontbrekende objektiewe toerekening.

100 Insgelyks sg "*noch nicht ausgeheilten Primärverletzung.*"

hier gevolgsaanspreeklikheid kan opdoen,[101] maar volgens ander skrywers nie.[102] Die voorgaande geld ongeag of die beskuldigde opsetlik of nalatig opgetree het.

5 SLOTSOM

Uit die voorgaande is dit meteen duidelik dat die meningsverskil tussen die Duitse skrywers nie soseer op die oorsaaklikheidsvraag betrekking het as op die gevolgstoerekeningsvraag nie. Wat die oorsaaklikheidsvraag betref, is hulle dit in die algemeen vrywel eens dat dit uitsluitlik met die *conditio sine qua non*-toets of soms met hierdie toets as basis en 'n bykomende adekwasietoets opgelos kan word. Met die aanvaarding van die *conditio sine qua non*-toets as hetsy uitsluitlike toets of selfs basiese toets vir oorsaaklikheid gee die Duitse skrywers egter geensins te kenne dat hierdie toets deurgaans feilloos werk of altyd gewenste resultate oplewer nie. Dat die *conditio sine qua non*-toets by alternatiewe oorsaaklikheid faal, by hipotetiese oorsaaklikheid probleme oplewer en in die algemeen gevolgsaanspreeklikheid te wyd stel, word allerweë erken. Deur gevalle van alternatiewe oorsaaklikheid egter as 'n uitsondering op die *conditio sine qua non*-toets te beskou, die toets alleen op werklike oorsaaklike gebeure en die konkrete ingetrede gevolg af te stem en die draagwydte van die toets op die een of ander wyse te begrens, word die vernaamste besware teen die praktiese uitwerking daarvan volgens die Duitse skrywers uitgeskakel. Een van die maniere waarop die draagwydte van die *conditio sine qua non*-toets soms beperk word, is dan om binne die raamwerk van die oorsaaklikheidsvereiste 'n verdere adekwasietoets, waarmee gevolgsaanspreeklikheid tot voorsienbare of waarskynlike oorsaaklike gebeure of gevolge beperk word, vir oorsaaklikheid te stel. Dit wil

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101 Rudolphi *Kommentar* 33, wat verklaar: "wem nicht verboten ist, einen fremden Selbstmord vorsätzlich oder fahrlässig zu veranlassen oder zu fördern, dem kann es unter den gleichen Voraussetzungen auch nicht untersagt sein, eine fremde Selbstgefährdung zu unterstützen oder zu veranlassen"; 1969 *JuS* 556–557; Jescheck 232; Roxin *Honig Festschrift* 142–143 146; *Gallas Festschrift* 241–259; Otto 1974 *JuS* 709–710; Marxen en Winter 1979 *JuS* 207–208; Ebert 1979 *Jura* 569 570. Volgens hierdie skrywers maak selfmoord en selfbesering geen misdade uit nie en behoort gevolgstoerekening ingevolge die "*Normzwecktheorie*" derhalwe ook nie by aandadigheid daaraan plaas te vind nie, tensy die selfmoord of selfbesering onvrywillig gepleeg is. Hierdie gevalle moet volgens hulle egter onderskei word van dié gevalle waarin die beskuldigde deur sy optrede 'n ander persoon daartoe aanstig of beweeg om 'n gevaarlike reddingspoging te onderneem (sg "*Förderns fremder Selfstgefährdungen.*") Voorbeeld hiervan is waar die beskuldigde opsetlik of nalatig 'n gebou aan die brand steek en 'n brandweerman in sy reddingspoging van die vasgekeerdes in die brand omkom, of waar hy 'n kind in 'n rivier stamp en 'n lewensredder in sy poging om hom uit die water te haal, verdrink. Ofskoon die brandweerman en die lewensredder regtens verplig is tot 'n reddingspoging, is dit die beskuldigde wat hier die risiko skep en kan die gevolg hom toegereken word. Insgelyks moet hier onderskei word die geval van sg "*einverständliche Fremdgefährdung,*" waarin die beskuldigde self, en nie die slagoffer nie, enduit beheer oor die skending van die betrokke regsgoed (lewe of liggaam) behou en derhalwe die uiteindelike skadelik daad verrig, soos bv by doodslag op versoek en selfmoordooreenkomste. Vgl. Schlüchter 1976 *JuS* 379–380, waarvolgens deelname aan selfmoord geen oorsaaklikheidsprobleem daarstel nie.

102 Sien oor aandadigheid aan selfmoord *Oorsaaklikheid by Moord en Strafbare Manslag* 265 ev en oor die botsende en uiteenlopende standpunte van die skrywers oor hierdie onderwerp 292 ev:

egter voorkom asof die adekwasietoets in die lig van veral die noue verwantskap daarvan met die toets vir nalatigheid toenemend deur die Duitse skrywers nie soseer as 'n oorsaaklikheidstoets nie, maar veeleer as 'n gevolgsaanspreeklikheidsbegrensingstoets en in dié sin as 'n voorloper tot die teorie van objektiewe toerekening beskou word. Op sy beurt beteken dit dat met die algehele verwerping van die indiwidualiserende oorsaaklikheidsteorieë enersyds en die onvermoë van die Duitse skrywers om tot dusver met die een of ander towerformule, waarmee alle oorsaaklikheidsprobleme altyd opgelos sal kan word, vorendag te kom andersyds, die *conditio sine qua non*-toets as enigste toets vir oorsaaklikheid oorbly.

Vir sover dit die gevolgsaanspreeklikheidsbeperkingsvraag aangaan, word daar by aldrie die teorieë van wederregtelikheid en skuld, relevansie en objektiewe toerekening van die veronderstelling uitgegaan dat die oorsaaklikheidsvraag alreeds aan die hand van die *conditio sine qua non*-toets beantwoord is. Al wat dus volgens die Duitse skrywers oorbly, is om in die lig van die algemene reëls van die Duitse strafreg en die sogenaamde "*Verbrechensaufbau*" in besonder te bepaal of die beskuldigde gevolgsaanspreeklikheid behoort op te doen. In dié verband geniet die objektiewe toerekeningsteorie tans die meeste steun onder die Duitse skrywers as gevolgsaanspreeklikheidsbegrensingsteorie. Hierdie teorie, wat veral uit die teorieë van adekwasie en relevansie ontwikkel het, is egter nog in sy ontwikkelingstadium en kan gevolglik nog nie op algemene geldigheid aanspraak maak nie. Interessant is egter dat daar by die objektiewe toerekeningsteorie nie alleen met sekere algemene maatstawwe vir gevolgstoerekening gewerk word nie, maar dat daar toenemend spesifieke maatstawwe ontwikkel word om enersyds vir die aard van die betrokke feitestel waaroor dit gaan en andersyds vir die ter sake besondere misdaad wat ter sprake kom, voorsiening te maak.

Met betrekking tot die praktiese uitwerking van die enger gevolgsveroorsakingsteorieë en die gevolgsaanspreeklikheidsbegrensingsteorieë is dit eweneens interessant dat daar 'n groot mate van eenstemmigheid onder die Duitse skrywers bestaan oor die strafregtelike aanspreeklikheid al dan nie van die beskuldigde in die meeste van die bespreekte voorbeelde. Trouens, skynbaar is die meningsverskil tussen hulle hoofsaaklik beperk tot gevalle van 'n atipiese oorsaaklike verloop, waarin die gevolg medeveroorsaak word deur die slagoffer self, of derdes, of natuurkragte. Dat so 'n verskeidenheid van gevolgsveroorsakingsteorieë en gevolgsaanspreeklikheidsbegrensingsteorieë egter tot soveel eensgesindheid oor die strafregtelike aanspreeklikheid al dan nie van die beskuldigde in spesifieke feitestelle kan lei, dui daarop dat die meningsverskil tussen die Duitse skrywers nie soseer die strafregtelike aanspreeklikheid self van die beskuldigde in bepaalde gevalle betref nie, maar veeleer die teoretiese begronding van gevolgsveroorsaking en gevolgsaanspreeklikheidsbeperking.

AANTEKENINGE

'N SKOKKENDE UITLATING OOR PSIGIESE SKOK? — 'N BESINNING NA AANLEIDING VAN MASIBA v CONSTANTIA INSURANCE CO LTD 1982 4 SA 333 (K)

1 Inleiding

Die opeenvolging van gebeure wat die agtergrond daargestel het waarteen afhanklikes onlangs op grond van hulle broodwinner se dood aan beroerte, nadat hy aan buitengewone spanning onderwerp was, met 'n skadevergoedingseis geslaag het, sal seker om verskillende redes kommentaar ontlok. Ten einde te sê wat met hierdie bydrae beoog word, moet eers vasgestel word wat in die *Masiba*-saak aan die orde was. Daarna kan die enkele kwessie waarop hiermee veral toegespits word na vore gebring word.

2 Die Masiba-saak

Vereenvoudig kom die verhaal op die volgende neer: Die oorledene was na 21h00 op 'n helder, Kaapse wintersaand per motor op pad huis toe. By hom in die motor was sy eggenote, hulle driejarige dogtertjie, haar maatjie en 'n agtienjarige familielid. Toe die motor onklaar raak, klim die drie grootmense uit en begin dit stoot. Vier mans daag daar op en help hulle om die motor tot bo-op 'n spoorwegoorbrug te stoot. Daar probeer een van die vier die oorledene beroof. Sy eggenote bemerk dit en storm van agter die motor na die regterkantste voordeur om haar man by te staan, dog sy word deur 'n verbysnellende motor omvergestamp en kom in 'n beseerde toestand op die oorkantste sypaadjie te lande. Die oorledene, wie se aanvaller intussen die loop geneem het, gaan toe na haar om hulp te verleen. Net toe hy by haar kom, bots 'n derde motor met soveel geweld van agter teen die oorledene se stilstaande motor dat dit dwarsoor die pad skiet en eers op die rand van die brug tot stilstand kom. Met 'n ontredderde kreet oor wat met die twee kleintjies in sy motor sou gebeur het, storm die oorledene in die rigting van sy motor. Hy word egter deur beroerte neergevel. Drie dae later sterf hy sonder dat hy weer sy bewussyn herwin het. Dit blyk dat die oorledene met sy mediese geskiedenis van hoë bloeddruk besonder vatbaar was vir beroerte indien hy aan besondere spanningsvolle omstandighede onderwerp sou word. Die eiseresse (die eggenote, namens haarself en hulle minderjarige kinders, en hulle meerderjarige dogter) slaag uiteindelik met hulle skadevergoedingseise teen die statutêre versekeraar van die derde motor.

Om daarby uit te kom, maak die hof eers uit dat die eiseresse afhanklikes met die nodige onderhoudsaansprake teenoor die oorledene was (335E–H).

Daarop word hier nie ingegaan nie. Verder moes die hof oor die verhaalbaarheid van die eiseresse se skade uitspraak gee. Dit is in die loop van die hof se positiewe bevinding hieroor dat waarnemende regter Berman se stelling voorkom wat tot hierdie besinning aanleiding gegee het. Die kwessie wat dit na vore laat kom, is naamlik of deliktueel relevante skok as gevolg van saakbeskadiging gely kan word. 'n Verdere vraag, te wete op watter wyse afhanklikes se aksie van 'n hipotetiese skuldoorsaak van hulle broodwinner afhanklik is, is reeds elders bespreek (1983 *THRHR*).

3 Die Bedoelde Stelling in die Masiba-saak

In die loop van regter Berman se uitspraak in die *Masiba*-saak maak hy die volgende stelling met betrekking tot die toepassing van die voorsienbaarheidsmaatstaf op die onderhawige geval:

> "It seems to me that, whilst *a reasonable man* in the position of the driver of the motor vehicle insured by second defendant might not have foreseen that children could have been sitting in the stalled Cortina motor car . . ., he . . . *ought to, and would, have foreseen that*, among the bystanders there present, who must have been clearly visible standing about on the well-lit road, was *the owner of that car*, and that such owner *might well suffer considerable shock at the sight of his car being hit* in its rear, propelled a not inconsiderable distance along and across the road to end up on the opposite side of the bridge with every expectation of seeing it topple over onto the railway track below" (342H- ek beklemtoon).

Aangesien dit so is, verwerp regter Berman die verweerder se bewering dat die oorledene, indien hy nie gesterf het nie, nie 'n voorsienbare eiser sou gewees het nie. Daarmee het die hof, in die terminologie van die sogenaamde leerstuk van die onvoorsienbare eiser, uitgemaak dat die verweerder wel 'n regsplig teenoor die oorledene verskuldig was (*Dulieu v White & Sons* 1901 2 KB 669 675; Van der Walt *Delict: Principles and Cases* (1979) par 22).

Lees 'n mens nou die sin wat deur die beklemtoonde woorde in waarnemende regter Berman se aangehaalde stelling daargestel word, kom dit daarop neer dat 'n sodanige regsplig bevind kan word waar 'n saak beskadig is en dit vir die eienaar daarvan psigiese skok teweeggebring het — psigiese skok as gevolg van saakbeskadiging is dus nou 'n deliktueel relevante feit. Hieroor moet meer gesê word.

4 Psigiese Skok as Deliktuele Skuldoorsaak — Engelse en Suid-Afrikaanse Reg

Nie al of selfs die meeste van die moontlike of belangrike kwessies in verband met skok word hier vermeld of bespreek nie. Die oorsprong en ontwikkeling van die reëls op hierdie regsgebied is voldoende nagevors en opgeteken deur andere, van wie se toepaslike gevolgtrekkings hier dankbaar gebruik gemaak word. Vir meer besonderhede kan onder andere gekyk word na Prosser *Handbook of the Law of Torts* (4de uitgawe) 49–62 327–335; Fleming *The Law of Torts* (5de uitgawe) 152–159; Goodhart "The Shock Cases and Area of Risk" 1953 *MLR* 14–25; Goodhart "Emotional Shock and the Unimaginative Taxicab Driver" 1953 *LQR* 347–353; Havard "Reasonable Foresight of Nervous Shock"

1956 *MLR* 478–497; Milner "Liability for Emotional Shock" 1957 *SALJ* 263–266; Potgieter *Deliktuele Aanspreeklikheid op Grond van die Nalatige Veroorsaking van Skok* (1974, Ongepubliseerde LLM-verhandeling RAU; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A); McQuoid-Mason "Emotional Shock — Why the Cartesian Distinction?" 1973 *THRHR* 115–139; Van der Vyver "Vonnisbespreking: *Bester*-saak 1973 *THRHR* 169–175; Neethling en Potgieter "Vonnisbespreking: *Bester*-saak" 1973 *THRHR* 175–181.

Uit die weergawes van die huidige stand van die Suid-Afrikaanse reg met betrekking tot skok is dit duidelik dat die Engelse reg in hierdie verband vir ons van meer as bloot regsvergelykende belang is. Ofskoon die betrokke skuldoorsaak uiteraard hier te lande aan die tradisionele *facta probanda* van die Suid-Afrikaanse skadevergoedingsreg onderhewig is, moes vir die erkenning en ontwikkeling van daardie skuldoorsaak swaar op Engelse reg gesteun word omdat die Romeins-Hollandse bronne grootliks daaroor swyg. In wat hierna volg, word daardie verband tussen die Suid-Afrikaanse en Anglo-Amerikaanse reg ten opsigte van psigiese skok met betrekking tot die vraag of saakbeskadiging tot deliktueel-relevante skok kan lei, gebruik om perspektief te probeer kry op wat waarnemende regter Berman se stelling wat in paragraaf 3 hierbo weergegee is, eintlik sê. Sodoende kan standpunt ingeneem word oor die aanvaarbaarheid al dan nie van die gedagtegang agterliggend aan daardie uitlating.

5 Ontwikkelings op die Gebied van Skok as Deliktuele Skuldoorsaak

Volgens die huidige stand van die reg met betrekking tot skok is dit duidelik dat die vereiste dat die slagoffer van die skok self gevaar moes geloop het om fisiese letsels op te doen (*Dulieu*-saak 675), nie meer in die Engelse reg geld nie (*Hambrook v Stokes Bros* 1925 1 KB 141 152; *Hinz v Berry* 1970 1 All ER 1074). Met hierdie ontwikkeling is wegbeweeg van die taamlik eenvoudige begrensingsreël wat in die *Dulieu*-saak (675) so gestel is:

> "A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C."

Die behoud van hierdie grof veralgemeende eie gevaar-vereiste kon geen verfynde geregtigheidsgevoel bevredig nie. Daarbenewens was dit "intelectually unsatisfying," soos Jolowicz, Lewis en Harris (*Winfield and Jolowicz on Tort* (9de uitgawe) 121) dit bestempel. Die wegbeweeg van die eie gevaar-vereiste, ingevolge waarvan potensiële aanspreeklikheid in die onderhawige gevalle begrens is deur die bestaan van 'n regsplig onderhewig te maak aan die slagoffer se voorsienbare blootstaan aan eie gevaar, is in *Hambrook v Stokes Bros* (152) deur Lord Bankes soos volg verwoord:

> "The shock resulted from what the plaintiff's wife either saw or realised by her own unaided senses, and not from something which someone told her."

Aangesien haar reaksie op wat sy gesien het die normale, te verwagte reaksie was van 'n moeder wat besef dat haar kinders in gevaar verkeer, staan die hof in 'n meerderheidsbeslissing die eis toe. Dat hierdie ontwikkeling wyer potensiële aanspreeklikheid in sodanige gevalle kan meebring, was voor-die-hand-liggend.

Dit sou en het dus weer die aanspreeklikheidsbegrensingsprobleem in skokgevalle opnuut na vore laat kom. Hiervan bied veral die kritiek teen die latere uitspraak in *Owens v Liverpool Corporation* 1939 1 KB 394 oorvloedige bewys. Daardie saak het regstreeks oor saakbeskadiging as bron van deliktueel relevante skok gehandel.

6 Owens v Liverpool Corporation 1939 1 KB 394

In die *Owens*-saak is beslis dat saakbeskadiging wel tot deliktueel relevante skok kan lei. Die oorledene se bejaarde moeder, 'n oom, en 'n niggie en haar eggenoot, het in daardie saak 'n geldsom geëis omdat hulle hewig geskok is toe die verweerder se trem, wat nalatig bestuur is, voor hulle in die oorledene se lykstoet teen die lykswa gebots het. Die botsing was so geweldig dat die glasruite van die lykswa gebreek het, die oorledene se kis binne-in omgeval het en so hittete op die straat neergetuimel het. Die oom het alles sien gebeur en die ander het dit kort daarna opgemerk. 'n Laer hof bevind toe dat die eisers inderdaad as gevolg van die verweerder se nalatigheid in geld uitdrukbare skade gely het (nogal ten bedrae van £75, £15 en £100 respektiewelik). Desnieteenstaande faal die aksie egter omdat daar, volgens die hof, nie bewys is dat die besering of doding van 'n mens deur die eisers waargeneem of gevrees is nie. 'n Lyk is immers geen mens meer nie.

Teen die pasgemelde bevinding word in hoër beroep gegaan. By appèl ag die hof hom gebonde aan die feitebevindinge van die hof *a quo* (daardie feitebevindings is ook nie aangeveg deur die respondente nie). Die hof beklemtoon dat hy by 'n appèl van die betrokke soort slegs die hof *a quo* se bevindings oor die toepaslike regsreëls en die toepassing daarvan kan nagaan en eventueel regstel (398 401). Nietemin laat die hof *obiter* geen twyfel daaroor nie dat hy uiters skepties staan teenoor die hof *a quo* se feitebevinding dat die eisers as gevolg van die gebeure inderdaad beduidende psigiese skok opgedoen het wat nie geredelik van die ervare, koelkop, redelike *vir constans* (*Dulieu*-saak 684) sou afgerol het nie. Dit kom voor of die appèlhof, indien hy nie uitsluitlik tot die regsvrae beperk was nie, die aangeleentheid graag met 'n beroep op die reël *de minimis non curat lex* sou afgehandel het. Hieraan sou, volgens die hof, slegs ontkom kan word indien dit uit die betrokke feite sou blyk dat die verweerder nalatig was, oftewel dat hy 'n regsplig tot sorgsame optrede nie nagekom het nie. Die rede waarom 'n nalatigheidsbevinding alles sou verander, is daarin geleë dat die eierskedelreël dan in werking tree ingevolge waarvan 'n nalatige verweerder hom nie oor die eiser se buitengewone smartlapgeaardheid sal kan bekla nie (400–401). Hierdie siening van die toepaslike reëls lyk onaanvegbaar. (Winfield & Jolowicz 126 n 46 se standpunt dat die eierskedelreël slegs geld waar die verweerder inderdaad van die eiser se buitengewone kwesbaarheid geweet het, stel 'n onaanvaarbaar hoë voorsienbaarheidsvereiste vir die werking van die reël – en is in elk geval nie te versoen met uitsprake soos die in *Smith v Leech Brain & Co Ltd* 1961 3 All ER 1159 (QBD), *Hughes v Lord Advocate* 1963 1 All ER 705 (HL) en *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* 1970 3 All ER 553 (CA) nie.)

Laasgenoemde weg was egter nie vir die appèlhof in die *Owens*-saak oop nie. Die hof *a quo* het nalatigheid bevind en dit is nie by appèl aangeveg nie. Die appèlhof was dus beperk tot die regsvraag of 'n mens in beginsel deliktueel-relevante skok kan ly waar iets anders as 'n mens se lyf of lewe bedreig of aangetas is (399 *in fine*). Met 'n beroep op regter Kennedy se benadering in die *Dulieu*-saak sê Lord MacKinnon (400):

> "The principle must be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb – less obvious to the layman but nowadays equally ascertainable by the physician."

Na die *Bester*-saak is dit ook hier te lande geykte reg. Lord MacKinnon gaan dan voort:

> "That alleged shock results from apprehension as to a less important matter may well be material in considering whether the allegation be proved. But fear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove" (400).

Hierdie standpunt verdien instemming. Lord MacKinnon verwys ook na die ontwikkeling deurdat die eie gevaar-maatstaf (*Dulieu*-saak) laat vaar is (*Hambrook*-saak) en konstateer dan die volgende:

> "Those two cases deal with shock resulting from apprehension as to personal injury to the claimant himself, or to some other person in whose safety the claimant is, from affection, or from mere humanity, concerned. Does it follow that, in a claim for damages for shock, there must in every case be apprehension of injury to some human being, as the learned deputy-judge thought? *If real injury has genuinely been caused by shock from apprehension as to something less important than human life (for example the life of a beloved dog), can the sufferer recover no damages for the injury he, or perhaps oftener she, has sustained?*" (Ek kursiveer).

7 Reaksie op die Uitspraak in die Owens-saak

Dat die, myns insiens, suiwere beginselstandpunt wat hierbo aangehaal is later as die hoogwatermerk op hierdie regsgebied bestempel sou word (na aanleiding van onder andere Lord MacMillan in *Bourhill v Young* 1943 AC 92 105 *in fine*), is nie verbasend nie. Dit is noodwendig altyd die geval waar 'n regsreël ten volle ontwikkel het. Uiteraard het die uitspraak wye bespreking en selfs heftige kritiek ontlok en word dit tot as omvergewerp in latere uitsprake (Goodhart 1953 *MLR* 19) en as "nie meer goeie gesag nie" (Potgieter 42) afgemaak.

Dit kom sinvol voor om die reaksies op die *Owens*-uitspraak te ontleed om vas te stel wat dit daarin is waarmee probleme ondervind word en hoe dit aangebied word. In daardie kritiek en bespreking word naamlik van sekere bekende tegnieke gebruik gemaak wat dikwels gebruik word waar 'n te starre teoretiese standpunt, wanneer dit in die alledaagse werklikheid formalisties deurgevoer wil word, tot ontstellende resultate lei. Dit is dus nodig om enkele van die ontvlugtingsmeganismes waarna dan gegryp word hier na vore te bring.

Ontleding van die kritiek teen die *Owens*-uitspraak toon aan dat die algemene tema daarvan is dat dit glo nie redelikerwys voorsienbaar is dat iemand so 'n smartlap kan wees dat derglike gebeure hom beduidend sou skok nie (*Bourhill*-saak 110). 'n Opvallende ding is dat diegene wat hierdie mening huldig

in hulle uiteensetting van die feite wat in die *Owens*-saak aan die orde was, slegs praat van "four mourners" (Winfield & Jolowicz 126; Fleming 154), of van "mere spectators" (*Bourhill*-saak 100 (Lord Thankerton) en 116 (Lord Porter); Goodhart 1953 *MLR* 19; Havard 492). Hierbo is gesê dat die eisers inderdaad naby verwant aan die oorledene was. Die feit dat die gemelde kritici die eisers se noue verwantskap met die oorledene verswyg, is 'n baie interessante verskynsel. Waarom generaliseer hulle die naasbestaande-eisers (waaronder die oorledene se bejaarde moeder) tot blote roubeklaers? Is dit dalk omdat hulle, teen hulle sin en skadelik vir hulle vooringenome teoretiese standpunt, spontaan besef dat ernstige skok by sodanige persone wel redelikerwys voorsienbaar is en bewysbaar kan wees, ofskoon nie by ander, bewysbaar minder regstreeks betrokke deelnemers aan 'n begrafnisstoet nie? Oënskynlik wil hulle dus nie die resultaat van die aanwending van die voorsienbaarheidsmaatstaf aanvaar nie; nietemin wil hulle steeds voorgee om bloot daardie maatstaf toe te pas.

So beskou, kom aan die lig dat die beoordelaar, deur bloot in 'n besondere geval meer of minder van die betrokke omstandighede te abstraheer die grense van die redelike voorsienbare na hartelus kan versit. Sodoende word oënskynlik nie aan die redelike voorsienbaarheidsmaatstaf afgedoen nie – en tog word voorkom dat die resultaat bereik word wat andersins deur die toepassing van daardie geykte kriterium gelewer sou word.

Hierdie weg word dikwels betree waar die beoordelaar se geregtigheidsoortuiging deur die gevolge van sy formalistiese toepassing van die voorsienbaarheidsmaatstaf geweld aangedoen word. Die aanwending van hierdie generaliseringstegniek – om langs 'n omweg tog die soepele voorsienbaarheidsmaatstaf te beperk – is 'n arbitrêre manier van doen wat berus op 'n vooringenome geregtigheidsbeskouing wat vreemd aan die skadevergoedingsreg is.

Die voorgenoemde blyk myns insiens uit die kritiek teen die *Owens*-saak wat berus op die gemelde generalisering met betrekking tot die identiteit van die eisers en hulle besondere verhouding tot die oorledene. Verder blyk dit uit die kritiek van andere dat die hof verkeerdelik sou bevind het dat die verweerder 'n regsplig teenoor die eisers gehad het (byvoorbeeld Lords Thankerton (100), Wright (110) en Porter (116) in *Bourhill v Young*). Wat hierdie kritiek nie verreken nie, is dat die hof *a quo* reeds nalatigheid bevind het, welke bevindinge deur die appèlhof eenvoudig aanvaar moes word. Dit het dus reeds ingevolge die "duty"-leer vasgestaan dat daar 'n regsplig was wat verbreek is. Ook hierdie kritici sê myns insiens met hulle kritiek eintlik nie meer nie as dat die voorsienbaarheidsmaatstaf hier 'n resultaat oplewer wat hulle om beleidsredes nie wil aanvaar nie. Dit blyk ten duidelikste uit Lord Wright se stelling dat die grens van aanspreeklikheid daar getrek moet word

> "where in the particular case the good sense of the jury or of the judge decides" (*Bourhill*-saak 110).

Die reaksie wat op die uitspraak in *Owens v Liverpool Corporation* gevolg het, het een ding sterk na vore gebring – en wel 'n ding wat hoegenaamd nie in die *Owens*-saak voor die hof was nie. Dit is naamlik dat daar nie met redelike

voorsienbaarheid asof met 'n formule gewerk kan word om die bestaan al dan nie van 'n regsplig vas te stel nie, aangesien die antwoord op daardie vraag altyd op 'n beleidsbesluit moet berus. Vir 'n juris wat daaraan gewoond is om met die onregmatigheidselement van die Suid-Afrikaanse reg te werk, klink dit byna na ou nuus (kyk *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833C e v).

8 Wat oorbly Ondanks die Kritiek teen Owens v Liverpool Corporation

Wat egter nie in die kritiek op die *Owens*-saak uitgemaak is nie, is dat deliktueel-relevante skok hoegenaamd nie kan ontstaan waar dit nie 'n menselewe is wat bedreig of aangetas is nie.

Die feit dat aantasting van die eie lyf of lewe van 'n mens baie waarskynliker sodanige skok kan teweegbring as andersins (Havard 482), neem nie weg nie dat uiterste vrees, met gevolglike skok, ook uit die bedreiging of aantasting van 'n ander of van iets anders as 'n mens kan voortvloei (soos selfs Havard 481–482 toegee). Gevalle waar skadevergoedingseise geslaag het op grond van skok opgedoen as gevolg van saakbeskadiging het al meermale voorgekom. Fleming (157) noem in hierdie verband *Davies v Bennison* 1927 22 Tas SR 52 (waarin onder meer geslaag is op grond van psigiese skok opgedoen deur waarneming hoe 'n troetelkat gedood word). Prosser (56 n 86) verwys na *Great A and P Tea Co v Roch* (1930) 153 A 22 waar skynbaar geslaag is op grond van psigiese skok wat opgedoen is toe 'n niksvermoedende siel 'n vieslike, reeds dooie rot ontdek het wat doelbewus in 'n pakkie toegedraai en aan die slagoffer gegee is in plaas van die brood wat die slagoffer verwag het om daarin aan te tref.

In die Amerikaanse reg gaan dit skynbaar meestal nie soseer oor die aantasting van die eienaarsbelang in die betrokke saak nie, as oor die geweld of boosaardigheid wat uit die wyse en erns van die saakbeskadiging as sodanig blyk (28 ALR 2d 1077 1089 e v). Waar uit saakbeskadiging opset, "positive malice" of kwaadwilligheid jeens die reghebbende op die betrokke saak blyk, word dit as verswarende omstandighede aangemerk wat meebring dat die saakbeskadiging wel tot deliktueel relevante skok kan lei (28 ALR 2d 1077). Dieselfde behandeling val gevalle te beurt waar uit die saakbeskadiging so 'n mate van belediging of minagting blyk dat dit tot psigiese skok lei (28 ALR 2d 1078). In 'n geval soos *MJ Rose Co v Lowery* (1929) 169 NE 716 is skok wat opgedoen is toe eenvoudig met geweld by die slagoffer se huis ingebreek is om op meubels beslag te lê, as deliktueel relevant aanvaar.

Aangesien dit in *Owens v Liverpool Corporation* wesenlik oor die nalatige aantasting/bedreiging van 'n lyk gehandel het, kan gerus gekyk word hoe sodanige gebeurlikhede met betrekking tot skok in die Amerikaanse reg behandel word. Prosser (329–330) deel mee dat die nalatige wanhantering van lyke aldaar algemeen tot geslaagde aksies gelei het waar verswarende omstandighede soos dié wat hierbo genoem is, aanwesig was. In verskeie gevalle het aksies op grond van skok egter geslaag al was daar geen besondere verswarende omstandighede aanwesig nie. Voorbeelde is gevalle van die roekelose of nalatige balseming van

lyke, ondigte doodskiste, nalatige vervoer of versending van lyke, foutiewe identifikasie van lyke, verbroude lykskouings en ongemagtigde kremasie en begrafnisse.

'n Interessante geval, waar met goeie gevolg op grond van skok ageer is, is *Blanchard v Brawley* (1954) 75 SO 2d 891 (1960 *Duke LJ* 135), waar 'n lyk raakgeskroei is toe dit met behulp van 'n vlamsnytoestel uit 'n wrak losgesny moes word. Verder is daar etlike gevalle waar skokeise geslaag het nadat lyke raakgery is. Van al hierdie gevalle sê Prosser:

> "What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious."

'n Enkele rede vir die toenemende erkenning daarvan dat mense ook as gevolg van die waarneem van saakaantasting deliktueel relevante skok kan ly, kan waarskynlik nie gegee word nie. Dit moet seker eerder aan 'n verskeidenheid faktore toegeskryf word. Daaronder val beslis die beter wordende kennis in verband met die psigologie en fisiologie en van die effek van spanning en vrees op die mens. Verder mag dit wees soos Fleming (155) sê:

> "[T]he trend has been towards a much more sympathetic view of human sensitivity."

Dit mag ook wees dat die gees van materialisme en "Diesseitsgläubigkeit" (soos Weyers *Unfallschäden, Praxis und Ziele von Haftpflicht-und Vorsorgesystemen* (1971) 578 dit noem), wat veral weens die oorloë en ekonomiese terugslae van hierdie eeu ongekende momentum gekry het, daartoe lei dat dit vandag nie noodwendig as onbetaamlik beskou word as iemand so emosioneel betrokke raak by sy besittings (hetsy of hy dit ter streling van sy fynere gevoelens of belegging of bate wat vir sy lewensonderhoud nuttig is, aanhou) dat hy 'n deliktuele skuldoorsaak op grond van skok mag hê as dit aangetas word nie. Breedvoeriger beskerming van die menslike waardigheid mag die rede wees waarom so geredelik 'n aksie verleen word waar die saakbeskadiging onderneem word met die doel om die reghebbende daarvan te skok, te beledig of as 'n blyke van minagting teenoor hom. 'n Suiwerder beginseloorweging sou myns insiens wees dat die minagting vir die geskape werklikheid wat uit gewelddadige, skuldige saakbeskadiging spreek, bewus of onbewus ervaar word as strydig met die eintlike bestemming van daardie goed en die mens se verantwoordelike taak van rentmeesterskap oor die geskape werklikheid (vgl bv Gen 1:28 31; Job 1:9 10, 41:2, 42:10; Ps 8:7–9, 50:12, 61:6, 65:6–14, 104, 126:1, 144:9–14, 145:15 16, 146:5 6; 148:5; Pred 1:13, 3:10; Mat 20:15; Joh 1:3; Hand 14:17, 17:27; Rom 11:36; 1 Kor 8:6; Jak 1:17). Waar so 'n belewenis bestaan, ongeag wat as die bewuste rede daarvoor aangevoer word, kan begryp word dat die intrede van skok by diegene wat sodanige roekelose, minagtende optrede waarneem, ingevolge 'n beleidsbesluit ooreenkomstig die gemeenskap se regsoortuigings, as deliktueel relevant aangemerk moet word.

9 Die Perke op Deliktuele Aanspreeklikheid op Grond van Skok as Gevolg van Saakbeskadiging

Feit is dat deliktueel relevante skok wel uit saakbeskadiging kan voortvloei. Hierdie toedrag van sake het algemeen die besef laat posvat dat die ongenuanseerde voorsienbaarheidsmaatstaf op sigself geen formule bied deur die aanwending waarvan aanspreeklikheid in sodanige gevalle binne redelike perke gehou sal kan word nie (Winfield & Jolowicz 125; Fleming 137). Vandaar dat al hoe meer begin is om te sê, in 'n poging om die onontbeerlike beleidsbesluit as 'n regswetenskaplike leerstuk te vermom, dat die eintlike begrensing in hierdie soort gevalle in die bestaan al dan nie van 'n regsplig gesoek moet word. Hierbo is reeds gesê dat daaraan 'n beleidsbesluit ten grondslag lê – dat daarvoor dus meer nodig is as die blote vraag of die soort benadeling van die klas waartoe die eiser behoort op 'n oorwig van waarskynlikheid geoordeel redelikerwys voorsienbaar was of nie.

Dit is 'n vraag of die voorgenoemde insig volkome helderheid bring. Weliswaar het die arbitrêre beperkings van die verlede nou ook in die Suid-Afrikaanse reg in die slag gebly (te wete: eie gevaar-vereiste, fisiese letsel of siekte as gevolg van die psigiese skok-vereiste, die menselewe of -liggaam bedreig of aangetas-vereiste).

> "So long as the fear of injury or harm is foreseeable, it is irrelevant that the injury or harm is threatening another person, such as the claimant's child . . ., or, for that matter, the claimant's chattel, such as his motor car (as in the instant action)" – per waarnemende regter Berman in die *Masiba*-saak 343E-F.

Hierdie toedrag van sake laat verskeie vrae ontstaan waarop nie hier antwoorde gegee kan word nie maar wat in die toekoms aan die hand van die bogemelde algemene beginsels gehanteer sal moet word. Een van die vrae is of dit die verhoudingsnabyheid ("the claimant's child") of die geografiese en chronologiese nabyheid van die skokslagoffer aan die skokkende gebeure of enige een van daardie faktore op sigself is wat vir die bestaan van 'n regsplig die deurslag moet gee (laasgenoemde was in die Engelse reg skynbaar die geval – Fleming 142; *Bourhill v Young*, wat waarneming deur die slagoffer se "unaided senses" verg; in *McLoughlin v O'Brian* 1982 2 All ER 298 (HL) is al daardie faktore egter verwerp en is net met redelike voorsienbaarheid gewerk).

'n Verdere vraag is of saakbeskadiging ook tot deliktueel relevante skok mag lei by iemand anders as die eienaar van die saak (in die *Masiba*-saak 342H en 343E-F word die eienaarsbelang nog beklemtoon). Sou die lener, huurder of pandhouer van 'n saak ook deliktueel relevante skok kan ly as die betrokke saak beskadig of vernietig word? 'n Derde vraag is: hoe ver moet gegaan word met die vergoeding vir psigiese skok of spanning as gevolg van kontrakbreuk (Fleming 178 25; De Wet en Van Wyk *Die SA Kontraktereg en Handelsreg* (4de uitgawe) 202-203 223)? Die vierde vraag is of dieselfde sal geld waar nie vorderingsregte nie, maar ander onstoflike vermoënsgoed (werfkrag, outeursbelang, uitvindersbelang) bedreig of aangetas word? Vyfdens kan gevra word hoe ver

gegaan moet word in gevalle waar bedreiging of aantasting van ander persoonlikheidsaspekte as die *corpus* van die mens (te wete *fama* en *dignitas*), benewens dié krenking ook tot psigiese skok lei?

By enige toekomstige noodsaak om op vrae soos die voorgaande antwoorde te vind, moet daaraan vasgehou word dat aanspreeklikheidsbegrensing nie kan geskied sonder die vel van 'n billikheidsoordeel oor die besondere geval nie, waarby etlike faktore, soos die individuele en algemene belange, nut van die aktiwiteit en die voorsienbaarheid van die aard, omvang en intrede van die gelede nadeel, 'n rol speel (Van Rensburg *Normatiewe Voorsienbaarheid as Aanspreeklikheidsbegrensingsmaatstaf in die Privaatreg* (1972) 56 e v). By die benadering van sodanige probleme mag net nooit toegelaat word dat van die beginselbepaaldheid van ons deliktereg afgestap word of dat die byna bygelowige en oordrewe vrees vir oewerlose aanspreeklikheid daartoe lei dat andersins gegronde eise op grond van psigiese skok weens formalisme of die aanwending van allerlei ander ontsnappingsmeganismes afgewys word nie. Dit mag nuttig wees om die volgende woorde van Prosser (51) daarby in gedagte te hou:

> "So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law."

CFC VAN DER WALT
PU vir CHO

DIE REGSPOSISIE VAN WERKNEMERS BY 'N STAKING IN DIE ARBEIDSREG

Ongeveer dertig jaar het verloop alvorens 'n hof weer geroepe was om die regsposisie van werknemers by 'n staking onder die loep te neem. In *Ngewu, Masondo v Union Co-Operative Bark and Sugar Co Ltd* 1982 4 SA 390 (N) is die volgende bewese feite vir doeleindes van hierdie bespreking van belang. Daar is ten gunste van die applikante aanvaar dat gratis rantsoene een van die bepalings in hulle dienskontrakte was (402C). Op 30 Januarie 1981 kondig respondent aan dat die gratis rantsoene vanaf 1 April 1981 opgehef sal word. Die volgende dag (31 Januarie) is daar 'n stopsetting van werk, die gevolge waarvan die summiere afdanking van die werknemers en die ontsegging van hulle akkommodasie op die perseel is. Hulle vra 'n verklarende bevel aan met die strekking dat hulle afdanking onregmatig is omrede die respondent se handeling 'n uitsluitingsdaad daarstel en dat hulle daarom ook herbesit van hulle akkommodasie moet verkry. Respondent weer beskou die stopsetting van werk as 'n staking. Die partye het ooreengekom dat die bepalings van die Wet op Arbeidsverhoudinge 28 van 1956 op die feite van toepassing is. Die werkgewer se optrede op 30 Januarie 1981 word deur die hof as repudiasie van elke dienskontrak beskou, welke repudiasie sekere regskeuses aan die werknemers gebied het (402

F-H). Die hof bevind dat die werknemers nie die repudiasie aanvaar het nie (402G). Die diensverhouding duur daarom voort. Die hof bevind voorts dat die werknemers se aandrang op 'n geldsom in die plek van die gratis rantsoene nie in ooreenstemming met die bepalings van die voortbestaande dienskontrakte is nie (402G-403A). (Die regsreëls wat die hof op die mandament van spolie toepas, word vir doeleindes van hierdie bespreking buite rekening gelaat (394 A–F).)

Die vraag wat nou beantwoord moet word, is of die stopsetting 'n staking of uitsluiting daarstel. Die hof haal die omvattende omskrywing van 'n staking en uitsluiting aan soos dit in artikel 1 van die Wet op Arbeidsverhoudinge 28 van 1956 voorkom (397G–398E). Vir die onderhawige feitegeskil is regter Booysen van oordeel dat die volgende gedeeltes van die definisies relevant is:

> " 'strike' means . . . the refusal or failure (by employees) . . . to continue work or to resume work . . . if
> (i) that refusal or failure . . . is in pursuance of any combination, agreement or understanding between them, whether expressed or not; and
> (ii) the purpose of that refusal, failure . . . is to induce . . . any person by whom they are . . . employed –
> (aa) to agree to . . . any demands or proposals concerning terms and conditions of employment . . .
> (bb) to refrain from giving effect to any intention to change terms or conditions of employment, or, if such change has been made, to restore the terms or conditions to those which existed before the change was made."
>
> " 'lock-out' means . . .
> (a) The exclusion by him (the employer) of any body or number of persons who are or have been in his employ from any premises on or in which work provided by him is or has been performed;
> or
> (b) . . .
> (c) the breach or termination by him of the contracts of employment of any body or number of persons in his employ . . . if the purpose of that exclusion . . . breach, termination is to induce any persons who are or have been in his employ . . .
> (i) to agree to or comply with any demands or proposals concerning terms or conditions of employment . . .
> or
> (ii) to accept any change in the terms or conditions of employment."

Regter Booysen beslis dat die regsposisie op die moment van stopsetting van werk beoordeel moet word. Soos reeds vermeld, bevind die hof dat die stopsetting van gratis rantsoene repudiasie deur die werkgewer daargestel het, gemelde repudiasie nie deur die werknemers aanvaar is nie en die dienskontrakte bly voortbestaan het. Die hof bevind verder dat die werknemers nòg op die gratis rantsoene, nòg op 'n geldsom in die plek daarvan aangedring het. Hulle eise was vir 'n addisionele R48,00 of R60,00 (klaarblyklik 'n arbitrêre bedrag) per maand respektiewelik (405C). Die stopsetting van werk was daarom 'n

> " 'refusal or failure . . . to continue work or resume work . . . with the purpose of inducing' the respondent to agree to their demands concerning terms of employment. The refusal or failure was one contemplated by clause (i) of the definition of 'strike' and I am therefore satisfied that the work stoppage amounted to a strike" (405D).

Die hof beskou die betrokke staking as 'n onregmatige repudiasie van die dienskontrak wat summiere ontslag regverdig. Dit is ook irrelevant of

> "such dismissal or termination took the form of an acceptance of their repudiation or . . . on the grounds of their breach . . ." (405E).

Vir die kousaliteitsteoretici mag die vraag nou al ontstaan of die oorsaaklike feit van stopsetting nie die repudiërende aankondiging van die werkgewer was nie aangesien dié aankondiging

> "was announced as a *fait accompli* and I find on a balance of probabilities that it was also understood as such by the applicants" (402D).

Op die feite soos bevind deur die hof is die reg suiwer toegepas. Daarom is die uiteindelike bevinding dan ook korrek. Verskille oor die feitelike bevindings mag opduik, soos dat die dienskontrak *ongewysig* voortgeduur het na die repudiasie deur die werkgewer nieteenstaande die feitlike bevinding dat die opsegging van gratis rantsoene 'n absoluut voldonge feit was. Ek wil egter op sekere algemene stellings kommentaar lewer en 'n streng onderskeid betreffende die aanwendingsgebied van die *ratio decidendi* bepleit.

Eerstens kan gekyk word na die stelling dat 'n bepaalde stopsetting van werk òf 'n staking òf 'n uitsluiting maar nooit beide kan wees nie (403B). Hierdie reël is afkomstig van 'n klaarblyklike *obiter dictum* van die appèlhof in *Walker v De Beer* 1948 4 SA 708 (A) 715–716. Die appèlhof was slegs geroepe om te bepaal of die betrokke stopsetting van werk òf 'n staking òf 'n uitsluiting ingevolge die destyds geldende Nywerheidsversoeningswet 36 van 1937 was. Die regsvraag was nie of die betrokke stopsetting sowel 'n staking as uitsluiting kon omvat nie. Die gewraakte stelling was daarom onnodig — die uiteindelike bevinding kan bereik word al word die gemelde stelling geskrap. Die stelling van regter Booysen in die *Ngewu en Masondo*-saak moet ook nie as 'n *ratio decidendi* beskou word nie omrede die hof die reël baseer op die konsessie van applikante se advokate (403B en sien ook Hahlo en Kahn *The South African Legal System and its Background* (1968) 270 veral vn 45). Die gelyktydige bestaanbaarheid al dan nie van die twee regsfigure in dieselfde feitekompleks sal natuurlik na aanleiding van 'n persoon se definisie van 'n staking en uitsluiting onderskeidelik bepaal word. Dat dit die wetgewer se bedoeling is om tussen die twee regsfigure te onderskei, is vanselfsprekend, maar om kategories te konkludeer dat hulle nie tegelykertyd by dieselfde feitekompleks teenwoordig kan wees nie, is uiters geforseerd.

Die lotgevalle van die partye in die *Walker*-saak, *R v Mtiyana* 1952 4 SA 103 (N) en *R v Canqan* 1956 3 SA 366 (E) noop 'n mens om juis tot die gevolgtrekking te kom dat 'n staking en uitsluiting gelyktydig by dieselfde feitekompleks kan bestaan. Die howe van eerste instansie bevind die stopsetting 'n staking terwyl die howe van appèl weer meen dat die oorsaak daarvan die optrede van werkgewerskant was en dat die stopsetting daarom as 'n uitsluiting gekarakteriseer kan word. Weens die wye omskrywing van 'n staking en uitsluiting in artikel 1 van die Wet op Arbeidsverhoudinge 28 van 1956 en die legio van moontlike feitekomplekse is dit, myns insiens, moontlik dat 'n staking en uitsluiting gelyktydig kan bestaan. Hiertoe dra sekere bevreemdende aspekte van die statutêre definisies by. Mens dink hier byvoorbeeld aan die bepaling waar die wetgewer persone "*wat in diens was*" of 'n "*werkgewer was*," wat "*versuim om herindiensneming aan te neem*" of persone "*weer in diens te neem*,"

met 'n staking of uitsluiting onderskeidelik identifiseer, asook die bepaling wat "*die beëindiging van dienskontrakte*" deur werkgewer of werknemer as 'n staking of uitsluiting tipeer. Dit is logies dat hierdie pas gemelde gevalle gelyktydig van werkgewer- en werknemerskant teenwoordig kan wees en dat beide se oogmerke een van die gevalle genoem in (i), (ii), (iii) of (aa), (bb), (cc) van die omskrywing van 'n staking of uitsluiting onderskeidelik mag wees. Die mees voor-die-handliggende voorbeeld waar beide gelyktydig teenwoordig kan wees, is die situasie waar 'n kollektiewe arbeidsooreenkoms afgeloop het voor of sonder dat die partye oor die voorwaardes van die nuwe kollektiewe arbeidsooreenkoms ooreen kon kom. Die werkgewer sluit die werknemers uit tot tyd en wyl hulle sy diensvoorwaardes aanvaar en die werknemers besluit om te staak tot tyd en wyl die werkgewer hulle voorwaardes van diens aanvaar. Beide partye kan uitdruklik verklaar dat hulle optredes 'n uitsluiting en staking onderskeidelik is. Om slegs een feit as die oorsaak van die stopsetting van werk aan te wys, sal gekunsteld wees. 'n Persoon hoef nie terug te deins vir die hantering van so 'n situasie nie. Wat die regsgevolge van die staking en uitsluiting betref, is my standpunt dat die een as die ander se spieëlbeeld beskou moet word. Die strafregtelike of sivielregtelike gevolge kan nog steeds teen die een of beide partye van die diensverhouding gerig word indien toepaslik, maar veral dan met inagneming van die volgende:

Die alternatiewe, restriktiewe en dan korrekte benadering tot die *dictum* in die *Walker*-saak is dat indien 'n staking X-feit is, X-feit nie ook 'n uitsluiting kan wees waar 'n uitsluiting Y-feit is nie. Aan die ander kant kan X-feit en Y-feit egter nog altyd gelyktydig teenwoordig wees.

Die tweede opmerking wat nader beskou moet word, gaan oor die ongewenste gelykskakeling van die gemeenregtelike dienskontrak met die kollektiewe arbeidsregtelike verhouding. So 'n gelykskakeling lei byvoorbeeld tot die gevolgtrekking dat spesifieke nakoming nooit gevorder kan word nie (400F). Die *locus classicus* vir hierdie gevolgtrekking is *Schierhout v Minister of Justice* 1926 AD 99. Een van die redes wat die appèlhof teen spesifieke nakoming aanvoer, is die persoonlike verhouding tussen werkgewer en werknemer (107). Die kollektiewe arbeidsreg ontstaan weens industrialisasie en massa-indiensneming waar die persoonlikhede van werkgewer (normaliter 'n regspersoon) en werknemer nooit die persoonlike kontak of verhouding van die gemeenregtelike dienskontrak openbaar nie. Die minister mag kragtens artikel 43 van die Wet op Arbeidsverhoudinge 28 van 1956 herindiensneming aanbeveel. Dat ons howe nog aan die argaïse gedagte vashou, lyk onvanpas. Daarom is dit verblydend dat die volbank in *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 4 SA 151 (T) hom bereid verklaar het om by 'n diensverhouding waarop die Wet op Arbeidsverhoudinge 28 van 1956 van toepassing is, spesifieke nakoming te beveel (156H). Dit is myns insiens egter ongelukkig dat die hof nie 'n verskil trek tussen die gemeenregtelike dienskontrak en die arbeidsregtelike diensverhouding nie. Indien die hof dit sou doen, behoort die diskresionêre bevoegdheid

tot spesifieke nakoming geredeliker uitgeoefen te word by verhoudinge wat deur die nywerheidswette gereël word.

Derdens moet gekyk word na die kategoriese aanname dat 'n werkgewer werknemers wat staak summier mag afdank (405E-F). Hierdie absolute ontkenning van die bevoegdheid om te staak in die kollektiewe arbeidsreg, is uit pas met praktiese en juridiese realiteite (Claasen "Stakingsreg. 'n Nuwe Teorie" 1978 *TRW* 1-20; Kachelhoffer "Die Wet op die Reëling van Bantoe-arbeidsverhoudinge" 1974 *THRHR* 257 e v). Indien ons howe en skrywers (en veral ook die nuusmedia) net eers wil onderskei tussen die regmatige en onregmatige staking wanneer hulle na 'n staking verwys, kan die deur geopen word om ons reg in pas te bring met die res van die Westerse wêreld. Die staking moet vanuit sy huidige bestaansfeer in die kollektiewe arbeidsreg beoordeel word. Dit is 'n noodsaaklike onderbou en voorvereiste vir die sinvolle bestaansreg van kollektiewe bedinging. Indien ons reg kollektiewe bedinging aanvaar, moet hy die regmatige aanwending van 'n staking aanvaar. Ek het reeds riglyne probeer neerlê om tussen die normale privaatregtelike kontraksgebondenheid en die regmatig geagte stopsetting van werk 'n balans te bewerkstellig (Claasen *Stakingsreg in Diensverband in Suid-Afrika* Proefskrif Leiden 1975). By volharding met 'n absolute sivielregtelike verbod op stakings weens die beskouing daarvan deur die bril van die gemeenregtelik dienskontrak, mag die gevolglike negering deur die regsorde van 'n bevoegdheid om te staak tot ongekende konsekwensies lei.

Wat nodig is, is 'n wysiging in die algemene sienswyse oor die maatskaplike funksie en betekenis van 'n wettige staking. Die benadering van die staking vanuit die kontraktuele verhouding tussen werkgewer en individuele werknemer moet laat vaar word en dit moet as 'n kollektiewe optrede, gelei deur 'n werknemersorganisasie, gesien word. By die reëling van lone en ander arbeidsvoorwaardes speel die kollektiewe element 'n belangrike rol. Dié rol word algemeen toegejuig. Wanneer byvoorbeeld by afloop van 'n kollektiewe arbeidsooreenkoms die vakvereniging hom moet neerlê by die besluite van 'n werkgewer, sou kollektiewe bedinging van die kant van die werknemer tot magteloosheid gedoem wees.

Onderhandelinge is tog net sinvol indien een party nie gedwonge is om die voorstelle van die ander party te aanvaar nie. Weens inherente skadelike newewerking moet die stakingsdaad die *ultimum remedium* wees nadat alle middels aangewend is om 'n *impasse* te deurbreek. Die aanvaarbaarheid van die staking, selfs as uiterste middel, in die kollektiewe arbeidsreg noodsaak 'n reëling van die reg om daarvoor 'n plek in die regsorde in te ruim. Tans blyk wetgewing die enigste metode te wees. Ons positiewe reg bevat 'n innerlike teenstrydigheid deurdat werknemersorganisasies wat 'n wettige staking uitroep 'n regmatige handeling verrig, terwyl die individuele werknemer wat aan dieselfde handeling deelneem, onregmatig optree en tot nakoming of skadevergoeding verplig kan word! (Sien art 79 van die Wet op Arbeidsverhoudinge 28 van 1956 en die sake hierbo vermeld.)

Naas die vakverenigings moet ook die werknemers by die wettige staking beskerm word. Die effek moet wees dat die werkweiering nie as wanprestasie beskou sal word nie. Vir my is die enigste aanvaarbare oplossing dat by 'n wettige staking die regte en verpligtinge van die partye in die arbeidsverhouding geskors moet word. Dit kan egter nie *ad infinitum* deur die werkgewer geduld word nie. Summiere ontslag, met al sy nadelige gevolge, word deur skorsing uitgesluit, maar ek is van mening dat opsegging met inagneming van die normale opseggingstermyn altyd moontlik moet wees. Viktimisasie in enige vorm moet voorkom word. Daarom sal die bevoegdheid tot ontslag slegs moontlik wees indien *alle* stakendes ontslaan word. So 'n reëling sal die kollektiewe aard van die aksie onderstreep. Die wettige staking sal by noodwendige implikasie slegs moontlik wees in die area van die sogenaamde relatiewe verbod op stakings. (Art 65 van die Wet op Arbeidsverhoudinge 28 van 1956; De Kock *Industrial Laws of South Africa* 625-632; Schaeffer en Kachelhoffer *Nywerheidsreg in Suid-Afrika* 143-147; Van Jaarsveld en Coetzee *Arbeidsreg* 169-170.)

Omdat 'n staking fenomenale finansiële implikasies vir werkgewer, werknemer en die gemeenskap inhou en in laaste instansie neerkom op die vervanging van rede deur geweld, is ek van mening dat hierdie vryheid streng gereguleer moet word. Daarom word voorgestel dat op hierdie vryheid, naas die remedies wat daar vir die partye gestel word, 'n tydsduurbeperking geplaas moet word, en dat by afloop van hierdie termyn die nywerheidshof as arbiter die geskil moet besleg. By hierdie beslegtiging sal in gedagte gehou moet word eerstens dat die werkgewer se verantwoordelikheid die sinvolle en onafgebroke funksionering van die onderneming is terwyl die werknemersorganisasie se primêre verantwoordelikheid die behartiging van die werknemers se belange is. Tweedens dra elke party die verantwoordelikheid om die belange van die ander betrokke party in sy eie beleid in aanmerking te neem. Derdens moet rekening gehou word met die afhanklikheid van die gemeenskap of derdes van die voortsetting van die onderneming.

In die lig van bostaande uitgangspunte word die volgende wetswysigings aan die hand gedoen:

A WYSIGINGSWET OP ARBEIDSVERHOUDINGE NO X VAN 1984

WET

Tot wysiging van die Wet op Nywerheidsversoening 1956 ten einde 'n wettige staking te omskryf en die regte en pligte van werknemers en werkgewers by 'n wettige staking te reël.

1 Wysig artikel 1 van die Wet op Nywerheidsversoening 28 van 1956 deur die invoeging van die volgende definisie: "wettige staking" [beteken]

(a) 'n handeling soos hierbo by "staking" omskryf waarvan die verrigting nie deur artikel 65 of enige ander wetgewing belet word nie;

(b) mits die gemelde handeling voorafgegaan is deur 'n skriftelike kennisgewing van voorneme om te staak deur die werknemersorganisasie aan die

betrokke werkgewer of werkgewersorganisasie – welke kennisgewing slegs kan geskied nadat alle versoeningsprosedures ingevolge hierdie wet uitgeput is en minstens 14 dae vanaf kennisgewing tot daadwerklike stopsetting van werk verstryk het; en verder

(c) mits die staking gelei word deur 'n geregistreerde werknemersorganisasie wat reeds by voormelde kennisgewing vir ten minste twee jaar geregistreer was.

2 Voeg artikel 79A in in die Wet op Nywerheidsversoening 28 van 1956:
Art 79A *Beskerming van werknemers by deelname aan 'n wettige staking* –

(a) 'n Wettige staking skors die arbeidsverhouding van die betrokke werknemers en werkgewer. Die werkgewer het egter die bevoegdheid om sodra stopsetting van werk intree, die stakende werknemers na behoorlike kennisgewing te ontslaan. Ontslag is egter slegs moontlik indien alle stakende werknemers gelyktydig ontslaan word. By gebrek aan 'n ooreengekome opseggingstermyn moet 14 dae kennisgewing van ontslag gegee word.

(b) Die inspekteur (by regulasie bepaal) wat kennisgewing van stopsetting van werk ingevolge artikel 65A ontvang het, moet in die geval van 'n wettige staking, waar geen opsegging plaasgevind het nie, na 21 dae van stopsetting die Minister in kennis stel. Die Minister kan, indien hy dit raadsaam ag, die geskil vir arbitrasie na die nywerheidshof verwys.

B WYSIGINGSWET OP WERKLOOSHEIDSVERSEKERING NO Y VAN 1984

WET

Tot wysiging van die Wet op Werkloosheidsversekering 1966 ten einde vir 'n werklose weens 'n wettige staking voorsiening te maak.

1 Wysig artikel 35 van die Werkloosheidsversekeringswet 30 van 1966 soos volg:

Vervang die huidige subartikel (d) met die volgende:

(d) Indien hy werkloos is weens deelname aan 'n onwettige staking.

Volledigheidshalwe verdien vermeld te word dat die uitsluiting net soos 'n staking beredder moet word en dat enige wysiging rakende stakings *mutatis mutandis* ook ten opsigte van uitsluitings aangebring sal moet word.

JY CLAASEN
Universiteit van die Oranje-Vrystaat

PUBLIC BENEFIT AND THE PRESCRIPTION OF PUBLIC DEBTS

1 Introduction

The question of public debt prescription has been the subject of some speculation recently, with Nestadt J holding in *Oertel v Director of Local Government* 1981

4 SA 491 (T) 507H that "the conditions of establishment give rise to rights which are for the benefit of the public and of a kind which, despite the Prescription Act 68 of 1969 . . . are not . . . subject to prescription." On appeal (*Oertel v Direkteur van Plaaslike Bestuur* 1983 1 SA 354 (A)), however, Van Heerden AJA held that the "verpligtinge onder bespreking . . . aan verjaring onderhewig was en inderdaad verjaar het" (376F).

From these two extracts it is obvious that a number of contradictory issues arise and a reading of the various stages through which the case (1981 2 SA 77 (T); 1981 4 SA 491 (T); 1983 1 SA 354 (A)) passed serves only to confirm this.

2 Facts

The *Oertel* case has a long history, including a hearing before a single judge, then the full bench of the Transvaal provincial division and finally referral to the appellate division where the two previous decisions were reversed.

The facts of the case go back to 1970 when the Glen Anil Development Corporation Ltd applied, in terms of section 58 of the Town Planning and Townships Ordinance 25 of 1965 (T) to the director of local government for the establishment of three townships, viz Pierre van Ryneveld Township and two extensions to it. The application was granted by the Administrator subject to certain conditions. One of these conditions (essentially a pre-condition) determined that Glen Anil submit, in broad detail, a general plan regarding the construction and maintenance of roads in the township and the provision of a stormwater drainage system for approval by the third respondent, the Verwoerdburg Town Council. Once these conditions had been met the administrator approved the townships in terms of section 69 of the ordinance, on 28 April 1976, again subject to certain conditions contained in Administrator's Notices nos 530, 531 and 532 of 1976. Of these conditions, the third, forming the point in issue, determined:

"(3) *Stormwater drainage and street construction*

a The township owner shall submit to the local authority for its approval a detailed scheme complete with plans, sections and specifications, prepared by a civil engineer approved by the local authority, for the collection and disposal of stormwater throughout the township by means of properly constructed works and for the construction, tarmacadamising, kerbing and channelling of the streets therein together with the provision of such retaining walls as may be considered necessary by the local authority. Furthermore, the scheme shall provide for the catchment of stormwater in catchpits whence it shall be drained off in water-tight pipes of durable material, approved by the local authority, in such a manner that water will in no way dam up or infiltrate on or near the surface of the ground. Furthermore, the scheme shall indicate the route and gradient by which each erf gains access to the street on which it abuts.

b The township owner shall, immediately after the scheme has been approved by the local authority, carry out the scheme at its own expense on behalf and to the satisfaction of the local authority under the supervision of a civil engineer approved by the local authority.

c The township owner shall be responsible for the maintenance of the streets to the satisfaction of the local authority until the streets have been constructed as set out in sub-clause b."

Thereafter Glen Anil commenced with the construction of the streets and the stormwater drainage system, which obligations it ceased to carry out soon thereafter. On 22 February 1977 the company was wound up, the liquidators being the appellants in this case. On 10 May 1977 the Verwoerdburg Town Council called on the appellants to carry out their obligations in terms of the service agreements within a period of twenty-one days, failing which the town council would cancel the agreements and claim damages in respect thereof. Some seven days later one of the applicants informed the council that the liquidators were no longer in a position to install the services.

In June 1980 the applicants sold a number of erven in the townships to subsidiaries of the Trust Property Corporation (Pty) Ltd who, in their turn, sold erven to members of the public and to other purchasers. Two months later the director of local government, upon request by the Verwoerdburg Town Council and in terms of Section 71 of the ordinance, informed the second respondent, the registrar of deeds, that the conditions had not been met. As a result of this the registrar of deeds refused to register the transfer of any of the erven in the township. Later, however, this *caveat* was qualified and confined to transfers from the company and not to transfers from others who had already obtained transfer from the company. The applicants then brought an urgent application claiming:

a an order declaring the notification of the director of local government to the registrar of deeds in terms of section 71 of the ordinance to be of no force or effect and further that the registrar was accordingly not entitled to refuse to register the transfer of any erf; alternatively, ordering the director to withdraw his notification to the registrar in terms of sect 71;

b a declaration that paragraph 3 of the conditions of establishment proclaimed on 28 April 1976 were not enforceable by the director of local government and the Verwoerdburg Town Council as against the applicants.

Herein lies the crux of the matter, as the main ground of the application was that Glen Anil's obligations under paragraph 3 of the conditions of establishment had, in terms of section 11(d), read with section 12(1) of the Prescription Act 68 of 1969, become prescribed by 27 May 1980.

It was submitted (1981 2 SA 77 (T) 81) that the right of action against the applicants accrued at the latest on 17 May 1977 (when the applicant informed the Verwoerdburg Town Council that they were no longer in a position to install the services) and, further, that the period of prescription had not been interrupted for a period of three years. The period of three years as determined by section 11(d) had therefore passed when the town council commenced proceedings on 11 September 1980 in order to force the applicants to comply with the conditions of establishment.

3 Interpretation of "Debt" for Purposes of Prescription Act

One of the main arguments centres around the question whether the obligation to construct stormwater drainage and streets in terms of the conditions of establishment was a "debt" for the purposes of section 11(d) of the Prescription Act.

"Debt" is not defined in the Act. Its predecessor (the Prescription Act 18 of 1943) defines a "debtor" as "a person against whom a right is enforceable by action" (s 1).

De Wet, author and draftsman of the new act, submitted a memorandum (published in *Opuscula Miscellanea* (1979) 75–144) on his reasons for altering the act. The memorandum contains no definition of "debt" and as Le Roux J stated (1981 2 SA 77 (T) 85H) "neither does it contain direct assistance for concluding that 'debt' includes any obligation, whether imposed by statute for the common weal or whether it affects private rights only."

In the various stages of the case different rules of interpretation were followed in determining the precise meaning of the word "debt" in section 11. In its first stage the court (89H) was of the opinion that a general word such as this should be interpreted according to its context and the object which the legislature had in mind when using it, and that one interpretation in a particular statute does not necessarily hold good for another statute. Le Roux J was adamant that the prime purpose of interpretation is to discover the intention of the legislature. This is in accordance with Steyn (*Die Uitleg van Wette* (1981) 2) who is of the opinion that the intention of the legislature is the sovereign rule of interpretation to which all other rules are subordinate. Le Roux J therefore concluded (90A–F) that only where the state ventures upon the sphere of private law, where it acts as an individual and where it acquires rights and obligations similar to that of a private individual when contracting with other persons, do the rights and obligations of the state form a "debt" for the purposes of the Prescription Act. In essence the extinction of a debt by prescription penalises the negligent creditor who fails to enforce his rights where no good reason exists, or where there is no disability which prevents him from doing so. Where the state acts as a private individual those rights are subject to prescription; it is in that sense only that the state is bound by the Prescription Act. The so-called "public rights" should be excluded from the operation of the Prescription Act, and "debt" should be restricted to claims arising in the field of private law.

The full bench (1981 4 SA 491 (T)) was in agreement with this, Nestadt J being of the opinion that the obligations imposed on Glen Anil were in the nature of statutory duties aimed at benefiting the public rather than commercial obligations of the civil law. The former can only lose their efficacy by being repealed, for otherwise the object of the legislature would be frustrated (499B–C). The exact scope of "public rights" was not examined, but it was held (507–508) that the conditions of establishment gave rise to rights which were for the public benefit and, the Prescription Act notwithstanding, therefore not subject to prescription.

The appellate division (1981 1 SA 354 (A)) decided (370B–E) that "debt" should be interpreted according to its accepted or normal meaning, namely "an obligation to do something or not to do something." A debt may also arise from a statutory obligation and in principle it should therefore make no difference whether compliance with it is for the benefit of the public or not. Furthermore,

the appellate division decided that there is no indication in the act that the word should be used in a narrower sense to exclude public law rights and held (375A) that the 1969 act was also applicable to public law rights. It would seem as if statutory debts are for these purposes "public debts."

When we examine sect 11 of the Prescription Act, we see that the "public debts" of taxation (s 11(a)(iii)) and mining rights (s 11(a)(iv)) were expressly mentioned. If we apply the rule of interpretation *inclusio unius est exclusio alterius* (Steyn 50), then by their explicit inclusion the remaining (other) public rights are excluded.

Kerr (*Principles of the Law of Contract* (1980) 330) is one of few authors who have examined these implications and he states that "where no Act of Parliament provides otherwise and *omitting consideration of provisions favouring the State* the periods are . . ." (italics mine). With regard to these provisions he expressly (330 n 260) mentions section 11(a)(iii), (iv) and 11(b) – those sections concerning public law debts. Is not a similar conclusion to the abovementioned rule of interpretation also applicable here?

As far as our case law on the interpretation of "debt" is concerned, it was held in *Leviton and Son v De Klerk's Trustee* 1914 CPD 685 691 that "debt" means "whatever is due – *debitum* – from any obligation." In *Evins v Shield Insurance Co Ltd* 1979 3 SA 1136 (W) the word "debt" in the Prescription Act was held (1141F–G) to denote "not only a debt sounding in money which is due, but also a debt for the vindication of property. The word debt should be given a wide and general meaning, but it cannot embrace all rights between two persons." According to Tebbutt J in *The Master v I L Back and Co Ltd* 1981 4 SA 763 (C) "debt" is interpreted (777F–H) as being wide enough to include not only any liability arising or being due or owing under a contract, but also the liability arising from the regulation to pay the fee provided therein, albeit that such fee owes its existence to a statutory enactment. According to this judgment the word "debt" could therefore include the obligations of the applicants in *Oertel's* case.

The appellate division (1983 1 SA 354 (A)) did not argue the point in great detail. Van Heerden AJA found it unnecessary to go into the exact meaning and consequences of the definition or the category of the rights discussed. He merely stated that the condition did give rise to an obligation, the "duties" of which could be extinguished in a variety of ways . . . and continued that (375(G)):

> "[i]n aard, anders as oorsprong, verskil die verpligting dus nie van 'n kontraktuele verpligting met dieselfde inhoud nie, en het dit 'n duidelike vermoënskarakter aangesien die verpligting klaarblyklik 'n geldelike surrogaat het."

It would seem, therefore, that there is very little certainty about the precise interpretation of "debt" for the purposes of the Prescription Act, and the judgment of the appellate division does little to clarify the position.

If, however, we take the word "debt" and examine it in the light of the "public interest" issue, the conclusion should be that the so-called "public debts" be excluded from the operation of the Prescription Act.

4 "Public Interest"

The decision of Van Heerden AJA in the appellate division involves no public policy considerations. Nestadt J's conclusion (1981 4 SA 491 (T) 501D–E) is, however, that "[w]hilst the exact juristic basis of the limitation on the running of prescription . . . against the State . . . is not given, it would appear to rest not so much on the nature of the obligation *per se* but on broad considerations of public policy akin to the Crown prerogative of the English law." These limitations apply where the right or property in question is respectively exercised or set aside for the benefit of the public as opposed to the case where the state engages in commercial enterprises and acts as an ordinary creditor for its own direct benefit only. Le Roux J's view is also that "public rights" should be protected (1981 2 SA 77 (T) 90C).

We are here dealing with an administrative law relationship (Wiechers *Administratiefreg* (1973) 123) and in comparing administrative law and private law Wiechers states (9) that public law regulates the public interest while private law regulates private interests. Furthermore, administrative actions should always serve the public interest and not only particular or individual interests (Wiechers 212). This would be in agreement with Nestadt J (1981 4 SA 491 (T) 501) and Le Roux J (1981 2 SA 77 (T) 90B–D) that public rights should be excluded from the operation of the Prescription Act, and that "debt" should therefore be restricted to those claims which arise in the field of private law.

The conclusion of Galgut AJA (1983 1 SA 354 (A) 377–380) was the same as that of Van Heerden AJA, but he examined the facts on administrative-law principles. The important part which the director plays in all stages prior to the approval and establishment of a township is stressed. The case of *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) is referred to as is *Palm Fifteen v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A) where Miller JA stated that the fundamental purpose of conditions of establishment of a township is, *inter alia*, to be in the interest of sound local government and in the interest of future residents (888H).

Galgut AJA referred to section 71 of the ordinance and describes its purpose, which is to ensure orderly development of the township in the interest of its residents.

The provisions of section 71 read as follows:

> "No registration of the transfer of any erf in a township established after the commencement of this Ordinance shall be effected in a deeds registry unless and until the notice referred to in s 69 has been published in respect of such township and after such publication the Registrar of Deeds shall refuse to register the transfer of any erf in a township if he has been advised by the Director that any of the conditions imposed under the provisions of the Townships Amendment Act 1908 or of this Ordinance have not been complied with *in so far as such conditions are applicable as at the date when deeds for registration of such transfer are lodged.*" (Italics inserted by Galgut AJA.)

The appointment of a director has as its purpose the guardianship or the protection of public rights, and as such the powers of the director are limited

(379A–B). Therefore he should not have the power to prevent the sale of an erf – which is essentially what happened in this case.

However, Galgut AJA concluded (379H) that if one has regard to the wording of section 71 the power to prevent the sale of erven could be exercised only if the conditions were applicable at the time when the *caveat* was obtained. The judge found that the conditions were not applicable at 4 August 1980 and that therefore the *caveat* should not have been imposed; therefore the appeal should succeed.

Galgut AJA did not raise the prescription question at all but the important point he did raise, which in essence is similar to that raised by the court of the first instance and the Court *a quo*, is the question of public interest. Although Galgut AJA's conclusion differed, the fact that the question of public interest was raised can, in my view, be seen as a positive step, and where this is in issue, a larger degree of circumspection is necessary.

As was stated *supra*, the appellate division did not deal directly with the "public interest", but approached the matter from the point of view whether prescription runs against the state or not.

5 Does Prescription run against the State?

It has been said (1981 2 SA 77 (T) 88B; also *Swanepoel v Crown Mines Ltd* 1954 4 SA 596 (A) 603H) that the former Prescription Act was never meant to be a codification of the law relating to prescription and neither was its successor.

This would therefore open the door to rules of common law possibly being applicable, and this question was examined at length by the appellate division.

The court first examined those old authorities which could provide a different solution to the problem. The majority of the old authorities approach prescription from the view of both acquisitive and extinctive prescription and the two are often referred to interchangeably. Van Heerden AJA found (374H) that the only possible exception to the fact that there was no recognisable Roman-Dutch-law rule that extinctive prescription either did not run against the state or was not applicable to public law debts was given by Goris who in his *Commentatio* stated (3 1 9: "In hoc autem suis fruentur privilegiis fiscus minores aliique contra quos non currit praescriptio") viz that prescription does not run against the state. This text, however, seems also to refer to both acquisitive and extinctive prescription.

The appellate division then examined our case law to ascertain whether prescription did run against the state. Cases dealing with both acquisitive and extinctive prescription were examined and include *inter alia, Latsky v Surveyor-General* 1877 B 68; *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194; *Municipality of Frenchhoek v Hugo* (1885) 2 SC 230; *Jones v Town Council of Cape Town* (1895) 12 SC 19. However, rules relating to the one are not necessarily applicable to the other.

As far as extinctive prescription is concerned, it was found in *Colonial Treasurer v Johannes Jacobus Coetzer* 1872 NLR 40 and in *Van der Merwe v*

Minister of Defence 1916 OPD 47 that prescription was held not to have run against the state, whereas in *Union Government v Tonkin* 1918 AD 533 and *Union Government v Smit* 1918 OPD 52 it was held to have run against the state.

A case where the facts are almost identical to those of the *Oertel* case is that of *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) where the main issue was whether the claim arose out of a contract within the meaning of section 3(2)(c)(i) and (d) of the Prescription Act 18 of 1943. In the *Breet* case it was held (531E–F) that the claim was not based on a contract within the meaning of the act and further that the ordinance provides that the establishment of a township was designed to protect the interest not only of the applicant but also of persons who would acquire property in a township and who would become its residents and the users of its amenities. This was one of the reasons leading Van den Heever JA to overrule the plea of prescription (532B–C). Although the 1943 act is at issue in the *Breet* case and the 1969 act in the *Oertel* case, the important issue of "public interest" remains the same for both.

The decisions of Le Roux J in the court of first instance and Nestadt J in the court *a quo* are essentially the same as the judgment of Van den Heever JA. Should not, therefore, the plea of prescription also have been overruled in the *Oertel* case?

6 Presumption – The State is not Bound by its own Acts

Section 19 of the Prescription Act provides that the state is bound by the act. Nestadt J is of the opinion that *prima facie* this section is unambiguous and unqualified, but that such an interpretation would be contrary to the general rule of construction that an enactment does not apply to the state (1981 4 SA 491 (T) 502A–D).

Hahlo and Kahn (*The South African Legal System and its Background* (1968) 304) state that the law is made for subjects only and that it must be clear from the language used or the nature of the enactment whether the legislature intended to bind the State.

In *Union Government v Tonkin supra* it was stated (541) that in applying the rule that the State is not bound by its own acts, while starting with a presumption in favour of the Crown one may look at the surrounding circumstances, and may consider its objects, mischiefs and its consequences. In this case too, Innes JA mentioned that this presumption only applies where the prerogative of the state is at stake. The prerogative which is at stake here is that of *nullum tempus occurit regi* – still adhered to in England where prescription does not run against the Crown (1983 1 SA 354 (A) 373F). Steyn (76) provides certain guide-lines regarding the present position: commencing with the fact that the interpreter should start with the presumption that the state is not bound, he should look to surrounding circumstances, the aim of the act, whether prerogative rights are affected etc, but Labuschagne ("Die Uitlegsvermoede teen Staatsgebondenheid" 1978 *TR* 42–65) give reasons for rebutting this presumption. In

his discussion of this presumption Wiechers (338–339) concludes that the principle of "wetsongebondenheid van die Staat slegs geld t o v daardie statutêre private reëlings wat, indien die Staat in die uitvoering van sy owerheidstaak ook daaraan gebonde sou wees, belemmerend op die owerheidsfunksies van die Staat sou inwerk."

7 Period of Prescription

Under the 1943 act the period of prescription for those debts (s 3(c)(iii)) not specifically dealt with was 30 years. The period under the 1969 act is three years. Nestadt J (1981 4 SA 491 (T) 503E) states that it is inconceivable that the legislature could have intended to reduce the period of prescription to such an extent, especially bearing in mind the consequences referred to by Le Roux J (1981 2 SA 77 (T) 90D–E). These include certain provisions under the Road Traffic Ordinance which, if they were to be extinguished by prescription, "would cause chaos too ghastly to contemplate." Van Heerden AJA also refers to the period of 30 years which was reduced to three years and states (1983 1 354 (A) 375B–C) that it would have been preferable to retain the 30-year period, at least as far as public law debts are concerned. He continues that the fact that the period was reduced is no indication that prescription should not be applicable in this case. The reduction of the period is rather a drastic one, which should not be accepted too lightly.

8 Conclusion

It is difficult to believe that the intention of the legislature in this case was that the so-called "debt" which arose out of the conditions of establishment should be subject to prescription. If the reduction of the period of prescription as well as the presumption that the state is not bound by its own acts is taken into account it may be questioned whether prescription should be applicable in this case.

The "public interest" issue – a most important one – has also been raised and our courts will have to examine this issue more closely in future.

It is hoped that an interpretation of "debt" which would have the effect of penalising purchasers of erven and future inhabitants of a township "who are the real beneficiaries of the rights conferred by the conditions of establishment, but who have no opportunity of enforcing those rights [and] militates against all logic and sense of fairness" (1981 2 SA 77 (T) 90B–D) will not be followed. Public debts should therefore be excluded from the operation of the Prescription Act, and "debt" should be restricted to claims arising in the field of private law.

Public debts normally arise in connection with statutory provisions and the way in which public debts and statutory duties relate to one another has not been conclusively dealt with by the court in *Oertel's* case. It would seem that this matter requires further academic and judicial attention.

A BURDZIK
University of South Africa

VONNISSE

S v STELLMACHER 1983 2 SA 181 (SWA)

Strafreg – dronkenskap as verweer

In 'n kroeg in Suidwes neem 'n man wat aan die bedieningskant van die toonbank sit, sy gelaaide pistool en trek los. Hy tref een van die weinig nugtere teenwoordiges in die oor. Daarna vuur hy nog 'n skoot of drie en tref 'n bottel en 'n glas. Hy druk arm met 'n man of twee, gesels met die manne en 'n persoon wat nie meer lank sou leef nie, kom die kroeg binne. Hy vra die pistoolskut wat nog steeds agter die toonbank sit, om 'n bottel wyn aan hom te verkoop. Die skut weier: dis nie sy hotel nie, sê hy. Die ander man kan homself maar help. Daarna beveel die skut ene De Walt om die voorgenome wynkoper uit die kroeg te neem. Dit doen De Walt en gee die arme siel die raad om pad te gee. Die raad word in die wind geslaan. Die persoon dring daarop aan om terug te gaan en wyn te koop. Hy gaan terug, nog 'n skoot word deur die skut afgetrek en die koppige wynkoper sak dood neer voor ene Witbooi. Witbooi het toe al 'n ruk lank, heel wys, doodstil plat op die vloer van die kroeg gelê: het hy dit nie gedoen nie, was hy dalk oorledene nommer twee.

Die skutter word weens moord aangekla. Die staat probeer blykbaar nie eens ernstig om 'n skuldigbevinding weens moord of strafbare manslag te verkry nie, maar poog om die beskuldigde op grond van geestesongesteldheid ingevolge artikel 78(6) van die strafkode na 'n inrigting te laat verwys. Dit geluk nie en die man wat so kwistig geskiet het, een gedood het en 'n ander net-net nie gedood het nie, word onskuldig bevind en ontslaan. Hy is so vry soos 'n gemsbok op een van Suidwes se uitgestrekte vlaktes. Hy was ontoerekeningsvatbaar met die skietery as gevolg van die vrywillige inname van drank. Om 'n ou Engelse rympie 'n bietjie te wysig:

> "He who drinks and 'guns' away
> Is free to 'gun' another day."

'n Mens wil vra hoe op dees aarde so iets dan moontlik is? Dit kan mos nie gebeur nie, of hoe dan nou? Feit is dat dit kan gebeur – dit het tog immers gebeur.

Hoe dit moontlik is? Dit is moontlik want ons het mos nie meer strafreg nie, ons het mos nou strafregwetenskap. Dit is moontlik vandat dit mode geword het om neerhalend na "law mechanics" te verwys en die opleiding van "juriste" naarstiglik nagestreef word. Dit is moontlik want van regstudente en andere wat in die regte stu-

deer word verwag om hulle weg te vind deur die doolhowe van teorieë, filosofieë, spekulasies, redenasies, dogmatieke, sistematieke, postulate en dies meer – wat alles in Duits as *Strafrechtwissenschaft* bekend staan – instede van "die letters en eenvoudige sillabes" te bestudeer. Dis moontlik vandat ons vertel word dat *actus reus* en *mens rea* eintlik een en dieselfde ding is, 'n sogenaamde finale handeling; vandat ons vertel word dat *mens rea* onder die skuilnaam "skuld" (is 'n Afrikaanse woord al ooit so verkrag soos hierdie een?) in die kop van die regterlike beampte wegkruip en nie in die kop van die beskuldigde gesoek moet word nie. (Seker maar goed dat die wapen nog in die hand van die beskuldigde gesoek word, die drank in *sy* maag en die alkohol in *sy* bloed.) Dit is veral ook moontlik vandat dienstigheid in ons reg moet plek maak vir logika – net asof enigiemand wat al na 'n skooldebat geluister het, nie weet wat alles met "logika" bewys kan word nie. Dit is ook moontlik vandat ons reg in die proses gekom het om so juridies gesuiwer te word dat ons uiteindelik dalk met suiwere suiwerheid en geen reg meer nie, gaan sit.

Die skietery hierbo beskryf is in breë trekke die feite in *S v Stellmacher* 1983 2 SA 181 (SWA). Die beslissing is die eerste van baie wrange vrugte wat nog van *S v Chretien* 1981 1 SA 1097 (A) gepluk gaan word as die wetgewer nie gou ingryp en 'n onhoudbare situasie verander nie.

Met alle respek teenoor ons hoogste hof is die uitspraak in *Chretien* vir my so onaanvaarbaar dat ek my kwalik daaroor kan uitlaat sonder om 'n ongemaklike gevoel te kry dat daar met gebrek aan die verskuldigde eerbied geskryf word. Die uitspraak is en bly egter in duidelike druk op papier, die onhoudbare daarin kan nie misgekyk word nie. 'n Beginsel word gestel en dan word gesê dat dit nie soseer om die beginsel nie, as om sy toepassing gaan – *Stellmacher* is 'n voorbeeld van hoe die beginsel in die praktyk toegepas word. Dit kon ook, met eerbied, nie anders toegepas gewees het nie.

In *Chretien* word 'n ingrypende verandering in ons reg aangebring – dronkenskap word as 'n volkome verweer erken – en 'n mens soek verniet na die rede daarvoor in erkende bindende bronne of gesag. Daar word selfs nie na die veelvuldige akademiese kritiek op *S v Johnson* 1969 1 SA 201 (A), naamlik dat dit op 'n verhulde toepassing van die *versari in re illicita*-leer berus het, verwys nie. Hoekom die reg soos in *Johnson* vervat en wat al vir jare bestaan het, naamlik dat dronkenskap nie 'n volkome verweer op 'n aanklag van manslag kan wees nie, verander moes word, is ook nie duidelik nie. Dis blykbaar 'n kwessie van publieke beleid (1106E) en 'n nastrewing van juridiese suiwerheid en 'n logiese benadering tot die reg. Wat so juridies onsuiwer of onlogies daaromtrent was om beskonkenes wat vir hulle eie dronkenskap verantwoordelik was en onskuldiges in dié toestand leed aangedoen het, voor stok te kry, word nie verduidelik nie.

In 'n stadium besef die hof blykbaar die gevare wat sy standpunt inhou, en dan word gesê dat dit nie die beginsel is wat belangrik is nie, maar hoe dit toegepas word (1105H). Hoe juridies suiwer is so 'n benadering? Is dit raadsaam om die kompas weg te

gooi en dan maar volgens die son en die sterre te seil?

Uit die res van die betrokke paragraaf (1105H–1106B) blyk dit dat howe versigtig moet wees om nie sommer te glo dat 'n beskuldigde wat 'n ernstige misdaad begaan het, so dronk was dat hy nie geweet het wat hy doen nie. Myns insiens was dit miskien darem nie nodig vir die appèlhof om in hierdie laat stadium te herhaal dat outomatisme 'n verweer is wat versigtig ondersoek moet word nie. 'n Beslissing dat dronkenskap 'n verweer is wat nooit ten volle behoort te slaag nie, sou van veel meer praktiese waarde gewees het. Verder as hierdie vermaning gaan die hof ook nie. Die bewyslas bly onveranderd: Daaroor is nie betoog nie (1106B). As die praktiese toepassing van die beginsel die eintlik belangrike aspek is, verwag 'n mens dat die verhoor verdaag sou word sodat argument oor die bewyslas aangehoor kon word. Dít sou logies gewees het.

Betoog oor die bewyslas kon miskien goeie vrugte afgewerp het. Dit kon verhoed het dat die hof sulke onoortuigende gedagtes uitspreek oor die beoordeling van getuienis wat die grondslag van 'n verweer uitmaak.

Op 1105H word gesê dat 'n hof nie ligtelik moet *aanvaar* dat 'n persoon wat 'n ernstige misdaad gepleeg het, so besope was dat hy nie geweet het wat hy doen nie. Die mistasting is ooglopend. Geen hof hoef so 'n verweer te aanvaar vir die verweer om te slaag nie. Die bewyslas rus op die staat om die verweer bo redelike twyfel te weerlê. Slaag die staat nie daarin nie, dit wil sê as die verweer as 'n redelike moontlikheid bly staan – al is hy ook onwaarskynlik – slaag die verweer. Van aanvaarding deur die hof is geen sprake nie. Tensy die hof dus bereid was om die bewyslas te verander, voer die voorligting oor hoe die beginsel toegepas moet word, die hele aangeleentheid geen duim verder nie.

Die hof se ontleding van die getuienis in die *Johnson*-saak (1106G-1107E) kom my nog minder oortuigend voor. Dit getuig op die oog af van 'n onverklaarbare onkunde van hoe tot 'n feitebeslissing by 'n verhoor geraak word. Die elementêre beginsel dat die aanklaer ten minste 'n verweer se geldigheid moet betwis voor dit verwerp kan word – tensy dit op niks berus nie – word oor die hoof gesien. Die ewe elementêre beginsel dat die aanklaer nie die strekking van sy eie getuies se getuienis, as dit in die beskuldigde se guns tel, kan aanval nie, word eweneens oor die hoof gesien. Die beginsel dat getuienis van onpartydige getuies – veral byvoorbeeld 'n mediese getuie – al word hulle ook deur wie geroep, nie sommer verwerp kan word nie, tensy daar besonder aanvaarbare getuienis met 'n ander strekking is, word ook oor die hoof gesien.

Laat ons die hof se benadering tot die *Johnson*-getuienis nader beskou.

Ten einde vas te stel of *Johnson* op die feite korrek beslis is, gaan die hof die twaalfjaar-oue notule na (1106H). Die feite in die gerapporteerde beslissing moet dus aangevul of gewysig word. Mens wonder hoekom. In die *Johnson*-uitspraak staan tog duidelik: Die feite van die saak is nie in geskil nie" (202E). Let wel, nie "die getuienis" nie, maar "die feite" en een van daardie feite soos deur die verhoorhof bevind, was dat Johnson nie

geweet het wat hy doen nie (*Johnson* 203H).

Dit sou ook heel verbasend wees as die feite in geskil was. Die staatsaanklaer sou die getuienis van sommige van die getuies wat hy self na die getuiebank, geroep het, moes betwis het. 'n Ander getuie wat waarskynlik deur die staatsaanklaer self of moontlik deur die beskuldigde of die hof geroep is, se getuienis sou ook aangeval moes word, en hy was 'n duidelik onpartydige mediese deskundige wat deur die polisie na die toneel van die misdaad ontbied is.

Die getuies waarna verwys word, is meer spesifiek die polisie wat by die selle diens gedoen het toe Johnson 'n medegevangene in 'n polisiesel met 'n emmer doodgeslaan het, 'n mediese dokter wat kort na die doodslag 'n monster van Johnson se bloed getrek het en 'n speurder wat die volgende dag 'n verklaring van Johnson geneem het. Die polisie en speurder moes deur die staatsaanklaer geroep gewees het, die dokter waarskynlik ook, maar dis nie vergesog dat die verdediging hom kon geroep het nie.

Die getuienis van hierdie getuies word in *Johnson* (202-203) opgesom en die afleiding is oorweldigend dat daar 'n redelike moontlikheid of selfs 'n waarskynlikheid was dat Johnson ten tye van die doodslag en net daarna nie geweet het wat hy doen nie. Hoe die staatsaanklaer dit sou kon betwis, is moeilik om te begryp.

Met die feitebevinding dat Johnson nie geweet het wat hy doen nie, word in *Chretien* blykbaar nie saamgestem nie (1107D-E). Die redes word gevind in getuienis wat nie in die *Johnson* uitspraak vermeld word nie. Daar is naamlik getuienis dat Johnson sy stiefpa gereeld aangerand het as hy dronk was omdat sy stiefpa sy ma geslaan het, dat Johnson, nadat hy weens dronkenskap in hegtenis geneem is, sy naam en adres en ander besonderhede kon verstrek, dat Johnson nie wild met die emmer geswaai het nie maar na die kop van sy slagoffer gemik het en dat Johnson gesê het: "[V]andag maak ek al die dônners dood" (*Chretien* 1106H-1107E). Dit word nie in soveel woorde gesê nie, maar die suggestie in *Chretien* is onmiskenbaar dat Johnson se verweer verwerp moes gewees het weens hierdie vier faktore, veral, blykbaar, die laaste een. Die betoog is onaanvaarbaar. Dit is eenvoudig strydig met die toepaslike beginsels van bewyslewering.

Aanvullend tot wat hierbo gesê is oor die onmoontlike taak wat dit vir die aanklaer sou gewees het om die getuienis in Johnson se guns te betwis, moet onthou word dat met betrekking tot die bewyslas op die staat dit net nie opgaan om 'n paar faktore wat teen die beskuldigde tel uit die getuienis te pik en op dié manier te beslis dat die staat hom van sy bewyslas gekwyt het nie – veral nie in die lig van die strekking van 'n magdom getuienis in die beskuldigde se guns nie. Die soort proses word eerder omgekeerd *teen* die staat toegepas. Om Johnson se verweer op grond van die gemelde vier faktore te verwerp, kom eintlik daarop neer dat die bewyslas op hom geplaas word om sy verweer te bewys.

By nadere betragting blyk die vier faktore – afsonderlik en gesamentlik beskou – ook van weinig (indien enige) bewyswaarde te wees.

Wat moet 'n mens nou van Johnson se "ou laai" om sy stiefpa aan te

rand as hy dronk is, aflei? Dat hy die oorledene, wat 'n ou man was, vir sy stiefpa aangesien het? Dan *het* hy mos nie geweet waar hy is, wie by hom is en wat hy doen nie. Of moet 'n mens aflei dat hy 'n neiging tot geweld gehad het as hy dronk word – dit glo ek nie kan betwis word nie – en dat hy waarskynlik mense sou aanrand as hy dronk is. Dan was appèlregter Botha se benadering mos eintlik reg, naamlik dat Johnson se skuld gesoek moes word op die tydstip toe hy begin drink het (*Johnson* 211C-D). Dit verander egter nog niks aan die getuienis van die polisie en die dokter dat Johnson na die aanranding en dus waarskynlik daartydens ook, nie geweet het wat hy doen nie.

Wat moet afgelei word van die verstrek van sy persoonlike besonderhede? Dat hy toe hy by die polisiestasie opgedaag het nie so dronk was as tydens die doodslag nie. Dis eintlik maar al. Die getuienis is ook dat hy 'n ruk lank stil gesit het in die sel voor die doodslag. Die moontlikheid dat meer alkohol na sy arres in sy bloedstroom opgeneem is, lê aan die waarskynlike indien nie die sekere nie. Indien daaroor twyfel bestaan, tel dit in sy guns: *in dubio pro reo.*

Die doelgerigte slaan na die kop, wat bewys dit? Bewys dit dat hy presies geweet het wat hy doen, dan was hy skuldig aan moord. Geen kritikus van die *Johnson*-uitspraak het *dit* nog aan die hand gedoen nie. 'n Outomaat is soos 'n slaapwandelaar. Slaapwandelaars maak deure en vensters oop, loop op nou paadjies en gaan terug bed toe; dit bewys egter nog glad nie dat hulle bewus is van wat hulle doen nie.

Dan is daar die laaste faktor. Johnson het gesê: "[V]andag maak ek al die dônners dood" (*Chretien* 1107B-C en die reëls bo E). Van hierdie woorde moet afgelei word dat hy bewus was van wat hy doen. So 'n stelling kan nie 'n minuut se kritiese oorweging oorleef nie. As hierdie woorde van Johnson nou teen al die getuienis in Johnson se guns (*Johnson* 202-3) bo redelike twyfel moet bewys dat Johnson geweet het wat hy doen, dan moet 'n mens oorweeg wat Johnson eintlik bedoel het met "vandag maak ek al die dônners dood." As hy niks bepaald daarmee bedoel het nie, bewys die woorde niks. Wie was "al die dônners" wat hy wou doodmaak? Was dit sy stiefpa, sy familie, sy vyande, almal teen wie hy 'n grief gehad het? Dan het hy nie geweet waar hy is en wat hy doen nie, want geeneen van die mense was in die sel of selle saam met hom nie. As hy, inteendeel, geweet het waar hy is en wat hy doen, dan kon hy net die ander gevangenes in die selle of die polisie daar op diens, bedoel het. Hoekom sou hy so 'n slagting wou onderneem? Dit sou ook, soos een van die polisiegetuies gesê het, "stapelgek" wees. 'n Baie meer waarskynlike afleiding is dat die woorde "vandag maak ek al die dônners dood," geuiter is as deel van 'n algemene, onbewuste gevloek en geswets.

In die totaalbeeld van die getuienis en in die lig van die bewyslas, was hierdie vier faktore betekenisloos.

Die *Chretien*-hof doen ook aan die hand dat deskundige getuienis tot die effek dat Johnson nie geweet het wat hy doen nie, nie van waarde was nie, want sommige van die gemelde vier faktore is nie vir kommentaar aan die deskundige gestel nie (1107C-E). Die betoog berus op nog 'n mistasting. Ons weet nie wat die getuie sou gesê het as

sy aandag op die betrokke getuienis gevestig is nie. Dus, die bewyslas synde wat dit is, kan 'n afleiding van hierdie onsekerheid nie *teen* die beskuldige gemaak word nie: weer eens 'n sterk aanduiding dat die hof maar net nie daarvan kon wegkom om in effek die bewyslas op Johnson te plaas nie.

Dit is nie nodig om verder in te gaan op die appèlhof se opvatting in *Chretien* omtrent die toepassing van die beginsel dat dronkenskap 'n volslae verweer kan wees nie. As dit egter nie vir hierdie opvatting was nie, kon die *beginsel* in *Chretien* dalk beter ondersoek gewees het en was die sosiaal onaanvaarbare resultaat in *Stellmacher* dalk nie vandag moontlik nie.

In die *Stellmacher*-verslag word daar nie diep ingegaan op die vraag na skuld of onskuld nie. In die lig van die beginsel in *Chretien* gestel, was dit ook onnodig. Die staat het nie die geringste vooruitsig op 'n skuldigbevinding gehad nie. Al wat oorgebly het, was die wanhopige poging om die beskuldigde na 'n inrigting te laat verwys.

Stellmacher bied 'n goeie voorbeeld van hoe die beginsel in *Chretien* in die praktyk toegepas word. Die bewyslas was op die staat en enkele feite wat daarop dui dat die beskuldigde geweet het wat hy doen, kon nie die redelike moontlikheid dat hy ontoerekeningsvatbaar was, weerlê nie. Daarvoor was 'n te stewige grondslag in die getuienis gelê (*Stallmacher* 188A-B).

Indien 'n mens sou soek na los faktore soos die vier in *Johnson* hierbo vermeld, dit wil sê van die "vandag maak ek al die dônners dood"- gehalte, wemel die getuienis in *Stellmacher* van hulle. Die beskuldigde kon 'n pistool behoorlik vashou en blykbaar ook vir 'n geruime tyd; hy kon blykbaar die pistool oorhaal; hy kon die sneller trek; hy kon iemand vra wanneer hy sy skuld gaan betaal (185H); hy kon aan die oorledene verduidelik dat dit nie sy hotel was nie en dat hy nie wyn aan hom kon verkoop nie; hy kon bygevolg die versoek om wyn te verkoop ook verstaan; hy kon 'n bevel gee dat die oorledene uit die kroeg geneem moes word; hy kon armdruk en argumenteer: voorwaar nie onaansienlike prestasies vir iemand wat nie geweet het waar hy is en wat hy doen nie. Die verhoorhof is egter gebonde aan die beginsels van die bewysreg en kon dus nie die riglyne in *Chretien* volg oor hoe die feite in *Johnson* beoordeel moes gewees het nie.

Stellmacher se getuienis was dat hy heeldag nie geëet het nie, dat hy hard gewerk het en terwyl hy na sesuur die middag in die kroeg aan 'n halfbottel brandewyn gesit en drink het, lig skerp van 'n bottel in sy oë weerkaats het (183B) en dat hy van die gebeure daarna niks onthou het nie. Sy getuienis word gestaaf deur die getuie Nissan dat hy eienaardig voorgekom en gepraat het en daar is blykbaar ook geen ander verklaring vir die algemene amok wat hy gemaak het as dat hy nie geweet het wat hy doen nie (186G). In die lig hiervan was dit 'n onbegonne taak om bo redelike twyfel te probeer bewys dat hy geweet het wat hy doen.

As 'n mens die reg soos dit in die gewraakte *Johnson*-uitspraak toegepas is, nog kon toepas, sou daar seker geen onreg aan Stellmacher of die gemeenskap geskied het nie. Hy sou waarskynlik 'n opgeskorte vonnis gekry het weens strafbare manslag en geweet het

om in die toekoms versigtiger te wees met drank en vuurwapens.

Die feite dui daarop dat hy taamlik nalatig opgetree het. Hy eet heeldag niks, dra 'n gelaaide pistool in sy sak, storm 'n kroeg binne en begin brandewyn drink. As 'n mens nie daarvan beskuldig sou word dat jy *versari* wil laat herleef nie, kon mens seker sê dat sy skuld, in die vorm van growwe nalatigheid, hier by die begin van die drinkery met die gelaaide pistool byderhand, gesoek moes word. Maar in dié trant is in *Johnson* geredeneer en *Johnson* is nie meer ons reg nie.

Dit wil voorkom of die kommentator wat gesê het dat 'n nuwe dag met die *Chretien*-beslissing aangebreek het, heeltemal reg was: 'n *dies nefastus*.

JR DU PLESSIS
Universiteit van Fort Hare

S v COOPER 1983 2 SA 178 (B)
S v NTSIMANE 1983 2 SA 179 (B)

Application of Act 9 of 1981 (Bophuthatswana)

In two recent decisions of the Bophuthatswana Supreme Court important guide-lines were formulated for the application of the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 9 of 1981 (Bophuthatswana). These guide-lines could have a far-reaching effect on all offenders convicted of dealing in dagga and revealing their source of supply, even where such source is in the Republic of South Africa.

In *S v Cooper* 1983 2 SA 178 (B) the accused, a young White man who lives in Johannesburg, was found in possession of five grammes of dagga in contravention of section 2(b) of Act 41 of 1971. He pleaded guilty to a charge of possessing dagga and was found guilty as charged. From the evidence it emerges that the accused fully co-operated with the police in revealing his source of supply. The presence of mitigating factors led the magistrate to suspend a sentence of six months' imprisonment.

Of particular importance is the fact that, in terms of the Abuse of Dependence-producing Substances and Rehabilitation Centres Amendment Act 9 of 1981 (B), an accused who furnishes information revealing the source of his supply to the police, is entitled to have this taken into account as a mitigating factor when the court imposes sentence.

Section 2 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 was amended by Act 9 of 1981 (B), an amendment which is in force only in Bophuthatswana. This amendment reads as follows:

> "provided that if the contravention of which a person is convicted under para-

graph (a) or (b) relates to dagga only such person shall be liable . . .

(bb) in the case of a contravention of a provision of paragraph (b) – (i) in the case of a first conviction to imprisonment for a period not exceeding ten years:

(ii) in the case of a second or subsequent conviction, to imprisonment for a period not exceeding fifteen years: Provided that the court convicting an accused under paragraph (b) shall, if it is proved that the accused, after the arrest on the charge upon which he is so convicted, furnished to a police officer or any other peace officer and magistrate information revealing the source of his supply of the drug or plant forming the basis of such charge, take the furnishing of such information into account as a mitigating factor when imposing sentence."

The source of supply revealed by the accused was not in Bophuthatswana but in Durban in the Republic of South Africa. This aspect caused some difficulty for the magistrate because the correctness of the information could not readily be checked before sentence. The magistrate asked for general guide-lines in regard to suppliers revealed in the Republic.

Hiemstra CJ found (179A) that in view of the fact that Act 9 of 1981 contains no qualifications with regard to the whereabouts of the supplier, a court which feels that, on a balance of probabilities, the accused is actually revealing his source, will be entitled to find that this is a mitigating factor even though such source is in the Republic of South Africa.

Hiemstra CJ further held that although there was an element of hearsay evidence by Bophuthatswana police in respect of information received from the police of the Republic of South Africa, such evidence was admissible:

"The courts are not overly strict on evidence in mitigation which is hearsay. Statements from the bar about the personal position of accused persons are normally accepted if on the face of it they might reasonably be true and if the prosecutor does not contest them. Police information would be on the same basis *but the court must be satisfied that the South African Police have been officially informed and, are acting on the statements made.* In such a case it seems unnecessary to delay sentence until the result of the investigations in South Africa is known" (179C–D) (my emphasis).

The application of Act 9 of 1981 should be evaluated against the following general principles formulated by the Bophuthatswana Supreme Court:

a In *S v Fuleni* 1982 3 SA 294 (B) the Bophuthatswana Supreme Court stated that the purpose of the act was to introduce a new provision in respect of a conviction of possessing dagga. The intention is to persuade a person found in possession of dagga to reveal his source of supply. It is the supplier or dealer against whom the new act is aimed. If the accused therefore tells the police where he got the dagga, it could lead to the arrest of the dealer, and so the real culprit in the dagga trade can be caught. It is generally expected that magistrates will, where it appears that the accused has revealed the identity of his supplier, let him off with a suspended sentence if he is a first offender and the quantity of dagga involved is small.

b Magistrates are requested, in all cases of possession, to inquire whether the accused was informed of the new law by the arresting policeman. If he was not, the magistrate should inform

him of the new provision, and postpone sentence to give the accused a chance to reveal his source to the police. His information must be followed up by the police, and when he comes up for sentence and it appears to the court that he has given correct information, this must be taken into account as a mitigating factor (Hiemstra CJ (Steenkamp J concurring) in *S v Fuleni*).

c The most desirable way of obtaining information regarding the source of supply is to lead the evidence of the police official concerned (Hiemstra CJ in *S v Romeo Pooe* CA&R 42/82*).

d First offenders in possession of small amounts of dagga must, as far as possible, be kept out of prison (*S v Samson Ngobeni* CA&R 233/81).

e Magistrates must not be gullible when the accused says he does "not know" his supplier. In *S v Wilson Makhubela* CA&R 42/81 the provisions of Act 9 of 1981 were not implemented by the trial court. Regarding the implementation of Act 9 of 1981 Hiemstra CJ found that:

> "the magistrate allowed the accused to make a mockery of Act 9 of 1981 . . . A man with more than two kilogrammes of dagga in his possession obviously knows his supplier."

f A failure to apply Act 9 of 1981 may lead to the case being re-opened and the accused given the opportunity to reveal his source (*S v Freddy Marema* CA&R 101/82). Commenting on the purpose of Act 9 of 1981, the chief justice formulated the following principles:

(i) this act is intended to eradicate the sale of dagga but the courts should guard against too harsh an effect in implementing this act;

(ii) when an accused pretends that he does not know the person from whom he got his supply and is unable to point him out, this ought not to be accepted as an excuse.

g In *S v Gerard Nthafu* CA&R 152/82 Hiemstra CJ held on review that a failure to implement Act 9 of 1981 may result in the setting aside of the sentence and the remission of the case to the magistrate to pass sentence afresh. The accused in this case was not granted the opportunity to earn mitigation of sentence by revealing his source of supply. The sentence was set aside and remitted to the magistrate to pass sentence (*see S v Joseph Lekhele* CA&R 196/81; *S v Phillip Mahoko* CA&R 235/81; *S v Wilson Makhubela* CA&R 42/81).

h The possessor of a small quantity who is a first offender and who reveals his source of supply, will normally be given a suspended sentence. If the possessor refuses to reveal his source as contemplated in Act 9 of 1981 or alleges that he has no knowledge of the source, he may forfeit his chances for a suspended sentence (*S v Jack Moyeni* CA&R 31/82 referring to *S v Sikwane* 1980 4 SA 257 (B)). However, compassionate or other factors are not ruled out. *The accused may genuinely have no knowledge of the supplier.* In these instances he should be helpful by at

* This is a serial number allotted to criminal appeal and review cases in Bophuthatswana. Some of these cases are published in the Bophuthatswana Supreme Court reports.

least pointing out where the supplier was. The aim of the amendment would best be attained if the courts did not allow the accused to get away with a mere shrug of the shoulders, but ensured that the message is spread "as widely as possible that accused persons will be invited to reveal their source of dagga."

i The dealer must be firmly dealt with. When imposing sentence, the quantity of dagga involved should be taken into account as well as the fact that there was an actual dagga deal (*S v Jack Moyeni*).

j The large-scale operator with supplies running into quantities like 50kg or more should be heavily sentenced (*S v Sikwane; S v Jack Moyeni*).

It is clear that the policy of the Bophuthatswana Supreme Court is geared towards inviting the accused to reveal his source of supply.

In view of the steady increase in dagga cases, Act 9 of 1981 (B) has proved to be one of the most important weapons in combating this social evil. It is submitted that this amendment could profitably be used by other independent states in Southern Africa as well.

Where an accused reveals a source of supply in the Republic of South Africa, and sentence is not delayed until the result of the investigations in South Africa are known, the decision in *S v Cooper* could open the door to serious abuses, because the accused may name fictitious suppliers. By employing the more lenient approach as in *S v Cooper* the imposition of suspended sentences in cases of large operators could defeat the aim and purpose of Act 9 of 1981 (B) as stated in *S v Sikwane*.

S v Ntsimane 1983 2 SA 179 (B) provides valuable guide-lines as regards the sentencing of dealers in dagga who reveal their source of supply in terms of Act 9 of 1981 (B).

The accused was found guilty of possessing dagga, in contravention of section 2(b) of Act 41 of 1971 and was sentenced to six months' imprisonment of which four months were suspended. In court the accused, on being questioned in terms of Act 9 of 1981 (B), stated the name of his supplier. The supplier was arrested and proved to be the right person. On review Hiemstra CJ formulated guide-lines to assist in deciding whether a dealer could receive a total suspension of sentence:

> "The Act says it shall be a mitigation factor if the accused points out his supplier so that the supplier can be arrested and charged. This does not imply that the mitigation effect should *always* go so far as justifying *total* suspension. It also does not mean that when he refuses to reveal his supplier, there can be no suspension. There could be other mitigating features like old age and the like" (180D).

Hiemstra CJ added two important aspects as regards the charging and sentencing of the supplier:

a The normal position is that, where there are no special features (like previous convictions or a large quantity of dagga), the sentence is suspended altogether (180E); and

b although Act 9 of 1981 (B) refers to possessors, there is no reason why dealers should not always receive some advantage for revealing their source. A dealer should, however, receive a wholly suspended sentence only in rare circumstances (180F):

> "Dealing is a serious crime which should be firmly suppressed. Old age, poverty, small quantities and such like are reasons for lighter sentences, but generally the dealer and especially the large operator should be heavily punished."

In *S v Ntsimane* the conviction was confirmed but the sentence was wholly suspended for three years on condition that the accused does not again transgress any provision of Act 41 of 1971.

The general approach towards the punishment of dealers in dagga in Bophuthatswana can be summarised as follows: Where the court has to do with a crime such as dealing in drugs which threatens the public well-being and which is expressly branded by the lawgiver as a major evil, personal circumstances and rehabilitation make way for retribution and deterrence as the stronger elements in sentencing (*S v Sikwane*).

In the case of *Sikwane* it was held by the Bophuthatswana Supreme Court that the right to suspend minimum sentences, imposed for dealing in drugs (introduced into Bophuthatswana in 1978), was introduced for cases deserving compassion. To regard it as an open door for light sentences for dealers, Hiemstra CJ said, was contrary to the intention of the legislature.

Although magistrates were urged to deal firmly with dealers in dagga, the amount of dagga involved is always of major importance:

> "Hoewel hierdie hof die magistrate aanspoor om ferm op te tree teen die daggahandelaars (sien bv *S v Sikwane* 1980 (4) SA 257 (B)) moet daar gelet word op die hoeveelheid wat hulle in hulle besit gehad het. In *Sikwane* se saak was dit 45 kilogram. Dit is waar dat die hoeveelheid 'n saak van toeval kan wees. 'n Man kon 'n groot massa dagga aangehou het vir verkoop en toe hy gevang word, net 'n klein hoeveelheid oorgehad het. Dit kan gebeur, maar dan is die geluk aan sy kant. As hy 'n klein hoeveelheid het, is 'n faktor wat kan bewys dat hy 'n groot operateur is, net nie teenwoordig nie. In hierdie geval is ses jaar vir minder as drie kilogram buite verhouding. Die blote feit dat hulle wel handel dryf, is nogtans grond vir 'n swaar vonnis" (*S v Frans Morapedi* CA&R 152/81).

The criteria in *Sikwane's* case were evidently formulated to combat large-scale operations by dealers in dagga, as appears from the sentences imposed in the cases of *S v Woolboy Tokang* CA&R 71/81, *S v Adelinah Tshukutswane* CA&R 133/81, *S v Josiah Mabena* CA&R, *S v Catherine Mathabe* CA&R 85/82, *S v Martha Ntshai* CA&R 65/82 and *S v Gerard Nthafa* CA&R 152/82. References to a few unreported decisions clearly illustrates the approach of the Bophuthatswana Supreme Court in this regard.

In *S v Woolboy Tokang* Steenkamp J on review suspended two years of a five-year sentence for dealing in dagga. The amount of dagga found in the possession of the accused was 130 grams. In terms of the amendment of section 2(a) of Act 41 of 1971 (Amendment Act section 2 of Act 22 of 1980 (B)) no compulsory sentence exists for an offence in terms of section 2(a) or (b) of Act 41 of 1971. Taking into consideration the age of the accused and the amount of dagga found in his possession, Steenkamp J remarked:

> "Die beskuldigde is 28 jaar oud en 'n eerste oortreder. Alhoewel hierdie Hof op 'n paar geleenthede daarop gewys het dat dit eintlik die handelaar is wat swaar gestraf moet word, moet die beskuldigde se persoonlike omstandighede tog in ag geneem word. Die verdere feit is dat die hoeveelheid dagga wat by hom gevind is en waarmee vermoed word dat hy handel gedryf het, slegs 130 gram is.

> Die hoeveelheid dagga is ook 'n faktor wat by vonnis in aanmerking geneem moet word."

In *S v Josiah Mabena* Hiemstra CJ confirmed the conviction but reduced a sentence of six years' imprisonment to three years, where the accused was found in possession of 200 grammes of loose dagga.

Van der Merwe AJ in *S v Catherine Mathabe,* where the accused was found guilty of dealing in dagga and sentenced to six years' imprisonment of which two years were suspended, commented as follows:

> "Die skuldigbevinding is in orde maar die vonnis is buitensporig swaar. Beskuldigde is 20 jaar oud, sy is 'n eerste oortreder, sy is in besit van 70 gram dagga gevind en sy het slegs 5 zolle daarvan teen vyftig sent stuk verkoop."

The conviction was confirmed but the sentence replaced by one of two years' imprisonment.

From *S v Ntsimane* it is clear that the aim of the courts in Bophuthatswana is directed at eradicating the large-scale operators in dagga.

The success of the application of Act 9 of 1981 (B) in achieving this aim in practice, is illustrated by *S v Cooper* and *S v Ntsimane.* These legal developments in Bophuthatswana may prove to be worthy of export to other Southern African countries in need of legal reform in this field.

AWG RAATH
University of Bophuthatswana

REFRIGERATED TRANSPORT (EDMS) BPK v MAINLINE CARRIERS (EDMS) BPK 1983 3 SA 121 (A)

Aquiliese aksie van die huurder van 'n saak wat homself aanspreeklik gestel het vir skade aan die saak

Respondent (eiser) was die huurder van 'n voorhaker en leunwa-kombinasie ingevolge 'n huurkontrak met GLC. Die kombinasie is deur die vervaardigers ingevolge 'n koopkontrak met GLC direk aan eiser gelewer. Die huurkontrak tussen GLC en eiser maak daarvoor voorsiening dat eiser vir alle skade aan die saak verantwoordelik sal wees. Nadat die kombinasie aan eiser gelewer is, het GLC alle regte ingevolge die kontrakte aan G oorgedra. Daarna was die kombinasie in 'n botsing met 'n soortgelyke kombinasie betrokke, as gevolg waarvan die kombinasie van eiser beskadig is. Die hof bevind (124F) dat die botsing veroorsaak is deur die nalatigheid van die werknemer van appellant (verweerder) wat die ander kombinasie bestuur het. Eiser vorder van verweerder skadevergoeding vir sowel die skade aan sy vrag in die leunwa as vir die waardevermindering van die kombinasie self. Verweerder opper geen besware teen die eerste deel van die eis nie, maar teen die tweede deel voer hy aan dat eiser nie *locus standi* het om die waardevermindering

te verhaal nie. Laasgenoemde aangeleentheid kan puntsgewys behandel word.

1 Die maklikste manier waarop eiser sy *locus standi* kan bevestig, is deur sessie van die eienaar van die saak te verkry. Die algemene reël is dat 'n mens skade slegs in jou vermoë ly, en dat die eienaar van 'n saak dus die een is wat benadeel word as die waarde van die saak afneem. Daarom is hy normaalweg die een wat skadevergoeding kan verhaal deur te bewys dat die verweerder se handeling hom op onregmatige en skuldige wyse vermoënskade berokken het. As die nie-eienaar begerig is om self die *actio legis Aquiliae* teen die dader in te stel, kan hy sy *locus standi* bewys deur eenvoudig sessie van die eienaar te verkry (*Lean v Van der Mescht* 1972 2 SA 100 (O) 107–108). Sessie bied natuurlik nie altyd uitkoms nie omdat dit soms tydrowend of onmoontlik kan wees om sessie te verkry. Pauw (1977 *TSAR* 62) noem die voorbeeld van die geval waar die delikpleger en die eienaar van die saak broers is, en die eienaar dus kan weier om sessie te gee (*Grobbelaar v Van Heerden* 1906 EDL 229); en van die geval waar die staat die eienaar is sodat dit moeilik en tydrowend mag wees om sessie te verkry (*Kruger v Strydom* 1969 4 SA 304 (NK)). In die onderhawige geval het die eiser wel ná die botsing sessie van G verkry, maar verweerder het beweer dat G se eiendomsreg nie bewys is nie. Die hof vind dit onnodig om te beslis of G wel eienaar was (125B 126A). As eiendomsreg deur *attornment* op G oorgegaan het, sou die eiser se *locus standi* onaanvegbaar gewees het.

2 Juis omdat dit nie altyd moontlik is om sessie te verkry nie, is sekere nie-eienaars al in die verlede toegelaat om self die *actio legis Aquiliae* in te stel. Dit geld veral vir sekere saaklik reghebbendes soos die pandhouer en die vruggebruiker (*Erasmus v Mittel and Reichmann* 1913 TPD 617 622; *Kruger v Strydom* 1969 4 SA 304 (NK) 308D; *Van Wyk v Herbst* 1954 2 SA 571 (T) 574); die *bona fide possessor* (*Erasmus v Mittel and Reichmann* 1913 TPD 617 622; *Setlogelo v Setlogelo* 1921 OPD 161 165; *Hudson's Transport v Du Toit* 1952 3 SA 726 (T) 729H; *Matthee v Schietekat* 1959 1 SA 344 (K) 348B–E; *Kruger v Strydom* 1969 4 SA 304 (NK) 308D; *Swart v Van der Vyver* 1970 1 SA 633 (A) 647G); die nie-eienaar wat verantwoordelikheid vir skade aan die saak op hom geneem het (*Maraisburg Divisional Council v Wagenaar* 1923 CPD 94 95; *Sulaiman v Amardien* 1931 CPD 509 510–511; *Spolander v Ward* 1940 CPD 24 25; *Moosa v Mahomed* 1940 NPD 435 440; *Smit and Shapiro v Van Heerden* 1941 TPD 228 231; *Moodley v Bondcrete* 1959 2 SA 370 (N) 373); en ander nie-eienaars, veral huurkoopkopers, met 'n selfstandige eie belang in die waarde van die saak (*Lean v Van der Mescht* 1972 2 SA 100 (O); *Rondalia Finansieringskorporasie van Suid-Afrika v Hanekom* 1972 2 SA 114 (T); *Vaal Transport Corporation v Van Wyk Venter* 1974 2 SA 575 (T); *Smit v Saipem* 1974 4 SA 918 (A); *Botha v Rondalia Versekeringskorporasie van Suid-Afrika* 1978 1 SA 996 (T); *Tarmacadam Services (SA) v Minister of Defence* 1980 2 SA 689 (T)). Verder was daar al voorstelle dat die nie-eienaar self die aksie kan instel omdat hy (spesifiek as *huurkoopkoper*) as die *ware eienaar* van die saak beskou moet word

(Cronje 1979 *TSAR* 16; 1979 *De Jure* 228; 1979 *THRHR* 142; Sonnekus *Sakereg Vonnisbundel* 74 77; 1979 *TSAR* 41 137–139); of omdat hy (spesifiek as *huurkoopkoper*) as 'n *bona fide possessor* gesien en behandel moet word (*Lean v Van der Mescht* 1972 2 SA 100 (O) 109D; *Vaal Transport Corporation v Van Wyk Venter* 1974 2 SA 575 (T) 577G): of omdat die deliksaksie van die nie-eienaar gebaseer kan word op die *aantasting van 'n vorderingsreg* as selfstandige delik (Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 377–388; Oelofse 1979 *De Jure* 3; Pauw 1979 *De Jure* 58; Tager 1970 *SALJ* 10). Uit die onderhawige feite is dit duidelik dat eiser se *locus standi* op enige van die volgende aanvaarde gronde gebaseer kon word: (a) hy het sessie van die eienaar G se aksie verkry; (b) hy het 'n eie selfstandige belang (positiewe interesse: *Smit v Saipem* 1974 4 SA 918 (A) 931H–932H) in die saak; (c) hy is teenoor die eienaar van die saak verantwoordelik vir skade aan die saak (negatiewe interesse: *Smit v Saipem* 1974 4 SA 918 (A) 931H–932H). In die besondere geval is besluit om laasgenoemde grondslag te gebruik en is daar beslis dat die houer van 'n saak wat homself verbind het om skade daaraan te vergoed, self met die Aquiliese aksie weens vernietiging of beskadiging van die saak kan ageer (125B). Met hierdie resultaat kan geen fout gevind word nie.

3 Die hof besluit om onder die omstandighede geen uitspraak te maak nie oor die vraag of dit nodig is dat die houer hom juis teenoor die *eienaar* van die saak vir skade moes verbind het (125C–E). Die hof kon egter net sowel beslis het dat dit onnodig is: solank die houer 'n *negatiewe belang* in die saak het in die sin dat hy verantwoordelik is vir skade, behoort die hof die aksie aan hom te verleen (*Spolander v Ward* 1940 CPD 24; *Smit v Saipem* 1974 4 SA 918 (A) 931H–932H). As die huurkoopkoper dus teenoor die eienaar aanspreeklik is, die huurder teenoor die huurkoopkoper, en die lener teenoor die huurder, behoort die lener se negatiewe belang steeds deurslaggewend te wees.

4 In die omstandighede het die hof beslis dat daar aan die eiser se negatiewe belang gevolg gegee moet word en daarom verkry hy *locus standi* om skade te verhaal gelyk aan sy negatiewe belang, met ander woorde die omvang van sy vergoedingsplig teenoor die eienaar. Daarom is die omvang van die vergoeding korrek vasgestel op die *waardevermindering* van die saak. Hieruit mag egter nie afgelei word dat die houer altyd op die *volle omvang van die waardevermindering* aanspraak kan maak nie. As sy vergoedingsplig byvoorbeeld tot R10 000 beperk is, behoort sy eis ook tot dieselfde bedrag beperk te word ten einde die verskillende belange by die saak in die eis van mekaar te onderskei (*Smit v Saipem* 1974 4 SA 918 (A) 932C). As die houer eis op grond van sy positiewe belang, behoort die hof met omsigtigheid vas te stel hoe groot die houer se selfstandige belang in die saak is, en dan behoort sy eis tot daardie omvang beperk te word. Die lener of huurder wat geen negatiewe belang het nie, kan wel onder sekere omstandighede 'n selfstandige positiewe belang in die waarde van die saak hê, maar dit sal moontlik laer wees as die positiewe belang van die huurkoopkoper wat nog net een paaie-

ment op die saak verskuldig is. Om verwarring te voorkom, sal dit ook wenslik wees om die houer se eis op grond van sy positiewe belang te oorweeg slegs in die geval waar daar geen negatiewe belang bestaan nie.

5 As die verskillende belange deeglik van mekaar onderskei word, behoort daar geen probleme met konkurrente aansprake van die eienaar en selfs meer as een nie-eienaar te ontstaan nie. Dit is duidelik dat daar vir een skade slegs een verhaalsreg kan bestaan, en geen hof sal van die delikpleger verwag om die volle waardevermindering aan meer as een eiser te vergoed nie (*Lean v Van der Mescht* 1972 2 SA 100 (O) 110H–111A; *Vaal Transport Corporation v Van Wyk Venter* 1974 2 SA 575 (T) 578C: *Smit v Saipem* 1974 4 SA 918 (A) 932C-D; *Botha v Rondalia Versekeringskorporasie van Suid-Afrika* 1978 1 SA 996 (T) 999F–G); maar die blote feit dat een of meer nie-eienaars oor 'n selfstandige aksie beskik, skakel nie die eienaar se aksie uit nie (*Lean v Van der Mescht* 1972 2 SA 100 (O) 111A; *Rondalia Finansieringskorporasie van Suid-Afrika v Hanekom* 1972 2 SA 114 (T) 116H; *Smit v Saipem* 1974 4 SA 918 (A) 932D; *Botha v Rondalia Versekeringskorporasie van Suid-Afrika* 1978 1 SA 996 (T) 999D–E). Omdat geskille oor konkurrente eise gewoonlik net sal opduik as daar geen houers is met 'n aanspraak op grond van negatiewe belang nie maar wel op grond van positiewe belang (*Smit v Saipem* 1974 4 SA 918 (A) 932C) – wanneer die eienaar en houer dus albei vir *dieselfde skade* wil eis – moet die omvang van die skadevergoeding in die onderhawige saak baie duidelik beperk word tot gevalle van *negatiewe belang*. In *Smit v Saipem* (1974 4 SA 918 (A)) was daar wel 'n positiewe belang van die houer ter sprake, maar onder die omstandighede was sy positiewe belang reeds gelyk aan die volle omvang van die waardevermindering. 'n Mens moet dus aanvaar dat die eienaar, as hy in daardie saak self ook aksie ingestel het, geen skade sou kon bewys nie. Deur die toename van die houer se belang kan die eienaar s'n dus prakties afneem totdat daar niks oorbly nie. Daar sal egter vir 'n later beslissing gewag moet word om die presiese werking van 'n afweging van positiewe belange prakties te demonstreer.

AJ VAN DER WALT
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

KOZA v KOZA 1982 3 SA 462 (T)

Section 9(1) of the Divorce Act 70 of 1979 – Forfeiture of benefits – nature of pleadings and evidence needed

It is almost impossible to assert that the judgment in *Koza v Koza* makes any profound statement concerning the substantive law of forfeiture of

patrimonial benefits of the marriage. However, the decision merits some attention since it indicates the procedural requirements for the proper operation of section 9(1) of the Divorce Act. Indeed, this decision is of particular importance to the practitioner.

This was a divorce matter between Blacks. Since there was neither a declaration in terms of section 22(6) of the Black Administration Act 38 of 1927, nor an antenuptial contract between them, the court held that there was no community of profit and loss and that each was to retain the ownership of his and her property respectively (463F). What seems to have complicated the issue was that the parties were married out of community of property and that there was no antenuptial contract. Consequently the court refused to order forfeiture in favour of the appellant, basing the refusal upon the inference that the only benefit to which the spouse was entitled was a claim to a half share in the joint estate (where the marriage was in community of property) or a claim in terms of an antenuptial contract (where the marriage was out of community of property) (464C).

On appeal McCreath J relied upon Hahlo's view that the forfeiture of benefits extends to gifts made *stante matrimonio* (465A; *vide* HR Hahlo, *The South African Law of Husband and Wife*, 4th ed 439 *et seq*).

Thus without deciding upon the correctness of the law, the judge assumed in the appellant's favour that the patrimonial benefits of the marriage out of community of property were not restricted to those based on antenuptial contract (465B), thereby avoiding the uncertain waters of forfeiture of patrimonial benefits. The court then proceeded to enquire whether or not it should order forfeiture. McCreath J rightly considered the issue in the light of the forfeiture of benefits provision in the Divorce Act.

Before the enactment of the Divorce Act of 1979 it was mandatory for the court, on granting a decree of divorce, to order forfeiture of patrimonial benefits in favour of the successful plaintiff except where the divorce was based on incurable insanity. The judge had no discretionary powers to order the redistribution of assets. Under the common law, the plaintiff in a divorce action based on adultery or malicious desertion, merely sought an order for forfeiture which the court could not withhold. (See Hahlo, *op cit* 430; Hahlo and Sinclair, *The Reform of the South African Law of Divorce* 1980 51.) The court therefore accepted the plaintiff's *ipse dixit* and granted the relief on the strength of the common-law obligation. On the basis of this the practitioner simply prayed *inter alia* for an order for "*forfeiture of the benefits arising from the marriage.*" Thus Nathan wrote: "It is not the practice to particularize in detail in the combined summons... in regard to claims for forfeiture of benefits of the marriage whether in or out of community of property" (*South African Divorce Handbook* 71).

The practice of boldly praying for forfeiture was consequently imported into current divorce pleadings. But, by and large, practitioners overlooked the fact that section 9(1) clearly confers a discretion upon the judicial officer

whether to order forfeiture or not. In *Koza's* case, McCreath J aptly held that a litigant claiming forfeiture "should plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought" (465H). It was held that the pleadings were not formulated accordingly. If, in future, the court is invited to resolve a dispute on the issue of forfeiture, the pleadings will have to comply with section 9(1) and conform with the appropriate rules of the court (rules 17(2) and 18(4) of the *Uniform Rules of the Supreme Court*).

Since section 9(1) confers upon the court a discretion whether it should order forfeiture of benefits, if the court is to exercise its discretion properly, the pleader's allegations of material facts must be supported by evidence of the factors stated in section 9(1). There must also be evidence of the nature and value of the benefits if it is to be determined whether one spouse has unduly benefited in comparison with the other (465G–H). Though there was some evidence of the applicant's contribution, it was considered to be insufficient to enable the court to exercise its discretion or to warrant a redistribution of assets (466 A–B). Consequently the appeal failed. (466F).

"Today, a large fraction of disputed divorce matters are about money" (*vide Singh v Singh* 1983 1 SA 781 (C) 785B–C). In order to succeed on the forfeiture issue the pleader must place before the court sufficient particularity and evidence pertaining to the factors contained in section 9(1). *First*, the court will infer the duration of the marriage from the pleadings. *Secondly*, the circumstances giving rise to the matrimonial breakdown will be deduced from the facts indicative of the irretrievable breakdown of the marriage. *Thirdly*, there must be facts supported by evidence about any substantial misconduct on the part of either of the parties.

When is a party's misconduct to be regarded as *substantial*? In the absence of an appellate division pronouncement, the only guide is the pronouncement of Lord Denning MR in *Wachtel v Wachtel* [1973] 1 All ER 289. His lordship stated that substantial misconduct is present "where the conduct of one of the parties is . . . 'both obvious and gross,' so much so that to order one party to support [*or to forfeit to*] another whose conduct falls into this category is repugnant to anyone's sense of justice" (835–6). The position of the principle expressed in *Wachtel's* case is somewhat uncertain in this country. It was rejected in *Swart v Swart* 1980 4 SA 364 (O) but accepted in *Singh's* case (*supra* 787G–H). The balance has been tilted in favour of the "obvious and gross" criterion by the strong joint academic support of Hahlo and Sinclair (*op cit* 47). It remains to be seen whether the appellate division, when seized of an opportunity, will be influenced by Lord Denning's approach to the issue of conduct, under both the forfeiture provision (section 9(1)) and the maintenance provision (section 7(2)). The ancillary question is what type of substantial misconduct is "obvious and gross?" Recently (in *Singh's* case *supra*) Baker J held that the misconduct is "gross" when the defendant's adultery is, in the plaintiff's honest view, irreconcilable with the continuance of the marriage or where one spouse maliciously deserts the other

(787D–F). *Finally*, there must be sufficient evidence of the nature and value of the benefits in respect of which forfeiture is sought. The onus of establishing the respective contributions of the parties therefore rests upon the respective spouses (*vide Gates v Gates* 1940 NPD 361 365).

The appeal in *Koza's* case failed, even though the court decided the issue of forfeiture of benefits of the marriage out of community of property without an antenuptial contract in the applicant's favour, because the pleadings were not properly formulated and there was a lack of sufficient evidence for the court to invoke its discretion. This decision provides the necessary procedural guidance as regards the substantiation of a claim for forfeiture of patrimonial benefits arising from the marriage.

ESSOP M PATEL
Advocate of the Supreme Court of South Africa

NAIDOO v MOODLEY 1982 4 SA 82 (T)

Mandament van spolie

In die beslissing in *Naidoo v Moodley* 1982 4 SA 82 (T) is weer 'n voorbeeld te vinde van die aanwending van die mandament van spolie – hierdie keer om 'n respondent wat die elektrisiteitstoevoer tot die applikant se woonplek afgesny het, te beveel om dit te herstel. (Die gerapporteerde beslissing is eintlik 'n appèl deur die respondent *a quo*, maar gerieflikheidshalwe word na die partye verwys as applikant en respondent soos hulle in die aanvanklike aansoek was.) Dié beslissing was die onderwerp van 'n onlangse bespreking deur Van der Walt (sien 1983 *THRHR* 237 e v). In beginsel behoort hierdie beslissing geen probleme op te lewer nie. Die respondent het 'n daad van spolie gepleeg deur die reg in eie hande te neem en die elektrisiteitstoevoer tot die gedeelte van die gebou wat deur die applikant geokkupeer is, af te sny. Sodoende is die applikant ontneem van 'n belangrike element van dít waaruit sy okkupasie bestaan het. Heeltemal tereg gaan regter Eloff nie in op die meriete van die saak nie en in ooreenstemming met die beginsel *spoliatus ante omnia restituendus est* word die beslissing in die hof *a quo* bevestig waar die respondent beveel is om die elektrisiteitstoevoer te herstel. Daar sou hiermee volstaan kon word, maar in sy bespreking opper Van der Walt die moontlikheid dat die uitspraak oor 'n ander boeg gegooi kan word, naamlik "dat E (die respondent) die besit of gebruik wat H (die applikant) van die *elektrisiteit self* gehad het, gespolieer het." Dat dit hier in 'n sin wel oor die *elektrisiteit* gaan, kan nie betwyfel word nie. Ongelukkig bou Van der Walt 'n kunsmatigheid in sy argument wat meebring dat hy heelwat meer in hier-

die beslissing lees as wat daar staan en dit dan as steun gebruik vir 'n standpunt wat myns insiens vir ernstige kritiek vatbaar is.

Die ernstigste punt van kritiek lê daarin opgesluit dat Van der Walt die *Naidoo*-beslissing interpreteer as steun vir die standpunt dat die onmoontlikheid van besitsherstel nie 'n geldige verweer teen die aanwending van die mandament van spolie is nie en dit sodoende in ooreenstemming stel met die beslissing in *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K). Met onmoontlikheid van besitsherstel word in hierdie verband bedoel die objektiewe onmoontlikheid aan die kant van die *spoliator* om die *status quo ante* te herstel, aangesien die gespolieerde saak vernietig, wesenlik beskadig of aan 'n *bona fide* buitestaander vervreem is. Die *spoliator* sou dan nie in staat wees om die *gespolieerde saak* terug te gee nie, met die gevolg dat die mandament van spolie nie gebruik kan word nie en die *spoliatus* op 'n ander remedie aangewese is. (Sien o a *Potgieter v Davel* 1966 3 SA 555 (O); *Moleta v Fourie* 1975 3 SA 999 (O).) In *Fredericks v Stellenbosch Divisional Council supra* is die standpunt egter ingeneem dat die *spoliator* met die mandament van spolie beveel kan word om selfs 'n *nuwe* saak aan die *spoliatus* te gee indien die *gespolieerde* saak vernietig is en besitsherstel daarvan dus onmoontlik geword het. Van der Walt impliseer nou dat die mandament van spolie in die *Naidoo*-geval ook toegestaan is ondanks die feit dat besitsherstel in werklikheid onmoontlik geword het – dit was naamlik volgens hom vir die *spoliator* onmoontlik om "dieselfde elektrisiteit" terug te gee. Die vraag moet egter gevra word of die *Naidoo*-beslissing wel verdere steun is vir die standpunt wat in die *Fredericks*-beslissing ingeneem is. Myns insiens is dit nie die geval nie.

As uitgangspunt moet gestel word dat dit opvallend is dat regter Eloff in die *Naidoo*-beslissing nie sy aandag aan die betrokke aspek gee nie. Inteendeel, die vraag of die applikant hier wel op die beskerming van die mandament kon aanspraak maak, word, soos Van der Walt aantoon, nie werklik in oorweging geneem nie. Die enigste ander moontlikheid is dan dat die feite van die *Naidoo*-beslissing sodanig is dat die afleiding gemaak kan word dat dit 'n geval is waar die hof, soos in die *Fredericks*-beslissing, die *spoliator* beveel het om 'n plaasvervangende saak aan die *spoliatus* te gee aangesien die gespolieerde saak om watter rede ook al nie teruggegee kon word nie (of, soos Van der Walt sê, "vervangende besitsherstel" beveel is). Dit behoort egter duidelik te wees dat die twee gevalle hoegenaamd nie *in pari materia* is nie: in die *Naidoo*-geval het besitsherstel tog nie onmoontlik geword in die sin soos die begrip hierbo verduidelik is nie. Die kritiek teen die *Fredericks*-beslissing word juis daarteen gerig dat die mandament van spolie aangewend is ondanks die feit dat die gespolieerde saak vernietig is en besitsherstel van *daardie saak* derhalwe onmoontlik geword het. Die onhoudbaarheid van die *Fredericks*-beslissing uit sowel 'n positiefregtelike as 'n regswetenskaplike oogpunt is reeds elders uitvoerig bespreek en slegs sekere kernpunte sal hier uitgelig word. (Sien De Waal *Die Moontlikheid van Besitsherstel as Wesenselement vir die Aanwending van die Mandament van Spolie* LLM-verhandeling Universiteit van Stellenbosch

(1982).) Volgens die feite van die *Fredericks*-beslissing sou die uitvoering van die hof se bevel beteken het dat die *spoliator ander* sinkplate en boumateriaal van dieselfde gehalte en waarde in die hande moes kry om die betrokke plakkershutte weer op te bou. Gesien in die lig van die feit dat die mandament van spolie 'n *spoedeisende* regsmiddel is wat terselfdertyd die moontlikheid van slegs *tydelike* verligting inhou, gee so-iets aanleiding tot ernstige dogmatiese en praktiese probleme. Nie alleen kan so 'n proses tydrowend wees en sodoende die element van spoedeisendheid negeer nie, maar die finale bevel van die hof kan ten gunste van die *spoliator* wees – die mandament van spolie word tog verleen as 'n tussentydse maatreël voordat die hof op die meriete van die saak ingaan. Die vraag ontstaan nou wat met die plaasvervangende saak moet gebeur indien die uiteindelike regsvraag ten gunste van die *spoliator* beslis word. Laasgenoemde sou waarskynlik aanspreeklik gehou word vir die koste wat aangegaan is in die verkryging van die plaasvervangende saak, ondanks die feit dat die uiteindelike regsvraag in sy guns beslis is. Hierdie koste om 'n plaasvervangende saak te lewer, kan in bepaalde omstandighede baie hoog wees. Myns insiens is dit onprakties en in beginsel onaanvaarbaar dat 'n *spoliator* tot optrede beveel kan word wat sulke verreikende gevolge vir hom kan inhou sonder dat die hof die geleentheid gehad het om die onderliggende regsposisie in oënskou te neem terwyl die voordeel wat hieruit vir die *spoliatus* voortvloei moontlik van bloot tydelike aard kan wees.

Dat soortgelyke oorwegings nie in *Naidoo v Moodley* ter sprake kom nie, behoort duidelik te wees. Volgens die benadering wat Van der Walt as 'n moontlike aanvoer, is die saak waaroor dit hier gaan die elektrisiteit wat aan die *spoliatus* se woonplek gelewer is. Die besitsontneming het dan daaruit bestaan dat hierdie elektrisiteitstoevoer beëindig is. Besitsherstel kon dus bewerkstellig word bloot deur die elektrisiteitstoevoer te herstel. Selfs volgens hierdie benadering is die onmoontlikheid van besitsherstel deur die *spoliator* 'n aspek wat hoegenaamd nie in gedrang was nie en dus glad nie as 'n moontlike verweer ter sprake gekom het nie. Die argument dat besitsherstel onmoontlik geword het omdat die *spoliator* nie "dieselfde elektrisiteit" kon teruggee nie en dat die mandament van spolie desondanks toegestaan is, is onoortuigend. 'n Analoë geval is te vinde in die beslissing in *Sebastian v Malelane Irrigation Board* 1950 2 SA 690 (T). In hierdie saak het die respondent (die besproeiingsraad) die watertoevoer tot die applikante se plase afgesny en daar is aansoek gedoen om die mandament van spolie. Hierdie aansoek is in die hof *a quo* van die hand gewys maar by appèl toegestaan en die respondent is beveel om die watervloei te herstel. Daar kan tog nie met erns geargumenteer word dat besitsherstel in hierdie geval onmoontlik geword het omdat die respondent nie "dieselfde water" kon teruggee nie en dat die mandament van spolie desondanks toegestaan is nie. Besitsherstel kon bewerkstellig word bloot deur die afgesnyde watertoevoer weer te herstel. Presies dieselfde argument geld tog vir die *Naidoo*-geval.

Die probleem met Van der Walt se benadering tot die mandament van spolie lê myns insiens by sy uitgangs-

punt. Hy is naamlik van mening dat die mandament van spolie nie "'n remedie vir die beskerming van besit" is nie, maar wel 'n remedie "om die regsorde teen vredesbreuk te beskerm." Dit lyk asof die kar hier voor die perde gespan word. Is die *ratio* onderliggend aan alle regsreëls dan nie tog "om die regsorde teen vredesbreuk te beskerm" nie? Dit as sodanig bring egter nie mee dat die beginsels onderliggend aan 'n bepaalde regsfiguur oorboord gegooi kan word ten einde die uiteindelike doel daarvan, naamlik die voorkoming van 'n versteuring van die regsorde, te bereik nie. Waarom sou dit dan in die geval van die mandament van spolie aanvaarbaar wees? Dit is tog sekerlik nie 'n geval waarvan gesê kan word dat die doel die middel heilig nie. Die volgende omskrywing plaas die aangeleentheid moontlik in beter perspektief: die mandament van spolie is 'n regsmiddel wat besitsverhoudinge beskerm *ten einde* te verhoed dat die reg in eie hande geneem word en die regsorde sodoende versteur word. Dit impliseer tog dat nog steeds gekyk moet word na die beginsels onderliggend aan die mandament van spolie as regsmiddel.

Myns insiens is daar ook 'n probleem met die benadering van Blecher ("Spoliation and the Demolition of Legal Rights" 1978 *SALJ* 8 e v) na wie Van der Walt as steun verwys. Blecher voer aan dat die hof in die oorweging van 'n spoliasiebevel 'n *wye diskresie* het en faktore soos die volgende in ag kan neem: die aard van die besitsontneming; die omstandighede ("plight") van die persoon wie se besit ontneem is; en die vraag of 'n bevel tot besitsherstel prakties sal wees. Dat die hof wel 'n wye diskresie in die oorweging van 'n aansoek om 'n *interdik* het, kan nie betwyfel word nie. (Sien onder andere *Webster v Mitchell* 1948 1 SA 1186 (W); *Johannesburg Consolidated Investment Co Ltd v Mitchmer Investments (Pty) Ltd* 1971 2 SA 397 (W).) Die mandament van spolie is egter *nie* 'n interdik nie (al is daar ooreenkomste in die *uitwerking* daarvan en sistematiseer sommige skrywers die mandament onder die interdik – sien bv Jones en Buckle *The Civil Practice of the Magistrates' Courts in South Africa* I). Ander oorwegings geld vir die mandament van spolie en dit is duidelik dat die hof geen wye of algemene diskresie het by die oorweging van 'n spoliasie-aansoek nie. Vir die verlening van die mandament van spolie word telkens twee vrae gestel, naamlik:

(a) of die applikant kan bewys dat hy geregtig is op die mandament – dit wil sê dat hy in vreedsame en ongestoorde besit van die saak was en dat die respondent spolie gepleeg het (sien onder andere *Sillo v Naude* 1929 AD 21 26; *Malan v Dippenaar* 1969 2 SA 59 (O) 62; *Yeko v Qana* 1973 4 SA 735 (A) 739; Van der Merwe *Sakereg* 90; Silberberg *The Law of Property* (1 uitg) 86); en

(b) of die respondent een van die erkende verwere teen die mandament kan bewys (sien o a Jones en Buckle I 88–89; Oosthuizen *The Law of Property* 19; Van der Merwe *Sakereg* 91–93; Taitz "Spoliation Proceedings and the 'Grubby-Handed' Possessor" 1981 *SALJ* 36 38–39).

Die mandament van spolie is nie 'n magiese regsmiddel wat maar ingespan kan word in gevalle waar 'n ander remedie nie gerieflik ter hand lê nie. Daar is steeds grense waarbuite dit nie aangewend kan word sonder om die regsbeginsels wat ten grondslag daarvan lê, te verkrag nie.

MJ DE WAAL
Universiteit van Stellenbosch

BOEKE

MEDICAL MALPRACTICE LAW
by DIETER GIESEN

Gieseking-Verlag Bielefeld 1981

Medical law is a rapidly expanding area of the law; yet it is a comparatively new discipline. That makes it necessary and desirable, wherever possible, to draw from the experience of other countries. To a greater extent than in many other areas, comparative studies therefore prove to be of great assistance in finding solutions to new problems and in providing the experience which an individual legal system does not (yet) possess. However, the language barrier often sadly seems to prevent the transfer of ideas. Whereas the Anglo-American legal systems have long been consulted in the sphere of medical law in Germany, the converse does not always apply. Prof Giesen's answer to the difficulty that German is regarded more or less as an inaccessible language in many English-speaking countries is to publish his book on medical malpractice law in two languages: in German as well as in English. This system has obvious disadvantages: one has to buy a thick volume, half of which is a repetition of the other; the German reader does not want the English translation, and the English reader frowns when he has to pay for the German original as well. Thus, in order not to increase the volume of his book further, Giesen has written the footnotes in English only, which, considering the fact that much of the detailed information (and not only references) is to be found in these footnotes, is a somewhat half-hearted compromise solution. It seems to me that a book should rather be written in one language only; if one wants to reach the English-speaking readers, this may, of course, be English; these readers should, on the other hand, take note that for a detailed examination of the sources (especially the decisions of the German courts) a knowledge of German is necessary in any event, and that one cannot – as too often is the case in South Africa as well as in other countries – do truly comparative research by relying on materials in the English language only. Whilst one hopes that a book written in English on German law will stimulate further interest, it might well also have the effect of inducing the English-speaking audience to believe that a knowledge of the Continental languages is dispensable. "No one concerned with research can afford not to have this book

on his desk:" This was the comment of professor Denis Leigh, London, when he had to review what was a precursor to parts of the book presently under review: a study on civil liability of physicians with regard to new methods of treatment and experiments, which appeared in 1976 and which, by the way, is trilingual. What was true in 1976 can even more appropriately be said about the new *Medical Malpractice Law.* One can hardly imagine somebody setting out to do research in medical law who does not consult this work, or rather, use it as the basis and matrix of his endeavours.

Giesen's book is a masterpiece of comparative study. The reader is not confronted with separate chapters on different legal systems, but with a crisp analysis of the relevant legal problem into which the comparative view is truly and fruitfully integrated. The text itself sets out the principles very clearly and does not become entangled in too much detail; the detail is left to the footnotes. The wealth of information contained is enormous; this section of the book covers no fewer than 118 pages in small print; the only unfortunate feature is that the compilation of all the footnotes in a separate section (instead of at the foot of each page) does not make it easy for the reader to appreciate the information contained in the footnotes.

Giesen's analysis of the legal aspects of medical malpractice is well-balanced. It is important to note this specifically, for writers who venture into this area of the law are very often biased and not truly impartial. The dialogue between the legal and the medical profession has proved to be very difficult. Doctors are traditionally often believed to be in a privileged position; because their aim is to help their patients (the *salus aegroti*) they watch the interference of the lawyer (who often insists that other values (especially the *voluntas aegroti*) must also be taken into account and who wants to subject doctors to the same rules as everybody else) with suspicion and distrust. They often claim that the lawyer does not really understand their situation; owing to his lack of experience in their field, he cannot understand their problems properly. These arguments are partially true. To put doctors, who perform an operation, on a par with a cut-throat (which is what the approach of the German Federal Supreme Court boils down to as far as the dogmatics of the law of delict are concerned) is not only objectionable to doctors. However, other legal writers impressed by these arguments seem to serve as little less than a fifth brigade for the medical profession, arguing for special privileges by accepting the "expert opinions" of the doctors without questioning their validity. The course Giesen steers in his book is free from these extremes. One feels that he has a detailed knowledge of the problem he discusses. He rightly emphasises that the courts must guard against an all too ready presumption of negligence when something goes wrong in the operating theatre. An error of judgment does not always constitute negligence in itself. All too often people today develop an "Auspruchsmentalität;" they do not accept the blows of fate as such any longer, but in the words of Fritz Werner, regard "Schicksal als einklagbaren Rechtsverlust" (*Das Problem des Richterstaates* (1960) 23). On the other

hand, Giesen rejects in principle what has become known as therapeutic privilege. Furthermore, he displays a well-founded scepticism as regards medico-technical "progress:" not everything which has become technically possible must *eo ipso* be regarded as morally and legally acceptable; the law does not necessarily have to accommodate these new developments: they have rather to be judged against the existing legal rules. Thus, for example, Giesen takes a strict line as far as liability for research experiments is concerned. Here, one not infrequently finds the most surprising insensitivity towards fundamental and obvious moral considerations. A judge of the Hamburg Court of Appeal once drew my attention to the research about viral hepatitis carried out by Saul Krugman *et al* on disabled children. A detailed account of these experiments may be found in the 1967 *Journal of the American Medical Association* 365 *et seq* and 1970 1019 *et seq.* Krugman, a professor of paediatrics was not charged in court; on the contrary, the German Robert Koch Foundation awarded him the Robert Koch gold medal!

Other areas in which Giesen takes a rather cautious and more conservative line are in the double blind tests for new methods of treatment and experimentation, transsexual surgery (Giesen criticises the interesting decision of the German Federal Constitutional Court of 1978 (1979 *FamRZ* 25 *et seq*) where the refusal by the German Federal Supreme Court to allow an application to change the sex entry in the state-kept official birth register from male to female was regarded as unconstitutional) and heterologous insemination. Artificial insemination by donor seems to be practised in many countries around the world, and the courts are increasingly becoming involved (cf eg a decision by the BGH, dated 7th April 1983, which will be published in the Law Reports in due course). The moral implications are far-reaching and not yet fully understood. Giesen, for instance, raises the question whether it would be malpractice if the physician were negligent in choosing the sperm of a donor of greatly different racial origin from that of the husband. His answer is in the affirmative. But can difference in race in this sense be evaluated as mistake or perhaps damage in law? Another disturbing point is that the Council of Europe in its *Draft Recommendation on Artificial Insemination of Human Beings* postulates that the physician shall not administer artificial insemination if the conditions make the preservation of secrecy unlikely. Giesen rightly condemns this recommendation and the proposed principle of secrecy as unconstitutional and illegal in terms of German law.

Giesen divides the main text of his book into three parts. First, he devotes his attention to the civil liability of physicians in general. He discusses contractual and tortious liability and then treatment *contra legem artis* and treatment without the patient's informed consent as the main grounds of the physician's liability. Part 2 deals more specifically with civil liability for new methods of treatment and experimentation. The disposition and selection of topics is sometimes slightly questionable. When Giesen deals with organ and tissue transplants, one would, for example, also have liked him to say something about the dissection

of corpses – an equally problematical topic. Part 3 consists of a treatment of selected problems of expert opinion, education and further professional training and trust in reciprocity between the medical and legal professions.

The range of topics is impressive. Giesen discusses the new no-fault compensation schemes in New Zealand and Sweden as well as the recommendation of the Pearson Commission in England. Criticism can be levelled only against the details. The remarks about the treatment of a suicide (182) seem to be too casual. Whilst I would agree that the wishes of a suicide (often) have to be disregarded, I do not think that that is so because they cannot be approved morally. Nor do I share Giesen's dislike (248) for the so-called "Widerspruchslösung" with regard to transplantations from deceased persons (the presumption that the deceased did not object to the removal of transplantation material from his dead body, unless he had, during his lifetime, explicitly expressed himself about the matter). In my view, the "Einwillingungslösung" (organ removal only, where a clear and probable consent was (or is) given by the deceased or his nearest relatives), goes too far in the protection of a somewhat irrational *post mortem* personality right.

Finally, the 15 appendices are extremely valuable: they make the basic tools for any research in this area of the law easily accessible. *Inter alia*, Giesen includes the legal text relevant to the discussion of medical malpractice law, professional regulations and the declarations of Helsinki and Tokyo and gives a survey of statutory provisions and legislative activities with regard to the transplantation of human organs and tissue.

R ZIMMERMAN
University of Cape Town

CONSTITUTIONAL CHANGE IN SOUTH AFRICA THE NEXT FIVE YEARS

Ed B DEAN and D VAN ZYL SMIT

Juta & Co Ltd Cape Town/Johannesburg 1983: v and 125 p

Price R9,25 + GST (paperback)

This booklet consists of five contributions, four of which are papers read to an audience of students of constitutional law in Cape Town in September 1982. Inevitably, since the appearance of the Draft Constitution of the Republic of South Africa, some of the material has become dated, but much of it remains as relevant as it was a year ago.

The first contribution, by Du Toit, is entitled "Political Factors Likely to Influence Constitutional Change." This has been written in a straight-forward

style and should be of interest to anyone who is concerned with the political situation and not only to the professional political scientist. Among the external political factors discussed is the possibility of an internationally recognised settlement in South West Africa/Namibia. Internal factors include the political stability within the country, the role and strategy of the (Coloured) Labour Party, the role of right-wing (White) parties and the role of the liberal white opposition. Finally, although the proposed "new deal" will not affect the constitutional position of Blacks, the attitudes and strategies of Black political leaders will obviously be of crucial importance during the next five years.

The author's analysis of the options and dilemmas of the various political parties is particularly illuminating, as is his prognosis as regards the longer term trends and patterns in South African constitutional development.

Although none of the contributors can be said to hail the new proposals as a panacea for South Africa's ills, the contribution of Simpkins, on "Economic Factors and Constitutional Change" is possibly the most pessimistic of all. The author quotes at some length from De Tocqueville's *L'Ancien Regime* and it must be conceded that the parallels he draws between conditions in pre-Revolutionary France and present-day South Africa appear to have an alarming validity. It certainly cannot be denied that economic factors are as important in political development as are purely political, social and psychological issues.

The psychological factors are dealt with by Foster. Unfortunately much of this chapter is couched in the kind of psychological jargon which is all but intelligible to the uninitiated. There seems to be no reason why the psychological issues involved in the current debate on constitutional change cannot be stated clearly, in non-technical language, without detracting from the professional nature of the publication. Furthermore, the author is on occasion guilty of very unprofessional lapses into highly emotive language, which certainly detracts from his credibility as an objective analyst.

Be that as it may, some of the psychological factors which will influence the present constitutional crisis are dealt with, and these are certainly of interest to all concerned. The neo-positivistic approach in which the constitutional proposals occupy a prominent position, is dealt with first, with emphasis on concepts such as persuasive communication which is influenced by source factors (notably credibility, attractiveness and power), the message factor, channel factors, receiver factors and destination factors, and inter-group relations, which in turn depend on perceived status, secure social identity and views of the legitimacy of the existing social order. The critical theory approach is, however, preferred by the author as less superficial. Here the emphasis is not so much on the actual proposals as such as on the psychological and social processes influencing the change away from general power inequality.

The fourth chapter, written by Boulle, which deals with the likely direction of constitutional change in

South Africa, is perhaps the most important one from the point of view of the constitutional lawyer. In fact, anyone who is concerned with South Africa's constitutional future should take cognisance of what is said in this contribution. The question of the legitimacy of any constitution is so crucial that one cannot but regard it as the first and most important issue to be resolved. The constitutional response to the legitimacy issue both influences and is influenced by the proposed parameters of constitutional reform. It is significant that this process of change will not involve the consensus of all concerned, but is restricted to what the author refers to as "consultation among selected political élites on an agenda prepared by the government" (61); that the government (understandably!) intends to retain the initiative in the process of constitutional change; and that it is intended that the process of constitutional adaptation will take place gradually in a piecemeal fashion. No brand-new, complete constitution "out of the box" is being planned for South Africa. No major deviation from the existing separatist policy seems to be planned as far as Blacks are concerned, although some modifications may have to be made in the social and economic (if not constitutional) spheres. In the constitutional and administrative spheres a certain degree of decentralisation is probably inevitable.

As the author himself admits, it is no easy matter to predict how the proposed "segmental autonomy" of Whites, Coloureds and Indians is going to work, whether "consociational democracy" will materialise or remain merely a pipe-dream, how the issues of nationality and citizenship will influence the process, to what extent the Westminister system will survive in spite of all the state intentions to replace it with a more "relevant" system, and, finally, what the role of the judiciary will be under a new dispensation.

The author concludes by posing a number of questions relating to the effect which participation by Coloureds and Indians may have in the sphere of political realities. These represent what are perhaps the most immediate issues confronting the government.

The final chapter, written by Dean, is a résumé of the main features of the 1982 constitutional proposals. Since 1983 has seen the manifestation of these proposals in the form of a constitution which has already been through parliament and has been put to the White electorate in a referendum, this chapter is, to a certain extent, dated. However, the issues raised by the author have by no means been resolved in the new constitution so that the criticism remains as valid as it was in January 1983 when the chapter was written.

To sum up: this booklet contains a good deal which is of interest to the South African citizen. In fact, it is the layman rather than the constitutional laywer who will derive the most benefit from a study of these views. As a "thinking man's guide to the referendum" it may be said to have a negative rather than a positive stance towards the proposed reforms, but this perhaps is what is needed in view of the government's virtual monopoly of the public media. What the authors have done is to warn the reader not to expect

the new constitution to resolve the constitutional issues facing South Africa instantly and painlessly.

Finally, a rather technical criticism: even if this booklet had to be printed and published in a hurry, surely it could have been a little more meticulously edited and proof-read?

GRETCHEN CARPENTER
University of South Africa

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Inskrywings op die blad moet gerig word aan die uitgewer: Butterworth, posbus 792, Durban 4000.

'n Regsorde sonder norme?

('n Verkenning van normrelativerende tendense in enkele irrasionalistiese teorieë oor die reg)

Lourens M du Plessis
BJur et Comm BPhil LLD
Professor in die Regsfilosofie aan die Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SUMMARY

A System of Law without Norms?

This article investigates and seeks to explain the reasons for the phenomenon of norm relativism in twentieth century, irrationalistic legal thought. Four examples of this norm relativism are at first examined. The phenomenon is then explained as a philosophical off-shoot of irrationalism which represents a reaction to the supremacy of human reason in rationalistic thought. It is argued that the irrationalistic philosophers of the twentieth century are seeking a new context in which man as a totally free being can rediscover himself. This leads to a rejection of the notion of a rationally created world (-order). In the concluding judgment of irrationalistic norm relativism four theses are advanced and explained: (a) irrationalistic legal thought is mainly a reaction to legal positivism; (b) this reaction is by no means "complete," since the reaction itself leads to a new kind of legal positivism; (c) the phenomenon of norm relativism does, however, provide useful food for thought in as far as traditional views of legal science and the "practical" application of the law as well as (d) the theory-practice relationship in legal training are concerned.

1 INLEIDING

'n Mens sou verwag dat elke omskrywing van die reg 'n verwysing na sy normatiewe – dit is sy reël- of wetmatige – geaardheid sal bevat. Wat jou "normaalweg" immers met die eerste oogopslag van die reg opval, is sy algemeen voorskriftelike of, om dit milder te stel, reëlende aard. In die spreektaal word die reg daarom dikwels gewoon "die wet" genoem.

Regsgeleerdes – ten minste diegene wat in min of meer die tradisionele Westerse regskultuur "opgevoed" is – hou 'n besondere siening op die reël- of normaard van die reg na. Die regsnorm beskik oor die kenmerk van 'n verlede-, hede- en toekomsomspannende kontinue geldingsgesag wat 'n groot verskeidenheid voorsienbare (en selfs onvoorsiene) konkrete situasies reëlend dek. Gevolglik vergemaklik die juridiese normbenadering die regsgeleerde se begripsmatige greep op die konkrete regswerklikheid deur onder meer (a) juridies relevante gebeurtenisse in abstrakte normtaal te transponeer, (b) die norme self

sistematies te klassifiseer en (c) dikwels – eweneens vir sisteemdoeleindes – aan grondliggender beginsels of grondnorme te koppel. Die juris is 'n rasionele liefhebber van orde, word geglo, en hierdie orde (ook in sy denke) word alleen deur 'n juridies normatiewe benadering tot die vloeibaarhede van die konkrete – die "gebeurende" – regswerklikheid moontlik gemaak.

> "Recht," beweer Adorno[1] daarenteen,
>
> "ist das Urphänomen irrationaler Rationalität. In ihm wird das formale Aquivalenzprinzip zur Norm, alle schlägt es über denselben Leisten."

Adorno verwys na die hierbo beskrewe, tradisionele, normgekonsipieerde opvatting oor die reg wat, as 'n eiesoortige "tweede werklikheid" (van definisies en begrippe), die "werklike werklikheid" (van mense) negeer, verskille tussen mense nivilleer (en bygevolg ongelykheid heimlik rugsteun) en as 'n maatskaplik kontrolerende ideologiese omheining die menslike bewussyn verdinglik of objektiveer. Adorno se oordeel is ongenadig kras. 'n Ligpunt in die Westerse regstradisie bemerk hy alleen in Aristoteles[2] se ponering van die billikheidsprinsipe as korrektief op die algemeen abstrakte aanwendingswydte van die regsnorm in die individuele geval. Hierdie insig strek, aldus Adorno,[3] Aristoteles tot onverganklike eer.

Adorno se aanval is wesenlik op die normatiewe hart van die reg – soos tradisioneel verstaan – gemik. Is so 'n aanval egter moontlik sonder om die reg as reg, die reg na sy eie wesensaard, ingrypend aan te tas? Die antwoord op hierdie vraag moet voorlopig voorbehou word. Juridiese normrelativering en -nivillering is 'n eg twintigste eeuse verskynsel. Enkele voorbeelde daarvan moet eers ondersoek en die redes daarvoor eers blootgelê word alvorens 'n betroubare oordeel daaroor gevel kan word. Daarom vervolgens enkele voorbeelde van normrelativering in die twintigste eeuse denke oor die reg.

2 DIE REG AS MERKTEKEN VAN TOTALE *VERWALTUNG*: DIE NEO-MARXISME

In die ry van voorbeelde wat ek wil noem, kon ek net so wel met die Neo-Marxiste geëindig het, omdat hulle opvattings 'n geradikaliseerde eindpunt in 'n bepaalde ontwikkelingsgang verteenwoordig. Aangesien hulle hul egter heel eksplisiet oor die samelewingsfilosofiese redes vir hulle juridiese normrelativering uitlaat, begin ek met hulle sienings en steek vandaar na die prinsipiële regverdiging daarvoor in vroeëre[4] filosofiese strominge deur.

> "As long as world history follows its logical cause, it fails to fulfil its human destiny."[5]

Wat bedoel Max Horkheimer, stigter van die *Frankfurter Schule*, met hierdie tegelyk aangrypende en siniese sleutelstelling oor die geskiedenis? 'n Bepaalde

1 *Negative Dialektik* (1966) 302.
2 *Ethika Nikomacheia* 1137b.
3 aw 303.
4 vroeër dan ten minste in 'n chronologiese sin.
5 Horkheimer *The Authoritarian State* in Arato en Gebhardt (reds) *The Essential Frankfurt School Reader* (1978) 117.

regsteoreties relevante faset van sy bedoeling word duideliker wanneer hy die verhoor van die omstrede Duitse oorlogsmisdadiger, Adolf Eichmann, in die vroeë sestigerjare beoordeel.[6] Eichmann wat ná die Tweede Wêreldoorlog as banneling in Argentinië gewoon het, word daar in hegtenis geneem en na Israel gebring om vir sy vergrype teen die Jode tydens die oorlog verhoor te word.

Horkheimer – self 'n vervolgde Duitse Jood – opper twee formele besware teen hierdie optrede:

a Eichmann het geen misdaad in Israel self gepleeg nie.

b Gegewe die allerdoel en -funksie van straf as 'n afskrikmiddel, is dit, aldus Horkheimer, louter waansin om te beweer dat enigiemand in Israel van optrede soos dié van Eichmann afgeskrik hoef te word.

Horkheimer se substansiële beswaar teen die Eichmann-verhoor is nog veelseggender: Die weg van die reg staan magteloos voor die (logiese) weg van die geskiedenis; die reg kan nie die gruweldade van èn 'n Eichmann èn 'n Derde Ryk ongedaan maak nie. Vervolging en massamoord is onvermydelike grondtemas van die wêreldgeskiedenis.

Die filosofiese denktema wat aan hierdie redenasie van Horkheimer ten grondslag lê, noem hy en Adorno die *Dialektik der Aufklärung*.[7] Die *Aufklärung* was veronderstel om die mens te bevry deur van hom heerser oor die natuur te maak.[8] Die mens se natuurbeheersing het egter verloop en gaandeweg mensbeheersing gaan insluit.[9] Verligting het verblinding geword. Beheersing *deur* die mens word bygevolg beheersing *van* die mens in 'n *verwaltete Welt*. Waardes verloor hulle betekenis. Manipulasie van en beheer oor die mens word die alleroogmerk van die gevestigde orde – in dié mate selfs dat Horkheimer later sou beweer dat die mens se enigste hoop op 'n beter toekoms in 'n *Sehnsucht nach dem ganz Anderen* geleë is.[10]

In hierdie lig moet Adorno se siening van die reg as die oerverskynsel van onredelike redelikheid (waarna in die vorige paragraaf verwys is) eweneens begryp word. Deur alle mense oor dieselfde kam te skeer, is die reg, *gegewe sy normatiewe aard*, 'n maatskaplike kontrolemiddel by uitnemendheid: 'n merkteken van die voleindigde *Verwaltung* in 'n *verwaltete Welt*.[11]

Hierdie Neo-Marxistiese kritiek op die reg as 'n sosiale beheer- en kontrolemiddel is nie alleen daarop gemik om regsnorme na hulle geldingsaard te devalueer of te relativeer nie. Dit wil regsnorme geheel en al nivilleer of uitwis – dit is te sê indien daar enigsins aan die manipulasie van 'n gekontroleerde mens in 'n *verwaltete Welt* 'n einde te maak is. 'n Eeu of so vantevore het Karl Marx

6 Horkheimer *Zur Kritik der instrumentellen Vernunft* (1974) 317–320.
7 Horkheimer en Adorno het dan ook 'n boek met dieselfde titel gepubliseer. Klapwijk ondersoek hierdie tema krities in sy *Dialektiek der Verlichting* (1976).
8 Klapwijk aw 2–3; Rohrmoser *Das Elend der kritischen Theorie* (1970) 26.
9 Horkheimer *Instrumentellen Vernunft* 94.
10 Sien bv Horkheimer *Die Sehnsucht nach dem ganz Anderen* (1970).
11 Adorno *Negative Dialektik* 302–303.

en Friedrich Engels reeds na die staat en reg verwys as middele wat die bourgeoisie gebruik om 'n wêreld na hulle beeld en gelykenis te skep[12] ten einde die proletariaat te onderdruk.[13] Reg en staat het egter steeds 'n interim-funksie as sosiaal superstrukturele deurgange na die nuwe (utopiese) samelewing te vervul: die normatiwiteit van die reg bly voorlopig intakt. Horkheimer en Adorno (a) radikaliseer en (b) universaliseer hierdie ortodoks Marxistiese grondgedagte deur (a) alle sosiale ordening *per se* as onderdrukkende manipulasie te brandmerk en (b) onderdrukking in 'n veel wyer spektrum samelewingsituasies as bloot dié rondom die klassestryd te identifiseer. Veral die radikalisering van die onderdrukkingstema word deur die juridiese normrelativisme van die twintigste eeuse irrasionalisme moontlik gemaak. Hiervan vervolgens drie verdere voorbeelde.

3 WORD HARD EN REGEER ... SONDER NORME: FRIEDRICH WILHELM NIETZSCHE EN DIE LEWENSFILOSOFIE

Juridiese normrelativisme hoef nie tot "chaos" te lei nie. Die Neo-Marxiste is anti-norm-denkers omdat hulle anti-sosiale kontrole denkers is. Nietzsche, daarenteen, is 'n anti-norm-denker omdat hy – op 'n heel besondere wyse – prokontrole is. Kontrole van die een mens oor die ander is vir hom 'n lewenswet. Lewe vergestalt homself in meerderwaardige (sterk) en minderwaardige (swak) vorme. En die meerderwaardige, die sterkere, moet normongebonde kan heers. "Word hard!" is die nuwe tafel van die wet, want "[g]anz hart ist allein das Edelste."[14] Die harde mens is die edele *Uebermensch.* Hy is die heerser wat, volgens die gangbare moraal (insluitend die "kuddemoraal" van die Christendom), van nature 'n onlogiese en daarom onregverdige wese is.[15] Daar is geen rasionele orde waaraan objektiewe norme vir reg en geregtigheid kan ontspring nie:

> "[W]ir haben Alle kein herkömmliches rechtsgefühl mehr, deshalb müssen wir uns *Willkürsrechte* gefallen lassen, die der Ausdruk der Notwendigkeit sind, dass es ein Recht geben müsse."[16]

Die willekeur van die sterkere is die plaasvervanger vir tradisionele normatiwiteit. Vir 'n objektiewe normatiwiteit van die reg bestaan daar tewens geen grond meer nie, omdat geregtigheid slegs as 'n (subjektiewe) ooreenkoms *inter pares* kan bestaan.[17] Vir die sterkere om *regte* te hê, beteken dat *hy* besluit wat *andere aan hom* verskuldig is. Vir die sterkere om *verpligtinge* te hê, beteken dat *hy* besluit wat *hy aan homself* verskuldig is.[18] Regsbelange word dus nie deur 'n objektiewe orde van regsnorme nie maar deur die *de facto* maghebber se subjektiewe wil tot mag "gereguleer" en "geharmonieer."

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12 Marx en Engels *Manifesto of the Communist Party* in Feuer (red) *Karl Marx and Friedrich Engels: Basic Writings on Politics and Philosophy* 11.
13 aw 29.
14 Nietzsche *Gesammelte Werke XIII* 273.
15 *Werke VIII* 47.
16 *Werke VIII* 323–324.
17 *Werke IX* 470–471 en XIX 370.
18 *Werke XI* 220.

Nietzsche se normontkennende denke het dus nie noodwendig 'n demontering van sosiale strukture tot oogmerk nie. Dit bepleit 'n wesenlik normlose orde – *konkretes Ordnungsdenke* soos die nasionaal-sosialiste dit drie dekades later sou noem (en implementeer). In die volks- of *Führer*staat word regsreëlings naamlik "in belang van die gemeenskap" volgens subjektiewe waardebepalings oor wie in die gemeenskap meerderwaardig, edele en wie in die gemeenskap minderwaardig, onedele vorme van menslike lewe is – op basis van die sterkere se wil tot selfhandhawing – getref.[19] *Lebensunwerten Lebens* kan dus met 'n rein magsgewete vernietig word. Geïnstitusionaliseerde rassediskriminasie is 'n onvermydelike noodwendigheid solank die wil tot selfbehoud en selfhandhawing van die meesterras moet bly seëvier.

4 DIE "BAD MAN" WEET HOE: OLIVER WENDELL HOLMES EN DIE REALISME

Hoe vind 'n mens die reg? Hierop is Holmes se antwoord: deur voorspelling. Die reg is baie soos die weer. Jy weet nie presies hoe dit in 'n bepaalde toekomstige situasie daar gaan uitsien nie, hoewel jy op grond van sekere gegewens tot jou beskikking 'n redelik betroubare raaiskoot kan waag. Die betroubaarheid van jou raaiskoot berus egter nie op die kontinue normatiwiteit van die reg self nie, maar op die mate waarin jy in die hede die onvoorsiene elemente in 'n toekomstige judisiële beslissingsituasie akkuraat kan voorsien. Die werklike kenner van die reg is dus nie hy wat oor 'n groot hoeveelheid abstrak-teoretiese kennis van die werking en reikwydte van regsnorme beskik nie, maar hy wat 'n konkreet-eksistensiële belang daarby het om so akkuraat moontlik te probeer vasstel "what the Massachusetts or English Courts are likely to do in fact," met ander woorde die "*bad man.*"[20] Hierdie insig van Holmes maak 'n definisie van die reg sonder enige (tradisionele) verwysing na die normaard daarvan moontlik:

> "The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law."[21]

Op dieselfde lees is ook Jerome Frank se enigermate genuanseerder definisie van die reg geskoei:

> "Law, then, as to any given situation is either (a) actual law, *i e*, a specific past decision, as to that situation, or (b) probable law, *i e* a guess as to a specific future decision."[22]

Aan albei hierdie definisies lê twee aannames ten grondslag:

a Regsnorme is nie *ruim* genoeg om via deduksies of afleidings die besondere behoeftes van elke eiesoortige konkrete situasie te akkommodeer nie. Die situasie waarin die norm – soos tradisioneel gesê – toegepas word, word in feite self die norm. Die "nuwe norm" is kontingent: hy verskil van geval tot geval, van tyd tot tyd en van plek tot plek. En al wat vasstaan, is dat die norm sal verskil.

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19 Friedman *Legal Theory* (1953) 275–276; Thoss *Das subjektive Recht in der gliedschaftlichen Bindung* (1968) 40–43.
20 Holmes *The Path of Law* in Marke (red) *The Holmes Reader* (1964) 43.
21 tap.
22 Frank *Law and the Modern Mind* (1970) 50–51.

b Die regsnorm – as 'n mens nog van soiets sou kon praat – beskik nie oor enige *in abstracto*- blywende geldingskrag los van of naas en benewens die eenmalige konkrete situasie waarin dit toegepas word nie. Regsnorme is met ander woorde geen vergestalting van 'n soort universele "redelike sedelikheid" (of "rasionele moraliteit") nie. Die sedelikheid of moraliteit van die regsnorm word gekelder deur die feit dat die tradisioneel immorele *bad man* tot gesaghebbende regskenner by uitnemendheid verhef kan word. Die redelikheid of rasionaliteit van die regsnorm sneuwel voor die aanslae van 'n wesenlik a-rasionele, konkrete werklikheid. Selfs 'n "goeie filosofie" kan die algemeen geldige, redelike sedelikheid van die regsnorm nie red nie:

> "Philosophy does not furnish motives, but it shows men that they are not fools for doing what they already want to do. It opens ... the cords of a harmony that breathes from the unknown."[23]

Die denkdekor vir Holmes en die meeste ander realiste se regsopvattings is die pragmatisme – die "praktyksfilosofie" wat beweer dat "[o]ur idea of anything ... our idea of its sensible effects" is.[24]

5 DIE EKSISTENSIE BEPAAL DIE ESSENSIE: GEORG COHN EN DIE EKSISTENSIALISME

Daar bestaan besliste parallelle tussen Cohn se juridies eksistensiële en die realiste se juridies pragmatiese verklarings vir die oorsprong(e) van die normonafhanklike, kontingente geldingskrag van die reg. In albei gevalle is die onherhaalbare, konkrete situasie as verskyningsvorm van 'n *lebendige Wirklichkeit* (wat nie met behulp van objektiewe norme of abstrak-universele begrippe verstaan en bemeester kan word nie) èn die vertrek- èn die eindpunt van elke argument oor regsgelding.[25] Die reg self is tewens *lebendige Wirklichkeit.*

Die eksistensie-filosofie plaas egter – in teenstelling met die realiste se praktiese werkbaarheidshipotese – die grootste klem op (a) die voorrang wat die eksistensie (die konkrete bestaan) bo die essensie (die wesenlik blywende) geniet en daarby (b) die hipervrye mens se vermoë om self in die situasie keuses te kan maak: elke gebeurtenis, selfs (en veral) as dit nadelig is, is 'n skepping van die tot vryheid veroordeelde mens[26] se onvoorwaardelike wil, 'n gawe aan homself waartoe hyself besluit het.[27]

Cohn se goed beredeneerde uiteensetting oor die reg is egter nie op 'n geradikaliseerde weergawe van die twee voormelde grondaannames gebaseer nie. Tog is albei hierdie temas in 'n regswetenskaplik getemperde vorm by hom terug te vind.

Om met (a) (eksistensieprioriteit) te begin. Die kernpunt van Cohn se betoog kom op 'n hewige verset teen alle vorme van *Begriffsjurisprudenz* neer. Norme

23 *The Holmes Reader* 84.
24 Peirce *Collected Papers V and VI* (1965) 258.
25 Cohn *Existenzialismus und Rechtswissenschaft* (1955) 13.
26 Sartre *Het Existentialisme is een Humanisme* (1952) 24 se terminologie.
27 Sartre *De Heilige Genet, Martelaar en Komediant* (1962) 8.

en begrippe word deur hom gelykgestel juis in hulle onvermoë om tot die wese van die *lebendige* regswerklikheid deur te tas: die begrip of norm kan die eie-aardigheid van die reg slegs by benadering en in ieder geval hoogs onvolledig weergee,[28] want begrippe/norme is abstraksies, die konkrete situasie is realiteit.[29] Regsgesag – "dasjenige was eine Handlung zu einer . . . juristisch berechtigten macht" – is alleen in die reële gegewenheid van die konkrete situasie geleë, en in die konkrete situasie vervul die abstrakte norm 'n heel ondergeskikte gesagsfunksie.[30] Kortom, die eksistensie van die juridies relevante konkrete situasie (die lewendige regswerklikheid) bepaal die essensie van regsgesag. En hoewel Cohn nie die bestaan van regsnorme geheel en al loën nie, is die regsnorm in sy essensiële abstraktheid geen primêre bepaler van regsgelding nie.

Wat (b) hierbo (die mens se keusevryheid) betref, maak Cohn aanvanklik die stelling dat elke morele keuse 'n volkome vrye keuse – óók vry van norm- en begripsgebondenheid – is.[31] Om geregtigheid teenoor almal te bewys, sou dus juis beteken dat almal nie ooreenkomstig die reëlmaat van dieselfde norme behandel durf word nie, want onreg kan heel gemaklik onder die abstrakte vaagheid van "goeie" algemene norme skuilhou.[32]

Uit hierdie beskouing vloei belangrike implikasies vir Cohn se konsepsie van die regspraak voort.[33] 'n Hofsitting behoort, volgens hom, die vorm van 'n simposium aan te neem. Aan die simposium moet alle belanghebbendes, soveel moontlik deskundiges asook "die gemeenskap" deelneem. "Gemeenskap" beteken 'n verteenwoordigende deursnit van die gemeenskap, soos in die geval van 'n meningsopname. Met regbanke aldus beman, is dit nie juridies-tegniese normkennis nie maar 'n ervaringsreservoir van konkrete situasiebelewing wat die deurslaggewende sê in die gee van hofuitsprake het.

6 DIE FILOSOFIESE VERKLARING VIR DIE VOORGAANDE VOORBEELDE VAN NORMRELATIVERING: DIE IRRASIONALISME

Die uitstaande kenmerk van die leidende twintigste eeuse filosofieë word deur Sciacca[34] as 'n "supremacy of the 'practical' over the 'theoretical'; of the will over the intellect and of 'life' over 'reason' . . ." beskryf. Dit is *irrasionalisme* in 'n neutedop. Irrasionalisme is geen verwarde of onlogiese denke en dit behels ook nie 'n volkome verdringing van die rede deur die gevoel nie.[35] Dit is egter 'n bewuste verset teen die aansprake van die rasionalisme – vir vier eeue lank die heersende denkstroming op die Westerse toneel – wat pretendeer dat die *redelike* mens, omdat hy redelik is, die ganse werklikheid met sy redelike vermoëns kan deurgrond en beheers. In teorie klop alles – maak alles sin – as 'n

28 Cohn *Existenzialismus* 13.
29 aw 24.
30 aw 36.
31 aw 12.
32 aw 137.
33 aw 141–143.
34 *Philosophical Trends in the Contemporary World* (1964) 1.
35 Gardiner *Irrationalism* in Edwards (red) *The Encyclopedia of Philosophy IV* (1967) 214.

mens voorgee dat jy die werklikheid volkome met jou rede verklaar (het). Die irrasionaliste sien egter in dat die werklike werklikheid die redelike werklikheid dikwels loënstraf: die praktyk weerspreek die teorie, juis omdat die teorie as logiese abstraksie (hoe afgerond en deeglik verantwoord dit ook al mag wees) nie tot al die roerselle van wat "prakties gebeur" kan deurdring nie.

Die menslike rede moet dus gedevalueer word, en veral "de apriori's van het verstand" kom fel onder skoot.[36] Die aprioriteitstema van die rasionalisme is 'n wetenskaplike belydenis van die geloof dat die mens die maatstaf vir alle dinge is. Die apriori's is vir die rasionalis daardie redelike vermoëns van die mens wat hom – as outonome (selfwetgewende) wese – in staat stel om die hele werklikheid èn suiwer wetenskaplik wetmatig èn eties normatief te orden.[37] Die "vermoëndheid" van die apriori's bestaan *afgesien* van die menslike ervaring. Die mens hoef dus nie eers die werklikheid in feite of "prakties" te ervaar en te beleef ten einde dit te kan beheers nie.

Hierdie verhewe redelikheid van die rasionaliste se outonome mens word grondig deur die irrasionaliste bevraagteken, maar sy outonomie word ewe grondig geradikaliseer. Om met die element van bevraagtekening te begin: Rasionalistiese, aprioriese redelikheid gee voor dat dit die ware werklikheid ontdek deur dit in terme van begrippe en oordele te skep. Hierdie werklikheid is egter – en dít sien die irrasionaliste myns insiens tereg in – nie die ware of "lewendige" werklikheid in sy konkrete volheid nie. Vir die irrasionalis gaan dit immers nie bloot om abstrakte waarhede wat objektief geld nie. Hy sug na *waaragtig*heid – na waarheid gekoppel aan tyd en aan persoon.[38]

"Objektiewe waarhede" moet dus vanuit die staanspoor ontologies, kenteoreties en ook eties gerelativeer word,[39] sodat die vrye mens homself weer in sy deur die rede vervreemde omgewing kan herontdek. Daarmee word meteen by die radikalisering van die outonomie of, liewer, die skeppende ongebondenheid van 'n hipervrye mens aangeland. Vir die hierbo gemelde herontdekkingspoging word 'n rasioneel ondeurgrondbare faset van die "lewendige werklikheid" as herontdekkingskonteks gekies:

– die grootsheid van bruisende en wordende menslike lewe wat op die verwesenliking van 'n allerlewe, in die oppermens beliggaam, afspoed (lewensfilosofie)

of

– die rasioneel onkontroleerbare en onbeskryflike gang en wording van die lewenspraktyk (pragmatisme)

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36 Vollenhoven "Hoofdtrekken der wijsgerige Problematiek in die hedendaagse Mensch-beschouwing" (1964) *Koers* 198.
37 aw 189.
38 Van der Merwe *Grepe uit die kontemporêre Wysbegeerte* in IBC *Die Atoomeeu – "in U Lig"* (1969) 84.
39 Gardiner *Irrationalism* 214–218.

of

– die misterie van 'n (hoofsaaklik uitsiglose) menslike eksistensie (ingeworpenheid) wat die mens daartoe "oproep" om van sy bestaan iets sinvol te probeer maak deur te kies (eksistensialisme).

Dit is 'n oorvereenvoudiging om te beweer dat in die voorgaande filosofiese strominge die lewe en die praktyk en die menslike eksistensie onderskeidelik verabsoluteer word. Want die beginpunt en die eindpunt (indien enige) van die ontdekkingsreis is die wordende – die "homself realiserende" – mens. Hy moet op die lang duur die weelde van geborgenheid in rasionele absolutes ontbeer, ten einde homself juis aan die (rasioneel) ondeurgrondbaarste fasette van sy werklikheid te herontdek. So gesien, is die Neo-Marxistiese filosofie (as 'n mens die geskrifte van die lede van die *Frankfurter Schule* onder hierdie sambreelterm sou kon saamvat) 'n elegie op die hipervrye mens se onvermoë om homself, gegewe sy deur kontrole totaal van hom vervreemde wêreld, te herontdek.

Uit alles wat ek pas gesê het, volg dit as 'n vanselfsprekendheid dat die ontkenning en aftakeling van tradisionele norme vir die mens die enigste uitweg uit die doolhowe van 'n gerasionaliseerde werklikheid en samelewing bied, veral vir sover daardie norme boonop nog in essensie hoofsaaklik by rasionele verklaarbaarheid en regverdigbaarheid staan of val. Gegewe die dinamiek en onvoorspelbaarheid van die konkrete ontiese situasie waarmee die mens te kampe het, kan selfs "die gesonde verstand" nie daarin slaag om 'n logiese orde van norme te ontdek (laat staan nog te skep) nie. 'n "Regsorde van norme" is dus net soos 'n soortgelyke morele orde)[40] nie bloot 'n logiese nie, maar 'n reële ('n "feitelik situatiewe") *contradictio in terminis* – 'n merkteken van vreemdheid aan die werklike werklikheid.

7 'N BEOORDELING VAN DIE IRRASIONALISTIESE NORMRELATIVERING

Die verskynsel van juridiese normrelativering is eensdeels vreemd aan die "begrips- en normgeleerde" juris en andersdeels – soos reeds uit die vorige paragraaf blyk – 'n verstaanbare reaksie op sekere denksteriliserende tendense in die rasionalisme – wat juis probeer het om die menslike denke te vergoddelik. Die reaksie self is egter té eensydig en boonop onvolledig omdat rede-devaluasie nie met 'n ewe grondige devaluasie van die outonomie of, liewer, almag van die vrye mens gepaard gaan nie. Tog is uit die reaksie self sekere lesse vir die regswetenskap, regsopleiding en die regspraktyk te trek. Ek wil ten slotte hierdie neutedopbeoordeling van my aan die hand van 'n viertal stellings enigermate gemotiveerder toelig.

a *Die irrasionalistiese regsdenke is veral 'n reaksie teen die regspositivisme van die vorige en ons eie eeu.* Die regspositivisme is wesenlik eensydig deurdat dit, via 'n bepaalde gefikseerde konsepsie van die regsbron, die juridiese vorm van

40 aw 217–218.

regsnorme en -begrippe ten koste van die materiële, "waardebepaalde" inhoud – en bygevolg die regverdigheid daarvan – verabsoluteer.[41] Dit is ooglopend waar ten opsigte van wat Frans Wieacker[42] wetgewende regspositivisme (*Gesetzespositivismus*) of John Dugard[43] "primitive positivism" noem – dié gestalte van die regspositivisme volstaan met die siening dat uit die regsnorm, deur die regsnorm en tot die regsnorm alle reg en geregtigheid bestaan. Dit is in beginsel egter ewe waar van die sogenaamde *wissenschaftliche Positivismus* wat die historiese bronne van die reg formaliseer, alle besondere regterlike uitsprake uit 'n somtotaal van algemene regswetenskaplike begrippe en leerstellings aflei en hierdie afleidings van die invloede van alle sogenaamd nie-streng juridiese gegewenes (godsdiens, natuurreg, lewensbeskouing en ekonomiese en sosiale doelmatighede) probeer suiwer.[44] In die laasgenoemde geval dien die "deurgeordende" norm- en begrippekompleks as 'n analitiese byl wat – onder die dekmantel van kliniese wetenskaplikheid – die regswerklikheid in sy geskakeerde volheid tot 'n selfgenererende, selfakkommoderende en afgetrokke sisteem inkort deur dit van sy konkrete samehang met die volle werklike (of "lewendige") werklikheid los te kap. So word selfs die dinamiese regskultuur 'n bloot *in abstracto* gefikseerde, logies deurwaadbare regsbron terwyl besinning oor lewende regskwessies (soos geregtigheid) in regswetenskaplike onbruik verval.

Vir die tekortkominge van so 'n werklikheidsvreemde reg het die irrasionaliste 'n skerp oog. Nietzsche[45] beweer byvoorbeeld – myns insiens tereg – dat in die Germaanse reg (in teenstelling met die Romeinse reg) die histories vanselfsprekendste oorspronge van die Duitse en Europese reg te vinde is. As gevolg van die premisses waarop wetenskaplike regspositiviste (soos byvoorbeeld die Pandektiste) se regswetenskaplike arbeid berus, word wesenlik "volksvreemde" Romeinse reg egter vanweë sy begripsmatige gesistematiseerdheid, omlyndheid en geordendheid as basis van die eie "volksreg" aanvaar.[46] Histories konkreet beskou, is dít onverklaarbaar, maar sistematies abstrak beskou, onvermydelik.

Cohn[47] wys weer daarop dat 'n regswetenskaplik afgetrokke norm- en begrippesisteem, die "edelheid" van die tradisie waarop dit steun ten spyt, dikwels 'n doeltreffende dekmantel verskaf waaronder die barbaarse brutaliteite van 'n naakte *Zwek- und Machtspositivismus*[48] gemaklik kan skuilhou – soos inderdaad in Nazi-Duitsland gebeur het.

b *Die reaksie in (a) genoem, is egter nie volledig nie,* want hoewel die *denkprodukte* van 'n gewaand outonome mens gerelativeer word, word die *outonomie* van daardie selfde mens ewe grondig geradikaliseer, in so 'n mate dat daar met reg van die opkoms van 'n *irrasionele regspositivisme* gepraat kan word. Die reg

41 Hommes *Hoofdlijnen van de Geschiedenis der Rechtsfilosofie* (1972) 177.
42 *Privatrechtsgeschichte der Neuzeit* (1967) 328 ev.
43 *Human Rights and the South African Legal Order* (1978) xii.
44 aw 431.
45 *Werke VIII* 322.
46 Vgl ook Dias *Jurisprudence* 4e uitg 519–520.
47 *Existenzialismus* 137.
48 Wieacker *Privatrechtsgeschichte* 558 se terminologie.

van die sterkere wat onder "lewensdruk" by Nietzsche tot 'n blindelings aanvaarbare geregtigheidsmaatstaf verhef word, die alte geredelike kniebuiging voor "die dwang van die praktyk" wat in die realistiese regsdenke onvermydelik op waardenihilisme moet uitloop, of Cohn se "probeer-en-tref-" metode van regspraak wat die uitslag van 'n hofgeding van meningsopnames oor die "gemeenskap" se deurlewing van konkrete situasies afhanklik stel, is almal merktekens van hierdie eietydse regspositivisme. Die hipervrye mens verwring die herontdekkingskonteks waarin hy meen hy hom bevind (sien paragraaf 6 hierbo), tot 'n alternatiewe werklikheid waaraan hy homself (die eie Ek) moet ontdek, en daarom vereensydig hy dit tot 'n waarde-geïnverteerde eie wêreldjie waarin iets soos "openbare belang" of "reg en geregtigheid ten behoewe van andere" tot 'n argaïese herinnering aan 'n eens hooggeroemde, tradisionele moraliteit verloop. Horkheimer[49] verwoord hierdie egoïsme van die hipervrye mens – in weliswaar 'n "veredelde" vorm – só:

> "Das vollentwickelte Individuum ist die vollendung einer vollentwickelde Gesellschaft."

In die huidige samelewing, waar die ek-jy-identifikasie tans nie volkome kan wees nie, bestaan daar 'n dialektiese spanning tussen individuele vryheid en sosiale geregtigheid: hoe meer vryheid, hoe minder geregtigheid – en andersom.[50] Die ponering van hierdie spanning getuig myns insiens van die feit dat vryheid en geregtigheid in die denke van Horkheimer as teenoorstaande magsprinsipes met mekaar wedywer. En presies dít is die dilemma in die irrasionalistiese regsdenke: vryheid kan nie institusioneel ordelik geakkommodeer word sonder om die konkrete selfverwerkliking van die "ek" te kelder nie. Juridies normatiewe dwang wat via die kanale van gefikseerde regsbronne vloei, word gevolglik met die dwang van aansprake op individuele (hiper-)vryheid vervang. Hierdie alternatiewe sosiale mag woed net so ongebreideld en net so fel soos die "ordelike magte" van die tradisioneel regspositivistiese normterrorisme, en maak van die twintigste eeuse irrasionalistiese regsdenke – hoe absurd dit ook al mag klink – in sy allergrond 'n normvrye *Zweck- und Machtspositivismus.*

c *Vir die regswetenskap as sodanig en vir regstoepassing is daar belangrike lesse uit die irrasionalistiese begrips- en normrelativering te trek.* Wetenskaplike begrips-, oordeels- en teorievorming bied aan 'n mens geen deurtastende houvas op die konkrete volheid van die regswerklikheid nie. 'n Regswetenskaplike beeld van die regswerklikheid is niks meer nie as 'n abstrakte landkaart van daardie werklikheid.[51] Die begrippe wat 'n mens van die konkrete regswerklikheid kan vorm, is dus nie daardie werklikheid self nie, maar hulpmiddels wat 'n sistematiese oorskouing van die werklike werklikheid moontlik help maak.

Die toepassing van regsnorme in konkrete situasies hoef dus nie noodwendig langs die weë wat 'n begrippesisteem "logieserwys" aan die hand doen te geskied nie: dié sisteem kan (en sal waarskynlik) ontoereikend wees, en wetenskaplike

49 *Sehnsucht* 130.
50 Horkheimer *Verwaltete Welt?* (1970) 22 30.
51 Schuurman *Techniek: Middel of Moloch?* (1977) 100.

regsdenke wat werklikheidsgerig en -getrou wil bly, sal dus altyd (met verwysing na die konkrete situasie) alternatiewe (ten minste) antisipeer.

Begrip vir die beperkte algemeen-geldigheid van die regsnorm moet daarom eweneens tot 'n groter gevoeligheid vir *billikheid* in veral regstoepassing lei. Billikheid beteken dat die toepassing van die regsnorm *altyd* (en nie slegs in uitsonderingsgevalle nie) aan die eie-aardigheid van die konkrete toepassingsituasie georiënteer moet word. Aan die algemene geldingskant van die regsnorm kan 'n mens nouliks ontkom. Dit is nie dieselfde as om te beweer dat die norm in sy "algemeenheid" los van die konkrete situasie geld – só dat die konkreetheid van die situasie in die kleurskyfagtige abstraktheid van die norm hoef op te gaan – nie. Die norm is een faset van die konkrete situasie as "lewendige" werklikheid.

'n Redelik onlangse voorbeeld uit ons regspraak kan toelig wat ek bedoel. In die saak van *V v R*[52] is 'n kind deur kunsmatige bevrugting van die moeder met die saad van iemand anders as haar wettige eggenoot verwek. Die eggenoot het tot die sogenaamde KID toegestem. Die kind word *stante matrimonio* gebore en die vraag is of hy 'n binne-egtelike kind is. Vanuit die konkrete situasie van die kind self en sy ouers beskou, kan die hof oortuigende argumente ten gunste van sy binne-egtelikheid vind. Volgens die normatiewe stand van die reg bestaan daar egter nie genoegsame formele gronde vir sy binne-egtelikheid nie, want die tradisionele gesagsbronne (die ou skrywers en moderne skrywers) het eenvoudig nog nie met so 'n besondere geval gehandel nie. Die gevolg? Onder dwang van die bestaande algemene normsisteem moet die hof "met leedwese" bevind dat hierdie KID-kind buite-egtelik is! Hier is 'n duidelike illustrasie van 'n begrippesisteem wat ontoereikend is – wat die werklikheid van die KID-kind nie akkommodeer nie. Boonop, op grond van 'n heel besondere soort normdruk, kan (of wou) die hof hierdie gebrekkige begrippesisteem nie aanpas of aanvul nie: 'n eenregterhof van 'n provinsiale afdeling, lui die motivering, kan nie 'n bevinding in stryd met so 'n oorwig van bestaande gesag maak nie.[53]

d *Uit wat in (c) hierbo gesê is, moet by regsopleiding die korrelasie teorie-praktyk behoorlik verdiskonteer word – nog 'n belangrike les wat by die irrasionaliste te leer is.* Dit is 'n ander manier van sê dat die regswetenskap ook in die klaskamersituasie werklikheidsgetrou en werklikheidsrelevant beoefen moet word. 'n Werklikheidsrelevante regsopleiding is nie dieselfde as 'n opleiding wat klakkeloos aan die professionele praktyk diensbaar is nie. Die professionele praktyk is maar net nog 'n faset van die konkrete regswerklikheid en dra daarom dikwels ook (selfs meer as die akademie) die verengende oogklappe van eensydigheid. 'n Werklikheidsrelevante regsopleiding wil egter die student van die konkrete volheid van die lewende regswerklikheid bewus maak. Leer ons ons studente werklik meer van daardie werklikheid indien (byvoorbeeld):

– ons hulle oor die formele regsvereistes en -prosedures vir egskeiding inlig sonder om hulle ook op die vernietigende gevolge van egskeiding as 'n sosiale probleem attent te maak;

52 1979 3 SA 1006 (T).
53 1016.

– ons hulle met 'n *in abstracto*-uiteensetting van die eiendomsreg op onroerende goed vermoei sonder om hulle mee te deel dat (en waarom) die oorgrote meerderheid van die Suid-Afrikaanse bevolking in die oorgrote gedeelte van die Republiek nie eienaars van onroerende goed kan wees nie;

– ons hulle vertel dat alle burgers vrye toegang tot die howe en 'n reg op regsverteenwoordiging het sonder om hierdie mededeling met 'n "mits hulle genoeg geld het" te kwalifiseer;

– ons hulle probeer oortuig dat die howe objektiewe en regterlik afsydige beregters van geskille is – edel in elke opsig – en ons gerieflikheidshalwe vergeet dat regters nie vooroordeel- en voorkeurlose robotte is wat dikwels 'n belang by die bestendiging van die *status quo* het nie of, ten slotte;

– ons hulle met historiese argumente probeer oortuig dat die Suid-Afrikaanse reg primêr Romeins-Hollandse reg aangevul deur Engelse reg is en die bestaan van talle tradisionele Afrikaregstelsels in ons midde skromelik oor die hoof sien?

Ek wil herbeklemtoon: regswetenskapsbeoefening as teoretiese aktiwiteit kan nie daartoe kom om die konkrete werklikheid in sy volheid te deurgrond of selfs te gryp nie. Dit mag die regswetenskaplike egter nie verhinder om die wydste moontlike spektrum fasette van daardie werklikheid in sy begripsvisie te probeer kry nie. 'n Belydenis van teoretiese onmag op 'n bepaalde punt is immers nie gelyk aan 'n belydenis van die totale onmag van die wetenskap of van sy waardeloosheid nie.

8 SLOTOPMERKINGS

Met die slotsin van die vorige paragraaf in gedagte wil ek my by die volgende stelling van Holmes[54] aansluit:

> "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."

Hierdie stelling is sekerlik 'n goeie aansporing vir die regswetenskaplike om sy beskeie "plek te ken." Daar is egter ook 'n "certitude" wat die waarheid van hierdie stelling – sekerlik op 'n ander manier as wat Holmes in gedagte gehad het – onderstreep. Ek verwys na die wyse insig van die Prediker (3 11):

> "Alles het Hy mooi gemaak op sy tyd; ook het Hy die eeu in hulle hart gelê sonder dat die mens die werk wat God doen, van begin tot end, kan uitvind."

"Alles" sluit onder meer geboorte en dood, afbreek en opbou, huil en lag, swyg en spreek, liefhê en haat, oorlog en vrede – ja, "elke saak onder die hemel" – in. Met die eeu in sy hart kan die mens hierdie kosmiese gang van sake by benadering oorskou – selfs "'n geskiedenis daaroor skryf." Maar – en dít het die irrasionaliste raakgesien sonder om dit te verstaan – alles, die totale konkrete werklikheid van gebeure, kan nie van begin tot end begryp word nie. Hoekom? Hierin lê die grondoortuiging, die aller- "certitude" van die Christengelowige opgesluit: omdat nie 'n outonome of hipervrye mens nie, maar 'n almagtige God alles mooi of passend gemaak het op *sý* tyd.

54 *The Holmes Reader* 81.

Failure to choose the applicable law

Erwin Spiro
LLB Dr Juris Utriusque LLD (hc)
Advocate of the Supreme Court of South Africa; Kammmergerichtsanwalt

OPSOMMING

Internasionale Kontraktereg:
Gebrek aan 'n Uitdruklike of Stilswyende Regskeuse

Hierdie artikel is 'n regsvergelykende ondersoek, ten opsigte van internasionale kontrakte, na die regsposisie by gebrek aan 'n uitdruklike of stilswyende regskeuse. Die onderwerp word skaars in die Romeins-Hollandse en Suid-Afrikaanse reg behandel. In ooreenstemming met wat die korrekte standpunt van die ou skrywers en die appèlhof in *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AA 171 is, word betoog dat al die faktore hier in ag geneem moet word om aan die regstelsel gevolg te gee wat die nouste verbondenheid vertoon.

1 THE PROBLEM

It is not proposed to deal in this article with the question whether the parties to an international contract, meaning a contract extending over more than one legal unit,[1] are at liberty to stipulate the law applicable to such contract, be it partly or wholly (autonomy of the parties). That autonomy will here be assumed, as indeed the courts of most countries recognise it, although to a varying extent.[2] But what is the position where the parties to an international agreement neglect – for they are in a position to do so[3] – to stipulate the applicable law? It will be readily appreciated that the application of the one or the other law may often be of vital importance, for instance where the contract would be invalid according to the one law, but not according to the other.

It is also not proposed to deal with the case where the parties intended to, but in fact did not, stipulate the applicable law. Here the question may well arise whether the contract was altogether complete although one may heed the warning of Paton[4] that to avoid every contract where precise subjective agreement on every detail cannot be shown, would interfere too greatly with business demands.

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1 Spiro *Conflict of Laws* Cape Town (1973) 148 *ad notam* 1.
2 See, in addition to the leading textbooks, Rabel *The Conflict of Laws* vol II Chicago (1947) 357 *et seq.*
3 Spiro *The General Principles of the Conflict of Laws* Cape Town 1982, 59 *et seq.*
4 *Jurisprudence* Oxford (1946) 293 (*sub* (*a*) (will theory)).

In an early English case of the parties' failure to stipulate the applicable law, it was pointed out by Willes J[5] that the question of the applicable law was (still) within the sphere of the relation established by the contract and could not be decided as between strangers; in such cases it was, according to the judge, necessary to consider by what general law the parties intended that the transaction should be governed or, rather, to what general law it was just to presume that they had submitted themselves in the matter. This English case is of particular importance for South Africa, as it was referred to in one of the first leading South African conflict precedents viz *Stewart v Ryall*,[6] and even earlier, in *Stretton v Union Steam Ship Company*.[7]

Surely it is not so much a logical as rather a positive and constructive solution that must be found which is consistent with Roman-Dutch law and South African case law, and provides for modern exigencies.

2 ROMAN AND ROMAN-DUTCH LAW

2 1 Roman Law

Whether or not[8] certain passages of the *Corpus Juris* reflect the existence of a system of conflict of laws, they do contain principles of a general nature which also fit conflict of laws problems and they have been frequently referred to, mostly with obvious approval, by both the institutional writers and the South African cases, as will emerge from what follows. To ignore them would be tantamount to distorting the history of the development of the South African conflict of laws.

Pride of place falls to *D* 50 17 34 (Ulpian)[9] which is not always quoted in full, reading as follows:

> "Semper in stipulationibus et in ceteris contractibus id sequimur, quod actum est. Aut si non pareat quid actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur. Quid ergo, si neque regionis mos appareat, quia varius fuit? Ad id, quod minimum est, redigenda summa est."

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5 *Lloyd v Guibert* (1865) LR 1 QB 115 (Exchequer chamber).

6 (1887) 5 SC 146, at 155 per De Villiers CJ dealing with Mr Justice Willes's statement that it was generally agreed that the place where the contract was made was *prima facie* that which the parties intended to adopt, or ought to be presumed to have adopted, as the footing upon which they were dealing, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention; as for instance that the contract was to be entirely performed elsewhere. But that statement flowed from the one referred to above.

7 1881 EDC 315, 322 per Barry JP.

8 See Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* Cape Town 1972, 4 *et seq.*

9 See e g Bartolus *Ad Cod* 1 1 1 (*conctos populos*) No 19; J Voet *Ad Pandectas* 1 4(2) 19; 4 1 29; 22 1 6; Van der Keessel *Dictata thes* 44 (translated into Afrikaans by professors of the University of Pretoria vol 1 Amsterdam & Cape Town (1961) 148–149); *Stretton's* case (note 7); *Standard Bank of South Africa, Limited v Efroiken and Newman* 1924 AD 171 186 per De Villiers JA (as to which see further *infra ad notas* 123–126).

I offer the following translation:

> "As regards stipulations or other contracts we always accept what has been agreed upon. But should this not be clear, we have no alternative but to accept what is the custom in the region where the agreement was entered into. What is, however, the position if a custom cannot be established in that region because there are several? The whole [debt] must then be reduced to the minimum."

The last two sentences, to which scarce attention is paid as a rule, should be noted. Ulpian considers the very case where the parties to the contract do not stipulate a term (one must assume that such a failure is no obstacle to the validity of the (main) contract), or at least do not clearly do so, and suggests that recourse must then be had to the customs of the region concerned. This suggestion savours rather of an objective test in that no heed is paid to the (hypothetical) intentions of the parties. Ulpian goes even further. What is the position if there is not only one regional custom? According to him the debt should then be reduced to the minimum or, to use Buckland's words,[10] the obligation should be lessened, but not enlarged, reminding one of modern tendencies in the conflict of laws to protect the person who is either weaker or else a more deserving case.[11]

The emphasis is clearly on the place where the contract has been concluded, which must now be enquired into. Here, too, Roman law contains an often[12] quoted statement of Julian,[13] viz:

> "Contraxisse unus quisque in eo loco intellegitur in quo ut solveret se obligavit"

which I would translate as follows:

> "Parties to a contract are understood to have concluded it in that place where the performance was, according to their undertaking, due."

A complementary passage is *D* 42 5 3 (Gaius):[14]

> "Contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia"

which I translate as follows:

> "At any rate, however, a contract is understood to have been concluded, not in that place where the negotiations took place, but where payment is to be made."

There are, nevertheless, instances where, although the place of the conclusion of the contract differed from the place where payment was to be made, the *lex loci contractus* did matter. For instance, liability for eviction in regard to immovable property depended on the customs of the place where the sale was concluded,[15] and the customs of that place also generally determined the rate of interest,[16] etc. It would, therefore, appear that the (fictional) elevation of the

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10 *A Textbook of Roman Law* 3rd ed Cambridge (1963) 414 note 9.

11 See e g Ehrenzweig-Jayme *Private International Law* vol 3 Leyden (1977) 5 20 22 and 45; Kegel *Internationales Privatrecht* 4th ed Munich (1977) 276.

12 See e g Bartolus (note 9) No 18 (gloss 4); Huber *De conflictu legum* (*Ad Dig* 2 1 3) § 10 *in principio*; J Voet (note 9) 4 1 29; 22 1 6; *Stretton's* case (note 7) 322, 338; *Stewart's* case (note 6) 154; *Ferraz v D'Inhaca* 1904 TH 137 143 per Bristowe J; *Standard Bank* case (note 9) 187.

13 *D* 44 7 21.

14 Referred to in *Stretton's* case (note 7) 338.

15 *D* 21 2 6 (Gaius), referred to by J Voet (note 9) 4 1 29; 22 1 6.

16 *D* 22 1 (Papinian), referred to by J Voet (note 9) 22 1 6.

lex loci solutionis to the *lex loci contractus* was not meant to be of an absolute nature, irrespective of the particular circumstances.

2 2 Bartolus; Molinaeus

a *Bartolus (1314–1357)* According to Bartolus one must ordinarily look to the place where the contract was concluded,[17] but as regards the consequences of negligence and delay occurring after the conclusion of the contract, the customs of a selected place of performance govern, the *lex fori* applying if performance has been fixed at several places alternatively at the option of the plaintiff or at no particular place.[18] Elsewhere[19] this famous post-glossator points out that the intentions of the parties are presumed to have been in accordance with the customs of the place *ubi res agitur*, meaning, it is considered, where the contract has been concluded.

b *Molinaeus (1500–1566)* He was not the originator of the so called autonomy of the parties which he, however, advocates and elaborates upon in the field of the matrimonial property régime.[20] This outstanding French jurist, who is, like Bartolus, often referred to by the Roman-Dutch writers, stresses the merits of each case although he concedes:

> "patet: quia quis censetur potius contrahere in loco in quo debet solvere, quam in loco ubi fortuita transiens contrahit"[21]

which may be translated as follows:

> "clearly, a person will be regarded to have concluded a contract rather in the place where he has to perform than where he contracted as a temporary visitor."

2 3 The Roman-Dutch Writers

a *Burgundus (1586–1649)* Distinguishing not only between obligation and conveyance, the latter being subject to the *lex loci solutionis*,[22] Burgundus distinguishes first of all between form and substance:[23] the form and all it implies is subject to the *lex loci contractus*;[24] the substance depends on the intention of the parties and in the absence of any indication in this regard, the substance will be subject to the customs of the *lex loci contractus*,[25] ignorance of the law being no excuse,[25] although matters inherent in property are governed by the *consuetudo situs* (customs of the *lex rei sitae*).[26] All matters appertaining to

17 (note 9) No 17.
18 *ibid* No 18.
19 *ibid* No 43 *in fine*.
20 Spiro (note 3) 30.
21 Molinaeus *Opera Omnia* vol 3 (1681) 554. See further to the authorities quoted in Spiro (note 3) 30 Gutzwiller *Geschichte des Internationalprivatrechts* Basel and Stuttgart (1977) 74–76.
22 Burgundus *Tractatus Controversiarum ad Consuetudinem Flandriae* IV No 20. See also Gutzwiller (note 21) 126–127.
23 Burgundus (preceding note), No 1.
24 *ibid* No 7, 10 and 29.
25 *ibid* No 8.
26 *ibid* No 8 and 9.

the performance of the obligation (which are defined[27]) are subject to the *lex loci solutionis*,[28] by virtue of the presumption[29] that the *lex loci contractus* is where a person undertakes to make performance. (Story[30] criticises Burgundus because he deals with prescription as a matter of performance.)

b *P Voet (1619–1667)*[31] The *lex loci contractus* applies to the contents of a contract as the parties are presumed to have submitted to it, and that law also governs the formalities.[32] The performance of the obligations, viz *modus* (mode), *mensura* (measure), *negligentia* (negligence) and *mora* ((negligent) delay), is subject to the *lex loci solutionis*;[33] if there is more than one *locus solutionis* one has to look to the law of the place where the claim is being made, provided that the debtor is either found there or has his domicile[34] there.

If the contract is to be performed at some place other than that where it was concluded, then the *locus solutionis* is, by way of a legal fiction, the *locus contractus*.[35]

c *Huber (1636–1694)* Huber,[36] who never quoted P Voet, as in turn P Voet's son J Voet never referred to Huber,[37] left an indelible mark on the development of the conflict of laws, more particularly in respect of the law of contract. However, he did not deal with contracts *in extenso* nor in a systematic manner. In a few instances he did not even go further than to point out that what he said in connection with last wills applied to contracts as well.

In the second volume of his *Praelectiones Juris Civilis*, the first edition of which appeared in 1689, Huber said[38] (my translation):

> "One should, however, not pay too much attention to the place of the conclusion of the contract as it should rather be ignored if the parties to the contract meant another place. As it is said in *D* 44 7 (De O et A) 21:
> 'Parties to a contract are understood to have concluded it in that place where they undertook to perform their obligations.' "

Three years earlier Huber had expressed himself in his *Heedendaegse Rechtsgeleertheyt*[39] as follows (translation by Gane):[40]

> "It is otherwise when (a dying man or) two contracting parties have said expressly what law they wish to be followed, for that law must then be followed everywhere; just as

27 *ibid* No 27.
28 *ibid* No 25 and 26.
29 *ibid* No 29.
30 *Commentaries on the Conflict of Laws* 7th ed Boston (1872) § 302 *in fine*.
31 Rodenburg, also one of the great Roman-Dutch authorities, who lived from 1618 to 1668, does not, as far as I see, throw any light on the problems of this article.
32 *De Statutis et eorum Concursu* 9 2 9 10. See also *Stewart v Ryall* (1887) 5 SC 146 154 per De Villiers CJ.
33 P Voet (preceding note) 9 2 12 and see also 9 2 15 and 16 (value of money).
34 *ibid* 9 2 13.
35 *ibid* 9 2 11.
36 On the general role Huber played in the conflict of laws see Spiro (note 3) 30–31.
37 *ibid* 25 (note 99).
38 *Ad Dig* 2 1 3 No 10 *in principio*.
39 *Soo elders, als in Frieslandt gebruikelyk* 1 3 52.
40 as *The Jurisprudence of my Time* by Ulric Huber, 2 vols Durban (1939).

> also, if persons, who engage in a transaction at a certain place, declare that they have in contemplation another place, where they intend to complete the transaction, the law of the latter place must be observed as regards that transaction."

Huber does not here give an answer in so many words about the position prevailing when the *locus contractus* and the *locus solutionis* differ. It has indeed been held that Huber is generally inclined to favour the *lex loci contractus*.[41] But why does he in No 10 *supra*,[42] almost as if to prove the autonomy of the parties, refer to *D* 44 7 21, elevating the differing *locus solutionis* to the *locus contractus*? Huber's failure to criticise that passage appears to me to show that he accepts it, and the reason for his references to it must, in my view, be sought in an attempt to give an example of the exercise of the autonomy of the parties to exclude the law of the place where the contract has been concluded. If this is correct, the fictional replacement of the *locus contractus* by the *locus solutionis*, far from being a rigid rule of an absolute nature, comes into play only if this is consistent with the intentions of the parties, who may well be, and probably very often indeed are, inclined towards the *lex loci solutionis*. In other words, the emphasis is not so much on the range of the fiction as rather on the negative aspect that the *lex loci contractus* does not always apply, everything depending on the intentions of the parties.

That the fictional replacement of the *lex loci contractus* by the different *lex loci solutionis* is not meant by Huber to be a rule applicable once and for all, follows not only

firstly, from his proposition that the intentions of the parties reign supreme as set out above,[43] but also

secondly, from the fact that form requisites are subject to the *lex loci contractus*,[44]

thirdly, from the overriding principle that there must be no prejudice to the rights of another state or its subjects[45] nor a conduct *in fraudem legis*[46] and

fourthly, from the necessity to respect certain imperative laws imposed on immovables.[47]

Huber, in common with most writers, does not deal specifically with the question what the position is if the parties do not expressly or tacitly select the applicable law. It would be wrong to impute to him the view that in such a case

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41 Kollewijn *Geschiedenis van de Nederlandse Wetenschap van het Internationaal Privaatrecht tot 1880* Amsterdam (1937) 148 149 (except as far as the performance itself is concerned) and 159; Kosters-Dubbink *Nederlands Internationaal Privaatrecht* Haarlem (1962) 55; Van Rooyen (note 8) 20–21.

42 See note 38.

43 See *ad notas* 38 and 39 above.

44 *De conflictu legum* (note 38) No 5; *Heedendaegse Rechtsgeleertheyt* (note 39) 1 3 12 and 18.

45 *De conflictu legum* (note 38) No 2 § 3; *Heedendaegse Rechtegeleertheyt* (note 39) 1 3 6.

46 *De conflictu legum* (note 38) No 6 8 and 13; *Heedendaegse Rechtsgeleertheyt* (note 39) 1 3 31 32 and 42.

47 *De conflictu legum* (note 38) No 14 and 15; *Heedendaegse Rechtsgeleertheyt* (note 39) 1 3 45–49.

the *lex loci contractus* applies as a matter of course. As it appears to me, there is here no alternative but to ascertain whether any of the exclusionary factors just set out are not present. In other words, there must be a thorough investigation of all the surrounding circumstances.

I have paid more attention to Huber than to any other Roman-Dutch writer because he exercised an enormous influence, not only on Lord Mansfield[48] and Prof Westlake,[49] but also on the modern English case law in point – which in turn, as will be seen later, influenced the South African case law – culminating in the following dictum of Lord Simonds:[50]

> "The substance of the obligation must be determined by the proper law of the contract, i e the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection."

(In what follows this dictum is referred to as the *Bonython* formula.) Paragraph 188(1) of the *Restatement of the Law of the Conflict of Laws, Second*, of the American Law Institute[51] similarly lays down that, in the absence of an effective choice of law by the parties (which is permitted in § 187), the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.

d *J Voet (1647–1714)* Johannes Voet, the son of Paulus Voet, first of all subscribes to the doctrine of the autonomy of the parties, provided, however, that there is no interference with public law.[52] The parties may also express their intentions tacitly.[53] In the last-quoted passage J Voet also refers to a presumption that a person has the law of his domicile in mind. But this presumption is ill-conceived,[54] and, moreover, J Voet on more than one occasion[55] accepts the rule contained in *D* 50 17 34 that the intentions of the parties are of importance and that if they are not clear, the customs of the *locus contractus* will prevail, i e the lesser performance will be enforceable if a custom cannot be established;[56] likewise, J Voet, on various occasions, in common with the Roman law,[57] prefers the *lex loci solutionis* to the *lex loci contractus*, where they differ, quoting the Roman law sources.[58] When he does so for the first time,[59] he prefaces the various examples he instances with the

48 *Robinson v Bland* (1760) 2 Burr 1077.
49 *Private International Law* 7th ed by N Bentwich (1925) sec 212.
50 *John Lavington Bonython v Commonwealth of Australia* (1951) 201 PC 219 *in fine* and see Spiro (note 1) 155–168.
51 vol 1 St Paul, Minn (1971).
52 *Ad Pandectas* 1 4(2) 18.
53 *ibid* 1 4(2) 19.
54 Sce Kollewijn (note 41) 129.
55 (note 52) 1 4(2) 19; 4 1 29; 22 1 6.
56 *D* 50 17 34 *supra ad notam* 9.
57 *D* 44 7 21 and 42 5 3, *supra ad notas* 13 and 14.
58 (notc 52) 4 1 29; 12 1 25; 22 1 6. The Roman law sources are *D* 44 7 21 (note 13) and *D* 42 5 3 (notc 14).
59 (notc 52) 4 1 29.

cautionary warning "but we should rather take one view now and now another."[60]

In the light of the last remark, but also with due regard to J Voet's acceptance of *D* 50 17 34,[55] it may also be suggested here that if the parties did not expressly or tacitly select the applicable law, there must be a thorough investigation of all the surrounding circumstances.

e *Van der Keessel (1738–1816)* Van der Keessel's theses 27–44[61] summarise and expound the views of the Roman-Dutch writers of whom he is one of the last ones of stature, but it cannot be said that he takes the matter further.[62] This is particularly so as regards the question what the position is when the parties have not expressly or tacitly chosen the applicable law. On the whole his theses are consistent with the autonomy of the parties;[63] he also refers to *D* 50 17 34,[55] thus accepting what has been agreed upon (which seems to him in accordance with the intentions of the parties) but does not elaborate on the further contents of the passage. The parties cannot displace imperative law.[64] They may declare their intentions not only expressly, but also tacitly.[65]

Van der Keessel does not apply his mind to the case where the law of the *locus contractus* differs from the law of the *locus solutionis*. He is, however, aware that a number of "statutes" may compete with each other[66] and he applies himself to a competition of the *lex loci contractus* and the law of the domicile, his view here being:[67]

> "Existimo contrahentes, si nihil aluid actum esse appareat, se subiecisse videri legibus loci, ubi contractus est celebratus"

which I would translate as:

> "Failing any other stipulation, I consider that the parties appear to have subjected themselves to the *lex loci contractus*."

2 4 Summary

The Roman-Dutch law in point (including the Roman law) may suitably be summarised as follows:

1 1 The parties to a contract are at liberty to stipulate any terms they like, including the law governing the contract (e g Huber and J Voet).

1 2 Such an agreement may be express or tacit (e g J Voet and Van der Keessel).

1 3 It must, however, not violate an imperative law (e g J Voet and Van der Keessel).

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60 Gane's translation.
61 (note 9).
62 See Spiro (note 3) 31.
63 *Thes* 44 (note 9) 148–149.
64 *Thes* 43 (note 9) 142–143.
65 *Thes* 44 (note 9), 144 *et seq.*
66 *Thes* 44 (note 9) *in principio* (144–145).
67 *ibid* 148–149.

2 1 Subject to a contrary express or tacit stipulation of the parties, the *lex loci contractus* governs (e g Bartolus, Burgundus, P Voet, Huber and Van der Keessel).
2 2 1 Again subject to a contrary express or tacit stipulation, by a fiction of law (P Voet), the *lex loci solutionis* is the *lex loci contractus* if the former differs from the latter (most writers).
2 2 2 Story[68] states the rule as follows:—

> "But where the contract is, either expressly or tacitly, to be performed in any other place [than the one where it is made] there the general rule is *in conformity to the presumed intention of the parties*[69] that the contract *as to its validity, nature, obligation, and interpretation* is to be governed by the law of the place of performance. *This would seem to be a result of natural justice* . . ."[69]

The words "in conformity to the presumed intention of the parties" and "this would seem to be a result of natural justice" are not contained in the works of the Roman-Dutch writers, but it may well be argued that those words correctly reflect what they had in mind. Be this as it may, the whole passage was quoted in an appellate division case[70] which will be more fully discussed at its proper place.[71]

3 1 If the parties wish to select the governing law, they may select the *lex loci contractus* or the *lex loci solutionis* or any other law (Huber) as long as they do not violate an imperative law (J Voet, Van der Keessel).

3 2 Whether there is a selection of the applicable law by the parties at all and, if so, which law they have selected, is, of course, a matter of evidence which, it appears, has not been discussed by the Roman-Dutch writers.

4 If the parties have not chosen, expressly or tacitly, the governing law, we have the view of Ulpian, which has been referred to by the Roman-Dutch writers and the South African cases,[72] that the customary law of the place where the contract was concluded governs (see also Bartolus and Burgundus). That view, as was pointed out earlier, entirely ignores the (hypothetical) intentions of the parties and savours rather of an objective test.

5 Unless the South African case law is different, a question which will be enquired into presently, the Roman-Dutch law as so summarised is also the present law of South Africa.

3 ENGLISH LAW

A sketch of the South African law on the subject without the briefest reference to the development of the English law in point would fall short of giving a complete picture: not only do the South African cases draw considerably on the English cases, as will be seen (if it has not been shown already) but the English

68 (note 30) § 280 *ad notam* 4. See also Burge *Commentaries on Colonial and Foreign Laws* London (1838) vol 3 771 *ad notas* (*d*) and (*f*).
69 The italics are mine.
70 Viz *Standard Bank* case (note 9) 186 per De Villiers JA.
71 See below *ad notas* 123–126.
72 See note 9 above.

cases, particularly the earlier ones, also reflect the influence of the Roman-Dutch writers, especially Huber.[73] As I have dealt with the problem more fully elsewhere,[74] I shall now confine myself to giving an outline of the history of the so called proper law of the contract in England since the time of Dicey,[74] that is the law governing international contracts. The most convenient way to do so appears to me to compare Dicey's definition of the proper law in his first edition (1896)[75] with that in Dicey and Morris's 10th edition (1980).[76]

In his first edition Dicey defined the proper law of a contract as the law or laws by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed or, in other words, the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves. For the substance of this definition Dicey referred to *Lloyd v Guibert*,[77] *In re Missouri Steamship Co*[78] and *Hamlyn & Co v Talisker Distillery*.[79]

Rule 145 of the 10th edition of Dicey and Morris defines "proper law of a contract" as the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection. Dicey and Morris refer, in addition to the cases quoted by Dicey, *inter alia* (my choice) to *R v International Trustee for the Protection of Bondholders*,[80] *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Soc*,[81] *John Lavington Bonython v Commonwealth of Australia*,[82] *Re United Railways of Havana and Regia Warehouses Ltd*,[83] *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd*[84] and *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA*.[85]

The controversies raging with regard to some of the incidents of the rule are of no import in this connection. It has rightly been said[86] that stating the test is one thing, applying it another:

> "By its nature the test involves an exercise in judgment, a weighing of a multitude of different factors. Indeed there is no limit to the number of factors which can be taken into account, provided only that they have some bearing on the 'transaction'. The word is important because it directs the court's attention to the contractual matrix and excludes

73 See above *ad notas* 48–50.
74 (note 1) 155 *et seq.*
75 *Conflict of Laws* London (1896) 540.
76 *On the Conflict of Laws* London (1980) 747.
77 (1865) LR 1 QB 115.
78 (1888) 42 ChD 321.
79 (1894) AC 202.
80 (1937) AC 500.
81 (1938) AC 224 (PC).
82 note 50 above.
83 (1960) 2 All ER 332 (HL).
84 (1970) 1 All ER 796 (HL).
85 (1970) 3 All ER 71 (HL).
86 Per Sir John Donaldson MR in *Amin Rasheed Shipping Corp v Kuwait Insurance Co, The Al Wahab* (1983) 1 All ER 873 (CA) 876 *e f.*

consideration of matters which, although important to one of the parties, are extraneous to the transaction itself and may be unknown to the other party."

More particularly, I should in conclusion like to add, the place of performance, as all are agreed, is a relevant factor and may be the decisive one.[87]

4 SOUTH AFRICAN LAW

The facts in the leading case of *Standard Bank of South Africa, Ltd v Efroiken and Newman*[88] were as follows: Efroiken and Newman, being about to purchase flour in the United States of America, each made a contract in Cape Town with the Standard Bank, in terms of which the latter undertook to establish a credit for them with its branch in New York and to honour the seller's drafts upon them at that branch, provided that the drafts were accompanied in the case of Efroiken "by bill of lading and insurance policy" for certain flour, c i f Cape Town, and in the case of Newman "by full set of shipping documents including marine and war risk policies for merchandise shipped to Cape Town." Efroiken and Newman, for their part, undertook to accept the drafts on presentation and to pay them at maturity, provided they were accompanied by the stipulated documents. The sellers, when presenting their drafts at New York, attached to each a through bill of lading and an insurance certificate. These documents were accepted by the Standard Bank and the drafts honoured, but on presentation of the drafts in Cape Town Efroiken and Newman refused to accept them. When sued by the former for the difference between the amount of the drafts and the price realised from the sale of the flour bought by Efroiken and Newman, the latter raised the defence that the documents which accompanied the drafts were not the documents for which they had stipulated.

The judge in the court *a quo* came to the conclusion that, as the credit was negotiated and the acceptance and the payment of the bills were to be made within the Union of South Africa, it was the law here and not that of the United States of America which governed the construction of the contract and, purporting to apply South African law, granted absolution from the instance. On appeal the appellate division, per Innes CJ, Solomon JA, De Villiers JA, Kotzé JA and Wessels JA, confirmed the decision of the court *a quo.*

All five appeal judges refused to interfere with the decision *a quo.*

Solomon JA, agreeing with De Villiers JA that the appeal failed,[89] thought it was a fair presumption that Efroiken and Newman, on the one hand, and the Standard Bank, on the other, gave the words "bill of lading" (and "insurance policy") the sense in which they were ordinarily understood in South Africa where the drafts were to be presented to the former, that is to say as meaning "ocean bills of lading" (and "insurance policy") and held that, as the drafts presented to Efroiken and Newman were not accompanied by such documents, they were legally entitled to refuse to accept the drafts presented to them.[90]

87 (note 84) 799 *c* per Lord Reid.
88 1924 AD 171.
89 *ibid* 176.
90 *ibid* 176–178.

De Villiers JA, who delivered the longest judgment,[91] and Wessels JA agreeing with the former's judgment,[92] held:

a that the contract of sale was to be performed by Efroiken and Newman by payment against shipping documents in the United States of America, as it was also stipulated in the credit note,[93] where, moreover, according to Wessels JA,[94] the wheat had to be shipped and the bills of lading and insurance policies had to be drawn up;

b that applying the principle of law (for which De Villiers JA relied both on Roman law[95] and the decision in *Chatenay v Brazilian Submarine Telegraph Co*[96,97] whereas Wessels JA relied only on the latter decision[98]) that in the case of a contract to be performed in a particular place the parties impliedly agree that the contract is to be peformed in accordance with the law of such place, it had to be assumed to have been intended that the law of the United States of America should govern the question of what documents had to be tendered with the drafts in accordance with the contract;[99]

c that, in the absence of proof that under the law or custom of the United States of America the documents supplied were the equivalent of the documents agreed upon, Efroiken and Newman were entitled to refuse to accept the drafts;[100] and

d that accordingly the claim of the Standard Bank failed.[101] Innes CJ and Kotzé JA "concurred."[102]

The judgment was unanimous only in the sense that all appeal judges agreed that Efroiken and Newman were entitled to refuse the acceptance of the drafts. More particularly, there was no unanimity as regards whether South African law or the law of the United States of America governed the issue; Solomon JA applied South African law whereas De Villiers JA and Wessels JA referred to the law of the United States of America. There is also the question of the range of the "concurrence" of Innes CJ and Kotzé JA.

To recapitulate: while Solomon JA "agreed with his brother De Villiers that [the] appeal fail[ed]"[103] and Wessels JA "agreed with the judgment of [his] brother De Villiers",[104] Innes CJ and Kotzé JA simply "concurred" at the end of the

91 *ibid* 178–197.
92 *ibid* 197.
93 *ibid* 188 (De Villiers JA).
94 *ibid* 197.
95 *ibid* 185–188.
96 (1891) 1 QBD 79.
97 (note 88) 187.
98 *ibid* 198.
99 *ibid* 188 (De Villiers JA);198 (Wessels JA).
100 *ibid* 195 197 (De Villiers JA); 198–199 (Wessels JA).
101 *ibid* 197 (De Villiers JA); 199 (Wessels JA).
102 *ibid* 199.
103 *ibid* 176.
104 *ibid* 197.

report,[105] without earmarking the judgment or the judgments in which they concurred. That unqualified "concurrence" at the end of the report lends itself to two interpretations: (a) It refers only to the tenor of the judgment of the court, viz the recognition of Efroiken and Newman's right to refuse the acceptance of the drafts. (b) It refers to all the judgments, including their *rationes* (if there are any), any overlappings or inconsistencies notwithstanding.[106] The second interpretation, in my view, commends itself, being a corollary of the absence of any qualification attached to the "concurrence." The result, then, is that any *rationes decidendi* contained in the judgment of De Villiers JA, augmented by the concurrence of Wessels JA as well as the concurrence of Innes CJ and Kotzé JA, show a majority of four out of five.

The remaining question is whether there is a *ratio decidendi* or whether there are *rationes decidendi* contained in the judgment of De Villiers JA. As it appears to me, two *rationes decidenci* do indeed emerge from that judgment, viz:

1 Where the place of the conclusion of the contract and the place of the performance due differ, there is a presumption, *unless there is something to the contrary*,[107] that the parties must have intended that it should be carried out according to the law of the country where the performance is due.

2 In the absence of proof that the documents supplied were the stipulated ones according to the law or custom of the country whose laws applied, the Standard Bank could not compel Efroiken and Newman to accept the drafts.[108]

The *ratio decidendi* which matters for the purposes of this article is only the first, which will now be analysed. Before doing so, however, one may as well point out that if the principle regarded as the first of two *rationes decidendi* is held not to constitute a *ratio decidendi* of a majority judgment it would still have persuasive force of a high degree, pronounced as it is by an appellate division judge, not being contradicted nor, if interpreted as hereinafter, conflicting with the "business sense of all business men."[109]

The principle of the presumed intention of the parties that the law of the place of performance should govern the issue rather than that of the place of the conclusion of the contract is, however, qualified in that "there must not be something to the contrary." Such contrary indication would, of course, be constituted by a directly contrary intention of the parties, but could just as well

105 *ibid* 199.

106 I did not find any authorities in point. On the legal position of majority judgments in general see *Fellner v Minister of the Interior* 1954 4 SA 523 (A) and Prof Ellison Kahn in 1955 *SALJ* 6–15.

107 The italics are mine. The italicised words appear in *Chatenay's* case (note 96) per Lord Esher MR, which were quoted by De Villiers JA (note 88) 187 as a good illustration of the corresponding Roman-Dutch rule; that case was likewise referred to by Wessels JA *ibid* 198.

108 *ibid* 195 (De Villiers JA); 199 (Wessels JA).

109 *Chatenay's* case (note 96), as quoted by De Villiers JA (note 88), 187–188 and referred to by Wessels JA *ibid* 198.

be any other fact or incident. The principle must clearly be applied in a broad and far-sighted manner, particularly against the background of the Roman authorities quoted by De Villiers JA[110] and exemplified[111] by him by referring to *Chatenay's* case[112] to which also Wessels JA adverted.[113] When those authorities were discussed, it was pointed out that the (fictional) elevation of the *lex loci solutionis* to the *lex loci contractus* was not meant to be of an absolute nature;[114] reference was also made to Ulpian's view that, if the parties did not deal with a term, recourse had then to be had to the customs of the region concerned, which, it was submitted, savoured rather of an objective test in that no heed was paid to the (hypothetical) intentions of the parties.[115]

One may add to all these considerations an apposite view of De Villiers JA expressed in the *Standard Bank* case.[116] After stating the rule as it had been adopted[117] viz that the *lex loci contractus* governed the nature, the obligations and the interpretation of the contract, the *locus contractus* being the place where the contract was entered into (except where the contract was to be performed elsewhere, in which case the latter place was considered to be the *locus contractus*) and pointing out further that the intention of the parties to the contract was the true criterion to determine by what law its interpretation and effect were to be governed (for which proposition reference was made to the decision in *Spurrier v La Cloche*)[118] the appeal judge continued:

> "where parties did not give the matter a thought, courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties."

That view was, according to De Villiers JA, borne out by two English cases.[119] Not only the use of the words "ought to,"[120] but more so the unavoidable enquiry into "the subject-matter and the surrounding circumstances" point to an objective test being required. At any rate, the phrases "objective test" and "subjective test" must not be confused with the law of evidence.[121] As far as I see it, the objective test differs from the subjective test merely in that in the former,

110 *ibid* 186–187.
111 *ibid* 187–188.
112 (note 96).
113 (note 88) 198.
114 See the text above 2 1 *in fine*.
115 See the text above *ad notam* 9.
116 (note 88).
117 *ibid* 185.
118 (1902) AC 446.
119 (note 88) 185, viz *In re Missouri SS Co* 42 CHD 341 and *Hamlyn & Co v Talisker Distillery* (1894) AC 202. According to Grosskopf J in *Improvair Cape (Pty) Ltd v Establissements Neu* 1983 2 SA 138 (C) 145G, the approach in these cases is no longer followed in English law, but it is submitted that the modern English cases merely use a more elegant language. The law was contained in the old cases. Compare, for instance, the view of Lord Herschell LC in *Hamlyn's* case that the *lex loci solutionis*, though a matter of great importance, is not necessarily conclusive, with the opinion expressed in *Bonython's* case (note 50) 220 that it is a factor, and sometimes a decisive one, that a particular place is chosen for performance.
120 See also Cheshire and North *Private International Law* 10th ed London (1979) 207.
121 See Spiro (note 1) 159.

unlike the latter, the intention of the parties is not necessarily conclusive. Either test, moreover, will in many, if not in most, cases lead to the same result.[122]

Before the evaluation of *Standard Bank's* case[88] is concluded the absence of any direct reference to Roman-Dutch authorities in that case may be mentioned. It is considered that the importance of the decision is not affected thereby.

In the first instance, the various Roman authorities quoted are also Roman-Dutch authorities in as much as all of them were, as has been shown,[123] "received" by one or two of the great Roman-Dutch writers.

In the second instance, it was pointed out in the résumé of the Roman-Dutch law[124] that *D* 50 17 34 (Ulpian), received not only by Bartolus, but also by J Voet (and not only once) and Van der Keessel,[125] was indicative rather of an objective test.[126] It is indeed considered that the views of De Villiers JA in the *Standard Bank* case[88] are not inconsistent with Roman-Dutch law, even if they do not in fact truly reflect that law.

It is true that no South African case has followed and applied the *Bonython* formula[50] as such. As pointed out by Grosskopf J in *Improvair's* case,[127] in *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd*,[128] a full bench of the Transvaal Provincial Division did, however, place much reliance on the decision of the House of Lords in *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*[129] in which *Bonython's* case was followed and applied. In fact, Viljoen J, who delivered the unanimous judgment, said in a passage which sounded as if it could have come from an English decision:[130]

> "In the present case no inference can be drawn that the parties selected English law as the proper law of the contract. Other than agreeing upon an arbitral tribunal in London, there is no real or close connection with England. The parties are not domiciled there; the brokers have their offices in Canada and the United States respectively; the purchase price was to have been paid in American currency in Japan and the purchased goods were to have been shipped from South Africa to Japan. It seems that in the present case not even the curial law of England applied (save to a limited extent), because the [*Fédération Internationale du Commerce des Semences*] has its own rules . . ."

But does the judge really go all the way in applying the Bonython rule? Later he goes on to say:[131]

> "The parties must have intended the contract to be enforceable and, in my view, the only proper course to adopt in the present case was for the appellant as claimant to seek recognition of the award in the court to which the respondent as defendant was amenable (*actor sequitur forum rei*)."

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122 See also Grosskopf J in *Improvair's* case (note 119) 147A.
123 See above notes 9 and 12. See also notes 15 and 16.
124 See above text 2 4.
125 See above note 9.
126 See above text 2 4 4.
127 (note 119) 146B–C. Elsewhere the judge does not conceal that the *Bonython* formula appeals to him (147B).
128 1977 3 SA 1020 (T).
129 1970 3 All ER 71 (HL).
130 *Benidai's* case (note 128) 1034B–C.
131 *ibid* 1038H.

Van Rooyen, in his excellent monography[132] on the private international law of contract, deplores the fact that the old authorities, as well as the courts, lay too much stress on the *lex contractus* and the *lex solutionis*, more particularly on the latter, although the writers sometimes also consider the common domicile of the parties, which is indeed important, and he recommends a more functional approach, concluding in the following fashion:

> "Die *lex causae* is dus die gekose regstelsel of by gebrek aan 'n keuse, die engste verbonde regstelsel."

In the view taken in this article, the proper interpretation both of the writings of the Roman-Dutch authorities and of the appellate division decision in *Standard Bank of South Africa Ltd v Efroiken and Newman*[88] – there is no other appellate division decision on the point – will in practice lead to the same result as the *Bonython*[50] formula.

5 COMPARATIVE LAW (EEC CONVENTION)

One advantage, although not the only one, of a comparative-law approach is that it enables one to understand and appreciate one's own law better and, if need be, to criticise it. Reference has already been made to the law in point in England[133] and the United States of America.[134] It is, however, not intended to deal with all the other legal systems, nor even with all the most modern ones. Instead I shall confine myself to a brief outline of the law contained in the European Economic Community (EEC) Convention on the law applicable to contractual obligations (19-6-1980, Rome).[135] It is noteworthy that recent international conventions follow modern legal systems, sometimes in pioneering fashion,[136] and the Rome Convention is no exception. Its law in point is as follows:

The parties may choose the applicable law, partly[137] or wholly, and the choice may be an express one or it may be made in such a way that it can be deduced from the terms of the contract or the circumstances of the case.[138] If, at the time of the choice, all the other facts occur in one and the same country, the selection of the law of another country cannot oust mandatory provisions of the former.[139]

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132 (note 8) 217–218.
133 See *ad notas* 48 49 and 50 and 3 above.
134 See *ad notam* 51.
135 *OJ* L266 of October 9 1980. See also North in (1980) *JBL* 382 *et seq* and, on an earlier draft, Collins in (1976) 25 *I&CLQ* 35 *et seq.*
136 Spiro in *The Child and The Law* (edited by Bates) New York (1976) vol 2 529.
137 (note 135) art 3(1) second sentence. This is an instance of *dépeçage* (splitting) whereby issues are referred to different legal systems. See also Cheshire and North (note 120) 57–58. The feasibility of more than one legal system's being applicable is deplored by Grosskopf J in *Improvair's* case (note 119) 147B. But one cannot be too dogmatic; all the circumstances must be considered, and any such splitting will take place only where it is necessary. For another instance of "splitting" see below *ad notam* 141.
138 (note 135) art 3(1) first sentence.
139 *ibid* art 3(3). See also below *ad notam* 150.

If the parties have not chosen the applicable law, the contract is subject to the law of the country with which it is most closely connected.[140] If a divisible part of the contract is more closely connected with another country, then the law of such other country is applicable by way of exception.[141] Notwithstanding the judicial pronouncement that presumptions once fasionable during the earlier development of English private international law are now (whether for good or for ill) out of fashion and rejected,[142] the Convention provides for a number of presumptions in this connection, viz:

a There is the presumption that the contract is most closely connected with that country where the party which has to effect the characteristic performance has, at the time of the conclusion of the contract, its ordinary residence or, in the case of a company, a club or a legal person, has its headquarters.[143] But if the contract has been concluded in the course of the trade or profession of the party subject to the duty to effect the characteristic performance, then the governing law is that of the country of that party's principal place of business or of the place of business through which performance is to be effected under the contract.[144]

b The provisions of "a" above notwithstanding, there is a presumption that a contract is most closely connected with the country of the *res sita* where immovable property is concerned.[145]

c The presumption under "a" does not apply to contracts for the carriage of goods, single voyage charterparties and other contracts which are mainly for the carriage of goods; they are presumed to be most closely connected with that country which is that of the principal place of business of the carrier and either the place of loading or of discharge or of the principal place of business of the consignor.[146]

There are two important rules. The presumptions under "a" do not apply if the characteristic performance cannot be ascertained.[147] Furthermore, neither these presumptions nor those under "b" and "c", are applicable, if all the circumstances point to a closer connection of the contract with another country.[148]

The Convention does not deal with a "tacit" or "hypothetical" choice of law in so many words, nor does the *locus solutionis* figure as such. For that one need not have any regrets.

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140 (note 135) art 4(1) first sentence.
141 *ibid* art 4(1) second sentence.
142 *Coast Lines Ltd v Hudig and Veder Chartering N V* (1972) 1 All ER 451 (CA) 458*h* per Megaw LJ.
143 (note 135) art 4(2) first sentence.
144 *ibid* art 4(2) second sentence.
145 *ibid* art 4(3).
146 *ibid* art 4(4).
147 *ibid* art 4(5) first sentence.
148 *ibid* art 4(5) second sentence.

The forum is of course at liberty to apply its own mandatory provisions.[149] But effect may also be given to the mandatory provisions of the law of a country with which the contract has a close connection, even if that law is not the chosen or else the governing law.[150]

There are special provisions for some consumer contracts[151] and for contracts of employment[152] which are not of any particular interest in this connection.

In truly modern fashion[153] it is laid down that the Convention applies even though the law held to be applicable is that of a country other than a member state of the European Economic Community.[154]

149 *ibid* art 7(2).
150 *ibid* art 7(1). See also above *ad notam* 139.
151 *ibid* art 5.
152 *ibid* art 6.
153 Spiro (note 3) 21.
154 note 135 art 2.

The *lobola* agreement and the civil or Christian marriage

Nicola S Peart
DRS LLM
Assistant Lecturer in Law, University of Cape Town

OPSOMMING

Die *Lobola* Ooreenkoms en die Burgerlike of Kerklike Huwelik

Wanneer Swartes 'n burgerlike of kerklike huwelik aangaan, word 'n *lobola*-ooreenkoms dikwels in verband daarmee gesluit. Sodoende probeer Swartes die vernaamste elemente van 'n gemeenregtelike huwelik met dié van 'n gewoonteregtelike verbinding te kombineer. Hierdie kombinasie veroorsaak probleme omdat die twee vorme van huwelik wesenlik verskil. 'n Gemeenregtelike huwelik word tussen twee individue gesluit, terwyl 'n gewoonteregtelike verbinding tussen twee families gesluit word. Die *lobola*-ooreenkoms is die hoofelement van 'n gewoonteregtelike verbinding. Die funksie van die ooreenkoms is om die vrou se reproduksievermoë na haar man se familie oor te dra ten einde die voortsetting van die man se linie te verseker. Die gewoonteregtelike verbinding sal dus slegs voltooi word wanneer die vrou vir haar man voldoende kinders gebaar het en die man die *lobola* gelewer het.

Hierdie verpligtinge kan nie maklik vereenselwig word met die gemeenregtelike huwelik nie. Die algemene reël deur die howe gestel, is dat Swartes wat 'n gemeenregtelike huwelik wil aangaan al die gemeen- en wetteregtelike vereistes moet nakom. Bowendien moet al die gevolge van die huwelik deur die gemene- en wettereg gereël word. Dientengevolge het die howe dit konsekwent gestel dat 'n *lobola*-ooreenkoms wat by 'n gemeenregtelike huwelik gevoeg is, onderworpe is aan en gewysig moet word deur die regsbeginsels wat so 'n huwelik onderskraag. Terselfdertyd is *lobola* natuurlik 'n gewoonteregtelike transaksie wat deur die gewoontereg beheer moet word.

In hierdie artikel word die vraag geopper in hoeverre die gewoontereg in hierdie verband met die beginsels van die gemenereg bots.

So 'n botsing kan byvoorbeeld voorkom indien die man versuim om die *lobola* te lewer. *Ukuteleka* is 'n alledaagse praktyk in die gewoontereg om die man te dwing om te lewer. Ingevolge hierdie instelling word die vrou deur haar voog aangehou totdat haar man die eis vir verdere *lobola* nakom. Indien hy steeds versuim om te lewer, word die gewoonteregtelike verbinding ontbind. Hierdie praktyk maak die voortbestaan van die gemeenregtelike huwelik afhanklik van die *lobola*-ooreenkoms. In sulke gevalle moet die *lobola*-ooreenkoms aangepas word om dit in ooreenstemming te bring met die gemeenregtelike huwelik.

INTRODUCTION

When Blacks enter into a marriage by civil or Christian rites, they often conclude a *lobola* agreement in respect of that marriage. In this way, they attempt to combine the principal requirements of a marriage at common law with those

of a customary union.[1] While *lobola* is not required for the conclusion of a marriage, it is, of course, the chief ingredient of a customary union[2] and, as such, a very important part of African culture. For this reason it will be necessary to give a brief description of the importance of *lobola* in customary unions, before analysing the problems which arise when a *lobola* agreement is concluded in conjunction with a civil or Christian marriage.

LOBOLA AND THE NATURE OF A CUSTOMARY UNION

The Black Administration Act defines a customary union as

> "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage."[3]

Although this definition implies that a customary union and a marriage are different, it does not describe what a customary union is, apart from stating that it is a conjugal relationship established in accordance with customary law.

In fact, the definition is misleading, because a customary union is not a union between one man and one woman but rather a union of "the family of this man" and the "the family of this woman."[4]

The creation of a customary union may be divided into three phases. During the first phase, formal negotiations are opened between the two families, resulting in an affinition agreement. This agreement can best be described as "the consensus of the two families to establish relations by marriage between them."[5]

During the second phase, negotiations continue, seeking to achieve agreement concerning the *lobola* to be transferred by the groom to his bride's guardian. The *lobola* agreement involves the groom or his guardian and the bride's guardian, as representatives of their respective family groups. The *lobola* itself consists of cattle or money or some other valuable consideration. Once this agreement has been concluded and, usually, part or all of the *lobola* has been transferred, the bride is handed over to her husband's family and phase three begins, namely the establishment of a new family unit within the husband's family group.

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1 For purposes of this article the term "customary union" denotes a marital union concluded under African customary law, while the term "marriage" refers to a marital union concluded in accordance with the common law, i e a civil or Christian marriage.

2 *Mdhletshe v Kunene* 1945 NAC (N & T) 52; *Sitole v Xaba* 1945 NAC (N & T) 81; *Mpanza v Qonono* 1978 BAC 136 (C). In Natal, however, the *lobola* agreement is not an essential requirement for the validity of a customary union, according to s 57 of the code.

3 S 35 of Act 38 of 1927 as amended.

4 *Yaotey v Quaye* 1961 GLR 573 579 as cited by Daniels "Towards the Integration of the Laws Relating to Husband and Wife in Ghana" *Integration of Customary and Modern Legal Systems in Africa* (1971) 352 354. See also *Sila and Sila v Masuku* 1937 NAC (N & T) 121.

5 Holleman *Shona Customary Law, with Reference to Kinship, Marriage, the Family and the Estate* (1952) 98, n 1. In *Sila and Sila v Masuku* 1937 NAC (N & T) 121 123, McLoughlin described this phase in the following words: "The first stage affecting the attitude of the parties involves visits, pourparlers and the exchange of social courtesies all designed to establish concord between the groups culminating in the consent of the *groups* to the proposed 'marriage.' "

The essential requirements for the creation of a valid customary union are the consent of the bride[6] and the groom and the bride's guardian, the conclusion of a *lobola* agreement and the handing over of the bride. Once these have been complied with, a valid customary union between the bride and the groom comes into existence. Of all these requirements, however, the *lobola* agreement is, in practice, the most important. This can be deduced from the fact that mere cohabitation for a long time without payment of *lobola* will not be recognised as a customary union by the Black appeal courts

> "since in basic native law as practised by the natives and applied by the Courts, *lobolo* is the chief ingredient of the marriage."[7]

The purpose and function of the *lobola* agreement have been explained in a variety of ways. Schapera, for instance, says that the Tswana regard the handing over of *lobola* as a thanksgiving to the wife's parents for the care they have spent on her upbringing and their generosity in allowing her husband to marry her.[8] Van Tromp, on the other hand, regards *lobola* "as a kind of compensation" for loss of the daughter with religious, social and legal aspects attached to the transaction.[9] Other jurists consider the purpose of the *lobola* agreement to be the creation of a special bond between the two family groups.[10]

While it is true that the agreement may serve all or any of the aforementioned purposes, its main function is to signify the transfer of the woman's reproductive power to the husband's family.[11] For although a customary union is validly created when all the requirements are met, the object of the union is not yet attained. As McLoughlin points out in *Sila and Sila v Masuku*

> "the object of marriage is the procreation of children for the maintenance of the group."[12]

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6 As regards consent of the bride as an essential requirement for a valid customary union, Whitfield is quoted in the case of *Zimande v Sibeko* 1948 NAC (C) 21 23 as saying: "In olden times, before the annexation of the Country to the British Empire, the father was not required to consult his daughter or obtain her consent to her marriage union, and occasionally girls were forced on to men for whom they have no desire, and to whom they had no wish to be united. . . . Nowadays a forced marriage union is, of course, invalid and girls, knowing this, do not hesitate to appeal to Native Commissioners for protection, which is always forthcoming." The case goes on to say that "[t]he very idea of what is commonly known as forced marriages is repugnant to our civilised conscience." It is for this reason that s 30 of Proclamation 112 of 1879 was passed which declared a customary union void *ab initio*, if a woman was forced into the marriage against her wish. All the courts have enforced this principle laid down in the proclamation because forced marriages are considered to be repugnant to public policy. The Natal code has always required the consent of the bride as an essential element: ss 57 59. See generally on consent of the bride: Olivier, Olivier and Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 43–45; *Gebeleiseni v Sakumani* 1947 NAC (C & O) 105; *Zimande v Sibeko* 1948 NAC (C) 21.

7 *Mdhletshe v Kunene* 1945 NAC (T & N) 52 54; *Sitole v Xaba* 1945 NAC (T & N) 81; *Mpanza v Qonono* 1978 BAC 136 (C).

8 Schapera *A Handbook of Tswana Law and Custom* (1938) 138.

9 Van Tromp *Xhosa Law of Persons, a Treatise on the Legal Principles of Family Relations among the Amaxhosa* (1948) 49.

10 See, in general, for the purpose of the *lobola* agreement Olivier *op cit* 88–93.

11 Schapera *op cit* 139.

12 1937 NAC (N & T) 121 122.

It is only by transferring *lobola* that the husband's family acquires its rights to any children born of the union. It is a clearly established rule amongst all southern African tribes that non-payment of *lobola* will result in the children belonging to their mother's family.[13] *Lobola* and women are therefore exchanged "as equivalent reproductive potentialities."[14] It is in this light that one must regard maxims such as "cattle beget children"[15] and "the children are where the cattle are not."[16]

The woman will equalise the *lobola* given to her only once she has borne her husband a sufficient number of children. Once the obligations of procreation and delivery of *lobola* have been fufilled, the union is considered to be "complete." Although the fulfilment of these obligations is a duty lying with the spouses, the ultimate responsibility remains that of the two family groups as was envisaged in the affinition agreement. In this sense the *lobola* agreement is an attempt to maintain a social balance between the families of the spouses.[17] If, for example, the wife proves to be barren or dies prematurely, her family must assume its responsibilities by providing a substitute woman,[18] either as a seedraiser in the house of the wife, or as a substitute wife, in the case of death. On the other hand, if the husband does not deliver the *lobola*, his family will lose its rights to the children, as was pointed out above.

The *lobola* agreement may also serve to ensure good behaviour on the part of both spouses.[19] On the one hand, the wife's family is responsible for their daughter's fulfilment of her wifely duties. Neglect of her children or of her household duties or refusal to grant her husband conjugal rights, may result in the husband's rejecting his wife and claiming restoration of his *lobola.* On the other hand, ill-treatment of the wife entitles her to return to her guadian to seek his protection; this could lead to dissolution of the union and forfeiture of the *lobola* by the husband.

In the same way that a customary union rests on agreement between two families and transfer of *lobola*, its dissolution is a matter concerning both the families and return of *lobola:*

> "The keystone of the union is the *lobola*, and while *lobola* is retained by the wife's group, the union continue[s] to subsist."[20]

In order to dissolve a customary union, the wife must return to her guardian and at least part of the *lobola* must be restored to the husband's family or

13 The threat of losing the guardianship over the children serves as a means of enforcing delivery of *lobola.* Amongst the Xhosa, for instance, a procedure for encouraging payment known as *ukuteleka* is used: the wife and children return to the wife's guardian and remain with him until further payment is made.

14 Holleman *op cit* 148.

15 *Sila and Sila v Masuku* 1937 NAC (T & N) 121 124.

16 "Die beeste is waar die kinders nie is nie": Olivier *op cit* 112.

17 The concept of "completeness" of a customary union was developed by Holleman and adopted by Olivier *op cit* 90–91.

18 This custom is not known among the Xhosa: Bekker and Coertze *Seymour's Customary Law in Southern Africa* (1982) 274, hereinafter referred to as Seymour.

19 Seymour *op cit* 149.

20 *Mashapo and Mashapo v Sisane* 1945 NAC (N & T) 57 58.

agreement reached as to its disposal. The amount of *lobola* to be returned will depend on the reasons underlying the dissolution.

If the husband repudiates his wife for no reason at all, he will forfeit his *lobola*. Where, however, the husband has just cause for rejecting his wife he can reclaim *lobola* which will dissolve the union.[21] Occasional sexual infidelity by the wife, for instance, is usually not regarded as sufficient reason for dissolution but persistent unfaithfulness is.[22] As far as the wife is concerned, she would have a good reason for leaving her husband, if she were falsely accused of witchcraft or abandoned or unreasonably ill-treated. (Among the Nguni people she should then return to her guardian and wait for her husband to *putuma* her.[23] If she refused to comply with her husband's formal request, she would be considered to have deserted him and her family would be obliged to restore the *lobola*, thereby dissolving the union.)[24]

Death does not necessarily dissolve the union. If the husband dies, his wife may remain with his family and, if she is still capable of bearing children, she may enter into a levirate union (known as an *ukungena* union) with one of the brothers of the deceased.[25] Because the *lobola* is retained by the wife's family, the *ukungena* union is effected on the basis of the original agreement and, consequently, the children accrue to the husband's family group.

In the same way, the union need not be dissolved by the death of the wife. As was pointed out earlier, where the deceased was young and still capable of bearing children, a substitute wife may be sent to her husband. If the wife's group does not offer to provide the husband with a substitute, the union may be dissolved by the restoration of *lobola*, the amount of which will depend on the number of children born during the union.[26]

It is clear from the foregoing that the *lobola* agreement is not only essential to the creation of a customary union; it gives rise to rights and obligations which continue even after the death of one of the spouses. Thus it can be concluded that *lobola* lies at the foundation of the African institution of marriage.[27]

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21 *Kosane v Molotya* 1945 NAC (T & N) 70.

22 See in general on dissolution at the husband's instance Seymour *op cit* 175–185. Also *Mshweshwe v Mshweshwe* 1946 NAC (C & O) 9; *Mashapo and Mashapo v Sisane* 1945 NAC (N & T) 57.

23 This is the procedure whereby the husband requests his wife's return. See in general Seymour *op cit* 180–181.

24 In the case of gross ill-treatment or accusation of witchcraft, however, the wife will never be compelled to return, because these cases constitute such an irreparable breach of the union owing to the fault of the husband, that the union must be dissolved with forfeiture of the *lobola* by the husband: *Dumisa v Shange* 1978 BAC 72 (N–E); Seymour *op cit* 180.

25 *Mzilikazi v Kwasa* 1934 NAC (C & O) 42; *Sila and Sila v Masuku* 1937 NAC (N & T) 121 124; *Mpika v Mpanda* 1945 NAC (C & O) 66; *Mashapo and Mashapo v Sisane* 1945 NAC (N & T) 57.

26 Holleman *op cit* 240–241; Seymour *op cit* 174.

27 Harries "Christian Marriage in African Society" *Survey of African Marriage and Family Life* III Phillips (ed) (1953) 361.

THE COMMON-LAW MARRIAGE

Blacks have the option of concluding a customary union or a marriage in accordance with the common law.[28] The latter has been defined as

> "the legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."[29]

This definition emphasises the three essential characteristics of a common-law marriage, namely, that all marriages are monogamous, involve only two individuals and are potentially indefinite in duration. As regards the first of the three attributes, the definition is totally unambiguous in that the exclusiveness of a marriage precludes the recognition of any union which is potentially polygamous.[30] In South Africa a marriage is always monogamous, polygamy being considered fundamentally opposed to the principles and institutions of the state.[31] The South African courts will, therefore, not recognise a polygamous union as a marriage, whether it was entered into according to Hindu, Islamic or African customary law or in accordance with any foreign legislation which recognises polygamous marriages.[32]

While this difference between marriages and customary unions may be the most striking, the second characteristic is more fundamental. Whereas a customary union is concluded between two families, a marriage is contracted between one man and one woman – the two individuals are the only parties to the marriage. It is as a result of this difference that most of the problems arise when *lobola* agreements are concluded in respect of marriage.

As regards the third attribute of a marriage, namely its indefinite duration, there is little difference. Both the customary union and the marriage are intended to last indefinitely. This does not mean that these unions cannot be dissolved during the lifetime of the spouses. In the same way as a customary union may

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28 The legal capacity of Blacks to enter into marriages under the common law is governed by s 11(3) of the Black Administration Act.

29 Hahlo *The South African Law of Husband and Wife* (1975) 28. This definition is based on the well-known definition of marriage in *Hyde v Hyde and Woodmansee* (1866) LR 1P and D 130 133.

30 A polygamous union was first defined as any union which, according to the land where it was entered into, had the potential to be polygamous, i e where there was a possibility of plurality of spouses. Whether the union was in fact polygamous or not is irrelevant in determining whether a union is a polygamous one: *Bronn v Fritz Bronn's Executors* (1860) 3 Searle 313 321 332. This was followed by a Transvaal decision, *Rex v Mboko* 1910 TPD 445 447–448, and finally confirmed by the appellate division in *Seedat's Executors v The Master* (*Natal*) 1917 AD 302 308. See also Hahlo *op cit* 601.

31 *Seedat's Executors v The Master* (*Natal*) 1917 AD 302 309.

32 It is also clear from the definition of marriage in s 35 of the Black Administration Act that a customary union is not recognised as a legally valid marriage. This definition provides that a marriage is "the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom or any union recognised as a marriage in Black law under the provisions of section *one hundred and forty-seven* of the Code of Black Law contained in the Schedule to Law No 19 of 1891 (Natal) or any amendment thereof or any other law."

be dissolved,[33] a marriage may also be terminated either by divorce or annulment. But, whereas death does not necessarily terminate a customary union,[34] it follows logically from its definition that a marriage must end upon the death of one of the spouses.

If Blacks wish to enter into a marriage, they must comply with the requirements laid down by the common law. Accordingly, it will be necessary for the bride and groom to give their consent,[35] in the presence of witnesses, and for a marriage officer duly appointed by the state to solemnise the marriage in accordance with the prescribed formalities.[36] Otherwise than in African customary law, the consent of the parents or guardians is not required, unless one of the parties to the marriage is a minor.[37] Once these requirements have been met a legally valid marriage will have come into existence.

Whatever the attitude of the common law, it is probably safe to say that few Blacks would consider themselves married unless some arrangement had been made regarding *lobola.* Traditions in any culture are not lightly disregarded and this is why many Blacks conclude *lobola* agreements when they enter into common-law marriages.[38]

THE CREATION AND ENFORCEMENT OF THE *LOBOLA* AGREEMENT DURING THE SUBSISTENCE OF THE MARRIAGE

There is no law in South Africa today which prevents the parties to a marriage from concluding a *lobola* agreement in respect of that marriage; but this has not always been the case. During the nineteenth century, when customary law was accorded recognition in various areas subject to a repugnancy clause,[39] there was considerable opposition to the recognition of *lobola* agreements, especially in Natal and the Transvaal.[40] This was principally due to the attitude of the mis-

33 See pp 161–162 above.

34 See p 162 above.

35 Hahlo *op cit* 81. A boy below the age of 18 or a girl below the age of 15 are incapable of entering into a marriage. Likewise, an insane person is incapable of concluding a valid marriage. In addition, certain people are prohibited from marrying, namely persons of the same sex (this follows from the definition), Whites and Non-Whites (in accordance with s 1 of the Prohibition of Mixed Marriages Act 55 of 1949 as amended by Act 21 of 1968), and persons within the prohibited degree of relationship in accordance with s 28 of the Marriage Act 25 of 1961. Any marriage contracted in violation of these prohibitions shall be deemed null and void.

36 With regard to the formalities of marriage, see the Marriage Act 25 of 1961.

37 s 26 of the Marriage Act.

38 Seymour *op cit* 245; Olivier *op cit* 212.

39 The repugnancy clause is intended to ensure that certain rules forming part of customary law are to be excluded despite the general recognition accorded the customary legal system. Allott *New Essays in African Law* (1970) 159; Elias *British Colonial Law, a Comparative Study of the Interaction between English and Local Law in British Dependencies* (1962) 104.

40 Harries *op cit* 360–365; *Kaba v Ntela* 1910 TPD 964 969; *Meesadoosa v Links* 1915 TPD 357 361.

sionaries who thought that a *lobola* agreement was a contract of purchase and sale and therefore "uncivilised."[41] In an attempt to abolish this custom, the American missionaries in Natal passed regulations prohibiting the members of their church from demanding or receiving *lobola* for their daughters. As the Zulus strongly resented this attitude, the regulations were never enforced[42] and the *lobola* agreements continued to be recognised.

The missionaries were more successful in Transvaal where the *lobola* agreement was considered so "uncivilised" that it was prohibited by law.[43] In the Transkeian territories, on the other hand, *lobola* agreements always enjoyed full recognition even when concluded in respect of civil or Christian marriages.[44] The various laws governing the recognition of *lobola* agreements continued in force even after the Union of South Africa was established in 1910.[45] Uniformity was attained only in 1927 when the Black Administration Act was promulgated. Section 11(1) of that act leaves no doubt that *lobola* agreements are to be accorded full recognition as it specifically excludes such agreements from the ambit of the repugnancy clause, in terms of which certain institutions of African customary law may not be applied.[46]

Because *lobola* agreements are not contrary to public policy and in view of the fact that parties to a marriage may agree to anything which is possible, legal and not contrary to public policy,[47] it is clear that the Blacks are entitled to conclude a *lobola* agreement when they enter into a civil or Christian marriage.[48] It is, however, by no means clear how such agreements should be reconciled with a marriage.

When Blacks conclude a *lobola* agreement in these circumstances, it is likely that they will regard the *lobola* agreement as the chief ingredient of their marriage giving rise to the rights and obligations that would have arisen if the marriage

41 Harries *op cit* 361–362; Seymour *op cit* 149.

42 Harries *op cit* 362.

43 Law 3 of 1876 declared that "in furtherance of morality, the purchase of women or polygamy among Natives is not recognised in this Republic by the law of the land", quoted by Phillips "Marriage Laws in Africa" *Survey of African Marriage and Family Life* II Phillips (ed) (1953) 195; see also *Rex v Mboko* 1910 TPD 445; *Kaba v Ntela* 1910 TPD 964; *Meesadoosa v Links* 1915 TPD 357.

44 *Sihuhu v Ntshaba* 1 NAC 62; *Nozozo v Mahlala* 3 NAC 70; *Gwazela v Masimini* 4 NAC 74; *Sono v Mahlaka* 4 NAC 75; *Dikeni v Klass* 5 NAC 41.

45 Seymour *op cit* 1–6.

46 According to s 11(1) of the Black Administration Act, customary law may be applied: "Provided that such Black law shall not be opposed to the principles of public policy or natural justice: *Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles*" (my italics).

47 Hahlo *op cit* 278.

48 The early decisions of the appeal court of the Transkeian territories show that there was some doubt whether a *lobola* agreement could be concluded in respect of a marriage at common law: *Manqana v Ntintile* 1 NAC 218; *Edward v Msingileli* 3 NAC 69; *Magadla v Nombewu* 3 NAC 71. As Olivier *op cit* 213 points out, those doubts have been removed.

had been a customary union.[49] The spouses would not only consider the agreement essential to the creation of their marriage but would also consider it vital in determining the guardianship of their children. Conflicts are, in view of this, unavoidable.

Because the parties have chosen a common-law marriage, they inevitably assume a nuptial status under the common law; in consequence, all matters concerning the marriage must be dealt with according to that system.[50] *Lobola* agreements, on the other hand, are entirely foreign to the common law and it would, *prima facie*, appear to be more appropriate to apply customary law to such agreements.

As there is no legislation dealing with the relationship between a *lobola* agreement and a marriage, the courts have been obliged to find solutions to this problem. Their decisions have been fairly consistent. Generally it has been held that

> "a *lobola* agreement . . . in connection with a civil marriage must be regarded as ancillary to, and modified by, the legal principles underlying such marriage; but at the same time it remains essentially a Native law transaction, i e to the extent that it does not conflict with the principles underlying the civil marriage to which it is ancillary."[51]

There have been a few cases in which it was held that customary law should be applied to the *lobola* agreement even where it was inconsistent with the common-law marriage.[52] In the case of *Gomani v Bagwa*, for instance, it was held that

> "[s]uch a contract is no part of a Christian marriage, and is entered into under an entirely separate law from the law governing such marriage . . . It is a contract made under Native law and custom, and as such should be dealt with under Native law."[53]

Such decisions have been the exception. The general view seems to be that the marriage is given primacy over the *lobola* agreement and that customary law may be applied to that agreement only in so far as it does not conflict with the spouses' obligations under the marriage.[54] It is only when an obligation arising from the *lobola* agreement cannot be reconciled with an obligation arising from the marriage that customary law will not be applied to the agreement.

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49 This view may well have been strengthened by s 22(6) of the Black Administration Act, which provides that the legal consequences of community of property and of profit and loss shall not result automatically from a marriage between Blacks. In addition, the absence of a provision excluding the marital power of the husband has led to the conclusion that the object of s 22(6) is to prevent Blacks from being caught unawares by the consequences normal to marriage at common law. The exclusion of community of property and of profit and loss and the retention of the husband's marital power where the marriage is between Blacks, creates a union which resembles a customary union more closely: Seymour *op cit* 248.

50 Seymour *op cit* 249.

51 *Mbonjiwa v Scellam* 1957 NAC 41 (S); *Thlopane v Motsepe* 1932 NAC (N & T) 35; *Fuzile v Ntloko* 1944 NAC (C & O) 2; *Mfubu v Cembi* 1947 NAC (C & O) 101; *Ntabeni v Mlobeli* 1949 NAC (S) 158; *Sgatya v Madleba* 1958 NAC 53 (S).

52 *Gomani v Baqwa* 3 NAC 71; *Peme v Gwele* 1941 NAC (C & O) 3.

53 3 NAC 71 72.

54 Kerr "Roman-Dutch Law Marriages and the *Lobola* Contract" 1960 *Acta Juridica* 334 337, hereinafter referred to as Kerr (1960); Olivier *op cit* 213–214; Seymour *op cit* 258.

This raises the question when a *lobola* agreement, concluded in respect of a marriage, will conflict with the obligations of the spouses and, thus, with the principles underlying the marriage. As was pointed out earlier, while the *lobola* agreement is essential to the creation of a customary union, it is not essential to the creation of a marriage. The marriage will exist once the parties have consented to marry each other and the marriage officer has solemnised the marriage, irrespective of the existence of a *lobola* agreement.[55] If the parties to the marriage wish to have a *lobola* agreement in consideration of their marriage, the agreement will have to be entered into separately. Moreover, as the creation of a *lobola* agreement is foreign to common law, its validity must be determined in accordance with African customary law. Kerr suggests, however, that a *lobola* agreement in conjunction with a marriage should be treated as if it were a Roman-Dutch law contract[56] and, accordingly, one should look to that system to determine its validity.[57]

It is with respect that I disagree with this point of view. Not only is the agreement foreign to the common law, but the application of that system would also contradict the general view that a *lobola* agreement, although ancillary to the marriage, remains essentially a customary-law agreement to which customary law should be applied. The common law applicable to the marriage should only overrule the customary law applicable to the *lobola* agreement when the latter conflicts with the former.[58]

According to customary law, a *lobola* agreement may be concluded either expressly or tacitly.[59] In the latter case the existence of such an agreement may be inferred from the conduct of the parties.[60] The courts have held, however, that a *lobola* agreement cannot be implied when it is concluded in respect of a marriage. In such circumstances *lobola* has to be the subject of an express agreement.[61] The courts have been prepared to enforce implied terms in express contracts only.[62] The reason for this ruling is clear: a *lobola* agreement is not essential to a marriage and the courts can enforce such a contract only if its existence is proved. The courts have, evidently, not found the conduct of the parties sufficiently clear to hold that such an agreement had been entered into. The parties involved, in cases where it was sought to uphold tacit *lobola* agreements, belonged to tribes where the amount of *lobola* was negotiable;[63] and it

55 See p 164 above.
56 Kerr (1960) 337.
57 Kerr "Implied *Lobola* Contracts Ancillary to Roman-Dutch Law Marriages" 1963 *Acta Juridica* 49, hereinafter referred to as Kerr (1963).
58 See p 165 above.
59 *Mbonjiwa v Scellam* 1957 NAC 41 (S) 44.
60 *Cele v Radebe* 1939 NAC (N & T) 49; *Tusi v Mahlaba* 1939 NAC (N & T) 63; *Madonsela v Duba* 1942 NAC (N & T) 74; *Sitole v Xaba* 1945 NAC (N & T) 81; *Matholo v Moquena* 1946 NAC (C & O) 17; *Ngcongolo v Parkies* 1953 NAC 103 (S).
61 *Skweyiya v Sixakwe* 1941 NAC (C & O) 126; *Ntabeni v Mlobeli* 1949 NAC (S) 158; *Mbonjiwa v Scellam* 1957 NAC 41 (S).
62 *Ntabeni v Mlobeli* 1949 NAC (S) 158 159–160; *Cheche v Nondabula* 1962 NAC 23 (S) 28; see also Kerr (1960) 334.
63 e g the Xhosa and Bhaca.

may be accepted that, in these circumstances, the courts will enforce agreements only where the amount of *lobola* has been expressly agreed upon.

But the rule requiring an express agreement seems to have been modified where the parties to the agreement belong to a tribe which does have a fixed *quantum* of *lobola*. In the case of *Cheche v Nondabula*,[64] for example, the parties were Hlubis, among whom the amount of *lobola* is fixed by custom. In this case the parties had entered into a Christian marriage and had concluded a *lobola* agreement without expressly agreeing on the amount to be paid. Part of the *lobola* was transferred at the time of the marriage. When the bride's father subsequently sued for the outstanding *lobola*, the groom's father alleged that he was not liable for the customary amount of *lobola*. The court held that, in the customary law, the amount need not be expressly agreed upon if the parties to the agreement belonged to a tribe where the *quantum* was fixed by custom,[65] because

> "there is then a tacit understanding between the bridegroom's and bride's fathers when negotiations for the marriage are entered into that the full dowry is to be that fixed by custom and further... that the bridegroom's father holds himself personally liable for the payment of the quantum of the fixed dowry in the absence of any indication to the contrary."[66]

The court then concluded that in those circumstances the position is the same where the parties have concluded a *lobola* agreement in respect of a common-law marriage.[67]

While there has been no doubt, since *Cheche's* case, that the amount of *lobola* may be implied if the parties belong to a tribe among whom the *quantum* is fixed by custom, it was clear in that case that the parties intended to pay *lobola* because part of it had already been transferred. What would the court have decided if no *lobola* had been transferred?[68]

It is submitted that a *lobola* agreement may be implied if it is clear from the conduct of the parties, at the time of the marriage, that it was their intention that *lobola* should be paid. While part payment is an obvious indication of the parties' intention, it is not necessarily the only indication. If, for instance, the preparation and negotiations for the marriage follow the traditional pattern for the creation of a customary union, with the one difference that the union is to be celebrated in church, then it is submitted that the court could infer the existence of a *lobola* agreement.

Even although a *lobola* agreement concluded in respect of a marriage is recognised, there may be problems regarding its enforcement.[69] Among the tribes

64 1962 NAC 23 (S).
65 27.
66 28.
67 25.
68 Cf Kerr (1963) 49–51.
69 *Dikeni v Klass* 5 NAC 41 42; *Skweyiya v Sixakwe* 1941 NAC (C & O) 126 127: it will be enforced.

which grant a legal action to enforce delivery of *lobola*,[70] the enforcement procedure is perfectly compatible with the marriage. There are tribes,[71] however, which practise *ukuteleka*, a procedure by which the wife is detained by her guardian until her husband meets a demand for payment of further *lobola*. This method of enforcement has been the cause of many disputes. Prior to the Divorce Act of 1979,[72] the general view seemed to be that the custom of *ukuteleka* amounted to malicious desertion which was a ground for divorce at common law.[73] In *Ntsimango v Ntsimango*, for instance, Sleigh, president, considered the custom of *ukuteleka*

> "entirely opposed to the mutual obligations of husband and wife, married according to Christian rites."[74]

The court went on to say that

> "[t]he Native Appeal Court has repeatedly held that Common Law must be applied to the marriage contract of parties married according to Christian rites. . . . If the wife makes her return conditional upon the payment of *lobolo* . . . , such conduct from the wife, who is generally under the marital power of her husband and is expected to obey him, cannot be regarded as anything else but malicious."[75]

In *Mbani v Mbani*,[76] on the other hand, the court decided that *ukuteleka* did not amount to malicious desertion:

> "A malicious deserter is one who, constrained by no just or necessary cause, but owing to a disposition approaching fickleness and illwill, or through impatience of the marriage tie, casts off the care of wife and children, forsakes them, and wanders about with no intention of returning."[77]

According to this definition, two essential requirements had to be met, namely, factual desertion and *animus deserendi*, i e a fixed and settled intention of bringing the marriage relationship to an end.[78] In African customary law, a wife who leaves her husband because he has not paid *lobola*, does so because non-payment directly affects her dignity, rendering her presence at her husband's kraal untenable.[79] Thus the court concluded in *Mbani's* case that the wife had not left her husband and family with the intention of abandoning them and never returning – she would be ready and willing to return as soon as her husband made it possible for her to do so with dignity.[80]

In view of this decision it is difficult to understand how the court could decide that *ukuteleka* did amount to malicious desertion in *Ntsimango's* case. Even although the wife may have been regarded as having factually deserted

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70 Seymour *op cit* 164; Olivier *op cit* 104.
71 such as the Pondo, Thembu and Xhosa.
72 Act 70 of 1979.
73 *Sihuhu v Ntshaba* 1 NAC 62; *Njengaye v Mbola* 3 NAC 76; *Tonya v Matomane* 1949 NAC (S) 138; *Ntsimango v Ntsimango* 1949 NAC (S) 143.
74 1949 NAC (S) 143.
75 144; see also Kerr (1960) 334.
76 1939 NAC (C & O) 91; *Gama v Gama* 1937 NAC (N & T) 77.
77 92, where the court cited an analysis of Brouwer's definition of malicious desertion (*De Jure Connubiorum* 2 18 12) which was followed in *Webber v Webber* 1915 AD 239.
78 Hahlo *op cit* 390–391.
79 *Gama v Gama* 1937 NAC (N & T) 77; *Mbani v Mbani* 1939 NAC (C & O) 91 93.
80 93.

the husband, she certainly did not leave *animo deserendi.* Moreover, if she had left with the intention of terminating the union, her guardian would restore *lobola* rather than demand further payment.

Since the Divorce Act was introduced in 1979, there have been no reported cases dealing with *ukuteleka.* But if such a case were to arise, *Ntsimango's* decision would not be authoritative because malicious desertion is no longer a ground for divorce. A court may grant a decree of divorce on the grounds of irretrievable breakdown, which it will do

> "if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them."[81]

In terms of this section, the husband whose wife had been *teleka'd* by her guardian would, if he sought a divorce, have to prove that the marriage had broken down irretrievably. This would be no easy task, since *ukuteleka* does not suggest that the marriage has broken down with no reasonable prospect of reconciliation. The intention of the wife and her guardian is not to bring the marriage to an end, but rather to resume a normal marriage relationship once the husband has paid more *lobola.* The courts will, therefore, have to look at the problem of *ukuteleka* afresh.

Even if the practice of *ukuteleka* does not constitute an irretrievable breakdown of the marriage, the question remains whether this practice is compatible with the fundamental principles of a marriage by civil or Christian rites. The purpose of *ukuteleka* is to compel the husband to pay more *lobola* and if he fails to do so, he will be deemed to have rejected his wife. Under customary law, this would lead to dissolution of the union.[82] Consequently, *ukuteleka* makes the continuance of the marriage dependent on the *lobola* agreement and in this sense *ukuteleka* is incompatible with the common law. As Balk, president, said in *Cheche's* case in an *obiter dictum*:

> "[R]ecourse to *teleka* . . . cannot be sanctioned in the case of civil marriages as it would be opposed to public policy in that it is contrary to the principles governing such marriages."[83]

Parties belonging to a tribe which practices *ukuteleka* will, therefore, have to apply for a legal action to enforce payment of *lobola* even although this would not be possible in customary law.[84] The court may grant an order for specific performance or damages as if the agreement were an ordinary contract at common law.[85]

During the subsistence of the marriage, the spouses have obligations arising from the marriage not only *vis-à-vis* each other, but also *vis-à-vis* their families

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81 s 4(1) of the Divorce Act.
82 Seymour *op cit* 163.
83 1962 NAC 23 (S) 28.
84 Seymour *op cit* 163; *Adonis v Zazini* 1 NAC 46; *Mkohlwa v Mangaliso* 1 NAC 202; *Skweyiya v Sixakwe* 1941 NAC (C & O) 126; *Ngalimkulu v Mndayi* 1947 NAC (C & O) 65; *Tonya v Matomane* 1949 NAC (S) 138.
85 *Njengaye v Mbola* 3 NAC 76; *Skweyiya v Sixakwe* 1941 NAC (C & O) 126 127; *Mbonjiwa v Scellam* 1957 NAC (S) 41; *Sgatya v Madleba* 1958 NAC 53 (S) 56.

arising from the *lobola* agreement. In terms of the former the spouses are obliged to cohabit and observe conjugal fidelity.[86] In terms of the *lobola* agreement, the husband's primary obligation is to deliver *lobola* while his wife is obliged to bear issue to ensure the continuation of the husband's lineage.[87] As long as both parties comply with these obligations, there will be no conflict between the *lobola* agreement and the marriage. Conflicts do arise, however, if the wife is unable to have children. According to African customary law, the wife's family should assume its responsibility in terms of the *lobola* agreement by providing a seedraiser in order to complete the union.[88] If it does not do so, there is a possibility that the *lobola* will have to be returned, thereby dissolving the union. In view of the monogamous character of a marriage, it is clear that sexual intercourse with a seedraiser would amount to adultery by the husband giving the wife good reason to object.[89] If, on the other hand, the husband were to claim return of his *lobola* from the wife's family for failure to provide a seedraiser, and if the court were to uphold this claim, it would, in essence, be countenancing adultery. This would be out of keeping with the monogamous nature of a civil or Christian marriage. Thus a claim for return of *lobola* on the basis of failure to provide a seedraiser is incompatible with the fundamental principles of the marriage.

A similar position obtains if the husband fails to pay *lobola*. According to customary law, the father will, in theory, acquire rights in his children only if he transfers *lobola* to his wife's guardian in accordance with the agreement.[90] If the husband fails to deliver the *lobola*, customary law provides that the mother's guardian will acquire the rights in the children.[91] Under the common law, the parents of children may be deprived of their rights of custody and guardianship only in limited circumstances.[92] It is clearly incompatible with the principles of a marriage that mere non-payment of *lobola* should result in the father being deprived of his rights.[93]

THE *LOBOLA* AGREEMENT ON DISSOLUTION OF THE MARRIAGE

Further problems arise when one considers divorce. Once a common-law marriage has been entered into, both spouses are obliged to observe conjugal fidelity. A single act of adultery on the part of either spouse may lead to an irretrievable breakdown of the marriage and thus divorce.[94] In customary law, on the other hand, a single act of adultery by the wife is not regarded as sufficient reason for

86 Hahlo *op cit* 29.
87 See above.
88 See above.
89 The wife might not wish to sue for a divorce on the ground of her husband's adultery. In view of the polygamous nature of a marriage under customary law, she may not regard her husband's infidelity in the same light as a white person would.
90 See above. These rights are similar to the common-law concepts of custody and guardianship: see n 132.
91 See above.
92 Spiro *Law of Parent and Child* (1971) 239 247 325 *et seq*; see also pp 175 *et seq* below.
93 *Mbonjiwa v Scellam* 1957 NAC 41(S) 42.
94 s 4 of the Divorce Act of 1979.

repudiation by the husband. The husband in a customary union, of course, commits adultery only if he has sexual intercourse with another man's wife (because a customary union is potentially polygamous).[95] Sexual infidelity on the part of either spouse may, therefore, give rise to a conflict of laws, touching upon the very essence of a marriage at common law.

It is clear that the marriage, having been entered into in accordance with the common law, can only be terminated under that law: by a competent court on one of the accepted grounds of divorce.[96] If a marriage, which would not have been terminated if customary law had been applied, is dissolved in accordance with the common law, the question arises whether the *lobola* should be restored. (It must be remembered that, according to African customary law, it is essential for the proper dissolution of a customary union for all or part of the *lobola* to be restored to the husband.)

If a marriage is terminated because the husband feels that he cannot reconcile his wife's single act of adultery with the continued marriage relationship,[97] her guardian might attempt to resist a claim for restoration of *lobola.* Whether the guardian would be successful or not depends on the legal system to be applied to the *lobola* agreement. If customary law were applied to the agreement, the *lobola* could be retained by the wife's guardian, because a single act of adultery is not sufficient reason for termination of the union.[98] This would mean that, in terms of customary law at least, a union would continue to subsist after dissolution of the marriage. The courts have, however, been most emphatic in holding that only one union exists; namely the marriage at common law. There is no other subsidiary union which might survive the marriage when it is terminated.[99] If one accepts this view, then one must also accept that the application of customary law to determine whether *lobola* should be restored will conflict with the fundamental principles underlying the marriage.

The courts, when faced with this problem, have by no means been consistent. In the case of *Gomani v Baqwa,*[100] the members of the court were unanimous in holding that the *lobola* agreement should be governed by customary law. But the majority then went on to say that

> "[a] man whose marriage is dissolved through no fault of his is entitled to return of his dowry . . . Even if it were held that her conduct would not under Native law and custom

95 For a definition of adultery in customary law, see Olivier *op cit* 290; Seymour *op cit* 353. See also *Fuzile v Ntloko* 1944 NAC (C & O) 2 6.

96 Hahlo *op cit* 28; Hahlo and Sinclair *The Reform of the South African Law of Divorce* (1980) 14–39.

97 s 4(2)(b) of the Divorce Act.

98 Seymour *op cit* 176.

99 *Raphuti v Mametsi* 1946 NAC (N & T) 19 20. Moreover, where two people already married by customary law subsequently marry by civil or Christian rites, the customary union is superseded by the marriage. *Zondi v Gwane* 4 NAC 195; *Kos v Lephaila* 1945 NAC (C & O) 4; *Matchika v Mnguni* 1946 NAC (N & T) 78; *Tonjeni v Tonjeni* 1947 NAC (C & O) 8; *Tobiea v Mohatla* 1949 NAC (S) 91; *Ngcwayi v Ngcwayi* 1950 NAC (S) 231; *Nkambula v Linda* 1951 1 SA 377 (AD); *Ledwaba v Ledwaba* 1951 NAC (N–E) 398; *Njombani v Tshali* 1952 NAC 62 (S); *Mzizi v Pamla* 1953 NAC 71 (S); *Sgatya v Madleba* 1958 NAC 53 (S).

100 3 NAC 71.

> entitle the husband to the return of the dowry paid it would be repugnant to justice and equity to say that a woman and her father, who was a party to the contract, should be allowed to benefit by the woman's misconduct."[101]

So, although the principle laid down was that all matters arising from the agreement should be dealt with according to customary law, the majority decision relied on equity in deciding to permit restoration of *lobola.* Carmichael, RM, in a dissenting judgment, objected to this, stating that

> [o]ne cannot . . . hold at once that the question is resolvable under Native law and that it is to be construed in terms of a separate European marriage contract."[102]

His conclusion was that customary law should be applied to all aspects of the *lobola* agreement and, accordingly, that *lobola* should be restored to the husband only if his wife's misconduct were such as would have entitled him to restoration under customary law.[103]

In the case of *Fuzile v Ntloko*[104] the commissioner's court followed Carmichael's dissenting opinion. The plaintiff, after having obtained a decree of divorce from the divorce court, claimed restoration of *lobola* on the ground of his wife's adultery and desertion. The commissioner found for the defendant by applying customary law to the case (viz as if the *lobola* agreement had been concluded as part of a customary union instead of in consideration of a Christian marriage). He decided that

> "as Appellant had not putumaed[105] his wife and in fact does not desire her return, he has under Native Law rejected his wife and is therefore not entitled to the return of the *lobolo.*"[106]

On appeal, the court disagreed with the commissioner's judgment and held that the dissolution of a civil or Christian marriage is governed by the common law. Once the divorce decree has been granted, the marital union is terminated and, it was held, recourse may then be had to the courts to dispose of the *lobola* for the purposes of which the court's decree of divorce serves as authority.[107] In considering the claim for restoration of *lobola*, regard must be paid to the ground upon which the divorce was granted in order to determine whether or not the husband's claim will succeed. The court held that this decision must be made in accordance with the principles set out in *Qotyane v Mkhari*,[108] i e *lobola* might not be recovered if the husband was the direct or proximate cause of the divorce; on the other hand, the wife's guardian might not retain the *lobola* if his daughter's conduct was the reason for the dissolution of the marriage.

It may be concluded, therefore, that the common law is applied not only to dissolve the marriage, but also to determine which spouse was at fault and,

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101 72.
102 75.
103 76.
104 1944 NAC (C & O) 2.
105 See n 23.
106 2.
107 *Raphuti v Mametsi* 1946 NAC (N & T) 19 20.
108 1938 NAC (N & T) 192 193; see also *Gwala v Cele* 1978 BAC 27 (N–E).

based on this finding, whether *lobola* should be restored. Once it has been decided that *lobola* should be restored, customary law will be applied only to determine the amount of *lobola* to be returned. If the marriage has been terminated, the *lobola* agreement has to be terminated as well, because, according to the common law, there is no subsisting customary union for the purposes of which the *lobola* agreement could serve to transfer the reproductive power of the wife to her husband's group.[109]

According to the common law a marriage may also be determinated by death. In customary law, as we have seen, the death of one of the spouses will not necessarily end the union. If the husband in a customary union dies, the still existing *lobola* agreement and the widow's future are inexorably interlocked. While her guardian retains the cattle, the union between the two families subsists. As a widow in her deceased husband's family, she has a right to remain with that family and to be maintained by them.[110] She may choose to enter into an *ukungena* union[111] if she has not passed child-bearing age, so that she may continue to bear issue for her deceased husband's family.[112] If she decides to leave her husband's village because she wishes either to return home or to enter into a customary union with another man, she ceases to be a wife in her husband's family and restoration of *lobola* may become necessary on the grounds of her repudiation.[113] When, on the other hand, it is the husband's family who is guilty of rejecting the widow, the *lobola* is not recoverable.[114] Whatever happens, it is firmly established in customary law that the husband's heir inherits the deceased's rights and obligations under the *lobola* agreement, including the right to receive *lobola* for the legitimate and illegitimate daughters of the widow.[115]

Where the marrige is one by civil or Christian rites, the death of the husband dissolves the marriage "absolutely and completely,"[116] and all personal consequences of the marriage come to an end, leaving the surviving spouse free to remarry.[117] As regards a *lobola* agreement concluded in respect of that marriage, however, the courts have adopted the view that the agreement continues in force and that customary law is applicable to that agreement.[118] This may be inferred from decisions in which the court has not only awarded posthumous offspring to the family of the husband and granted his heir the right to receive *lobola* for

109 *Cobokwana v Mzilikazi* 1931 NAC (C & O) 44; *Andries v Mayekiso* 1932 NAC (C & O) 7; *Fuzile v Ntloko* 1944 NAC (C & O) 2 7; *Matchika v Mnguni* 1946 NAC (N & T) 78; *Tobiea v Mohatla* 1949 NAC (S) 91; *Mzizi v Pamla* 1953 NAC 71 (S); *Sgatya v Madleba* 1958 NAC 53 (S).

110 *Ntame v Mbede* 3 NAC 94; *Desemele v Sinyako* 1944 NAC (C & O) 17 18; *Sila and Sila v Masuku* 1937 NAC (N & T) 121.

111 See above.

112 Seymour *op cit* 234.

113 *Tobiea v Mohatla* 1949 NAC (S) 91 92.

114 *Mrubata v Dondolo* 1949 NAC (S) 174.

115 *Mavayeni v Mavayeni* 5 NAC 91 93; *Mbuyisa v Mtshali* 1937 NAC (N & T) 162; *Lebona v Ramokone* 1946 NAC (C & O) 14; *Nzimande v Phungula* 1951 NAC (N–E) 386.

116 *Magcoba v Magcoba* 6 NAC 17 18; *Tobiea v Mohatla* 1949 NAC (S) 91.

117 Hahlo *op cit* 242; *Tobiea v Mohatla* 1949 NAC (S) 91 92.

118 *Tobiea v Mohatle* 1949 NAC (S) 91; *Mrubata v Dondolo* 1949 NAC (S) 174.

daughters,[119] but has also found a widow who wished to remarry guilty of repudiation, thus entitling her husband's heir to claim return of the *lobola*.[120] It would seem that the courts consider the widow and the deceased husband's heir bound by the *lobola* agreement, in other words, a legal bond subsists between the two families. Moreover, it seems that, in practice at least, a widow remains a "wife" in the husband's family in terms of customary law,[121] despite the fact that, according to common law, she is deemed to be no longer married, and despite the fact that there is no customary union.[122] Once a marriage has been terminated by death, there are no rights and obligations between the spouses to be governed by the common law, with which rights and obligations under the *lobola* agreement may conflict. Accordingly, the objections to continuing to enforce *lobola* agreements fall away. This attitude is entirely out of keeping with the courts' approach to divorce but it is an inevitable consequence of the recognition and enforcement of *lobola* agreements in conjunction with civil or Christian marriages. When a husband institutes divorce proceedings he will want to end the marriage not only according to the common law, but also according to customary law. To achieve this he will have to institute separate proceedings, one to obtain a decree of divorce in accordance with the common law and a second to reclaim the *lobola* on the basis of the divorce. Where the marriage is terminated by the husband's death, however, it is unlikely that the heir will seek to reclaim the *lobola* in order to terminate the bond between the two families. So, although the marriage has come to an end according to the common law, at customary law the union subsists until either the husband's family or the widow wishes to terminate the union by disposing of the *lobola* and this is unlikely to happen. In practice, therefore, it is clear why the courts are presented with fewer conflicts in the case of death than divorce.

CUSTODY AND GUARDIANSHIP OF THE CHILDREN ON DISSOLUTION OF THE MARRIAGE

When a marriage is concluded at common law, that system will govern all matters arising from the marriage. Accordingly, it will determine not only the status of the spouses but also the status,[123] custody and guardianship of the children born of that marriage.[124] On the other hand, one of the rules of customary law is that a father's rights to his children depend on payment of *lobola*. If *lobola* is not paid, the children belong to the mother's family. All this is in

119 *Mrubata v Dondolo* 1949 NAC (S) 174.
120 *Ntlongweni v Mhlakaza* 3 NAC 163; *Desemele v Sinyako* 1944 NAC (C & O) 17; *Makedela v Sauli* 1948 NAC (C & O) 17; *Tobiea v Mohatla* 1949 NAC (S) 91.
121 *Desemele v Sinyako* 1944 NAC (C & O) 17 18.
122 *Raphuti v Mametsi* 1946 NAC (N & T) 19 20.
123 One of the invariable consequences of marriage is that children born during the subsistence of a marriage are legitimate: Hahlo *op cit* 125. If the children were born prior to the marriage between their parents, they will be legitimated by the subsequent marriage: *Sgatya v Madleba* 1958 NAC 53 (S); *Ledwaba v Ledwaba* 1951 NAC (N–E) 398; Seymour *op cit* 264 266.
124 Seymour *op cit* 249.

conflict with one of the fundamental principles of a marriage and can therefore not be upheld.

In terms of the common law, both parents have a natural right to the custody and guardianship of their children and a right to determine their upbringing. This is one of the consequences of a marriage which cannot be varied otherwise than by a court of law,[125] and which lasts even after the marriage has been dissolved whether by death or divorce.[126] But, while the wife has a say in the upbringing of the children, the husband's decisions are final.[127] Although the wife may, theoretically, have greater rights and obligations in common law than she would have in customary law, there is little difference in practice. This, presumably accounts for the absence of disputes in this respect during the marriage.

It is only on dissolution of the marriage that conflicts become apparent. On divorce, arrangements have to be made regarding custody and guardianship of the minor children. In this regard the court may, in terms of section 6(3) of the Divorce Act, make any order it deems fit.[128] In fact, the court may not grant a decree of divorce until it is satisfied that proper provision has been made for the children.[129] These provisions grant the court the power it needs, as supreme guardian of all minors, to safeguard the interests of minor children on divorce. If it is in the interests of a child, the court may award sole guardianship or sole custody to either parent.[130] Generally, the interests of a child are best served by granting sole custody to the mother and sole guardianship to the father.[131] In customary law, on the other hand, the rights to the children[132] are vested in the father and his family but it has become usual to allow young children to remain with the mother until they are old enough to return to their father.[133] If the usual

125 Spiro *op cit* 239 247 325 *et seq.*

126 Hahlo *op cit* 459 *et seq*; Spiro *op cit* 30–31.

127 Spiro *op cit* 30. There is one exception to the rule that the father's decision is final and that relates to the marriage of minor children. They require the consent not only of their father but also of their mother: s 5(4) of the Matrimonial Affairs Act.

128 This section deals only with the position of minors at the time of divorce proceedings. Applications regarding custody and guardianship by parents who are already divorced or are living apart are governed by s 5(1) of the Matrimonial Affairs Act 37 of 1953, as amended by s 16 of the Divorce Act. Such differences as exist between the provisions of these acts do not merit any attention for the purpose of this article. See Hahlo and Sinclair *op cit* 40–42 59.

129 s 6(1) of the Divorce Act.

130 s 6(3) of the Divorce Act; s 5(1) of the Matrimonial Affairs Act.

131 Hahlo *op cit* 460–463.

132 It should be noted that the concepts of custody and guardianship are foreign to customary law. In *Sila and Sila v Masuku* 1937 NAC (N & T) 121, it was held that the acquisition of rights in children is of primary consideration in customary law, but such rights have not been divided into two categories, viz custody and guardianship.

133 The courts have, however, granted the mother custody if the father is not a fit and proper person: Seymour *op cit* 226 n 2; *Zwana v Zwana and Twala* 1945 NAC (N & T) 59 63; *Mokoena v Mofokeng* 1945 NAC (C & O) 89; *Maruping v Maruping* 1947 NAC (N & T) 129; *Nkosi v Ngubo* 1949 NAC (N–E) 87; *Mkize v Mkize* 1951 NAC (N–E) 336; *Gumede v Gumede* 1955 NAC 85 (N–E).

custody and guardianship order is made, in terms of the common law, on dissolution of a marriage between Blacks, the order does, more or less, harmonise with customary law.

If the husband dies, however, the common law provision that guardianship is vested in the widow is, of course, in direct conflict with African customary law.[134] According to that system the husband's heir should assume guardianship because it is his family which has acquired rights in the children by transferring *lobola* to the mother's family. The courts have decided that the application of customary law in this instance would conflict with the fundamental principles of marriage.[135] As Thorpe said in the case of *Ramokhoase v Ramokhoase*

> "[a] surviving parent has a natural right to the personal control of a minor child."[136]

But there is no objection to the husband's heir receiving the *lobola* for the daughters of the deceased on the basis of the *lobola* agreement.[137]

The splitting of the right of custody and guardianship from the right to receive *lobola* gives rise to three questions. First, who is entitled to negotiate the terms of the daughter's *lobola* agreement? Secondly, who is entitled to *teleka* the daughter to force the groom to meet demands for *lobola*,[138] if a customary union has been entered into? And thirdly, who is to be regarded as the guardian of the children born of the union, if the groom remains in default? There is little doubt that the answer to all three questions would be the deceased's heir, as he is entitled to the *lobola*. This would mean that, in practice, the widow's right of guardianship would be limited to matters relating to the common law, while the heir would assume his role as guardian in matters relating to African customary law. Any conflict of interests may be resolved by appointing the heir as joint guardian with the mother which, in terms of the common law, any father may do by will or written instrument.[139] If this possibility were made automatic in respect of children born of African parentage, a situation would be created which would be more in conformity not only with customary law but also with

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134 Seymour *op cit* 261.

135 *Ntoyi v Ntoyi* 4 NAC 172; *Dlakiya v Nyangiwe* 4 NAJ 173; *Mdema v Garane* 5 NAC 199; *Malamlela v Malamlela* 6 NAC 5; *Ngcobo v Ngcobo* 1944 NAC (C & O) 16; *Nambida v Glaman* 1956 NAC 108 (S); *Msomi v Msomi* 1968 BAC 29 (N–E); *Ramokhoase v Ramokhoase* 1971 BAC 163 (C) *Madlala v Madlala* 1975 BAC 96 (N–E).

136 1971 BAC 163 (C) 167.

137 *Dlakiya v Nyangiwe* 4 NAC 173; *Mrubata v Dondolo* 1949 NAC (S) 174. According to s 3(1)(a)(ii) of the African Law and Tribal Courts Act, ch 237, of Zimbabwe (which has since been repealed by the Customary Law and Primary Courts Act 1981), custody and guardianship of children were determined by customary law: Bennett "African Marriages under the Marriage Act: African Law or Common Law?" 1977 *Rhod L J* 3 19. However, this ignored the fact that children are part of a marriage and that if the marriage is governed by the common law, the children must also be subject to that system.

138 See above for an explanation of this procedure.

139 There is nothing in s 23 of the Black Administration Act which prevents Blacks from doing so. It is provided for in s 72(1)(a)(i) of the Administration of Estates Act 66 of 1965 and in s 5(3)(b) of the Matrimonial Affairs Act; see also Hahlo *op cit* 328.

reality. Of course, such a rule would have to be subject to the overriding principle that the child's interests are of paramount importance.[140]

CONCLUSION

When Blacks conclude a *lobola* agreement in respect of their marriage, they attempt to combine the principal requirements of a marriage at common law with those of a customary union, so that they will be regarded as married under both systems of law. The courts have declared, time and again, that a customary union cannot exist in the face of a legally valid marriage[141] but, by permitting the parties to a marriage to conclude a *lobola* agreement, they have, in practice at least, tacitly recognised the existence of two marital unions. In view of the substantial differences between these two kinds of union it is inevitable that conflicts will arise. The courts have attempted to solve all potential areas of conflict by ignoring the fact that the *lobola* agreement signifies a marriage at customary law and by declaring the agreement a separate contract, ancillary to the marriage. In this sense, the agreement can be upheld to the extent that it does not conflict with the marital obligations of the spouses. Two of the fundamental obligations of marriage are cohabitation and conjugal fidelity,[142] and the courts will not enforce any rights or obligations arising out of the *lobola* agreement which conflict with these obligations. No conflicts will occur if the spouses comply with the obligations envisaged in the *lobola* agreement, namely, to bear issue and to pay *lobola.* Conflicts do arise, however, if the spouses do not fulfil the *lobola* obligations, because the consequences which result at customary law from non-compliance cannot be reconciled with the fundamental obligations of marriage. The practice of *ukuteleka*, for instance, is in conflict with these obligations because it makes the continuance of the marriage dependent on the *lobola* agreement, i e the husband's failure to meet his father-in-law's demand for more *lobola* may result in termination of the union. Instead, the courts have allowed the wife's guardian to apply for a legal action to enforce payment of *lobola.* The courts have also not upheld a claim by the husband for restoration of *lobola* on the basis of failure to provide a seedraiser if his wife proves to be barren. If the courts were to enforce such a claim, they would, in essence, be countenancing adultery, which clearly conflicts with the spouses' obligations to observe conjugal fidelity. This was also the reason why the court enforced a claim for refund of the *lobola* after a decree of divorce had been granted on the basis of a single act of adultery by the wife.

140 *Ngcobo v Ngcobo* 1944 NAC (C & O) 16; *Rowan v Faifer* 1953 2 SA 705 (E); *Mathenyane v Mathenyane* 1954 NAC 66 (C); *Mbuli v Mehlomakulu* 1961 NAC 68 (S); *Msomi v Msomi* 1968 BAC 29 (N–E); *Ramokhoase v Ramokhoase* 1971 BAC 163 (C).

141 See n 99.

142 See n 86.

Apart from the rights and obligations which the spouses have *vis-à-vis* each other, they have an absolute right to custody and guardianship of their children. Thus the customary law rule that the father's rights to his children depend on payment of *lobola* is clearly incompatible with the fundamental principles of marriage. Nor will customary law be applied to determine custody and guardianship of the children on their father's death, because according to that system the deceased's heir should assume guardianship and not, as under the common law, the widow.

In these areas, the *lobola* agreement must be adjusted to fit in with the marriage, but in every other respect customary law will continue to apply to the *lobola* agreement. These adjustments do give the impression of makeshift solutions to the fundamental problem of the numerous conflicts which must arise between customary law and common law as the result of combining a *lobola* agreement and a marriage. The differences between the two institutions are so great that there is no one simple answer for reconciling all possible conflicts. One should not assume that an answer will be found in prohibiting or refusing to enforce a *lobola* agreement in respect of a marriage because practice has shown that this type of ruling is dysfunctional.

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South Africa's state security legislation: exit section 6

Suryia Kumar Parmanand
B Iur LLM
Senior Lecturer in Public Law, University of Zululand
and
Charl Vorster
MA DLitt et Phil
Professor in Psychology, Rand Afrikaans University

OPSOMMING

Suid-Afrika se Staatsveiligheidswetgewing : die Uitvaart van Artikel 6

Hierdie artikel is 'n terugskouing na die voormalige artikel 6 van die Wet op Terrorisme 83 van 1967. Die wet se swakhede, eienaardighede en ander negatiewe aspekte, die implementering waarvan internasionale afkeuring teweeggebring het, word deur die skrywers belig.

Daar word aangetoon dat alhoewel artikel 6 geldig was as statutêre bepaling, die wyse waarop die bepalings geïmplementeer is, nie geldig was nie. Soos uit verskeie *dicta* blyk, is artikel 6 self ook van regskant aan kritiek onderwerp. Alle metodes om inligting uit aangehoudenes te probeer kry, het juridiese grense. Optrede wat hierdie grense oorskry, is onwettig. Die skrywers poog ook om die presiese bedoeling aanwesig by die wetgewer met die opstel van artikel 6, te bepaal. Hulle bespreek verskeie ondervragingsmetodes en die psigiese gevolge daarvan.

Die vraag of gevangenes regte het, word ten slotte kortliks bespreek. 'n Oproep word tot regsgeleerdes gerig om hulle teenkanting uit te spreek teen wette wat op basiese menseregte inbreuk maak.

1 A BRIEF BACKGROUND

Section 6 of our former Terrorism Act, which frequently engaged international attention, owing *inter alia,* to the alarming incidence of deaths in detention, has now been subsumed in our new Internal Security Act 74 of 1982. The latter is a fairly comprehensive enactment relating to state security and the maintenance of law and order in South Africa. In the light of section 6's obviously hyper-active career, it would be tantamount to a dereliction of duty if its somewhat unobtrusive demise were not subjected to at least some form of *post-mortem* comment.

The controversial section 6 had an interesting lineage: The "90-day law"[1] permitted interrogation in police custody for up to 90 days. The "180-day-law"[2] replaced the "90-day law" and provided for the detention of prospective prosecution witnesses for 180 days. The "14-day detention law"[3] permitted the detention of persons suspected of terrorist activities for fourteen days, during which they were interrogated. Finally, in 1967, came the controversial section 6, the so-called "detention-without-trial law."

An accumulation of circumstances, viz deaths in detention, the banning of eighteen organisations, three newspapers and seven individuals, and the detention under the Internal Security Act 44 of 1950 of forty-seven Black leaders, resulted in the appointment of the Rabie Commission of Inquiry in 1979. The commission's assignment was to examine the necessity, justice, equity and efficacy of our internal security legislation. The chairman of the commission was the Honourable Mr Justice PJ Rabie, now the chief justice of the appellate division. Many of the recommendations of the Rabie Report were incorporated into the new Internal Security Act of 1982.

2 THE RABIE REPORT (RP 90/1981)

The recommendations of the Rabie Report were disappointing in certain respects. For example, very little importance was apparently attached to the following:

a allegations of police misconduct raised at trials and at inquests;

b criticisms of security legislation by leading South African academics and lawyers;

c allegations by ex-detainees or statements by psychiatrists on the detrimental effects of interrogation in solitary confinement;

d the necessity for investigation into police interrogation techniques — as a result of which the commission was unable to comment on the lawfulness or permissibility of such techniques;

e the need to investigate deaths in detention and allegations by detainees and others of reported abuse.

On the other hand the Rabie Report did have a more positive side. For instance, it recommended the abolition of:

a the double jeopardy principle inherent in section 5(h) of the Terrorism Act and the "Sabotage Act";[4]

b mandatory minimum five-year sentences of imprisonment under the Internal Security Act 44 of 1950 and the "Sabotage Act" (the commission in fact recommended the reinstatement of the court's discretion in respect of sentencing in these instances);

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1 s 17 of Act 37 of 1963.
2 s 215*bis* of the Criminal Procedure Act 56 of 1955, inserted by s 7 of Act 96 of 1965.
3 s 22 of the General Law Amendment Act 62 of 1966.
4 s 21(4)(g) of Act 76 of 1962.

c the death penalty, where no act of violence had been committed (the Terrorism Act, the "Sabotage Act" and the Internal Security Act 44 of 1950[5] provided for the imposition of the death penalty as a discretionary sentence even where the offender had not committed any act of violence);

d the provisions of section 2 of the Terrorism Act and section 11(b) *ter* of the former Internal Security Act, whereby the accused had to bear the burden of proof beyond a reasonable doubt to rebut certain presumptions of guilt (the Rabie Report advocated proof on a balance of probability in respect of these presumptions);

In addition to the above, *inter alia*, the commission recommended:

e the suspension of the six-month period of prescription for civil claims by detainees by an amendment of section 32 of the Police Act 7 of 1958. This would have enabled a section 6 detainee to sue the minister of police for damages for assault during detention notwithstanding the fact that the action was instituted more than six months after the claim had arisen.

3 SECTION 6 IN RETROSPECT

Detention, ostensibly for interrogation, is the common denominator in South Africa's security legislation. Such detention is an integral part of the *modus operandi* of the officers responsible for internal security. While it is hoped that our new Internal Security Act will not manifest the shortcomings of its precursors, an exposé of the former section 6's disregard for basic human dignity may well encourage a move towards a respect for the physical and mental well-being of our political detainees of tomorrow and therefore a return to grass-roots humanity. The present article will for reasons of space concentrate only on the manner in which section 6 could be used to manipulate the *minds* of its detainees; i e in contradistinction to possible physical abuse of detainees.

4 'SENTENCE FIRST – VERDICT AFTERWARDS'[6]

In 1938 Krause J felt sufficiently moved to inform an unreceptive public about the inhumanity of solitary confinement:

> "In view ... of what an isolation cell is, and what the nature of other antiquated punishments are, and what their psychological effect must be, the time is long overdue for the public conscience to be roused and for some consideration to be given also to the treatment of our 'caged human beings'. It would come as a surprise to most people that lashes, solitary confinement, spare diet, and even leg irons (reminiscent of the chain galleys of the Middle Ages) are quite common forms of punishment inflicted for offences against prison discipline. The prison officials are not to blame as they merely carry out orders and the visiting magistrates can only apply the law as they find it, although they are in duty bound to exercise a reasonable and judicial discretion in so applying it."[7]

5 s 11(b) *bis*, 11(b) *ter*.
6 Lewis Carroll *Alice's Adventure in Wonderland* Penguin (1976) 157.
7 *R v Botha* 1938 OPD 85 89.

More than four decades have passed since Krause J's summons to the "public conscience." Little has changed. Solitary confinement and sleep deprivation are but two of a variety of techniques used to manipulate detainees' minds. The ostensible objective is to obtain information; no acknowledgement is given to the punitive aspect of the exercise. Those who cannot endure such penetrative mental encroachments become psychiatric wrecks. For others, parasuicide becomes real.[8] It is therefore not surprising that section 6 detainees were once described as

> "little better off than the *monstrum* of Roman law or the *vagabundus* of Germanic law: that is, the law no longer provided them with meaningful protection, but instead their well-being was left in the hands of human persons with the Minister of Justice as *dominus*."[9]

5 SECTION 6: A LICENCE FOR UNLAWFUL INTERROGATION METHODS

Section 6 did not *per se* sanction unlawful methods of interrogation; regrettably, however, its provisions were interpreted in a manner which could deceive one into believing that it did. It is not surprising that in the course of time the "Terrorism Act" and "section 6" came to be associated with "detention without trial" in the minds of most lawyers; almost to the extent that the latter phrase came to replace the official short title of the act.

The provisions of section 6 were draconian : It was lawful to hold a detainee at any place without legal representation (subsection 1) indefinitely, incommunicado, and in total secrecy (subsection 6). According to Mathews[10]

> "it [was] now certainly possible for persons to disappear without trace in detention and to remain there until they [died]. Even the children, husbands or wives [were] denied information."

Section 6 was part of our law simply because it had been enacted by parliament. However, the trend whereby delegates of the state attempted to achieve the objectives of section 6 by employing interrogation methods that had as their consequences, *inter alia*, disintegration of the minds of political detainees, had not been enacted by parliament. In any event this practice conflicted with a

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8 At the time of writing, approximately 54 political detainees are known to have died in detention, Dr Neil Aggett being the most recent. There is also an increase in the number of political detainees requiring psychiatric treatment during or pursuant to detention."Pravin Gordhan is the eighth detainee in the country to be admitted to a psychiatric ward in three months . . . Mr Sam Kikine, an official of Independent Trade Union . . . also underwent psychiatric treatment": 1982-03-28 *Sunday Times Supplement Magazine Extra* 1.

9 Van der Vyver "The Concept of Human Rights : Its History, Contents and Meaning" 1979 *Acta Juridica* 10 27.

10 Mathews *Law, Order and Liberty in South Africa* 151.

basic principle of our canons of interpretation, viz that the law had to be interpreted in such a way that it would lay the least possible burden on those affected by it.[11]

Furthermore, our courts often stressed that statutory enactments which curtailed the court's jurisdiction and encroached upon individual freedom had to be restrictively interpreted.[12] This attitude was taken a step further in *R v Pretoria Timber Co (Pty) Ltd*[13] where the court stated that

> '[w]here Parliament has conferred vast powers of legislation upon the executive, the courts should not in my opinion be astute to divest themselves of their judicial powers and duties, namely to serve as buttresses between the executive and the subjects."

The provisions of section 6 were not unassailable – several supreme court judgments made inroads into them. Judicial pronouncements by our courts in fact acknowledged the illegality of inhuman interrogation methods. *Rossouw v Sachs*[14] for example, dealt with the conditions under which detainees were to be held. The appellate division concluded that parliament intended the detention to be as effective as possible, the object being to induce the detainee to speak. However, assault, third degree, impairment of health or resistance by inadequate food, maltreatment in body or mind were not sanctioned.

Rossouw's case considered the provisions of section 17 of the General Law Amendment Act 37 of 1963, another detention-without-trial law not much different from the former section 6. In this case Ogilvie Thompson JA inquired:

> "Did Parliament intend that, in the furtherance of the object of inducing the detainee to speak, the continued detention should be as effective as possible, subject only to considerations of humanity as generally accepted in a civilized country?"[15]

It is submitted that the court's reference to "considerations of humanity" excluded solitary confinement or any interrogation method which exceeded the bounds of human decency. More specifically, the court acknowledged that the intention of parliament was to call a halt to such confinement where its consequence became inhuman. The judge clearly emphasised the duty to preserve the physical and mental health of the detainee,[16] thereby implicitly qualifying neglect thereof as unlawful. It was unfortunate that notwithstanding this philanthropic attitude the court regarded solitary confinement as a means of "inducing the detainee to speak,"[17] thereby typifying solitary confinement *per se* as lawful treatment.

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11 This principle, which follows from the presumption that the legislature did not intend an unjust or unreasonable result, was given judicial endorsement by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 552: "It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole."

12 See e g *S v Hartman, S v Jacobs* 1968 1 SA 278 (T) 282.

13 1950 3 SA 163 (A) 181–182.

14 1964 2 SA 551 (A) 564F.

15 561 564.

16 561D–E.

17 561C.

In a minority judgment in *Schermbrucker v Klindt*[18] Williamson JA rejected this view, stating that it was

> "manifestly wrong in modern times to impute the extraordinary and unprecedented intention to Parliament of legalizing a system of compelling persons to speak. There is nothing to prevent Parliament from doing that if it decides so to do; but at least one would expect to find such intention disclosed with far greater clarity."[19]

A more moderate view was also adhered to in *S v Weinberg*[20] when the appellate division regarded as reprehensible the third-degree methods of interrogation alleged to have been employed by the security police.

In *Essop v Commissioner SAP*[21] the court granted an interim interdict, the purpose of which was to restrain the respondent from treating the applicant unlawfully while he remained in detention. The finding that section 6 did not "deprive the court of its jurisdiction to enquire into the lawfulness of the treatment which a detainee was receiving while in detention"[22] was later confirmed.[23]

In *Nkondo v Minister of Police*[24] Smuts J acknowledged the consensus between counsel on both sides that despite the wide language of section 6, the court's jurisdiction was not excluded in every case. Smuts J went on to quote the *dictum* of Innes CJ in *Union Govt v Fakir*[25] relating to a statutory provision similar to section 6(5) where, notwithstanding the wide language of the legislature, the court could in certain circumstances still interfere, although the court did not do so in the present case.

A further inroad into the provisions of section 6 was made when Didcott J held in *Nxasana v Minister of Justice*:[26]

> "A court may, notwithstanding section 6(6) of the Terrorism Act allow evidence to be taken down by a magistrate on commission, relating to the circumstances of the detainee."

Significant in most of the aforementioned cases was the fact that the court would assist a detainee upon presentation of *prima facie* evidence of his unlawful treatment.

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18 *Schermbrucker v Klindt* 1965 4 SA 606 (A).
19 621G–H.
20 1966 4 SA 660 (A) 667.
21 1972 1 PH HS 4 (T).
22 9–10.
23 per Theron and Marais JJ in the Transvaal provincial division decision in case M 1804/71 of 1972-02-25, quoted in Dugard *Human Rights and the South African Legal Order* 340.
24 1980 2 SA 894 (O) 910.
25 1923 AD 466 469–470 per Innes CJ: "We are bound to give effect to the clear directions of the statute. But wide as the language may be, it does not exclude the jurisdiction of the Courts under every circumstance. Cases may be conceived in which interference would be justified. If there were a manifest absence of jurisdiction or if an order were made or obtained fraudulently, a competent court would be entitled to interfere. It is difficult to imagine such cases occurring in practice, but they are not impossible."
26 1976 3 SA 745 (A). See Snyman J in the Witwatersrand local division decision of *Schermbrucker v Klindt* handed down on 1964-08-14 and reported in *Schermbrucker v Klindt* 1965 1 SA 353 (T).

6 WHAT WAS THE INTENTION OF THE LEGISLATURE IN ENACTING SECTION 6?

If a lawyer were to unshackle himself momentarily of his legal training and to resort to sheer gut reasoning, he may well conclude that the legislature's intention was to isolate detainees without interruption, deprive them of the comforts of life and induce them to impart information. It would be conceded that any interruption of such isolation would defeat its purpose. Our hypothetical lawyer may even go so far as to suggest:

> "The Act [was] dealing with the serious problem of subversion, and the Court [had to] . . . enter into the spirit of the legislation which [was] to employ harsh measures to deal with a dangerous state of affairs . . . [A] restrictive interpretation here [was] quite out of place."[27]

In short, it might even be argued that the object of section 6 was to extract information from a detainee by employing whatever means were necessary; this might have included means that, but for the empowering legislation, could clearly have been labelled as unlawful. Without such "bite" to elicit information section 6 would have been ineffective! It would, according to this point of view, be inconceivable that the legislature, having created a creature of sorts, would also have intended it to be toothless!

However, the other side of the coin is interesting: Why does the average lawyer find it difficult to accept the interpretation of gut reasoning as indicative of the true intention of the legislature? Some of the many reasons are:

a Our principles of justice do not tolerate a negation of the rule of law,[28] least of all by nebulous statutory provisions.

b It is a rule of policy in our law that a person is innocent until proved guilty.[29]

c Sentence comes after verdict and never *vice versa*.[30]

d Prisoners awaiting trial are not convicted prisoners.[31]

e The police authorities should not be allowed to perpetuate injustices on persons *suspected* of terrorist activities by hiding behind nebulous provisions; if the legislature intended to deprive a detainee of all his personality rights it should have said so in plain terms; the legislature's failure to do so must be construed as revealing a contrary intention.

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27 per Young AJA in *R v Nkomo* 1964 4 SA 452 (SRAD) 464, a case on the Law and Order (Maintenance) Act ch 39 of Southern Rhodesia.

28 See e g Molteno "The Rules Behind the Rules of Law" 1965/1966 *Acta Juridica*, who quotes from Brookes and Macaulay *Civil Liberty in South Africa* 19: "The abrogation of the rule of law means despotism . . . No point is better established in political science than the proposition that civil liberty depends on the rule of law, and the abrogation of the rule of law would mean the end of civil liberty as we have known it."

29 See e g Schmidt *Die Bewysreg* 114; Hoffman and Zeffert *South African Law of Evidence* 3rd ed 399; *R v Britz* 1949 3 SA 293 (A) 302 where Schreiner JA stated that "the presumption of innocence is recognised as a fundamental safeguard of the rights of the individual."

30 See the *dictum* of Lord de Villiers CJ in *Whittaker v Roos* 1912 AD.

31 *ibid.*

f Especially where the intention of the legislature is unclear, the legislature is presumed not to have intended to deprive an individual of existing vested rights, whether such rights are derived from common law or statute.[32]

g Penal statutes must be strictly construed in favour of the accused[33] (and surely *a fortiori*, in favour of a person who is only *suspected* of unlawful activities).

Section 6 did not expressly provide for solitary confinement. That a detainee could be held in isolation appeared implicit in the provisions of section 6(6). However, this interpretation conflicts with basic principles of our rules of interpretation, e g the presumption that the legislature does not intend to deprive an individual of existing vested rights.[34] There is also the presumption in our law that a statute should not be interpreted so as to violate a rule of international law.[35]Although the Republic of South Africa is, as yet, not a party to any convention on human rights, a reference to article 3 of the European Convention on Human Rights can serve as an example of how this presumption may operate in future. Article 3 provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 was raised in *Ireland v The United Kingdom*.[36] The court considered as inhuman and degrading five particular techniques of in-depth interrogation, viz wall-standing (i e being interrogated for long periods in an uncomfortable position with one's fingertips against the wall); hooding; subjection to noise; sleep deprivation; and deprivation of food and drink. The court held that these five techniques, although not equivalent to torture, violated the European Convention on Human Rights, particularly article 3.

7 VIOLATION OF THE MIND

Unquestionably our security legislation exists to protect the state and therefore the public. However, the interests of the detainee *vis-à-vis* the public should be balanced: the state's power regarding state security should be proportionate to the measure of supervision and control of its officers implementing its security legislation. The fact that some detainees "bear up well" under solitary confinement or other mind-bending methods of interrogation cannot serve to justify a practice which allows another's ego to rupture under like conditions. An argument to the contrary is specious and its deduction incorrect because its basic

32 See the *dictum* of De Villiers AJA in *Blackmore v Moodie's GM & Exploration Co Ltd* 1917 AD 402 416; and *Tvl Investment Co v Springs Municipality* 1922 AD 337 347 per Solomon JA: "It is a well established rule in the construction of statutes that where an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, *unless it is plain that such was the intention of the* legislature" (my italics).

33 *R v Sachs* 1953 1 SA 392 (A) 399 per Centlivres CJ: "Where . . . a statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual."

34 *Tvl Investment Co v Springs Municipality* 1922 AD 337 347.

35 See Cockram *Interpretation of Statutes* 69.

36 1972 *Yearbook of the European Convention on Human Rights* 76 57, quoted by Rudolph: " 'Man's Inhumanity to Man Makes Countless Thousand Mourn!' " – Do Prisoners Have Rights?" 1979 *SALJ* 640 644.

premise is wrong: inhuman interrogation methods are *not* lawful. Solitary confinement, *per se*, or at the level where it even begins to cause an ego rupture, is barbarous and medieval.

In *Miranda v Arizona*[37] the court held that incommunicado interrogation amounts to third degree even in the absence of physical violence. The court said:

> "Since *Chambers v Florida* 309 US 227, this court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." (See also *Blackburn v Alabama* 361 US 199, 206 (1960).[38])

Violation of the minds of detainees remains a distinct risk under our stringent security legislation. There are indications that various mind games, some more effective and more inhuman than others have been played on "prisoner" guinea pigs in the past. The present article will touch on a few such "games" and will also provide an insight into the unreliability of information elicited by means of such techniques. Furthermore, it is hoped that the reader will gain some insight into the severity of the consequences of such assaults on the minds of the detainees involved.

8 SOLITARY CONFINEMENT

The case against solitary confinement is succinctly concluded in the suggestion that Eskimos never walk alone because the sheer monotony of their snowy landscapes could unbalance their minds. Similarly, monotony and lack of stimulus in solitary confinment unbalances the minds of prisoners.

How slowly we learn. As early as 1938 Krause J enlightened us, albeit simplistically, on solitary confinement:

> "Now solitary confinement and spare diet means being locked up in a specially constructed cell, usually with cement or stone floor, with a slit of an iron-barred window which admits a glimmer of light and a minimum of air and no sun and with an atmosphere which, due to the sanitary arrangements, very soon becomes foetid and unhealthy. The prisoner is allowed about an hour's exercise a day, and at night is lucky if he sees any light at all. Mentally there is stagnation and physically there is semi-starvation."[39]

Very few amongst us have heeded this *dictum* and have recorded their protest over the years.

9 THE CLINICAL VIEWPOINT

Solitary confinement involves both sensory and perceptual deprivation. Solitary confinement to which prisoners are subjected is a form of sensory deprivation.[40]

Sensory deprivation has been described as

> "the removal of perceptual experience with which the person is most familiar and on which he is, in varying degrees, dependent for his body image (e g kinesthetic, tactile

37 384 US 436 (1966).
38 448.
39 *R v Botha supra* 89.
40 Halleck *Psychiatry and the Dilemmas of Crime* (1971) 287.

and termal stimuli) and those on which he depends for his social identity or environmental familiarity (background noise, hearing other people, etc)."[41]

Various definitions make it clear that two main variables are relevant to a state of sensory deprivation, viz (a) a relative lack of stimuli, and (b) a relatively meaningless, unchanging or constant environment. One or both of these conditions could be present in solitary confinement if the individual is kept alone in a cell cut off from outside stimuli.

10 RESEARCH RESULTS

One golden thread runs through almost all the research results: subjection to sensory deprivation has a detrimental effect on most human beings. Both human experience and animal experimentation indicate clearly that "isolation from others leads to severe and sometimes irreparable damage."[42] As far back as 1821, the devastating effects of solitary confinement were appreciated: inspired by the Pennsylvania penal system, researchers tested the effects of solitary confinement on a group of prisoners. Many became either sick or insane and in 1823 the experiment was abandoned as a failure.[43] It is now trite that subjection to a monotonous sensory environment can result in disorganisation of brain function akin to the effect produced by drugs or lesions.[44]

10 1 Effects of Sensory Deprivation on Physiology

Research on electroencephelogram (EEG) activity under conditions of sensory deprivation undertaken in several countries have reported changes in EEG activity irrespective of the duration of deprivation[45] EEG abnormalities found in most subjects persisted after termination of the isolation. This seemed to suggest that "certain physiological after-effects may persist for periods equal to the initial isolation duration."[46]

Decreases in body weight invariably occur during prolonged isolation under both restricted and diverse diets of a plentiful nature.[47] Various investigators reported an average body weight loss of 5,7 lb after two days of perceptual

41 Alexander and Flagg in Wolman *Handbook of Clinical Psychology* (1965) 916.
42 Halleck *op cit* 54.
43 Caldwell *Criminology* (1965) 509.
44 Heron, Doane and Scott in Corso (ed) *The Experimental Psychology of Sensory Behaviour* (1967) 558.
45 Zubek in Rasmussen (ed) *Man in Isolation and Confinement* (1973) 46.
46 48.
47 *idem*.

deprivation,[48] 3,8 lb after three days of sensory deprivation,[49] and 4,5 lb after 4 days of sensory deprivation.[50]

10 2 Effects of Sensory Deprivation on Cognitive Processes

One investigator[51] reported that nearly every experimental subject who experienced sensory deprivation for a relatively long period of time reported having difficulty in thinking coherently and in concentrating. Some were unable to count consecutively for more than twenty or thirty numbers and others found it extremely difficult to talk. The effects occurred regardless of the general nature of the sensory deprivation conditions.

During the 1950s and 1960s "considerable experimental interest" had been shown in the behavioural and physiological effects of the subjection of humans to a reduction in the level and variability of environmental stimuli.[52] The first experimental work began in 1951 at McGill University, Montreal, to investigate the mechanisms underlying "brainwashing." The studies of Zubek,[53] Aftanas,[54] Hasek,[55] Sansom,[56] Schludermann,[57] Wiloosh[58] and Winocur[59] essentially confirmed the original McGill experiments: significant deficiencies in the ability to solve arithmetic problems, in numerical reasoning, in verbal fluency, in visualization in two- and three-dimensional space, and abstract reasoning, were observed. Other functions, such as digit span, rote learning, recall and recognition suffered no impairment.

10 3 Affective Changes under Sensory Deprivation

One investigator reported that

> "confined subjects often report extreme boredom, restlessness, irritability, anger, unrealistic fears and anxieties, depression, and physical complaints, rarely reported by subjects in control conditions."[60]

Another group of investigators[61] placed eighteen subjects in perceptual deprivation for three to four days. They reported of the subjects' boredom, development of a childish sense of humour, exaggerated emotional reactions, excessive irritation by small things, and annoyance with the experimenters. A few subjects reported that they spent a great deal of time brooding and dwelling

48 Kitamurs (in Rasmussen *supra*).
49 Weinstein *et al* (in Rasmussen *supra*).
50 Myers *et al* (in Rasmussen *supra*).
51 Corso *op cit.*
52 Zubek *op cit.*
53 *idem.*
54 Aftanas (in Rasmussen *supra*).
55 Hasek (in Rasmussen *supra*).
56 Sansom (in Rasmussen *supra*).
57 Schludermann (in Rasmussen *supra*).
58 Wilgosh (in Rasmussen *supra*).
59 Wincur (in Rasmussen *supra*).
60 Schultz *Sensory Restriction* (1965) 99.
61 Scott, Bexton, Heron and Doane (in Schultz *supra*).

on imagined injustices. Post-isolation interviews revealed the subjects' frequent surprise about the way they had felt during isolation, saying that they had been irritated out of proportion to the situation.

A further group of investigators[62] confined their eight subjects for eight hours of perceptual deprivation. They found that some subjects slipped into hypnagogic states. One became overtly paranoid, accusing the experimenter of trying to drive him insane. Four of the subjects experienced changes in body image, e g arms seemed to be dissociated from the body; others described fears of an unreal or paranoid nature, such as imagining that the building was burning down. Others, however, were not negatively affected and found the situation quite pleasant.

One study[63] involved isolating ten male and female subjects individually in a small cubicle, where they sat in conditions of sensory deprivation. These subjects were not told how long they would be so confined. After only two hours the subjects exhibited a disorganised and perplexed state. "The facial expressions were bizarre, and reflected a marked feeling of confusion." A number of specific and varied fears were expressed. Several subjects reported that they were afraid of losing control of their thoughts to the point of insanity. Another subject feared that he could no longer speak, which led him to a fear of being unable to move. Only two of the ten subjects appeared to be comfortable in the chamber.

Another study[64] confined twenty male and female subjects in sensory deprivation for as long as each subject could endure it. The average length of endurance was twenty-four to twenty-nine hours for men and forty-eight to seventy for the women. The subjects were visted and questioned four times a day. All subjects experienced anxiety and frequent panic attacks. One subject experienced a severe depression with bouts of weeping. Those terminated early (five to six hours) gave unbearable anxiety, tension, and panic attacks as their reasons for leaving. Eighteen subjects became agitated and restless while seven experienced body-image disturbances. Nightmares involving suffocation, drowning and killing people were reported by five subjects.

One investigator[65] noted that a differential effect was brought about when the subjects knew in advance how long the deprivation would last. Subjects who were ignorant of the duration of confinement appeared to experience more severe emotional reactions. On the basis of these last-mentioned results it was concluded that confinement periods for as short as two hours could produce reactions as severe as the longer periods of confinement when the subjects did not know how long the experience would last. This factor was apparently an important variable in sensory restriction research.[66]

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62 Freedman, Grunebaum and Greenblatt (in Schultz *supra*).
63 Cohen, Silverman, Bressler and Shmavonian (in Schultz *supra*).
64 Smith and Lewty (in Schultz *supra*).
65 Schultz *op cit* 119.
66 120.

10 4 Susceptibility to Persuasion or Influence

There is a clear indication that individuals become more susceptible to propaganda or persuasion after having been kept in solitary confinement. One writer states:

> "Methods of forceful indoctrination and persuasive coercion ... can be analyzed and understood simply as deliberate attempts to change behaviour and attitudes by a group of men who have virtually complete control of the environment in which their captives live. The victims are, in a special sense, isolated from those sources of consensual validation which normally reinforce their value standards and, consequently, their behaviour. The result is to create a kind of hypersuggestibility and receptivity to reinforcement of new values and expectancies because there is no way, other than that permitted by those in control, to confirm a judgment."[67]

The same writer emphasises

> "the relationship between man's dependence upon stimulation from the external environment for the maintenance of normal thinking, and how alteration or distortion of that environment can alter or otherwise distort thinking and behaviour ...
>
> If confinement is kept up the person loses contact with reality, he becomes totally disorientated and he exhibits symptoms you find in a person with psychosis – imbalance of the mind – such as high levels of anxiety, panic, delusions. He hallucinates, hears voices. Everything is distorted in terms of distance and height. Walls bulge, the figure of a policeman looms huge ... He might not even be able to write or speak properly. Then ... a state of depression could follow making him more susceptible to persuasion and propaganda."[68]

10 5 Suicide[69]

Severe depression is usually accompanied by thoughts of suicide or actual attempts at suicide. Some writers[70] maintain that since the basic function of the ego is integration, i e to hold the personality together, its complete failure is to be seen in disintegration, which occurs when the destructive drives overwhelm it. These drives are by hypothesis – and from clinical observation – headed in two directions: toward the self, and toward the outside world. A suicidal attempt is described as "a catastrophic reaction to an intolerable social and emotional situation," i e the organism finally fails to realise its potential and maintain its integrity against disruptive onslaughts from within and without.

10 6 Conclusions on Solitary Confinement

In summary, the following conclusions may be drawn:

a Solitary confinement will be stressful, to various degrees, for the majority of individuals exposed to it.

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67 Brownfield *Isolation* (1965) 32.

68 33.

69 The contents of this paragraph should not be construed as our exclusive explanation of all deaths or "suicides" in detention.

70 Menninger, Karl and Mayman in Martin "Psychological Aspects of the Organism under Stress" 2J AM PSA Assoc 67 (1954) 280.

b Solitary confinement, depending on the precise nature of the variables involved, could lead to temporary or even relatively permanent, psychotic-like reactions with loss of contact with reality, delusions and hallucinations.

c In solitary confinement, especially when the duration of the condition is indefinite, an individual, feeling that he is "losing his mind" and in a state of extreme anxiety and panic, perhaps also experiencing delusions or hallucinations, could be driven to suicide as a desperate and only escape from an intolerable, nightmarish situation.

d Solitary confinement could lead to increased susceptibility on the part of the detainee to such an extent that he could be induced to make invalid or untrue statements which should as a matter of routine not be acceptable to the courts.

In view of the highly serious implications which solitary confinement has for a detainee, the judgment in the case of *Rossouw v Sachs*[71] is, with respect, unfortunate and uninformed. This is obvious from its simplistic assumption that solitary confinement which does not afford the prisoner reading and writing facilities is not inhuman. The emphasis was misdirected; the niceties and inhumanity of solitary confinement *per se*, and its devastating effect on mental health, went unappreciated.

A definitely more informed decision was that in *S v Witbooi*[72] where Steyn J conceded that solitary confinement was a punishment sanctioned by law. However, his opinion was that such punishment did not befit a civilised community and he expressed the hope that sentencing officers would consider the undesirability of this form of punishment and resort to it only when they were faced with really no alternative.

Since solitary confinement is obviously here to stay, it is submitted that such confinement should be supervised by a psychologist or psychiatrist to prevent permanent harm to the detainee, and that no statement should be accepted unless it has been made after a "cooling off" period, again supervised by a psychiatrist or psychologist. To ensure that such supervision is clinically independent, it is further submitted that medical practitioners be chosen by the detainees themselves, or their families. Such practitioners should further be particularly qualified to determine the existence of psychic deviations.

11 OTHER INTERROGATION METHODS

As indicated earlier, solitary confinement is not the only barbarous technique of mind-manipulation of which detainees become the victims either directly or indirectly; others worthy of mention and which came to light in the unreported case of *S v Gwala*,[73] are debility, dependency and dread (DDD), Pavlovian conditioning, sleep deprivation and regression.

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71 *supra*.

72 1974 3 SA 322 (C).

73 case no C108 76 NPD judgment delivered on 1977-07-14/15. See this case generally in relation to DDD, Pavlovian conditioning, sleep deprivation and regression.

11 1 Debility, Dependency and Dread (DDD)

DDD[74] is a summary of the elements comprising a technique used more particularly by Communist captors on American air force pilots during World War II. The object was to extract false confessions and to induce the giving of false evidence in court.

Debility referred to the sense of apathy, weakness, discouragement and loss of stamina. It may be associated with a loss of appetite, fatigue, sleep deprivation, confinement and other aspects of the prison situation.

Dependency was the term used to describe the effect of complete dependence of the prisoner on his captors and the psychological state of mind that develops and makes one want to be totally subservient to one's captor irrespective of how the captor treats one.

Dread described the various types of anxiety, fears, apprehensions and concern ranging from worry to terror that are employed in the process of ensuring compliant behaviour.

Scientific literature on the subject of behaviour of prisoners under various conditions, including prisoners of war, civilian prisoners and concentration camp survivors, endorses the conclusion that this triad of factors (DDD) is extemely effective in inducing compliant behaviour in a captive.

It has been said that some of the dissociative effects of DDD wear off within a matter of days or weeks after repatriation or removal from the situation of duress. Some individuals will, for a few days or weeks, continue to mouth the phrases that they were taught or the statements that they had memorised and express confusion about what was true and what was not. It takes about a year for some of the rest of the effects of this type of trauma to pass : nightmares, excessive startle reactions, disturbances of appetite and sleep etc. Sometimes the psychological aftermath is chronic in spite of treatment. Some victims never recover.

11 2 Pavlovian Conditioning

There can be no gainsaying that Pavlovian conditioning is also an effective interrogation method. It is a type of automatic response to stimulus in which the responses appear incongruous with the stimulus but which response has been learnt through a now removed intermediary stimulus. For example X would ring a bell and Y would immediately stand on his head, or X may, in conjuction with a certain question put to Y, make a particular gesture, to which Y would automatically give an expected answer.

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74 See generally Farber, Harlow and West *Brainwashing, Conditioning and DDD (Debility Dependency and Dread)* 271–285.

11 3 Sleep Deprivation[75]

Regarding the nature and biological significance of sleep and the effects of loss of sleep in mental functions, it has been found that if an individual is substantially deprived of sleep for three or four days and nights, or chronically deprived of sleep over a period of many days or even weeks, certain personality changes occur which render him more suggestible, less able to test reality and more likely to comply with demands imposed from without. Sleep deprivation is used either deliberately or as part of a procedure to induce one to confess falsely to a crime.

Chronic sleep deprivation is described as a state brought about by circumstances that prevent a person from getting the amount and quality of sleep that he, as an individual, requires for daily restoration. The process induces certain changes in the biological function of the brain which are not perceptible to the victim who may subjectively experience only a sense of apathy or fatigue. It may be incurred in many ways, e g apprehension or chronic pain or environment disturbances, such as noise or light instead of darkness, or any other conditions that are disruptive of sleep.

11 4 Regression

Regression in psychiatry is employed to describe a psychological falling back to a more childlike emotional state. Regression among prisoners relates to the dependence upon the captor for everything, which tends to bring out in them certain childlike qualities – going back to the time when as children they had to depend on adults for everything.

Regression plays a part in certain types of confinement that may accompany the process of interrogation. There are three things that tend to happen when a person is confined for an indefinite period and isolated socially from his usual sources of reinforcement of his normal personality and rendered profoundly insecure and uncertain about what may be in store for him. The first is regression and a tendency to become more childlike in relation to his captors. The second is constriction, in which his fear of attention and awareness becomes narrowed down to very small details of the here and now, the immediate surroundings, the repeated counting of the objects in his cell to occupy his mind as children do. The third part of the triad of the phenomenon of regression is called "identification with the aggressor." It has to do with an unconscious adjustment to powerlessness in a frightening situation. One way of adjusting is to identify oneself with the captors and try to become like them, to oblige them, seek their approval and eventually even to begin to express their views, attitudes or ideas and to take them for one's own. One becomes one's captor, shares his power and is then not as totally helpless and impotent.

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75 See generally West, Janszen and Lester "The Psychosis of Sleep Deprivation" in Sanka (ed) *Some Biological Aspects of Schizophrenic Behaviour* Anns NY Acad. Sc 96 66–70.

12 DO PRISONERS HAVE RIGHTS?

Having sketched devastating effect of psychic bombardment of the minds of prisoners, we still have to ask the question whether prisoners are legally obliged to endure inhuman treatment.

To answer this question it is not necessary that one should digress into the elaborate debate on the rights or lack of rights of prisoners. Suffice it to say that every prisoner, and *a fortiori*, political detainee, has a basic right not to be subjected to physical and psychological abuse. These rights are derived simply from the fact that he is a human being living in a civilised society. In the same vein, it can be said that the distinction between prisoner's rights and privileges is a purely semantic one.

Why has the question of prisoners' rights in South Africa been decided mainly by default? Why are the majority of our courts apparently acting "as buttresses between the executive and the subjects?"[76] One writer[77] has cast the onus "upon our Supreme Court to remedy and regularise the position"; another[78] contends that the exercise of discretion by the commissioner of prisons regarding treatment of prisoners is quasi-judicial and that our courts can review it. The attitude that our courts should stand up and be counted is concisely summarised:

> "The true measure of the quality of a judicial system is how many hidden problems it brings into public view and how well it stimulates the responsible agencies into doing something about it."[79]

Notwithstanding this suggestion, our courts see fit to distinguish between prisoner's rights and privileges. This artificial approach has been criticised by an American district court[80] which stated that the

> "distinction between a 'right' and a 'privilege' – or between 'liberty' and a 'privilege' for that matter – is nowhere more meaningless than behind prisons walls."

In *Hassim v Officer Commanding, Prison Command, Robben Island*[81] the court concluded that the prisoner has a right to the court's relief in so far as the prison authorities exceed their delegated powers, e g the prisoner has a right not to be unlawfully subjected to solitary confinement.

Hassim's case concerned more particularly the rights of convicted prisoners. It needs only a small measure of logic to realise that the *Hassim* decision applies *a fortiori* where a detainee is subjected to a pre-trial solitary confinement, i e even before conviction. Diemont J clearly acknowledged that "solitary confinement is obviously of a penal nature"[82] and therefore different from segregation.[83]

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76 *R v Pretoria Timber Co (Pty) Ltd supra.*
77 Nairn "To Read or not to Read: Aspects of Prisoners' Rights" 1979 *SACC* 58 60.
78 Rudolph 1979 *SALJ* 640 650.
79 Bazelon "A Probing Role for the Courts" *NY Times* 27 col 3.
80 *Sostre v McGinnis* 442 F2d 178 (1971).
81 1973 3 SA 462 (C).
82 479 D, which also sets out the prison regulations relevant to segregation.
83 The rules governing the segregation of prisoners are to be found in s 78 of the Prisons Act 8 of 1959.

In the light of this acknowledgment, the inevitable and obvious conclusion is that section 6 detainees were punished even before conviction."[84]

It has also been argued,[85] and correctly so, that the retributive aspect of justice demands, *inter alia*, that only the truly guilty be punished and that it is therefore contrary to justice to deprive whole categories of people, e g "security prisoners," of their privileges because of abuse by a few persons.

A number of our appellate division decisions have established the principle that prisoners do have fundamental rights pertaining to necessities "basic to the maintenance of a reasonably civilised minimum standard of living."[86] The right to food, clothing, accommodation and medical treatment are included. However, "comforts" or "privileges" are distinguishable: these are dependent on the discretion of the prison authorities acting in terms of prison regulations and cannot be enforced in a court of law.[87] It is Corbett JA's departure from this attitude that makes his minority judgment in the *Goldberg* case praiseworthy. This bold judgment (as one writer put it)

> "indicates with devastating clarity that a different judicial technique and a different point of departure inspired by the need to find ways and means of upholding basic civil liberties and not to preside over their diminution or erosion, can with the same facts even in South Africa produce totally different results from those normally achieved."[88]

The same writer had also on an earlier occasion advocated, albeit rather strongly, that our judiciary could be more activist and "kill one aspect of the usefulness of the Terrorism Act for our authorities."[89] It was suggested that our courts could do this by being cautious in admitting evidence elicited by means of interrogation that had taken place incommunicado, since "solitary confinement over a long period, even if unaccompanied by any of its possible frills, is torture *per se*."[90]

Certainly our courts could be more active in protecting individual and minority freedoms without assuming the role of a superlegislature:

> "[I]f the judges are complaisant towards governmental power, Government will, of course, take what it is given. If the judiciary is prepared to provide leadership, its voice will be listened to with respect and gratitude. Because the individual citizen is dwarfed by the state and because the legislature may be relatively subservient to the executive, the judiciary is the most immediately available resource against the abuse of executive power."[91]

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84 *Whittaker v Roos and Bateman* 1912 AD 92, which concerned illegal treatment by a jailer of an unconvicted prisoner.

85 Van Rooyen "Aspekte van Reg en Geregtigheid met betrekking tot Gevangenes" 1981 *THRHR* 1 14.

86 Per Wessels ACJ in *Goldberg v Minister of Prisons* 1979 1 SA 14 (A) 31.

87 See generally *Rossouw v Sachs* and *Hassim v OC Robben Island supra.*

88 Van Niekerk "*Nought for their (or our) Comfort . . .*" 1979 *SACC* 55 57.

89 This is an extract from Barend van Niekerk's speech made at a protest meeting held at the Durban City Hall in November 1971. The protest meeting followed the death of s 6 detainee Ahmed Timol. This extract is also quoted in *S v Van Niekerk* 1972 3 SA 711 (A) 718C. See also Dugard "Judges, Academics and Unjust Laws : The Van Niekerk Contempt Case" 1972 *SALJ* 271 272.

90 *idem.*

91 Jaffe *English and American Judges as Lawmakers* (1969) 19.

In the *Goldberg* case appellants – political prisoners – challenged the right of the commissioner of prisons to deny them access to current news other than news of their families, friends and of sporting activities. They submitted that the commissioner was unlawfully breaching their rights in terms of sections 77 and 94(1) of the Prisons Act 8 of 1959 and regulation 109(4) framed in terms of the act. The majority of the appellate division ruled against the appellants.

Corbett JA dissenting, held that

> "fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed."[92]

This was therefore a decision against an *a priori* assumption that basic rights of prisoners do not include access to news and reading material. It was further held that a prisoner's mental and psychological well-being is of fundamental importance. The outspoken judgment rejected the interpretation that section 77 of the Prisons Act gave the commissioner *carte blanche* with regard to, *inter alia*, the treatment of prisoners: the commissioner's discretion is assailable, on the grounds of bad faith or of his failure to apply his mind to the matter either properly or at all.

Even Wessels ACJ who delivered the majority judgment recognised the fact that

> "a denial to [the prisoners] of... access to sources of news of current events in the Republic and abroad and to reading matter of their choice must of necessity result in severe hardship. They are all long-term prisoners and any prolonged isolation from news of current events must... necessarily result in frustration and possibly in some degree of disorientation eventually."[93]

These *dicta* have been seen as support for the submission that the commissioner does not have a free hand with regard to the treatment of prisoners and that such treatment may also not have disorientation as its consequence.[94]

Prisoners' rights found their fullest expression in the American decision of *Coffin v Reichard*.[95] In this case it was held that a prisoner retains all the rights of an ordinary citizen except those expressly or impliedly taken away from him by law. It is significant that more than forty years previously a similar point of view had already been expressed in the South African case of *Whittaker v Roos*.[96] In this case, which dealt with awaiting trial prisoners, Innes J held, in relation to the plaintiffs:

> "The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it... They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulation or necessitated for purposes of goal discipline and administration. Any such punishment would amount to an *injuria*. From which it follows that their claim for damages would not be restricted to actual pecuniary loss; for in respect of *injuria*

92 *Goldberg supra* 39C–D.
93 31G–H.
94 Rudolph *op cit* 649.
95 325 US 887 (1945) 445.
96 1912 AD 92.

compensation may be given for the insult, indignity and suffering caused by the wrongful act."[97]

13 CONCLUSION

In *R v Kumbana*[98] Krause J likened solitary confinement to "cruelty reminiscent of the Middle Ages." Today, almost forty years later, the time is long overdue that the sensitivities of our legal fraternity be awakened to the devastating effect which the application of legislation such as the now obsolete section 6 could have on "whole categories of people, e g 'security prisoners.' "[99]

It is surprising that no detainee has as yet instituted a delictual action based on the intentional infliction of severe emotional distress against the authorities. Perhaps the time is ripe for such an action.

On the other hand, it is to be hoped that in the course of time more lawyers will become aware of the dangers inherent in legislation such as section 6. They might even find it encouraging to note that it is not an offence to criticise statutes such as the Terrorism Act as long as the criticism "be expressed within legitimate bounds."[100] The latter phrase has been interpreted to mean criticism of legislation unaccompanied by illegal action.[101] If only we would all in a civilised fashion record our disapproval and give more attention to Krause J's directive plea, made in the year 1938, that

> "the time is long overdue for the public conscience to be aroused and for some consideration to be given also to the treatment of our 'caged human beings.' "[102]

97 122–123.
98 1945 NPD 146.
99 Van Rooyen 1981 *THRHR* 14.
100 per Ogilvie Thompson CJ in *S v Van Niekerk supra* 719H.
101 Dugard 1972 *SALJ* 282.
102 *R v Botha supra.*

AANTEKENINGE

DIE BELANG VAN DIE SAAKLIKE OOREENKOMS BY ROERENDE SAKE IN 'N ABSTRAKTE EN KOUSALE STELSEL VAN EIENDOMSOORDRAG

Eiendomsreg van 'n roerende saak word oorgedra deur verskuiwing van die beheer oor die saak tesame met die ooreenstemmende bedoelings van die partye om onderskeidelik eiendomsreg oor te dra en te ontvang (sien *Air-Kel H/A Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 922). Die duidelikste wyse waarop die fisiese verskuiwing van beheer oor die saak kan plaasvind, is vanselfsprekend deur daadwerklike oorhandiging van die saak deur die oordraer aan die verkryger. Dit is egter nie noodwendig dat die saak *de manu in manum* oorhandig moet word nie: ons reg ken ook verskeie fiktiewe leweringsvorms soos *traditio longa manu*; *traditio simbolica*; *traditio brevi manu*; *constitutum possessorium* en *attornment* (sien in die algemeen Van der Merwe *Sakereg* (1979) 210 e v; Silberberg en Schoeman *The Law of Property* (1983) 263 e v). Wat die wilsooreenstemming van die partye met betrekking tot die eiendomsoordrag betref, word van 'n saaklike ooreenkoms gepraat – 'n benaming wat nou ook deur die appèlhof erken is (sien *Air-Kel H/A Merkel Motors v Bodenstein* 1980 3 SA 917 (A)). Die gebruik om die benaming saaklike ooreenkoms ook in verband met die sessie van vorderingsregte aan te wend, word deur Susan Scott gekritiseer (1979 *TSAR* 48 e v). Volgens haar het die term saaklike ooreenkoms ontstaan met betrekking tot die oordrag, ontstaan en tot niet gaan van *saaklike* regte en moet dit tot hierdie kategorie van regte beperk word. Sy doen aan die hand dat die ooreenkoms op grond waarvan 'n persoonlike reg oorgaan 'n *oordragsooreenkoms* genoem moet word. Dit lyk asof hierdie kritiek geregverdig is maar aangesien ons hier met roerende sake te doen het en die term saaklike ooreenkoms dus wel toepaslik is, word die kritiek nie verder ondersoek nie.

Die vraag is nou watter praktiese betekenis die saaklike ooreenkoms het en of die betekenis daarvan enigsins beïnvloed word afhangende daarvan of die abstrakte of kousale stelsel van eiendomsoordrag in 'n bepaalde regstelsel geld. Ten einde die vrae te beantwoord, is dit nodig om na die ontstaansgeskiedenis van die begrip saaklike ooreenkoms te kyk.

Die wetenskaplike konstruksie van die saaklike ooreenkoms kom van Von Savigny (sien sy *Das Obligationenrecht als Theil des heutigen Römischen Rechts* (1853) bd II 249 e v en *System des heutigen Römischen Rechts* (1840) bd III 312–313). Volgens Von Savigny is *traditio* 'n ooreenkoms omdat dit al die kenmerke van die begrip ooreenkoms bevat. So bevat dit albei partye se wilsverklarings wat op die oordrag van besit en eiendomsreg gerig is en het dit tot

gevolg dat die regsverhoudinge tussen die partye nuut gereël word ("und es werden die Rechtsverhältnisse der Handelnden dadurch neu bestimmt" – *System* bd III 312). Von Savigny erken dat die wilsverklarings op sigself onvoldoende is om die regsgevolg (te wete eiendomsoorgang) teweeg te bring. Ten einde eiendomsoorgang te bereik, moet daadwerklike besitsverkryging ook bykom. Volgens hom verander dit egter nie die aard van die grondliggende ooreenkoms nie (*System* bd III 312. Oor die vraag of 'n mens met 'n *ooreenkoms* te doen het as die afspraak tussen die partye nie die regsgevolg teweegbring nie maar net daarop gerig is, sien Van Oven 3439 *WPNR* 519 e v; Cronjé 1978 *THRHR* 231 e v; Den Dulk *De Zakelijke Overeenkomst* (1979) 20 e v).

Von Savigny gee 'n duidelike uiteensetting van wat hy onder die begrip saaklike ooreenkoms (*dinglicher Vertrag*) verstaan by sy bespreking van die betekenis van die *iusta causa* vir *traditio* (*Obligationenrecht* bd II 256–257). Volgens hom kan *traditio* vir verskillende doeleindes plaasvind, byvoorbeeld omdat 'n saak verhuur of verpand word in welke gevalle eiendom nie oorgaan nie. *Traditio* kan egter ook plaasvind omdat 'n saak verkoop of verruil word en dan gaan eiendom wel oor. Uit die *iusta causa* blyk of die bedoeling met die *traditio* was om eiendomsreg oor te dra (soos in die geval van 'n koop- of ruilkontrak) en of dit nie die bedoeling was nie (soos in die geval van huur of pand). Dít sê hy is die werklike betekenis van die *iusta causa.* Volgens hom hoef die *iusta causa* egter nie noodwendig uit 'n voorafgaande verbintenisskeppende ooreenkoms te bestaan nie en het *traditio* nie net eiendomsoorgang tot gevolg as dit ter vervulling van die onderliggende verbintenis dien nie. (*Obligationenrecht* bd II 256; Felgentraeger *Friedrich Carl Von Savignys Einfluss auf die Übereignungslehre* (1927) 35.) Von Savigny sê daar is ongetwyfeld gevalle waar 'n geldige *traditio* plaasvind sonder dat daar van 'n verbintenis sprake is, byvoorbeeld as 'n aalmoes aan 'n bedelaar gegee word. Hy gee toe dat *traditio* in die meeste gevalle wel deur 'n verbintenisskeppende ooreenkoms voorafgegaan sal word. In sodanige gevalle vorm hierdie onderliggende ooreenkoms dan die *iusta causa* op grond waarvan gelewer word.

Von Savigny sê dat as dit by *traditio* gebruiklik was om uitdruklik te sê dat eiendomsreg deur 'n spesifieke handeling oorgaan (of nie oorgaan nie), dan was geen verdere ondersoek nodig na die vraag of eiendomsreg oorgaan of nie. Die oorgang van eiendomsreg sou dan immers vasgestaan het. Hieruit is duidelik dat dit in die eerste plek die wil van die partye is wat bepaal of eiendom met verskaffing van die fisiese beheer oorgaan al dan nie en hierdie wil hoef nie noodwendig uit 'n onderliggende verbintenisskeppende ooreenkoms te blyk nie (*Obligationenrecht* bd II 257 258; Den Dulk 14).

Aangesien sodanige uitdruklike verklarings oor eiendomsoorgang egter nie altyd plaasvind nie, moet in twyfelagtige gevalle gekyk word na al die omringende omstandighede wat die *traditio* vergesel, om vas te stel of dit die wil van die partye was dat eiendomsreg wel oorgaan. ("Um nun in zweifelhaften Fällen eine sichere Entscheidung zu finden, bleibt Nichts übrig, als auf die umgebenden

Umstände, Absichten, Zwecke zu sehen, auf dasjenige Rechtsgeschäft, mit welchem die Tradition in Verbindung steht, wrdurch sie herbeigeführt worden ist" - *Obligationenrecht* bd II 258.)

So blyk in die voorbeeld van die aalmoes aan die bedelaar uit al die omringende omstandighede die bedoeling om te skenk, en hierdie bedoeling dien dan as *iusta causa* vir die oordrag van eiendomsreg. Volgens Von Savigny is daar in hierdie voorbeeld geen onderliggende verbintenisskeppende ooreenkoms nie. Of sy voorbeeld vir die moderne reg geslaag is, is twyfelagtig. Per slot van sake hoef die verbintenis wat deur die *traditio* vervul word nie 'n tyd lank te bestaan het nie - die vordering kan ook deur die handeling ontstaan waardeur dit vervul word (Brandt *Eigentumserwerb und Austauschgeschäft* (1940) 69). Ook by 'n skenking soos hy beskryf, sou 'n mens 'n verpligting om te skenk, kan konstrueer. Hoe dit ook al sy, is dit duidelik dat Von Savigny erken dat eiendomsreg kan oorgaan al is daar geen onderliggende verbintenisskeppende ooreenkoms nie. Hy is met ander woorde 'n aanhanger van die abstrakte stelsel van eiendomsoordrag. Die *iusta causa* bepaal of eiendom met die oordrag van feitlike beheer oorgaan al dan nie, maar

> "de justa causa is daarmee niet een voorwaarde voor een geldige traditie, maar is kenbron van de wil van partijen voor de vraag, of zij met de traditie al dan niet de eigendom willen doen overgaan: de justa causa kwalificeert daarmee de traditio" (Den Dulk 13).

Von Savigny vereis met ander woorde net een wilsmoment wat op eiendomsoorgang gerig is en waarvan die *iusta causa* getuienis mag wees. (Sien ook Den Dulk 13.)

Aangesien Von Savigny 'n voorstander van die abstrakte stelsel van eiendomsoordrag is, kan die *iusta causa* nie met die *animus transferendi dominii* gelykgestel word nie. In 'n kousale stelsel daarenteen sou sodanige gelykstelling vanselfsprekend wees omdat afwesigheid van 'n *iusta causa* tot gevolg sou hê dat eiendom nie oorgaan nie, terwyl die *animus transferendi dominii* in die abstrakte stelsel ook naas die *iusta causa* kan bestaan (Den Dulk 14).

Die gedagte is nie hier om die verhouding tussen die *iusta causa* en die saaklike ooreenkoms volledig uit te pluis nie (sien daaroor Cronjé 1978 *THRHR* 237 e v). Hier is net na Von Savigny se standpunt in dié verband verwys om te beklemtoon dat die saaklike ooreenkoms by sy ontstaan vir 'n abstrakte stelsel van eiendomsoordrag bedoel was en nie vir 'n kousale stelsel nie.

Hierbo is reeds daarop gewys dat die *animus transferendi dominii* in die kousale stelsel in die *iusta causa* opgeneem word. Die *causa* is nie meer net die kenbron van die partye se wil met betrekking tot die oordrag nie - dit is die beliggaming van die wil self. Die *causa* kwalifiseer sodoende die oordrag, naamlik of dit net oordrag van die fisiese beheer is en of dit eiendomsoordrag is. Dit beteken dat dit onnodig is om die oordrag self as 'n saaklike ooreenkoms te beskou. Dit is met ander woorde nie nodig om 'n tweede wilsmoment wat op eiendomsoorgang gerig is, te vereis nie (sien Den Dulk 18–19). In die abstrakte stelsel is die posisie uiteraard anders want daar kan die *causa* ongeldig wees en

die eiendomsoordrag geldig mits daar inderdaad die bedoeling was om eiendomsreg oor te dra en te ontvang.

Van Oven sê dat

> "het praktische belang van het begrip 'zakelijke overeenkomst' is inderdaad zeer gering: vandaar dat men meer dan twintig eeuwen met vrij veel success het privaatrecht wetenschappelijk beoefend had, eer de Duitsers het ontdekken" (4072 *WPNR* 70).

In die lig van bostaande uiteensetting is dit duidelik dat hierdie stelling nie sonder meer vir die abstrakte stelsel van eiendomsoordrag kan geld nie. 'n Mens moet dan ook in gedagte hou dat Van Oven oor die Nederlandse reg skryf waar die kousale stelsel geld. Verder is dit belangrik om daarop te let dat ook Von Savigny nie van mening was dat sy *dinglicher Vertrag* in die praktyk groot invloed sou uitoefen nie. Sy standpunt het in die eerste plek teoretiese en sistematiese waarde gehad. Totdat Von Savigny op die toneel verskyn het, is eiendomsreg in Duitsland volgens die *titulus en modus*-leer oorgedra (sien Hofmann *Die Lehre vom Titulus und Modus Adquirendi und von der Iusta Causa Traditionis* (1873) 11 e v; Felgentraeger 5 e v). *Titulus* was die benaming wat aan die *iusta causa traditionis* gegee is terwyl *modus* die feitelike moment aangedui het (Hofmann 6–7). Hierdie leer het aanvanklik net by afgeleide eiendomsverkryging gegeld maar later het dit dogmaties heeltemal ontaard en ook op die oorspronklike wyses van eiendomsverkryging toepassing geniet. Toegepas op byvoorbeeld *occupatio* het *titulus* die regsreël beteken dat 'n bepaalde omstandigheid, dus 'n *modus*, eiendomsreg verskaf (Hofmann 11; Felgentraeger 5). Van hierdie verwarring is die *titulus*-leer eers deur Hugo teen die einde van die agtiende eeu bevry. Hugo het die leer egter nie geheel en al verwerp nie – vir afgeleide eiendomsverkryging wou hy dit behou. Spoedig is die *titulus en modus*-leer egter in elke vorm aangeval. Dit moet aan die gees van die tyd toegeskryf word waarin die historiese en teoretiese al hoe meer op die voorgrond getree het. Die neiging was steeds meer na 'n suiwer Romeinsregtelike stelsel en juis die *titulus en modus*-leer het in die weg gestaan van 'n suiwer Romeinsregtelike sistematiese skeiding tussen die kontraktereg en die sakereg. Hierdie skeiding is eers vervolmaak toe Von Savigny met sy siening van *traditio* as 'n saaklike ooreenkoms vorendag gekom het – voor hy op die toneel verskyn het, was *traditio* net 'n feitlike gebeure, nie 'n ooreenkoms nie (Brandt 66).

Hiervolgens is dit duidelik dat Von Savigny se uiteensetting baie beslis sistematiese en terminologiese waarde gehad het. Trouens, hyself sien die skeiding tussen die verbintenis- en sakereg as "die einzige Rettung des Verkehrs gegen gränzenlose Unsicherheit und Willkühr" (*System* bd III 355; sien ook Felgentraeger 40).

Dit is sekerlik so dat die saaklike ooreenkoms nie by elke transaksie waar eiendomsreg oorgedra word in soveel woorde tot uiting sal kom nie. Maar dit beteken nie dat hierdie ooreenkoms in die praktyk geen waarde het nie. Inteendeel, die saaklike ooreenkoms is van die grootste belang want dit is juis hierdie ooreenkoms in die abstrakte stelsel van eiendomsoordrag, en nie die verbintenisskeppende ooreenkoms nie, wat (mede-)bepaal of die eiendomsreg

van 'n saak oorgegaan het al dan nie. Die abstrakte stelsel gaan naamlik hand aan hand met 'n afsonderlike saaklike ooreenkoms. (Sien Krause 1939 *AcP* 312 wat dit soos volg stel: "Wenn man die Abstraktheit der Übereignung beibehält, so heisst das gleichzeitig Aufrechterhaltung des besonderen dinglichen Vertrages" (319).) Ontken 'n mens met ander woorde die bestaan van 'n afsonderlike saaklike ooreenkoms, moet 'n mens die abstrakte stelsel van eiendomsoordrag as sodanig aanval.

In 'n vonnisbespreking van *Burger v Rautenbach* (1980 4 SA 650 (K)) betwyfel ook Susan Scott die waarde van die saaklike ooreenkoms (1981 *THRHR* 187). In hierdie saak het B en R 'n pandooreenkoms aangegaan waarvolgens R sekere skape aan B in pand sou gee. Toe B later besit van die skape wou neem, is hy deur R verhinder om dit te doen. B doen aansoek om 'n dringende bevel en word gelyk gegee. In haar bespreking van die saak verwys Scott na die waarde van die saaklike ooreenkoms. Sy sê teoretici aanvaar die bestaan en nut van 'n saaklike ooreenkoms by die oordrag van saaklike regte en bepleit die behoud daarvan terwyl praktykgerigte juriste die begrip as waardeloos beskou (188–189):

> "Hoe min waarde aan hierdie ooreenkoms geheg word, blyk uit die beslissing onder bespreking, aangesien die oordraer nie meer die bedoeling het om die saak in pand oor te dra nie, maar deur die hof gedwing word om dit te doen" (189).

As ek haar betoog reg verstaan, meen Scott dat die saaklike ooreenkoms min waarde het omdat die hof 'n persoon kan dwing om 'n saak oor te dra hoewel die betrokke persoon nie (meer) die wil het om dit te doen nie.

Ek kan met hierdie siening nie saamstem nie. Per slot van sake geld dieselfde argument ook ten opsigte van 'n verbintenisskeppende ooreenkoms – ook in dié geval kan die hof 'n persoon dwing om 'n wil teen sy sin te vorm. Dan kan 'n mens ook daarop wys dat reeds De Groot gesê het dat 'n gedwonge wil ook 'n wil is ("ghedwongen wille [is] mede een wille" – *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 3 48 6; sien ook De Wet en Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 44). Al wat die hof *in casu* dus eintlik doen, is om die respondent te verplig om uitvoering te gee aan die pandooreenkoms wat hy aangegaan het en deel van die uitvoering van die pandooreenkoms is om 'n saaklike ooreenkoms aan te gaan. Ek kan nie sien dat 'n mens hieruit kan aflei dat die saaklike ooreenkoms min praktiese waarde het nie.

Verder baseer Scott haar siening geheel en al op Nederlandse gesag en soos geblyk het, geld die kousale stelsel van eiendomsoordrag in die Nederlandse regstelsel. Hierbo is ook daarop gewys dat 'n aparte saaklike ooreenkoms nie 'n vereiste in die kousale stelsel is nie. Wat die Nederlandse reg betref, is die Nederlandse skrywers waarop Scott steun dus heeltemal korrek as hulle beweer dat die begrip in die praktyk waardeloos is. In die Suid-Afrikaanse reg geld egter die abstrakte stelsel (*Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369; *Trust Bank van Afrika v Western Bank* 1978 4 SA 281 (A) 301 e v; *Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 923). En dit is myns insiens nie geregverdig om 'n konsekwensie van die kousale stelsel op die abstrakte stelsel toe te pas en dan die gevolgtrekking

te maak dat die saaklike ooreenkoms ook in die abstrakte stelsel waardeloos is nie.

Samevattend kan 'n mens dus sê dat die abstrakte stelsel van eiendomsoordrag wel met die begrip saaklike ooreenkoms moet werk terwyl die begrip in die kousale stelsel oorbodig is omdat die bedoeling om eiendomsreg oor te dra en te ontvang in laasgenoemde stelsel noodwendig in die *iusta causa* opgesluit is. Is daar nie 'n geldige onderliggende verbintenisskeppende ooreenkoms nie kan eiendomsreg in elk geval nie oorgaan nie. 'n Afsonderlike ooreenkoms wat net op eiendomsoorgang gerig is, sou dus geen doel dien nie.

DSP CRONJÉ
Universiteit van Suid-Afrika

REGSHERVORMING AAN DIE HAND VAN ARTIKELS 297 EN 300 VAN DIE STRAFPROSESWET 51 VAN 1977

Die resente beslissing *S v Lekgoale* 1983 2 SA 175 (B) beklemtoon die feit dat vergoedingsbevele 'n waardevolle bydrae kan lewer om 'n gepaste vonnis op te lê in daardie gevalle waar slagoffers van misdaad 'n materiële verlies gely het. Hoofregter Hiemstra stel dit soos volg:

> [T]his Court still urges magistrates to bear in mind the benefits of compensation orders. They are preferable to fines in the appropriate circumstances" (177F).

In die beslissing *S v Tshondeni* en *S v Vilakazi* 1971 4 SA 79 (T) is 'n daadwerklike poging deur die Transvaalse afdeling van die hooggeregshof aangewend om laerhowe te beïnvloed om die klaers by mes-aanrandings te kompenseer vir die skade wat hulle gely het, deur opgeskorte vonnisse op te lê en die beskuldigde die skade te laat vergoed. Die beleidsoorwegings wat deur voorsittende beamptes in ag geneem behoort te word is soos volg deur regter-president Cillie uiteengesit:

a Die eerste en fundamentele oogmerk van 'n opskortingsvoorwaarde is om die veroordeelde nie gevangenisstraf te laat uitdien nie (82H).

b Tweedens is die doel van 'n opskortingsvoorwaarde om die veroordeelde deegliker te laat besef wat die gevolge van sy onverantwoordelike misdadige optrede was (83D).

c Derdens is die oogmerk van vonnisse gekoppel aan vergoedingsbevele om die benadeelde te vergoed vir die skade wat hy gely het. Dit sou egter slegs wenslik wees indien die vonnis volgens regter-president Cillie 'n paslike en regverdige een is. Die beginsel word hier voorop gestel dat die strafpleger daarteen sal moet waak dat die gedagte posvat dat die veroordeelde aan die klaer 'n boete betaal *want die staat is en bly die enigste wat geregtig is om straf vir 'n oortreding uit te deel* (83E) (my kursivering).

d Vierdens behoort die betaalvermoë van die veroordeelde nie uit die oog verloor te word nie:

"In hierdie verband moet in gedagte gehou word dat die voorwaarde betaling by wyse van paaiemente mag insluit en dan sou die bedrag makliker deur 'n veroordeelde gevind kan word" (84C).

e Ten slotte onderstreep regter-president Cillie die noodsaaklikheid dat die betaling by die owerheid moet geskied (84G).

Alhoewel kompensasiebevele tot op hede in enkele beslissings oorweeg is (vgl *S v Zwane* 1973 2 PH H(S) 85 (O); *S v Milo* 1973 3 SA 942 (O); *S v Charlie* 1976 2 SA 596 (A)), het vergoedingsbevele as 'n voorwaarde by die opskorting van vonnisse weinig aandag geniet. In 'n reeks beslissings (hoofsaaklik ongerapporteer) sedert 1977, het die hooggeregshof van Bophuthatswana die beginsels van toepassing op vergoedingsbevele in die praktyk daadwerklik verfyn.

Hoofregter Hiemstra van Bophuthatswana het hom in 'n artikel "Compensation for the Victims of Crime" 1975 *Misdaad en die Gemeenskap* 233 soos volg oor die oogmerke van vergoedingsbevele uitgelaat:

"Some 20 years ago, I wrote an article in Penal reform news entitled 'The forgotten man or the mother of Kleinbooi'. The forgotten man is the victim of an offence who, if still alive is always good enough to attend the trial and give evidence for the State. He is often subjected to such gruelling cross-examination at the hands of the defence that he begins to wonder whether he is not the one who has done wrong. Ultimately sentence is passed and he is forgotten. He derives small satisfaction from the imprisonment imposed on the accused and he wonders why the State should be enriched by a fine for a loss he has suffered.

The reference to Kleinbooi arose from an incident in a murder trial. The accused was found guilty of murdering one Kleinbooi. Counsel pleaded in mitigation: 'He has an aged mother to support'. The judge remarked dryly: 'Didn't Kleinbooi have a mother?'

In that article I set up a plea for compensation for the victim of crime, to be provided by the convicted person. If he is without means as he usually is, his only asset — namely his labour power — should be employed in the cause of compensation. Standard wages should be paid for such work as he does during imprisonment and these should be deposited in a State fund, from which the victim should receive an amount fixed by the court in compensation. This was the broad outline of my proposal. Since then I have advocated the idea only once, and it has made absolutely no progress, at any rate not with the authorities."

Artikel 297 van die Strafproseswet 51 van 1977 maak daarvoor voorsiening dat die hof 'n vonnis mag opskort op voorwaarde dat die beskuldigde die klaer vergoed vir skade wat laasgenoemde as gevolg van die misdryf gely het. Daarbenewens bepaal artikel 300 van dieselfde wet dat die skade wat die klaer as gevolg van die misdryf gely het, aan hom betaal word. Indien die hof na aanhoor van die getuienis so 'n bevel maak, het dit die uitwerking van 'n siviele vonnis en is dit vir die benadeelde nie nodig om 'n siviele eis teen die beskuldigde in te stel nie.

Die beginsels aan die hand waarvan die hof vergoedingsbevele as 'n voorwaarde by 'n opgeskorte vonnis inkorporeer het, het veral op die volgende terrein uitgekristalliseer: (a) aanranding; (b) opsetlike saakbeskadiging; (c) diefstal.

In *S v Boy Mahlangu* CA & R 110/81 (hierdie is 'n verwysing na strafappèlen hersieningsake in Bophuthatswana sedert 1977, waarvan sommige beslissings gerapporteer word in die Bophuthatswana hofverslae waarvan vol I (1977-1979 BSC) reeds gepubliseer is) is die appellant skuldig bevind aan aanranding met

die opset om ernstig te beseer en gevonnis tot nege maande gevangenisstraf, waarvan drie maande vir drie maande voorwaardelik opgeskort is. By die oorweging van 'n geskikte vonnis, laat regter Steenkamp hom soos volg oor die moontlikheid van lyfstraf uit:

> "Die magistraat het blykbaar nie oorweeg om die appellant tot lyfstraf, gekoppel met 'n termyn van gevangenisstraf wat in sy geheel opgeskort word, onder andere op die voorwaarde dat die appellant 'n bedrag skadevergoeding aan die klaer betaal, te vonnis nie. Hierdie straf is moontlik nie oorweeg omdat lyfstraf as 'n vorm van straf besig is om in onbruik te verval en net in uitsonderlike gevalle opgelê word. In hierdie verband kan daar na die woorde van Van den Heever r in die saak van *R v Taling* 1942 OPD 264 te 265 verwys word:
>
> 'In general my revulsion from corporal punishment increases; but not in cases where punishment must be meted out to those guilty of offences of unprovoked violence or of bestial and wanton cruelty.' "

Met verwysing na *S v Maisa* 1968 1 SA 271 (T) ('n uitspraak van regter Hiemstra) sit regter Steenkamp die beginsels van toepassing op lyfstraf soos volg uiteen:

a Lyfstraf is 'n middel wat alleen in uitsonderlike gevalle toegepas behoort te word. Vir 'n persoon in sy laer twintigerjare of onder die twintig jaar kan dit soms van pas wees omdat dit die hof in staat stel om die oortreder uit die tronk te hou.

b Daar moet steeds in gedagte gehou word dat die mens se persoonlike waardigheid een van sy kosbaarste besittings is, en hoe ouer hy word hoe dieper word dit deur lyfstraf aangetas. Lyfstraf vir 'n man van vyf en veertig is 'n vernedering en howe behoort noukeurig na te dink voor hulle dit oplê.

In *S v Maisa* is die kriteria wat vir die oplegging van lyfstraf in aanmerking geneem behoort te word, soos volg aangedui:

a die ouderdom van die beskuldigde;

b die verswarende omstandighede van die misdryf en

c vorige veroordelings van die beskuldigde.

Volgens regter Steenkamp in *S v Boy Malhangu* behoort 'n kort termyn gevangenisstraf vermy te word:

> " 'n Kort termyn gevangenisstraf kan slegs na my mening dien as vergelding, afskrikking en tot 'n mate voorkoming. Daar sal altyd gevalle wees waar 'n kort termyn gevangenisstraf noodwendig opgelê moet word, maar hierdie gevalle moet tot 'n minimum beperk word."

Met verwysing na *S v Tsondeni en Vilakazi* sonder regter Steenkamp die derde kriterium (hierbo geformuleer) as die hoofoogmerk van 'n vergoedingsbevel uit. Hierdie kriterium moet in die lig van die volgende belangrike aspekte beoordeel word:

a Vanuit die oogpunt van die breë publiek is dit uiters belangrik dat die howe effektiewe magte behoort te hê vir die oplegging van vergoedingsbevele.

b Die misdadiger behoort nie toegelaat te word om die opbrengs van sy misdade te geniet nie.

c 'n Gevoel van boetedoening sou die misdadiger tot voordeel kon wees indien hy gedwing sou word om die verlies wat hy veroorsaak het, te herstel; in besonder indien sodanige boetedoening die vorm van kompensasie en vergoeding aan die individuele slagoffer sou aanneem.

Regter Steenkamp konkludeer dan dat

a hoewel 'n termyn gevangenisstraf geregverdig mag wees, die appellant gevonnis word tot lyfstraf, gekoppel aan 'n opgeskorte vonnis, op voorwaarde dat 'n bedrag kompensasie as vergoeding vir die verlies van die klaer betaal word; en dat

b 'n bedrag van R250,00 'n redelike bedrag vir die pyn en lyding van die klaer behoort te wees.

Die beginsels deur regter Steenkamp in *S v Boy Mahlangu* uiteengesit, is deur hoofregter Hiemstra in *S v Michael Mahole* CA & R 200/81 toegepas. 'n Vonnis van R120 boete of 120 dae, plus ses maande gevangenisstraf opgeskort vir vyf jaar, is deur die hoofregter verander na een van vier maande gevangenisstraf, opgeskort op voorwaarde dat die beskuldigde die klaer R100 kompensasie voor of op 30 November 1981 betaal. Die faktore in aanmerking geneem vir die wysiging van die vonnis, is soos volg deur hoofregter Hiemstra bespreek:

> "The accused maintained he was full of regret and remorse, and he was anxious to stay out of prison. The complainant was a woman. He injured her in the face with a broken glass. If he should pay her compensation, she will be pleased, he will be kept out of prison and he will go on earning his wage and will not lose his job. Everyone all round will feel that greater justice has been done. The accused can afford to pay the complainant a sum of money as compensation. He must be provisionally released to enable him to find the money."

Die besondere kriteria van toepassing op vergoedingsbevele in aanrandingsake is deur hoofregter Hiemstra in *S v Israel Medupe* CA & R 279/81 geformuleer. By oorweging van 'n gepaste vonnis waar die beskuldigde die klaagster (sy vrou) na milde provokasie met die vuis op die mond geslaan het, merk die hoofregter op:

> "This incident does not merit a prison sentence. Imprisonment is drastic punishment which should not be automatically resorted to. Where a knife was used, or the injuries severe, or there are previous convictions, imprisonment is justified, but not in the case of a single blow."

Asook:

> "Compensation to the complainant is greater justice than payment of a sum of money to the State by way of a fine."

In die onlangse beslissing van *S v Lekgoale* 1983 2 SA 175 (B) het die hooggeregshof van Bophuthatswana by monde van hoofregter Hiemstra die oplegging van vergoedingsbevele in aanrandingsake weer eens sterk gepropageer. Hierdie vorm van strafoplegging behoort meer aandag te geniet in die lig van die toepassing van vergoedingsbevele in die praktyk:

> "Compensation orders have become more and more frequent, and from a register kept in the Registrar's office, it appears that payments, also in instalments, are made on a gratifyingly large scale. No complaints are received that the administrative work cannot be handled" (177A-B).

Die saak *S v Joseph Phetu, Daniel Setholi en Abram Maeng* CA & R 209/82 is 'n goeie voorbeeld van die moontlikhede om die algemene beginsels van toepassing op vergoedingsbevele, soos geformuleer in *S v Mahlangu*, op vonnisse vir veediefstal van toepassing te maak. In hierdie saak is die drie beskuldigdes skuldig bevind aan die diefstal van 'n skaap en deur 'n magistraat tot twaalf maande gevangenisstraf elk gevonnis. Alhoewel al drie die beskuldigdes 'n goeie inkomste gehad het, is 'n versoek om 'n vergoedingsbevel deur die magistraat geïgnoreer. Die vonnisse van die beskuldigdes is vervolgens deur hoofregter Hiemstra gewysig en voorsiening is gemaak vir die insluiting van vergoedingsbevele. Die redes vir die wysiging lê volgens die hoofregter daarin dat

a die hof 'n vergoedingsbevel behoort te maak waar die beskuldigde finansieël in staat is om die verlies van die klaer te vergoed;

b waar die klaer versoek dat 'n bevel tot kompensasie gemaak moet word, sy versoek nie deur die hof geïgnoreer behoort te word nie; en

c in Bophuthatswana, waar siviele eise vir vergoeding slegs by wyse van hoë uitsondering voorkom, die strafhowe meer daadwerklik hulle bevoegdhede vir die afdwing van vergoeding behoort uit te oefen.

In *S v Joseph Khele* CA & R 79/82 het hoofregter Hiemstra 'n skuldigbevinding en vonnis van twee jaar gevangenisstraf vir 'n een-en-vyftig-jarige beskuldigde vervang deur 'n vonnis van twee jaar gevangenisstraf opgeskort vir vyf jaar op voorwaarde dat

a die beskuldigde nie skuldig bevind word aan 'n oortreding van artikel 11 van die Wet op Veediefstal 6 van 1975 (B) nie en

b die beskuldigde die klaer 'n bedrag van R120 vergoeding betaal (sien ook *S v Bekker* 1979 BSC 132).

Die oplegging van vonnisse waarby kompensasiebevele ingesluit is, moet teen die historiese agtergrond van Bophuthatswana se Wet op Veediefstal verstaan word. In 1975 het Bophuthatswana 'n eie Wet op Veediefstal aangeneem, wat in alle materiële opsigte ooreenstem met die destyds bestaande Suid-Afrikaanse wetgewing. Ingevolge artikel 15 is die verpligting op die hof geplaas om die aandag van die klaer op artikel 357 van die vorige Strafproseswet 56 van 1955 (RSA) te vestig. Artikel 357 is deur die huidige artikel 300 van die Strafproseswet 51 van 1977 vervang en artikel 15 van die Wet op Veediefstal moet dus gelees word as 'n verwysing na artikel 300 van Wet 51 van 1977 (*S v Manako* 1979 BSC 152) en artikel 12(1) van die Interpretasiewet 33 van 1957 (RSA). By die toepassing van vergoedingsbevele het die hooggeregshof van Bophuthatswana nie aangedring op die implementering van artikel 300 nie, aangesien dit die uitwerking van 'n siviele vonnis het (sien *S v Mogomotsi* 1978 BSC 59).

In *S v Offiwo Mosasi* CA & R 133/82 is die verskille tussen die toepassing van vergoedingsbevele ingevolge artikels 300 en 297(1)(a)(i) van die Strafproseswet 51 van 1977 uiteengesit. Nadat die beskuldigde in *S v Offiwo Mosasi* die waarde van 'n gesteelde bok op R50 geplaas het en die hof versoek het om 'n

vergoedingsbevel "ingevolge a 300 van die Strafproseswet" te maak, is die versoek deur die verhoorhof geïgnoreer. In sy uiteensetting van die probleme by die toepassing van artikel 300 van die Strafproseswet merk hoofregter Hiemstra op dat die hooggeregshof van Bophuthatswana nie aangedring het op die nakoming van artikel 300 nie,

> "because a compensation order under s 300 has the effect of a civil judgment. As it is a cumbersome and expensive affair to recover compensation. If the accused ignores the order (which almost invariably he will do) the remedy is execution against his assets. Mostly he has no assets worth executing upon and the whole process is not worth the costs involved."

In die lig hiervan het die howe landdroste meermale aangemoedig om artikel 297(1)(a)(i) toe te pas. Hiervolgens word die betaling van vergoeding as opskortingsvoorwaarde in die vonnis beliggaam (sien *S v Lepale* 1978 BSC 41). 'n Bevel ingevolge artikel 297 stem in verskeie opsigte ooreen met die tradisionele vergoedingsboete wat in die praktyk suksesvol was.

Die beslissing *S v Lekgoale* illustreer die feit dat voorsittende beamptes meermale van die artikel 297-prosedure gebruik kan maak by die vergoeding van slagoffers weens 'n verlies aan goedere of vir die pyn en lyding veroorsaak deur geweldsmisdrywe. *In casu* is twee beskuldigdes skuldig bevind aan aanranding met die opset om ernstig te beseer. Aangaande die vonnis van R500 of een jaar gevangenisstraf vir elk van die beskuldigdes merk hoofregter Hiemstra op:

> "in the case of compensation time could have been given for instalments and the money would have gone to the injured person instead of to the State" (176A).

Die verhoor van beskuldigdes in die distriks- en streekhowe bevraagteken die wenslikheid van 'n implementering van artikel 300 van die Strafproseswet 51 van 1977. In 'n land waar siviele eise deur die minder gegoede gedeelte van die bevolking by uitsondering voorkom, behoort 'n konsekwente toepassing van artikel 297 'n groot leemte te vul en kan daar heelhartig met die uitgangspunt saamgestem word:

> "Compensation is an important part of justice, and magistrates are urged to order it whenever there is a possibility that the accused can find the money. Particularly in a case like this where the complainant specially asked for compensation and where he is dependent on his livestock for a living, the compensation question should not be overlooked" (*S v Offiwo Mosasi* CA & R 133/82 per hoofregter Hiemstra).

AWG Raath
Universiteit van Bophuthatswana

MENSEREGTE, MILITÊRE DIENSPLIG EN GELOOFSBESWAARDES

Menseregte as 'n inhoudelik tipies juridiese gegewene word nog lank nie algemeen in die Suid-Afrikaanse regswetenskap aanvaar nie. Uit vele oorde kry dit die wind van voor en word dit die etiket omgehang van enersyds dubbelsinnig en vaag en andersyds a-juridies te wees. Wat laasgenoemde beswaar betref, kan

daar met vrug na die kritiek van Venter (*Wetenskaplike bydraes van die Potchefstroomse Universiteit vir Christelike Hoër Onderwys* reeks 11 inougerele redes nr 74) gekyk word. Hy ontken menseregte as juridiese postulaat in geen onduidelike taal nie waar hy dit stel dat 'n menseregtebenadering uit 'n analities wetenskaplike en prinsipiële oogpunt onvergeeflik is. Omdat nie gesê kan word dat die begrip niks meer inhou as dat dit met menslike aansprake te doen het nie, is sodanige omskrywing volgens hom te vaag om wetenskaplik en bruikbaar te wees. Hierdie kritiek is bepaald nie ongegrond as 'n mens na die Internasionale Kommissie van Juriste se definisie van menseregte kyk nie:

> "Empiries beskou is menseregte aansprake wat die individu as onderdaan van 'n staat teen die owerheid van die staat het dat laasgenoemde iets doen, nie doen nie of gedoog" (Sanders 1971 *THRHR* 165 e v).

Só beskou, is menseregte dus 'n blote vergestalting van ongeïnhibeerde aansprake wat die individu teenoor die owerheid sou hê. Daar word geen melding van enige verpligting hoegenaamd gemaak wat op die individu as teenpool van hierdie aanspraak/reg mag rus nie.

Wat die eersgemelde beswaar betref, word dit dikwels gestel dat die menseregtebegrip só inhoudloos is dat dit na smaak ingeklee kan word. En nou wil dit voorkom asof die wetgewer hom in hierdie verband met die wysiging van die Verdedigingswet 44 van 1957 in dieselfde probleem vasgeloop het as dié wat die howe in die Verenigde State van Amerika ondervind in gevalle waar dit spesifiek gaan oor die toepassing van 'n menseregtebenadering ("civil rights") op die publiekregtelike verhouding en meer in die besonder betreffende die situasie van die gewetensbeswaarde teen militêre diensplig.

In die Verenigde State word hierdie kwessie in die lig van die *First Amendment* vertolk, wat soos volg ten opsigte van godsdiensvryheid bepaal:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

So gesien, is hierdie 'n duidelike vergestalting van die bekende *dictum* van regter Jefferson:

> "The first Amendment has erected a wall between church and state. That wall must be kept high and impregnable." (*Everson v Board of Education* (1947) 330 US 1 18).

Hiermee saam is dit algemeen bekend dat die individu in die VSA se "civil rights" die grondslag van die verhouding tussen hom en die owerheid is.

Die *locus classicus* in die Amerikaanse regspraak met betrekking tot die publiekregtelike posisie van die geloofsbeswaarde teen militêre diensplig is *United States v Seeger* (1965) 380 US 163. Hier moes die hof naamlik bepaal of die registrante se gewetensbesware teen militêre diensplig sodanige geloof in 'n Opperwese was dat hulle aan § 456 (j) van die Selective Service Act 1948 voldoen het. Hierdie wet bepaal die volgende:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views of a merely personal moral code."

Een van die registrante het egter beweer dat dit 'n aantasting van sy morele kode is om 'n lewe te neem en dat hierdie 'n geloofsoortuiging is wat hy hoër ag as sy verpligting teenoor die staat. Dat hierdie nie 'n filosofiese oortuiging nie, maar inderdaad 'n geloofsoortuiging in 'n verhouding tot 'n Opperwese is, baseer hy op die definisie van geloof van ene Reverend Holmes. Volgens laasgenoemde is geloof naamlik

> "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands . . . It is the supreme expression of human nature; it is man thinking his highest, feeling his deepest and living his best" (739).

Dit is gevolglik moeilik om te onderskei tussen filosofiese en godsdienstige oortuigings en as maatstaf wend die regter die volgende toets aan:

> "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption . . . "

Hierdie toets los die probleem ongelukkig nie op nie en die onderskeid bly steeds vaag. In *Gillette v United States* (1971) 401 US 437 456 vestig die regter die aandag daarop dat hierdie vaagheid daartoe kan lei dat 'n aanspraak só inhoudloos kan wees dat dit na willekeur ingeklee kan word om by die behoeftes van die individu te pas:

> "Since objection may fasten on any of an enormous number of variables, the claim is ultimately subjective, depending on the claimant's view of the facts in relation to his judgment."

Dit is dus die registrant se subjektiewe beswaar wat getoets moet word en daar bestaan 'n wesenlike gevaar dat, juis as gevolg van die vaagheid van die kriterium wat aangewend moet word, daar gediskrimineer kan word teen die gewetensbeswaarde wat sy beswaar nie tegnies-korrek kan formuleer nie (457).

Dit wil voorkom asof die Suid-Afrikaanse wetgewer in dieselfde strik getrap het. Soos dit uit die debatvoering *in die volksraad* oor die onderwerp blyk, word dit herhaaldelik duidelik gestel dat daar nie meer gelet word op die kerklike denominasie van die geloofsbeswaarde dienspligtige nie. Al wat oorweeg moet word om te bepaal of 'n dienspligtige se beswaar inderdaad 'n geloofsbeswaar is (en nie 'n politieke, morele of filosofiese beswaar wat onvoldoende vir vrystelling van militêre diensplig is nie), is die subjektiewe oortuiging van die dienspligtige. (A 72B(2)(c) en (d). Slegs die aansoeker se godsdienstige oortuigings moet vermeld word.) Om as geloofsbeswaarde te kwalifiseer, moet die dienspligtige onder andere die feite en gronde waarop sy aansoek berus, bondig uiteensit en ook die openbarings- en belydenisgeskrifte vermeld waarop sy godsdienstige oortuiging berus. Die wetgewer weerhou hom daarvan om 'n standaard van godsdienstige oortuiging te stel waaraan 'n persoon moet voldoen ten einde as geloofsbeswaarde kragtens die in artikel 72D vermelde klassifikasie te kwalifiseer. Volgens hierdie klassifikasie kan aansoekers in een van die volgende kategorieë ingedeel word:

a 'n godsdiensbeswaarde met wie se godsdienstige oortuigings dit in stryd is om in 'n vegtende hoedanigheid in enige gewapende mag diens te doen; of

b 'n godsdiensbeswaarde met wie se godsdienstige oortuiging dit in stryd is om in 'n vegtende hoedanigheid in enige gewapende mag diens te doen, enige instandhoudingstake van 'n gevegsaard daarin te verrig en in 'n militêre uniform gekleed te wees; of

c 'n godsdiensbeswaarde met wie se godsdienstige oortuigings dit in stryd is om enige militêre diens te doen of militêre opleiding te ondergaan of enige taak in of in verband met enige gewapende mag te verrig.

Nou behoef dit sekerlik geen betoog nie dat dieselfde probleem as wat in die Verenigde State ondervind word, hom ook hier kan voordoen. Hierdie wetgewing skep die anomalie dat 'n subjektiewe oortuiging getoets moet word sonder dat die maatstaf vir toetsing verskaf word. Trouens, 'n maatstaf wat nog gebruik kon word, naamlik die verklaarde leerstellinge van die kerklike denominasie waaraan die aansoeker behoort, is doelbewus in artikel 67(3) as 'n vereiste laat vaar.

Dit is dus nie vergesog nie om te beweer dat die situasie hier kan opduik (en soos dit inderdaad reeds opgeduik het volgens 'n mededeling van die regsadviseurs van die SA Weermag) dat 'n diensplig tige bepaalde besware teen die handhawing van die *status quo* van die sosiale orde het en dit dan heel gemaklik as 'n godsdienstige beswaar kan inklee. Artikel 67(3) se uitdruklike weglating van die individu se verbondenheid aan 'n bepaalde kerklike denominasie laat dus vir hom hierdie deur wyd oop.

Slotsom: Die verhouding tussen die militêre owerheid en die diensplig tige is 'n bepaalde verskyningsvorm van die publiekregtelike verhouding tussen owerheid en onderdaan. Ek het hiermee probeer aantoon dat 'n ongenuanseerde menseregtebenadering nie hierdie verhouding kan verklaar nie. Die reg hou hom in eerste instansie besig met 'n harmoniëring van belange deur afbakening van regte en verpligtinge en so 'n menseregtebenadering ontbeer kennelik hierdie afbakeningsmoontlikheid. Daarom durf hierdie bepalings (in die Verdedigingswet) nie deur 'n menseregtebril gelees te word nie. Die benadering behoort een te wees waarin die vergeldingsaard van die reg voorop staan – waar nie met ongeïnhibeerde aansprake te doen gekry word of met oormatige owerheidsdwang nie, maar waar die regte, belange en verpligtinge van die owerheid en die individu afgebaken en geharmonieer word.

JA ROBINSON
PU vir CHO

DIE NOODSAAKLIKHEID VAN HERVORMING VAN ONS BORGTOGREG: 'N VOORLOPIGE VERSLAG

Die Suid-Afrikaanse borgtogreg word hoofsaaklik gereël deur artikels 58 tot 71 van die Strafproseswet 51 van 1977 aangevul deur interpretasies van die howe.

By oorweging van 'n borgaansoek gaan dit om 'n afweging van die beskuldigde se belange en reg op persoonlike vryheid, teenoor die belange van die

regspleging. Regsverydeling kan geskied in gevalle waar die beskuldigde ontvlug en sy verhoor ontduik (Hiemstra *Suid-Afrikaanse Strafproses* (1981) 129). Statistiek oor die aantal ontvlugtings van beskuldigdes vrygelaat op borgtog is nie beskikbaar nie, maar kan wel ingesamel word (sien my aanbeveling hieronder). Statistiek oor die aantal persone wat onnodig in hegtenis aangehou word, is egter baie moeiliker om te verkry. As 'n persoon die hele tydperk voor uitspraak in hegtenis aangehou word, is dit uiteraard onmoontlik om te bepaal of hy sy verhoor sou ontduik het indien hy vrygelaat was.

Die feit dat borgtogbesluite handel oor een van die hoogste persoonlike regte van 'n landsburger, naamlik die reg op persoonlike vryheid, is die duidelikste aanduiding van die belangrikheid en erns van so 'n besluit. Soos Lord Hailsham, eertydse *Lord Chancellor* van Brittanje by geleentheid (van toespraak voor die Gloucester-tak van die Britse *Magistrates' Association* op 11 September 1971) gesê het, is die weiering van borgtog aan 'n verhoorafwagtende

> "the only example, in peacetime, where a man can be kept in confinement without a proper sentence following a conviction after a proper trial. It is, therefore, the solitary exception to the Magna Carta."

Die meeste regsbeamptes in Suid-Afrika is sekerlik bewus van wat op die spel is by die oorweging van 'n aansoek om borgtog. Tog het ons borgtogreg nog nie dieselfde vlak van verfyning bereik as dié in Brittanje en sommige state van die Verenigde State van Amerika nie. Reeds sedert die sestiger jare is daar landswye borghervormingsprojekte in die Verenigde State van stapel gestuur. In Kanada het daar 'n soortgelyke hervorming in 1971 gevolg, asook in Brittanje in 1974. Elkeen van hierdie nasionale hervormingsprojekte is later in wetgewing vervat. Nasionale kongresse is gehou oor borgtog, en talle regeringskommissies is aangestel. (In die VSA is daar reeds in 1965 'n Nasionale Borgkongres gehou. Die Britse *Home Office* het weer 'n *Working Party* aangestel om die probleem te ondersoek. Die amptelike verslae is in 1973 uitgebring). Ook vanuit akademiese geledere het die onderwerp intensiewe aandag verkry – enkele proefskrifte daaroor het die lig gesien, honderde artikels daaroor het in regstydskrifte verskyn, en veral belangrik, meer as 'n honderd borgprojekte is deur verskillende universiteite en ander instellings aangepak.

Hierteenoor is ontstellend min aandag in Suid-Afrika aan ons borgtogreg gegee. Alhoewel daar heelwat gerapporteerde beslissings oor die onderwerp is, gaan hulle nie juis oor breë hervormende borgbeginsels nie, maar eerder oor *ad hoc*-probleemgevalle en interpretasieprobleme. Dit is jammer dat ons regters, wat sekerlike bewus behoort te wees van die ongelukkige stand van ons borgtogreg, klaarblyklik nie veel doen om hervorming aan te spoor nie. Akademiese navorsing oor die onderwerp is ook maar skraps. Die twee onlangse projekte aangepak deur Steytler ("Deciding on Liberty – A Bail Study of the Durban Magistrates' Courts" 1982 *SASK* 3) en Fernandez ("Bail: An Aspect of Justice" 1982 *SASK* 72) is eintlik die enigste ware kritiese ontledings wat tot dusver plaaslik onderneem is, en skep 'n waardevolle basis waarop voorgebou kan word.

Wat presies skort met die Suid-Afrikaanse borgtogreg? Myns insiens is die grootste probleem tans die houding van landdroste teenoor borgtogverlening.

Borgtog word verleen of geweier in uitoefening van 'n judisiële diskresie, en daarom is dit van die allergrootste belang dat 'n voorsittende beampte so 'n aansoek met die regte benadering, *in favorem libertatis,* aanhoor. Na voorlopige navorsing en uit persoonlike ondervinding wil dit my voorkom of sommige landdroste in die meer twyfelagtige gevalle eerder aanhouding in hegtenis sal gelas as borgverlening. Myns insiens word hierdie houding bevorder deur die moontlikheid van ontvlugting, en die vrees dat die voorsittende beampte verwyt sal word vir borgtogverlening in sulke gevalle van verhoorontduiking. Geen soortgelyke eksterne motivering bestaan egter om borgtog in soveel as moontlik gevalle toe te staan nie. Soos Nagel ("Discretion in the Criminal Justice System: Analysing, Channelling, Reducing and Controlling It" Olmesdahl en Steytler (reds) *Criminal Justice in South Africa* (1983) 35) dit stel:

> "[A] judge stands to lose more personally by making the error of releasing a pretrial defendant who then fails to appear for trial or who commits a crime while released, than by making the error of holding a defendant who would have appeared without committing a crime if released. The releasing type of error is embarrassing to the judge, because it is visible; but the holding type of error is not, because it is totally invisible."

Moontlike wyses waarop hierdie houdingsprobleem reggestel kan word, is:

a deur die invoering van statutêre beperkings op gevalle waar borgtog geweier kan word, deur 'n statutêre *reg* op borgtog te skep ten opsigte van sekere kategorieë minder ernstige misdrywe (vgl a 18 van die Britse *Criminal Justice Act* van 1967);

b deur die verlening van 'n aksie om skadevergoeding teen die staat aan 'n beskuldigde wat benadeel is deur 'n onnodige weiering van borgtog (sien King *Bail or Custody* (1973) 87 vir voorstelle oor die implementering van so 'n nuwe aksie om skadevergoeding).

c deur groter bewusmaking by die betrokkenes van die erns van borgtog, deur spesiale klem daarop te lê in opleidingsprogramme vir regstudente, polisiebeamptes, staatsaanklaers en landdroste.

Ander tekortkominge in ons borgtogreg, en moontlike verbeterings wat oorweeg kan word, is die volgende:

a Landdroste en staatsaanklaers is geneig om polisiebesware teen borgverlening te maklik en sonder meer te aanvaar. Daar behoort telkens aangedring te word op volledige motivering van besware. Die staatsaanklaer moet dan onafhanklik besluit of die redes werklike opponering van borgtog regverdig. Daarná moet die landdros, op sy beurt, die saak objektief ondersoek.

b Borgaansoeke word telkens oorweeg terwyl daar weinig persoonlike inligting oor die beskuldigde voor die hof is. 'n Judisiële diskresie kan slegs behoorlik uitgeoefen word as die hof oor voldoende inligting beskik. Die instelling van 'n tipe "mandatory bail information sheet" kan oorweeg word. Hierdeur sal verseker word dat die hof ten minste oor sekere basiese inligting omtrent die beskuldigde beskik. Aanvullende inligting kan in die hof verkry word deur die beskuldigde oor relevante apsekte uit te vra.

c 'n Statutêre vermoede ten gunste van borgtogverlening behoort ingestel te word (vgl Steytler 1982 *SASK* 17 se soortgelyke voorstel). Dit sal die *onus* in borgaansoeke terugplaas op die staat, waar dit hoort in kriminele verhore, en ook verseker dat die kwessie van borgtogverlening by elke verskyning van die beskuldigde oorweeg word.

d Die vasstelling van die borgbedrag in gevalle waar borgtog wel toegestaan word, moet op 'n meer wetenskaplike basis geskied. Die blote arbitrêre vasstelling van 'n bedrag deur die staat of die hof, soos dit in sommige howe tans gebeur, is nie korrek nie. Dit is 'n gevestigde beginsel in ons reg dat daar van niemand 'n buitensporige borgbedrag vereis kan word nie (sien Landsdown en Campbell *South African Criminal Law and Procedure* 5 (1982) 325). Die hoef *móét* dus telkens vóór vasstelling van die bedrag getuienis aanhoor oor die beskuldigde se vermoëns – hierdie opdrag wat so selde in die praktyk toegepas word, kom direk van die appèlhof (sien *S v Mohamed* 1977 2 SA 531 (A) 544G). Dieselfde kriteria en stappe wat gebruik word by die vasstelling van 'n *boetestraf* behoort hier aangewend te word (*S v Visser* 1975 2 SA 342 (K) 343E).

e Die beskuldigde behoort mondelings sowel as skriftelik ingelig te word oor die redes vir weiering van sy borgaansoek, asook van sy reg tot appèl teen so 'n weiering. 'n Vorm kan hiervoor gebruik word.

f Regshulpdienste behoort so uitgebrei en aangepas te word dat dit ook borgaansoeke dek.

g Die departement van justisie behoort op 'n gereelde en deurlopende basis statistieke oor borgaangeleenthede in te samel, te verwerk en te publiseer. Statistieke oor die persentasie van sake waarin borgtog geweier word, die redes waarom dit geweier word, die aantal persone wat ontvlug terwyl vrygelaat op borg, ensovoorts behoort ingesamel te word. Die enigste borgstatistiek wat die jaarverslag tans bevat, handel oor aansoeke om terugbetaling van verbeurdverklaarde borggelde. Sonder sulke deurlopende statistiese gegewens wat op 'n landswye grondslag ingesamel word, is verdere navorsing oor hierdie onderwerp moeilik. Die effektiwiteit van enige hervormingstappe sal ook slegs gemeet kan word aan die hand van sulke statistieke.

h Die departement van justisie behoort fondse beskikbaar te stel vir verdere navorsing oor borgtog. Latere besparings wat teweeggebring sal word deur 'n kleiner gevangenisbevolking sal meer as vergoed vir sulke navorsingsuitgawes.

i Aansoeke en beslissings oor polisieborgtog ingevolge artikel 59 van die Strafproseswet moet ook meer formeel geskied. Volledige motivering waarom dit geweier word, behoort skriftelik genotuleer word. 'n Afskrif hiervan moet dan aan die beskuldigde oorhandig word, en so 'n verdere afskrif by eerste verskyning aan die hof voorgelê word.

j Alternatiewe borgstelsels as die diskriminerende kontantborgstelsel wat ons gebruik, moet oorweeg word. So kan daar byvoorbeeld meer gebruik gemaak word van borgaktes en vereising van borg (*sureties*). Daar behoort ook meer

gebruik gemaak te word van die sogenaamde "vryborg" wat so gereeld deur beskuldigdes versoek word (vrylating op waarskuwing ingevolge a 72 van die Strafproseswet).

k Borgtogvoorwaardes kan meer gebruik word om sekere besware van die polisie teen borgtogverlening te bowe te kom, in plaas daarvan om borgtog heeltemal te weier.

l Die polisie behoort in baie gevalle van waarskuwings en dagvaardigings eerder as van arrestasie gebruik te maak om die beskuldigde voor die hof te kry.

Die nadele verbonde aan die onnodige aanhouding in hegtenis van 'n persoon is legio:

a die persoon verloor sy vryheid;

b dit kan daartoe lei dat hy sy werk en huisvesting verloor;

c sy gesinslewe kan erg ontwrig word;

d dit vererger die oorbevolkingsprobleem van ons gevangenisse;

e dit kos die staat 'n ontsaglike hoeveelheid geld om 'n persoon in bewaring aan te hou. Akkommodasie en etes moet aan die gevangene voorsien word. Ekstra gevangenisdienslede moet besoldig word. Die staat onderhou die gevangene se gesin terwyl hy in hegtenis aangehou word. Boonop verloor die staat inkomstebelasting en produktiewe mannekrag as die persoon uit sy werk gehou word.

f Die beskuldigde word ernstig aan bande gelê met die voorbereiding vir sy verhoor.

Daar word aanbeveel dat die Regskommissie dringende aandag skenk aan die verbetering van ons borgtogreg. Verder behoort elke regsfakulteit in Suid-Afrika 'n afsonderlike projek aan te pak vir die bestudering van borgtogpraktyke in hul plaaslike howe. Hierdie projekte kan min of meer geskoei wees op die projek wat die Universiteit van Natal, onder leiding van meneer Nico Steytler, aangepak het (sien 1982 *SASK* 3). Borgtoghervorming is dringend noodsaaklik in ons regstelsel. Elke dag wat verbygaan waarop verhoorafwagtende persone onnodig inhegtenis aangehou word, geskied daar onreg. Die beskawingsvlak van 'n samelewing kan gemeet word aan die hand van die verfyndheid van daardie samelewing se kriminele regsadministrasie. In ons s'n is daar nog hierdie belangrike gaping wat reggestel moet word.

TJ NEL
Staatsaanklaer, Mosselbaai

VONNISSE

GARDEN CITY MOTORS (PTY) LTD v BANK OF THE ORANGE FREE STATE LTD 1983 2 SA 104 (N)

Definisie van uitwinning – omvang van die verkoper se waarborg teen uitwinning

Hierdie saak betref 'n reeks saketransaksies wat uiteindelik vir die een party (Bank of the Orange Free State) 'n verlies tot gevolg het. A verhuur 'n motorkar aan B. Daarna verkoop B die motor aan C (die verweerder en latere appellant) wat weer met D (die eiser en latere respondent) reël om die motor by hom te koop en weer aan B te verhuur. Die motor bly dus in die besit van B en hy verkoop dit weer aan E wat dit daarna aan F verkoop. E kry kennis van A se titel en hy koop daarop die motor by A om sy koper F teen uitwinning te vrywaar. B, wie se boedel insolvent is, pleeg selfmoord en verdwyn van die toneel terwyl sommige van die gevolge van sy doen en late ontrafel moet word. Hierdie geding gaan oor 'n eis wat D teen sy verkoper, C, ingestel het en is gebaseer op uitwinning na aanleiding van die feit dat D nie by magte is om die motor van B of sy boedel te verhaal nie.

In hierdie appèlsaak word ingegaan op die betekenis van die term uitwinning in ons reg. Die hof wys daarop dat die waarborg teen uitwinning oorspronklik betrekking gehad het op die verlies van die besit van die koopsaak maar dat dit uitgebrei is om ook gevalle te dek waar die koper iets aan die eienaar moet betaal om die koopsaak te mag behou of, in die geval van opvolgende kooptransaksies, waar die koper weer die man wat van hom gekoop het, vergoed het (107). In *Olivier v Van der Bergh* 1956 1 SA 802 (K) 806 is beslis dat dit ook die geval dek waar die koper aanspreeklik is om die opvolgende koper te vergoed, al het hy hom nog nie vergoed nie. En in *Westeel Engineering (Pty) Ltd v Sidney Clow & Co Ltd* 1968 3 SA 458 (T) is dit duidelik gestel dat daar alleen van 'n verpligting of aanspreeklikheid sprake kan wees as die koper onderneem het om die opvolgende koper te vergoed of as daardie koper inderdaad uitgewin is en skade gely het.

Die hof kom dan tot die gevolgtrekking dat D nie self uitgewin is nie en dat hy ook nie aan 'n eis deur 'n opvolgende koper blootgestel is nie. Volgens die stand van die bronne wat die hof ondersoek, is dit die einde van die saak.

Die hof gaan egter ook in op ander aspekte, onder andere die rede vir D se verlies. Volgens die hof is hierdie

rede die feit dat D nie die besit van die motor van B of sy boedel kan terugkry nie (110):

> "What defeated it [dws D se eis teen B] was solely and simply [B's] conduct in disposing of the car, which put it beyond his power to perform the corresponding obligation."

Die hof hou ook nog rekening met die feit dat D die motor sou kon terugvorder van F of wie ook al dit in besit gehad het as hy (D) inderdaad eienaar van die motor geword het, maar volgens die mening van hof is hierdie feit onvoldoende om aan D 'n verhaalsreg te verleen:

> "Whether the want of a right to vindicate meant that it [D] was evicted is, however, a different matter."

Die antwoord van die hof op hierdie vraag is dan ontkennend:

> "The warranty against eviction does not go so far . . . [i e as to guarantee that it would become the owner of the car]" (110).

Dit is natuurlik waar dat die verkoper nie sy koper eienaar van die koopsaak hoef te maak nie, maar dit is nie die hele beeld van sy verpligtings nie want die verkoper kan nog steeds op grond van sy waarborg teen uitwinning aanspreeklikheid opdoen. Die werklike vraag is dus of die verkoper volgens sy waarborg aanspreeklik is as die koper skade ly as gevolg van die feit dat die verkoper hom nie eienaar van die saak gemaak het nie.

In hierdie verband is dit relevant om te verwys na Voet 21 2 1 en Pothier *Vente* 2 1 2 83 (by wie Kersteman *Aanhangsel* 466 kol 2 gevoeg kan word) waar hierdie skrywers verklaar dat die verkoper ook op grond van uitwinning aanspreeklik is waar die koper onsuksesvol is wanneer hy die koopsaak wil vindiseer juis omdat hy nie eienaar geword het nie. Volgens die regter is hierdie tekste "so cryptic, so laconic, that one can fairly call them fragments." Die hof verklaar dan dat die feite waarop hierdie opmerkings van die skrywers van toepassing is, nie verskaf is nie en dat hy gevolglik nie die stelling van die skrywers kan toepas nie.

Hierdie tekste is egter ook behandel deur Mostert (*Uitwinning by die Koopkontrak in die Suid-Afrikaanse Reg* (proefskrif UP 1965) par 758.) Hy verduidelik dat dit betrekking het op 'n geval waar die koper reeds *vacua possessio* verkry het en waar die saak daarna in die hande van die werklike eienaar gekom het wat homself suksesvol verweer het teen die koper se eis om afgifte van die saak. Later verklaar hy dat die derde reeds ten tyde van die koopkontrak wat tot die eis aanleiding gee reghebbende moes gewees het (par 1749). Dit blyk dan dat die tekste van Voet en Pothier inderdaad nie die feite van die onderhawige saak pas nie, maar dan kan verder gevra word of die hof nie sy weg moes oopgesien het om 'n verdere uitbreiding in te voer nie.

Mostert wys duidelik daarop dat as die begrip uitwinning beperk word tot die verlies van besit van die saak (deurdat die koper die saak aan 'n ander moet afstaan), dan staan die verkoper vir baie meer as net uitwinning in (par 945 949 1747). Hy gaan dan heen en formuleer die verpligting van die verkoper soos volg: Die verkoper staan daarvoor in dat die koper nie skade sal ly as gevolg van die regsuitoefening van 'n derde nie waar daardie skade intree as gevolg van die feit dat die verkoper 'n gebrekkige titel of 'n onvolledige titel aan die koper oorgedra het (par 949 957 1749).

Vervolgens kan eerstens gepoog word om hierdie omskrywing op die feite van die saak toe te pas. Verder kan gevra word of die saak nie nog ruimer gestel moet word nie.

As daar na die feite van die saak gekyk word, dan blyk dit dat D 'n verlies ly omdat hy nie die saak, wat inderdaad nog bestaan, van die besitter (F) kan verhaal nie. Hierdie skade ly D omdat hy 'n gebrekkige titel van sy verkoper gekry het. Al wat dan vasgestel moet word, is of hy hierdie skade ly as gevolg van 'n regsuitoefening van 'n derde. As D die saak van F probeer opeis het en hy dan òf sy eis verloor het òf laat vaar het vanweë F se goeie titel, is daar aan hierdie vereiste voldoen.

Kan dit saak maak dat F nie eienaar van die saak was toe C dit aan D verkoop het nie? F se titel is van dié van die destydse eienaar (A) afgelei en ek meen dat hy dan as reghebbende ten tyde van die koop behandel moet word.

Kan dit saak maak dat D (volgens die gegewens) blykbaar nie die saak van F opgeëis het nie? Daar kan maklik geredeneer word dat waar F se titel onbetwisbaar is, soos dit hier wil voorkom, hy nie aan so 'n eis gehoor sal gee nie en dat dit dus 'n oorbodige formaliteit sou wees.

Na aanleiding van hierdie oorweging kan aangevoer word dat die hof die eis van die koper D moes gehandhaaf het. Ook kan gestel word dat dit by uitwinning eintlik daaroor gaan dat die verkoper òf sy koper eienaar moet maak (hy is, natuurlik, nie verplig om dit te doen nie), òf die koper moet vrywaar teen enige skade wat hy ly as gevolg van die feit dat hy nie eienaar geword het nie indien daardie skade ontstaan vanweë 'n regsuitoefening deur 'n ander.

DJ JOUBERT
Universiteit van Pretoria

BANK VAN DIE ORANJE-VRYSTAAT v ROSSOUW 1983-09-19 KPA Saak A 60/83 Ongerapporteer*

Spoliasie – exceptio spolii – fisiese beheervereiste – onmoontlikheid van herstel – omvang van beginsel spoliatus ante omnia restituendus est

1 Feite

Die beslissing het voortgespruit uit 'n huurooreenkoms tussen die appellant/eiser (hierna A genoem) en die respondent/verweerder (hierna R genoem), ingevolge waarvan A aan R 'n

* Die skrywer erken graag die vriendelike hulp van landdros FR Smit en advokate AJ Nelson (prokureurs Marais Müller, appellant) en JG Foxcroft (prokureurs Claude Ipser, respondent), wat my van hulle onderskeie argumente in die saak voorsien het. Waardevolle insigte en verwysings is uit hierdie stukke verkry, maar die verantwoordelikheid vir standpunte hierin gestel en vir foute berus uiteraard by my.

vragmotor verhuur en gelewer het sonder om eiendomsreg aan R oor te dra. Die ooreenkoms het voorts daarvoor voorsiening gemaak dat A, in die geval waar R sy verpligtinge ingevolge die ooreenkoms sou versuim, met gepaste kennisgewing aan R die kontrak sou kon kanselleer en daaruit sou kon terugtree. Die gevolg daarvan sou wees dat A, naas enige verskuldigde betalings ingevolge die ooreenkoms, fisiese beheer van die vragmotor asook toepaslike skadevergoeding van R sou kon verhaal.

Volgens A se eisuiteensetting het R inderdaad versuim om sy verpligtinge ingevolge die ooreenkoms na te kom, deurdat R na bewering versuim het om die verskuldigde paaiemente aan A te betaal. As gevolg van hierdie versuim het A die *lex commissoria* in werking gestel, en aan R kennis gegee van terugtrede uit die ooreenkoms. Op grond van die kansellasie het A van R teruglewering van die vragmotor en betaling van die bedrag van R4 611,24 geëis – laasgenoemde bedrag synde die beweerde onbetaalde en verskuldigde huurgelde.

Ten tyde van A se terugtrede was die vragmotor egter fisies in beheer van 'n derde party (hierna P genoem), wat in opdrag van R sekere reparasies aan die vragmotor gedoen het. In daardie stadium het P 'n kontraktuele retensiereg teenoor R uitgeoefen vir betaling van die bedrag van R280,80, synde die koste van die herstelwerk. Daarna het A die bedrag van R280,80 aan P betaal en die vragmotor van hom in ontvangs geneem, waarna dit aan 'n verdere party vervreem is. Vir betaling van die agterstallige huurgeld het A vir R in die landdroshof gedagvaar. A se eis is gebaseer op nie-betaling van verskuldigde gelde ingevolge die gekanselleerde ooreenkoms.

In sy verweer het R die houding ingeneem dat A nie daarop geregtig was om die vragmotor van P in ontvangs te neem nie, en dat dit sonder sy medewete en teen sy sin geskied het. Daar is dus beweer dat A se optrede op spoliasie teenoor R neerkom, en gevolglik het R gevra dat die vragmotor aan hom teruggelewer word alvorens daar op die meriete van A se eis ingegaan word.

2 Uitspraak in die landdroshof

Op grond van bogenoemde feite het die landdros in die hof *a quo* besluit om eers die spoliasie-vraagstuk op te klaar voordat hy die eis op meriete oorweeg. Sy uitgangspunt was dat, indien daar wel spoliasie deur A gepleeg is, dit die hof se plig sou wees om aan die skuldige party "sy regte te ontsê" deur " 'n dowe oor" na sy eis te draai.

Die landdros het bevind dat die *lex commissoria* weliswaar aan A die reg gegee het om by terugtrede fisiese beheer van die vragmotor terug te eis, maar dan alleen langs 'n regserkende weg: òf met R se toestemming, òf deur middel van 'n regsproses. Terwyl die vragmotor egter nog onder R se beheer was, kon A dit nie deur eierigting terugneem nie. Die feit dat die vragmotor aan P gelewer is vir herstelwerk, het ook nie beteken dat R "sy regte in die voertuig" beëindig het nie, en daarom kon A dit nie sonder toestemming van P oorneem nie. Die landdros het dus bevind dat A wel spoliasie teenoor R gepleeg het. Die normale prosedure in só 'n geval sou wees dat R 'n mandament van spolie teen A sou aanvra, maar in hierdie geval dien die

beginsel dat *spoliatus ante omnia restituendus est* – in die vorm van die *exceptio spolii* – daartoe dat A se eis op die meriete opgeskort word totdat hy die vragmotor aan R terugbesorg het. Aangesien die vragmotor aan 'n derde vervreem is, bevind die landdros verder dat dit vir A onmoontlik is om die spoliasie te herstel, en dat sy eis op die meriete dus prakties verval. Uitspraak word in R se guns gegee. Die landdros het sterk klem op die feit gelê dat die hof nie kan duld dat 'n eiser een deel van sy aanspraak deur eierigting realiseer, en daarna die hof nader om die res te realiseer nie.

3 Uitspraak by appèl in die hooggeregshof

Die landdros se beslissing in die hof *a quo* is by appèl in die hooggeregshof deur regter Vos (wat die uitspraak gegee het) en regter Williamson omvergewerp, en wel op grond van die volgende oorwegings:

A het nie spoliasie gepleeg nie, aangesien R op die relevante tydstip nie die nodige *detentio* of fisiese beheer van die vragmotor gehad het om hom as *besitter* daarvan te laat kwalifiseer nie. Die hof is van mening dat die paneelklopper P "vir homself in besit was," wat sou impliseer dat R nie "in besit" was nie: R het volgens die hof "eintlik sy besit opgegee" toe hy die voertuig aan P oorhandig het. Op grond van hierdie standpunt kon daar, volgens die hof van appèl, geen spoliasie wees nie, en daarom het die regters verkies om nie 'n bevinding te maak oor die vraag of R wel die *exceptio spolii* teen A se eis kon opper nie. Die landdros se bevinding word dus tersyde gestel, en die saak word na hom terugverwys vir beslissing op die meriete van A se eis.

4 Kommentaar

Vanweë die besondere verloop van die aksie bring hierdie beslissing etlike nuwe en interessante vraagstukke na vore, waarvan enkeles hier kortliks uitgelig en bespreek sal word.

4 1 *Bestaan van die* exceptio spolii *in die moderne Suid-Afrikaanse sakereg*

Die hof van appèl verwys op twee plekke (bl 6 r 15 en 28 van die getikte uitspraak) na R se verweer as " 'n soort opskortende pleit of beswaar," maar dit is tog duidelik dat die hof wel deeglik bewus is van die feit dat dit eintlik die *exceptio spolii* is wat hier ter sprake is (bl 7 r 6–8 van die getikte uitspraak). Ongelukkig vind die hof dit onnodig om te beslis oor die vraag of hierdie *exceptio spolii* nog in die moderne Suid-Afrikaanse reg bestaan. Dit sou dwaas wees om *ex cathedra*-uitsprake oor hierdie moeilike en interessante probleem te waag (vandaar ook die hof se huiwering), maar daar word tog hier aan die hand gedoen dat die vraag aan die hand van die volgende oorwegings beantwoord moet word.

a Sover vasgestel kon word, is die bestaan van die *exceptio spolii* nog nie vantevore in 'n Suid-Afrikaanse hofsaak te berde gebring nie, en die enkele Suid-Afrikaanse bronne wat hoegenaamd die bestaan van die *exceptio spolii* vermeld, doen dit uitdruklik in 'n historiese konteks, sonder om enige aanduidings vir die moderne reg te gee (Wessels *History of the Roman-Dutch Law* 481; Price *The Possessory Remedies in Roman-Dutch Law* 55; Hahlo en Kahn *The South African Legal Sys-*

tem and its Background 454; De Waal *Die Moontlikheid van Besitsherstel as Wesenselement vir die Aanwending van die Mandament van Spolie* 19–20).

b Die oorsprong van die hedendaagse *mandament van spolie* word algemeen teruggevoer na die *Canon Redintegranda* (*Decretum Gratiani* 3 1 1). Daar bestaan bronne wat op hulle beurt die *Canon Redintegranda* terugvoer na die *Pseudo-Isidoriana* (Bruns *Das Recht des Bestzes im Mittelalter und in der Gegenwart* 131-163; Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht* 204-205; Ruffini *L'actio Spolii* 183–241; Hahlo en Kahn a w 454), en na die *Lex Visigothorum* (Fockema Andreae a w 201-204). Gemeenskaplik aan al hierdie bronne is egter die feit dat die moderne *mandament van spolie* vanuit die kanoniekregtelike beginsel dat *spoliatus ante restituendus est* ontwikkel het, en verder dat genoemde beginsel aanvanklik in die vorm van die *exceptio spolii* bestaan het: die gespolieerde biskop kon enige strafregtelike aksie teenstaan met behulp van hierdie verweer, totdat die gespolieerde saak aan hom terugbesorg is. Eers veel later het die beginsel die vorm van 'n daadwerklike *aksie* aangeneem, aanvanklik bekend as die *condictio ex canone Redintegranda*, later as die *actio spolii*, en nog later in die Romeins-Hollandse reg as die *mandament van spolie* (hoewel met vele wysigings – sien veral Wesenberg-Wesener *Neure Deutsche Privatrechtsgeschichte* 22). Hoewel die Romeins-Hollandse mandament van spolie van die sewentiende en agtiende eeue vele ander invloede getoon het, was daarin tog duidelike spore van die kanoniekregtelike beginsel te bespeur. In die Duitse en die Italiaanse reg het die aanvanklike *actio spolii* sy vorm die duidelikste behou (Coninck Liefsting *Bezitrecht en de Nederlandsche Bezitactiën* 286).

c Dit is nie sonder meer duidelik of die *exceptio spolii* self ook in die Romeins-Hollandse reg van die sewentiende en agtiende eeue geresipieer is of bly voortbestaan het nie. Geeneen van die bekende skrywers van die tyd vermeld die bestaan van die *exceptio spolii* nie (vgl De Groot 2 2; Groenewegen *De Leg Abr* 1 4 15; Van Leeuwen *RHR* 2 8 en 5 17; Huber *Hedendaagse Regtsgeleertheyt* 5 10 7; *Voet* 43 16 7; Van Bynkershoek *Obs Tum* 794 1354 1404; Van der Keessel *Praelectiones ad Gr* 2 12; Van der Linden *Koopmans Handboek* 3 1 5 4).

d Die bekende Romeins-Hollandse regswoordeboeke van die sewentiende en agtiende eeue vermeld ook nie die *exceptio spolii* nie, nòg onder die hoof *spolie* nòg onder die hoof *eksepsie* (vgl *Hollandsch Rechtsgeleerd Woordenboek; Aanhangsels tot het Hollandsch Rechtsgeleerd Woordenboek;* Boey *Woorden-Tolk; Nederlandsch Placaat en Rechtskundig Woordenboek*).

e Enkele Romeins-Hollandse skrywers oor die prosesreg van die sewentiende en agtiende eeue vermeld ook nie die *exceptio spolii* nie (vgl Van der Linden *Judicieele Practijcq* 2 22 1; Merula *Manier van Procedeeren* 4 37 2 8; Bort *Tractaat van Complaincte* 1 39; Van Alphen *Papegay* 1 14). Ander skrywers oor die prosesreg van dieselfde tydperk vermeld egter wél die *exceptio spolii* (bv Van Zutphen *Practycke der Nederlandsche Rechten* onder die hoof *Spolie*; Schomaker *Consultatien en Advisen* dl 4 *cons* 20 3; Damhouder *Practyke van Civile Zaken* 138 10; Wassenaar *Practyck Judicieel* 1 4 1

6 tot 1 4 1 9). Uit hierdie bronne blyk dat ook Gaill (*Observationes*) en Menochius (*De Adispiscendae Retinendae et Recuperandae Possessionis*) die *exceptio spolii* bespreek, maar hierdie twee bronne was ongelukkig nie vir my beskikbaar om te raadpleeg nie. Dit is natuurlik waar dat hierdie skrywers wat wel van die *exceptio spolii* melding maak, nie almal van die provinsie Holland afkomstig was nie, maar aan die ander kant is dit onrealisties om net na die "egte" Hollandse skrywers te verwys, aangesien hulle onderling na mekaar verwys, en aangesien al die genoemde skrywers gewilde bronne van die vroeë Suid-Afrikaanse prosesreg was (sien Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 442).

f Coninck Liefsting (aw 283–294) betoog breedvoerig dat die *exceptio spolii* nie (in 1869) meer deel van die Nederlandse reg uitmaak nie, en wel op grond van die feit dat artikel 619 van die gekodifiseerde *Burgerlijk Wetboek* van 1838 vanaf die uitgebreide *actio spolii* van die Kanonieke reg na die *interdictum unde vi* van die klassieke Romeinse reg teruggekeer het. Die *exceptio spolii* is spesifiek deur artikels 152–161 van die *Burgerlijk Wetboek* afgeskaf, aangesien dit die beskikbare eksepsies uitputtend kodifiseer, sonder om vir só 'n eksepsie voorsiening te maak. Beide bogenoemde argumente van Coninck Liefsting aanvaar by implikasie egter dat die *exceptio spolii*, net soos die *actio spolii*, wel in die oud-Nederlandse reg geresipieer is, en dat dit nog steeds sou bestaan het as dit nie vir die kodifikasie van 1838 was nie. Die implikasie hiervan is dat die Romeins-Hollandse reg van die sewentiende en agtiende eeue, wat in Suid-Afrika geresipieer is, wel vir albei vorme van die spoliasiebeginsel voorsiening maak.

g Die Suid-Afrikaanse reg aangaande die mandament van spolie steun baie sterk op die formulering van die spoliasiebeginsel soos in die *locus classicus, Nino Bonino v De Lange* 1906 TS 120 122, en wel na aanleiding van die Duitse juris Leyser se siening van die beginsel (vgl *Meditationes ad Pandectas* bk 7 *specimen* 504). Leyser bestee verder 'n hele *specimen* (nl 506) aan die *exceptio spolii*. Van der Linden, wat een van die laaste en belangrikste skrywers van die Romeins-Hollandse reg was, vermeld self nie die *exceptio spolii* nie, maar hy haal wel vir Leyser aan, en dan spesifiek met verwysing na die genoemde *specimen* (nl 506) wat Leyser uitsluitlik aan die *exceptio spolii* spandeer (vgl Van der Linden *Judicieele Practijcq* 2 22 1 2e vn). Die enigste Suid-Afrikaanse beslissing waarin die geskiedenis en ontwikkeling van die mandament van spolie enigsins volledig bespreek word, naamlik *Meyer v Glendinning* 1939 CPD 84 88–92, en waarin daar by wyse van voorbeeld (nie by name nie) na die oorspronklike *exceptio spolii* verwys word, haal ook vir Leyser as gesag aan.

h In die algemeen steun die moderne Suid-Afrikaanse sakereg, veral op die terrein van besit, baie sterk op die gesag van Von Savigny (vgl Van Zyl a w 491–493). Von Savigny self erken en bespreek die *exceptio spolii* taamlik breedvoerig (vgl *Das Recht des Besitzes* afd 6 par 50).

i Daar bestaan in die Suid-Afrikaanse reg etlike hofbeslissings wat riglyne verskaf aangaande die beoordeling van die vraag of 'n bepaalde gemeenreg-

telike aksie of reël verval het al dan nie. In *Green v Fitzgerald* 1914 AD 88 110–111 is daar deur die appèlhof aanvaar dat 'n reël van die gemenereg wel deur onbruik kan verval, anders as in byvoorbeeld die Engelse reg. Daar is ook aanvaar dat dit nie altyd nodig is dat daar 'n teenstrydige reël moes ontstaan voordat die ou reël kan verval deur onbruik nie –

> "both in principle and on authority mere desuetude must in certain circumstances be sufficient" (111).

Die hof het verder daarop gewys dat blote ongereelde gebruik of nie-gebruik vir 'n relatief lang tydperk nie voldoende sal wees nie, en dat dit nodig sal wees om aan te toon dat die onbruik van die regsreël dui op 'n algemene aanvaarding van die feit dat dit verval het (sien ook *LTA Engineering Co v Seacat Investments* 1974 1 SA 747 (A) 771G–H).

In die lig van hierdie oorwegings, tesame met die feit dat die *exceptio spolii* net een kant van die beginsel dat *spoliatus ante omnia restituendus est* uitmaak, sou dit moeilik wees om te aanvaar dat die *exceptio spolii* deur onbruik verval het. Daar bestaan geen logiese rede waarom die een faset van die beginsel sou verval, terwyl die ander faset (die mandament van spolie) nie net bly voortbestaan het nie, maar inderdaad toenemend as die belangrikste remedie vir die beskerming van besit gereken word (sien Middelberg 1954 *THRHR* 268 272; Van der Merwe *Sakereg* 88). Ons reg erken verder 'n baie noue verband tussen die twee fasette van een en dieselfde beginsel wat sowel 'n aksie as 'n verweer moontlik maak (vgl *Davenport Corner Tea Room v Joubert* 1962 2 SA 709 (D) 712-713).

Samevattend sou daar beweer kon word dat daar wel gesag bestaan vir die argument dat die *exceptio spolii* nog deel van die moderne Suid-Afrikaanse sakereg uitmaak. Hierdie gesag berus hoofsaaklik op die feit dat die *exceptio spolii* heel waarskynlik wel in die Romeins-Hollandse reg geresipieer is enersyds, en dat die beginsel waarop die *exceptio spolii* berus (*spoliatus ante omnia restituendus est*) toegeneem het in belang vir die moderne Suid-Afrikaanse reg andersyds, sodat daar skaars geargumenteer kan word dat die *exceptio spolii* deur onbruik verval het.

4 2 *Die aard en werking van die* exceptio spolii

Die term *exceptio spolii* is verwarrend, aangesien 'n *eksepsie* in die moderne Suid-Afrikaanse reg iets heel anders is as die *exceptio* van die klassieke of die Middeleeuse reg (sien Claassen *Dictionary of Legal Words and Phrases* bd 2 40 onder *exceptio*). Die Romeins-regtelike *exceptio* het die verweerder toegelaat om bykomende feite te pleit waardeur die eiser se feite in 'n ander lig gestel word – iets soortgelyks aan die moderne *spesiale verweer* dus (Herbstein en Van Winsen *The Civil Practice of the Superior Courts in South Africa* 323–329 338–342). 'n Vergelyking van genoemde uiteensetting van die moderne spesiale verweer met die uiteensetting van die werking van die *exceptio spolii* soos dit deur die outeurs van die sewentiende en agtiende eeue bespreek word, wys dadelik dat die funksie van die *exceptio spolii* inderdaad geen ooreenstemming met die moderne eksepsie vertoon nie, maar wel met die moderne spesiale verweer (Merula *Manier van Procedeeren* 4 40 1 tot 4 40 14; Boey *Woorden-Tolk* on-

der *exceptie*; Van der Linden *Judicieele Practijcq* 2 4 5 tot 2 4 8; Van Zutphen *Practycke der Nederlandsche Rechten* onder *exceptie* en *spolie*; Damhouder *Practyke van Civile Zaken* 126–138).

Herbstein en Van Winsen (a w 323–324) omskryf die moderne spesiale verweer soos volg:

> "A special plea is one which does not raise a defence on the merits of the case but, as its name implies, sets up some special defence which has as its object either to delay the proceedings [soos bv *lis pendens*], or to abate or quash the action altogether, a declinatory plea [soos bv *res judicata*] ... The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence which he raises on exception must appear from the declaration itself; he must accept as true the allegations contained therein and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration."

Spesiale verwere kan òf opskortend òf ontbindend (ook soms genoem peremptories) van aard wees. Die opskortende spesiale verweer het as oogmerk die vertraging van die aksie totdat die een of ander tydelike versperring uit die weg geruim is, terwyl die ontbindende spesiale verweer die aksie òf substansieel òf in die besondere vorm waarin dit ingestel is, laat misluk (vgl Herbstein en Van Winsen a w 325 327).

Die Romeins-Hollandse bronne wat die werking van die *exceptio spolii* behandel, vermeld duidelik dat die effek daarvan is dat die eiser se aksie uitgestel word totdat hy die spoliasie herstel het. Die verweerder hoef nie op die eis te antwoord nie totdat die tydelike versperring (die spoliasie) uit die weg geruim is. Dit word dan 'n *praejudicieele exceptie* of 'n *dilatoire exceptie* genoem – die moderne opskortende spesiale verweer. Van Zutphen (*Practycke der Nederlandsche Rechten* onder *spolie* by 2 en 4) vermeld wel die moontlikheid dat die effek van die *exceptio spolii* prakties ontbindend kan wees, byvoorbeeld waar die spoliator nie kan herstel nie omdat hy insolvent is. Schomaker (*Consultatien en Advisen* dl 4 *cons* 14 1 6) vermeld ook die moontlikheid dat die *exceptio spolii* in effek *peremptoir* kan wees.

Samevattend kan dus gesê word dat die *exceptio spolii* die werking van 'n opskortende spesiale verweer het, dit wil sê die verweerder wat daarvan gebruik maak, hoef nie op die eiser se aksie te antwoord nie totdat die eiser die tydelike versperring uit die weg geruim het deur die spoliasie ongedaan te maak. Indien dit prakties vir die eiser onmoontlik sou wees om die spoliasie te herstel, kan hy nie met sy eis voortgaan nie. Die verweerder wat die *exceptio spolii* gebruik, moet nuwe feite beweer en op 'n oorwig van waarskynlikheid bewys voordat hierdie effek sal intree. Die nuwe feite sal feite moet wees wat spoliasie bewys: ongesteurde beheer aan die kant van die verweerder vooraf, en onregmatige versteuring daarvan deur die eiser.

4 3 *Vereistes vir die* exceptio spolii

Die feit dat daar 'n noue verband bestaan tussen die verweer enersyds en die aksie andersyds wat albei uit dieselfde beginsel voortspruit, impliseer dat die vereistes vir die verweer en vir die aksie in beginsel ook dieselfde sal wees. Net soos in die geval van die mandament van spolie, sal die verweerder wat van die *exceptio spolii* gebruik wil maak, twee vereistes moet

bewys: (a) dat verweerder vooraf vreedsame en ongesteurde beheer van die betrokke saak gehad het, en (b) dat eiser die saak teen verweerder se wil en sonder sy toestemming uit verweerder se beheer verwyder of hom in die uitoefening van sy beheer gesteur het (Van der Merwe *Sakereg* 90; Schoeman *Silberberg and Schoeman – The Law of Property* 135–136; *Nino Bonino v De Lange* 1906 TS 120 122; *Yeko v Qana* 1973 4 SA 735 (A) 739E).

Beheer beteken in hierdie verband 'n kombinasie van fisiese beheer oor die betrokke saak (*corpus*), tesame met die bedoeling om voordeel daaruit te verkry (*animus*). Wat die *corpus*-vereiste betref, bestaan daar geen twyfel nie dat daar 'n bepaalde minimum van fisiese beheer vereis word (vgl veral die onlangse beslissing in *Mankowitz v Loewenthal* 1982 3 SA 758 (A) 766 G–H). Dit is egter ewe duidelik dat hierdie vereiste nie impliseer dat daar absoluut deurlopende en voortdurende beheer moet wees nie, of dat die beheer oor elke gedeelte van die saak moet strek nie (Van der Merwe a w 70; *Nienaber v Stuckey* 1946 AD 1049 1057; *Morkel's Transport v Melrose Foods* 1972 2 SA 464 (W) 467H–468A; *Bennett Pringle v Adelaide Municipality* 1977 1 SA 230 (OK) 233A; *Ex parte Van der Horst: in re Estate Herold* 1978 1 SA 299 (T) 301B–H). Die fisiese beheer hoef ook nie persoonlik uitgeoefen te word nie, maar kan deur middel van 'n dienaar of verteenwoordiger uitgeoefen word. Daar bestaan twyfel oor die vraag of die dienaar of verteenwoordiger self die mandament van spolie teen derdes kan instel in die naam van die prinsipaal (*Mpunga v Malaba* 1959 1 SA 853 (W) 861E–F; *Mbuku v Mdinwa* 1982 1 SA 219 (Tk) 222F) maar in die verlede is daar algemeen aanvaar dat die prinsipaal wel self die mandament teen derdes kan instel op grond van hulle spoliasie teenoor die dienaar of verteenwoordiger (vgl Gibson *Wille's Principles of South African law* 193; Hall *Maasdorp's Institutes of South African Law* vol 2 12; *Muller v Muller* 1915 TPD 28 31).

Volgens Van der Merwe (a w 70) is die objektiewe maatstaf wat aangelê moet word die vraag of die persoon wat beweer dat hy in beheer was, in staat was om fisiese heerskappy oor die saak met uitsluiting van ander persone te herwin nadat hy tydelik daarvan afstand gedoen het. Vir die doeleindes van die mandament van spolie is die prinsipaal dus nog die houer van die saak indien hy in staat bly om fisiese beheer van die saak vanaf die dienaar of verteenwoordiger oor te neem. Omdat die vereistes vir die vestiging van beheer altyd effens strenger beoordeel word as die vereistes vir die behoud van reeds gevestigde beheer (vgl Schoeman a w 120–121; *Nienaber v Stuckey* 1946 AD 1049 1057–1058; *Welgemoed v Coetzer* 1946 TPD 701 720; *Morkel's Transport v Melrose Foods* 1972 2 SA 464 (W) 467H–468B; *Ex parte Van der Horst: in re Estate Herold* 1978 1 SA 299 (T) 301A–G) sal daar bewys van 'n daadwerklike fisiese handeling van die dienaar of verteenwoordiger verwag word voordat aanvaar sal word dat die prinsipaal fisiese beheer verloor en die dienaar of verteenwoordiger fisiese beheer oorgeneem het. Samevattend kan dus gesê word dat, in die geval van sogenaamde middellike beheer, die prinsipaal vir die doeleindes van die mandament van spolie as houer beskou sal word solank

die dienaar of verteenwoordiger nie 'n daadwerklike inbeheersnemende handeling verrig het nie, en die prinsipaal dus nog beheer van die saak van hulle kan oorneem. Indien die dienaar of verteenwoordiger daadwerklik 'n handeling verrig waardeur dit vir die prinsipaal onmoontlik gemaak word om beheer te herwin, het hulle self 'n spoliasiehandeling gepleeg.

Al die gesag wat tot dusver in hierdie verband bespreek is, en wat onder die hoof "middellike beheer" saamgevat kan word, het gehandel oor die geval waar daar tussen 'n "ware besitter/houer" of 'n "middellike besitter/houer" en 'n "onmiddellike besitter/houer" onderskei kan word, en wel omdat die *onmiddellike* besitter/houer, wat daadwerklike fisiese beheer oor die saak uitoefen dit *vir en namens* die ware of *middellike* besitter/houer doen *as sy verteenwoordiger*. Die reëls wat in so 'n geval geld, is van Von Savigny afgelei (sien *Welgemoed v Coetzer* 1946 TPD 701 714; *Mbuku v Mdinwa* 1982 1 SA 219 (TK) 221E). Die kernvraag was nog telkens *of die onmiddellike houer (verteenwoordiger), gesien die feit dat hy nie in eie naam hou nie maar namens iemand anders, self die mandament van spolie teen 'n derde spoliator kan instel.* Hieroor was die gesag nog altyd verdeel (vgl *Myer v Glendinning* 1939 CPD 84; *Muller v Muller* 1915 TPD 28; *Mpunga v Malaba* 1959 1 SA 853 (W); *Mbuku v Mdinwa* 1982 1 SA 219 (TK)). Daar was egter nog altyd eenstemmigheid daaroor dat die ware of middellike besitter/houer, in die geval van middellike of verteenwoordigende beheer, via sy verteenwoordiger voldoende fisiese beheer oor die saak kon hê om self die mandament van spolie teen 'n derde in te stel sou laasgenoemde die onmiddellike fisiese beheer van die verteenwoordiger versteur (*Mbuku v Mdinwa* 1982 1 SA 219 (TK) 222H).

In die onderhawige geval is die vraag of die feit dat die onmiddellike houer (P) 'n eie belang by sy beheer oor die saak verkry het, bo en behalwe die belang wat hy vir en namens die middellike houer (R) uitoefen (sien *Mpunga v Malaba* 1951 1 SA 853 (W) 861F), die gevolg het dat die middellike beheer van R verval sodat P die enigste houer word (vgl *Mbuku v Mdinwa* 1982 1 SA 219 (TK) 222H: "Should the agent have some beneficial interest in holding the thing concerned the picture changes, but then, of course, he is not merely holding as agent.") In hierdie geval is P naamlik nie R se verteenwoordiger nie, maar 'n retensiereghouer, wat juis in eie naam en teenoor R 'n eie regmatige houerskap uitoefen. Dit beteken, in terme van die *Mpunga*- en *Mbuku*-geskil dat P wel self die mandament van spolie in eie naam teen enige spoliator (ook R) sou kon instel, maar die vraag is nou of R nog steeds die mandament teen spoliators kan instel. In kort is die vraag dus dit: het R onder die omstandighede, waarin P die saak nie as R se verteenwoordiger nie, maar in eie naam as retensiereghouer fisies beheer, voldoende fisiese beheer oor die saak behou om self as spoliatus te kwalifiseer? Hier word aan die hand gedoen dat hierdie vraag nie op grond van die verteenwoordigingsvraagstuk beantwoord moet word nie, maar wel op grond van eiesoortige oorwegings wat voortspruit uit die doel en aard van die mandament van spolie.

Die doel van die mandament van spolie is om eiemagtige versteurings van die *status quo* met betrekking tot

fisiese saaklike beheer te bekamp sonder om op die meriete van daardie beheer in te gaan. Die vraag moet dus hier wees of R *vir die doeleindes van die mandament* voldoende fisiese beheer oor die saak gehad het. In die lig van die doel van die aksie kan daar geargumenteer word dat R *fisies en feitelik* by magte was om sy beheer oor die saak weer op te neem bloot deur aan P die verskuldigde herstelkoste te betaal. Wat dit betref, is R in 'n posisie wesenlik dieselfde as dié van die motoreienaar wat sy voertuig teen betaling in 'n parkeergarage laat (vgl *Coetzee v Coetzee* 1982 1 SA 933 (K)). Daar kan geargumenteer word dat so 'n persoon *die moontlikheid om volgens eie keuse fisiese beheer weer op te neem* behou het (vgl *Groenewald v Van der Merwe* 1971 AD 233 239: "[P]hysical prehension is (for the purposes of taking possession) not essential if the subject matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure.") Hieruit volg dat enige eiemagtige optrede van P waardeur hy daardie moontlikheid-om-beheer-te-herwin vir R op onregmagtige wyse beëindig, prakties op spoliasie neerkom. So 'n handeling verskil nie wesenlik van dié van 'n grondeienaar wat die hekke op sy plaas sluit om sodoende 'n ander se gebruik van 'n serviuutpad te beëindig nie (vgl *Beukes v Crous* 1975 4 SA 215 (NK)).

Daar kan dus geargumenteer word dat R se moontlikheid om beheer weer oor te neem van P voldoende fisiese kontrole *vir die doeleindes van die mandament* daarstel, en dat beëindiging van daardie moontlikheid deur P op spoliasie neerkom, waaraan enige *mala fide* derde deel kan hê.

Daar bestaan geen probleme met betrekking tot die *animus*-vereiste in hierdie feitestel nie, en daarom sal dit hier buite rekening gelaat word. Dit is in ieder geval geykte reg dat die *animus ex re commodum acquirendi* vereis word (sien *Yeko v Qana* hierbo).

Wat betref die tweede vereiste, naamlik dat die saak sonder die toestemming en teen die wil van die houer uit sy beheer verwyder is, verdien dit in die onderhawige feitestel ook vermelding dat dit nie nodig is dat daar juis algehele ontneming van beheer moet wees nie – dit is voldoende as daar enige handeling was waardeur dit vir die houer onmoontlik gemaak is om sy beheer uit te oefen of te geniet (*Van Rooyen v Burger* 1960 4 SA 356 (O) 360A–363G). Die howe beklemtoon verder die vereiste dat die handeling sonder die gespolieerde se medewete of teen sy sin moes plaasvind (*Curatoren of Pioneer Lodge No 1 v Champion* 1879 OFS 51 54; *Nino Bonino v De Lange* 1906 TS 120 122; *Kotze v Pretorius* 1971 4 SA 346 (NK) 350A; *Beukes v Crous* 1975 4 SA 215 (NK) 218E).

Samevattend kan gesê word dat daar 'n sterk saak uitgemaak kan word vir die argument dat die prinsipaal in 'n situasie van middellike fisiese beheer oor 'n saak voldoende beheer oor daardie saak het vir die doeleindes van die mandament van spolie. Dit sou ook geld vir die geval waar iemand sy fisiese beheer oor 'n saak tydelik afstaan aan 'n ander vir die doeleindes van reparasiewerk, juis omdat hy sy fisiese beheer kan terugkry bloot deur die verskuldigde reparasiekoste te betaal. Indien die kontrakteur wat die reparasiewerk doen, die saak sonder die op-

draggewer se medewete of teen sy sin aan 'n derde afstaan, pleeg die kontrakteur teenoor die opdraggewer spoliasie. Indien die derde van hierdie toedrag van sake bewus is, is hy ewe aanspreeklik vir die spoliasie as die kontrakteur. Die howe is blykbaar nie geneë om die mandament van spolie teen die *bona fide*-verkryger toe te laat nie (sien veral De Waal hierbo en gesag deur hom bespreek), maar in beginsel is die *mala fide*-ontvanger self ook 'n spoliator.

4 4 *Invloed van onmoontlikheid van herstel*

Daar bestaan gesag vir die standpunt dat die mandament van spolie nie toegepas moet word as die verweerder onmagtig is om die saak terug te gee nie, byvoorbeeld omdat dit onomkeerbaar vernietig of aan 'n *bona fide*-derde vervreem is (sien veral De Waal hierbo en gesag deur hom bespreek; Van der Merwe a w 92 en 1977 *ASSAL* 253; Delport en Olivier *Sakereg Vonnisbundel* 72 99; Sonnekus *Sakereg Vonnisbundel* 55 63–64 66 70–71; Schoeman a w 141–144; *Potgieter v Davel* 1966 3 SA 555 (O); *Burnham v Neumeyer* 1917 TPD 630; *Louw v Herman* 1922 CPD 252; *Elastocrete v Dickens* 1953 2 SA 644 (SR); *Jivan v National Housing Commission* 1977 3 SA 890 (W); maar *contra* Scholtens 1966 *ASSAL* 221–222; Blecher 1978 *SALJ* 8 11; *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K)).

Met betrekking tot die *exceptio spolii* moet daar twee stertjies by hierdie debatteerbare uitsondering gevoeg word. In die eerste plek is dit nie noodwendig onmoontlik om die spoliasie ongedaan te maak net omdat die saakin die beheer van 'n derde is nie – indien dit byvoorbeeld vir die spoliator redelik moontlik sou wees om die saak terug te kry, kan die spoliasiebevel steeds gemaak word. Onmoontlikheid van herstel kom eers by vervreemde sake ter sprake as dit duidelik is dat die vervreemding dit prakties onmoontlik maak om in die besondere geval die saak terug te kry (Delport en Olivier a w 99; Van der Merwe a w 93).

In die tweede plek dui die vereistes van logika en gesonde verstand daarop dat die spoliator nie in die geval van die *exceptio spolii* bevoordeel kan word deur die feit dat dit vir hom onmoontlik is om die spoliasie ongedaan te maak nie. Soos hierbo aangedui is, het beide Van Zutphen en Schomaker die moontlikheid voorsien dat die effek van die *exceptio spolii* ontbindend ten opsigte van die eiser se eis kan wees. As die eiser in die geval van die *exceptio spolii* toegelaat sou word om onmoontlikheid van herstel te opper, sou dit neerkom op 'n uitnodiging aan hom om die saak te vervreem of te vernietig ten einde sy eis te laat voortgaan. Dit is nodeloos om te sê dat dit die hele doel van die mandament sou vernietig. Die onreg wat die eiser ly as gevolg van die feit dat sy saak gekelder word omdat hy nie die spoliasie ongedaan kan maak nie, is alleen aan sy eie skuld te wyte, en daarom nie buitengewoon onbillik nie. Hierdie resultaat is ook nie so vreemd as wat mag voorkom nie – dit vertoon in werklikheid interessante ooreenkomste met die geval van die gefrustreerde *actio rei vindicatio* in die geval van estoppel (sien Louw 1975 *THRHR* 218 226–227 en die gesag daar bespreek).

4 5 *Invloed van lang tydsverloop*

Een van die min geldige verwere wat teen die mandament van spolie geopper kan word, is die feit dat daar 'n onredelike lang tyd tussen die beweerde spoliasie en die instel van die aksie verloop het. Die riglyne wat neergelê is, kom kortliks daarop neer dat die applikant goeie redes moet aanvoer waarom hy so lank versuim het as die aksie langer as 'n jaar en 'n dag na die beweerde handeling ingestel word, en dat die respondent goeie redes moet aanvoer as hy beweer dat daar onredelike versuim was in 'n geval waar minder as 'n jaar en 'n dag verloop het (*Jivan v National Housing Commission* 1977 3 SA 890 (W) 892A). Die vraag is of hierdie oorweging ook in die geval van die *exceptio spolii* ter sprake kom. Gesonde verstand skryf voor dat dit nie die geval is nie: dit is die gespolieerde se goeie reg om te besluit om nie aksie in te stel vir die herstel van sy beheer nie, maar dit impliseer nie noodwendig dat hy daarom ook van sy verweer teen 'n aksie van die spoliator afstand doen nie. In die *Jivan*-saak hierbo is dit duidelik gestel dat hierdie tydperke niks meer as riglyne bied nie, en daarom word hier voorgestel dat die tydperke in die geval van die *exceptio spolii* met groot omsigtigheid toegepas moet word, in die lig van die ware *ratio* van die *Jivan*-saak.

5 Samevatting

5 1 Hoewel die hof van appèl dit in die onderhawige beslissing onnodig gevind het om hom oor die bestaan al dan nie van die *exceptio spolii* uit te spreek, word die mening hier gewaag dat die *exceptio spolii* wel deel van die moderne Suid-Afrikaanse reg uitmaak, en wel as die teenkant van die *mandament van spolie*, as die twee fasette van die belangrike beginsel *spoliatus ante omnia restituendus est*. Die bestaan van die *exceptio spolii* word hoofsaaklik afgelei uit die feit dat dit eintlik net die teenkant van genoemde beginsel is, en die feit dat hierdie beginsel van toenemende belang in die Suid-Afrikaanse reg is. Verder bestaan daar historiese aanduidings tot die effek dat hierdie *exceptio spolii* wel in die Romeins-Hollandse reg van die sewentiende en agtiende eeue geresipieer is.

5 2 As die *exceptio spolii* wel deel van die moderne Suid-Afrikaanse sakereg uitmaak, is dit in die vorm van 'n spesiale verweer. Om die verweer van spolie te gebruik, moet die verweerder hom van dieselfde bewyslas kwyt as in die geval van die mandament van spolie. Die effek daarvan sal wees dat die eiser se saak op die meriete opgeskort word totdat hy die spoliasie ongedaan gemaak het. As dit vir hom onmoontlik is om die spoliasie ongedaan te maak, behoort die verweer 'n peremptoriese of ontbindende werking te hê. Die eiser behoort slegs onder buitengewone omstandighede toegelaat te word om aan te voer dat daar 'n onredelike lang tyd verloop het tussen die spoliasiehandeling en die verweer.

5 3 In die lig van voorgaande oorwegings word hier aan die hand gedoen dat die beslissing van die hooggeregshof in die onderhawige saak foutief was. Die verweerder het, volgens die gewone vereistes van die mandament van spolie, wel voldoende middellike beheer oor die saak behou terwyl dit in die duikklopper se beheer was, omdat hy fisiese beheer van die duikklopper

kon oorneem deur bloot die herstelkoste te betaal. Verder het die duikklopper spoliasie teen die verweerder gepleeg deur die voertuig aan die eiser te oorhandig, omdat die duikklopper daardeur die verweerder se vermoë om fisiese beheer terug te kry, vernietig het. Die eiser was 'n *mala fide*-ontvanger en daarom 'n mede-spoliator. Onder normale omstandighede sou die verweerder die mandament van spolie teen òf die duikklopper òf die eiser kon aanvra, en daarom behoort hy die *exceptio spolii* teen enigeen van hulle te kan gebruik.

5 4 Die probleme rondom die fisiese beheervereiste vir spoliasie kan grootliks uitgeskakel word deur enigsins duideliker gebruik van terminologie, en daar word aan die hand gedoen dat die hof se gebruik van die term *detentio* onnodig verwarrend is. *Detentio* of houerskap is nie gewoon gelyk te stel met die fisiese beheer of *corpus* wat vir die mandament van spolie vereis word nie. Net soos besit of *possessio* bestaan houerskap of *detentio* ook uit twee elemente, naamlik 'n fisiese beheervereiste (*corpus*), en 'n bedoelingsvereiste (*animus*). Die verskil tussen besit en houerskap is juis geleë in die verskillende bedoelings van elkeen: by besit is die bedoeling die *animus domini*, en by houerskap is dit die *animus ex re commodum acquirendi* of die bedoeling om ander van fisiese beheer oor die saak uit te sluit. Vir beide die mandament en die verweer van spolie is dit voldoende om houerskap of *beheer* te bewys – die term *besit* is streng gesproke ontoepaslik.

AJ VAN DER WALT
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

BOTHA v VAN NIEKERK 1983 3 SA 513 (W)

Die koper of sy genomineerde

In hierdie geval is daar 'n koopkontrak gesluit tussen Botha (as verkoper) en Van Niekerk (as koper) of sy genomineerde. Van Niekerk stig 'n maatskappy en nomineer dié, en die maatskappy aanvaar die nominasie.

In die loop van sy uitspraak oor die geldigheid van die nominasie gaan regter Flemming in op die konstruksie van die geldige aanwysing van 'n genomineerde en stel die saak soos volg:

> "Hulle het ooreengekom dat eerste respondent [Van Niekerk] iemand mag aanwys wat die kontrak as sulks oorneem deurdat dieselfde regte en verpligtinge wat reeds bestaan van een party na 'n ander oorgaan. Daardie regte en verpligtinge ondergaan geen wysiging wanneer hulle so oorgaan nie" (526H).

Dié verskynsel doop die regter kontraksoorname (527A). Hy trek dit deur en verklaar dat die genomineerde gebonde is aan "swakhede in eerste respondent se posisie wat reeds ontstaan het," soos 'n terugtredingsreg wat reeds deur die verkoper verwerf is (527C–D). Die oorname van die kontrak is egter

nie "terugwerkend" nie, en die koper bly byvoorbeeld nog aanspreeklik vir okkupasiehuur wat voor nominasie oploop (527D–E). Totdat die verkoper van die nominasie kennis kry, kan hy die koper as koper beskou en byvoorbeeld kennisgewings en aanmanings op hom bestel (527F).

Dit is gewis 'n interessante standpunt wat blykbaar die feit dat die nuwe eienaar van 'n verhuurde saak ook vir die verhuurder se verpligtinge moet instaan, as grondslag het (527A–B).

Die vraag is egter of so-iets wel regtens bestaanbaar is. Regte kan sedeer word en die koper kan sy reg op transport sedeer aan iemand wat hy 'n genomineerde noem. Dit is dan dieselfde reg wat hy het met die modaliteite waaraan dit onderhewig is. Verpligtinge kan slegs deur ooreenkoms van al die betrokke partye oorgedra word, dit wil sê deur ooreenkoms van die koper, verkoper en genomineerde. In hierdie saak is die kenmerk, as 'n mens dit so wil noem, dat die verkoper reeds by die kontraksluiting toestemming verleen en dit wil voorkom asof die toestemming onherroeplik is. Slegs die koper en genomineerde stem by die latere nominasie toe.

Tradisioneel is daar by oorname van verpligtings 'n delegasie van verpligtings, naamlik 'n opheffing van die ou verbintenis en 'n skepping van 'n nuwe verbintenis tussen verkoper en genomineerde. Die inhoud van die verbintenis bly dieselfde, maar daar is nuwe partye. Maar dit, sê regter Flemming, is nie wat hier gebeur nie omdat

> "[w]at die onderhawige partye met uitoefening van hulle kontraksvryheid bedoel het en na my mening reggekry het, is om partye te vervang sonder om die skuld te vervang."

Hulle het dus verpligtinge oorgedra sonder delegasie of novasie.

Die vermelde kontraksvryheid slaan op die vryheid om die inhoud van hulle kontrakte te bepaal, maar ofskoon partye 'n kontrak met enige inhoud kan aangaan, moet dit wettig en juridies moontlik wees. Hier is die vraag of 'n oordrag van verpligtinge soos die regter hom dit voorstel moontlik is en die antwoord wat hier voorgedra word, is dan dat dit tot dusver onbekend is en daarom onmoontlik is.

Wat die bronne betref die volgende: In *Hughes v Rademeyer* 1947 3 SA 126 (A) 139 voorsien appèlregter Greenberg dit as moontlik dat die een party hom in die koopkontrak kan verbind tot die delegasie van die ander party se verpligtings ingevolge die kontrak. In *Flaks v Sarne* 1959 1 SA 222 (T) 225 was daar in 'n koopkontrak voorsiening vir die substitusie van die een party (koper) en in 'n geding teen die substituut verklaar die hof dat hy nie as koper aangespreek kan word nie omdat daar nie 'n formeel geldige koopkontrak tussen hom en die ander party (verkoper) is nie. Die onvermelde uitgangspunt is dat daar 'n delegasie plaasvind en dat daar by delegasie 'n nuwe koopkontrak tussen verkoper en substituut tot stand kom. In *Berman v Teiman* 1975 1 SA 756 (W) 758 gaan dit oor die uitleg van 'n klousule in 'n koopkontrak en die hof aanvaar dat 'n koopkontrak in ons reg aangegaan kan word deur 'n koper ingevolge 'n koopkontrak wat voorsiening daarvoor maak dat hy sonder verdere bykoms van die verkoper sy verpligtinge kan oordra (oormaak) aan 'n ander (genoem "nominee") en die

handeling word nêrens van delegasie onderskei nie. In *Grobler v Bennion* 1976 2 SA 459 (N) 461 word nominasie met delegasie gelykgestel. Treisman (1975 *De Rebus* 533–9) behandel dit ook as 'n delegasie, asook Wulfsohn (*Formalities in Respect of Contracts of Sale of Land Act* (71 of 1969) 140).

Die analogieë waarop die regter hom wil beroep, is ook nie van hulp nie. In die geval van die "undisclosed principal" geld van regsweë die regsreëling, populêr bekend as die leerstuk van die verborge prinsipaal, wat nie verband hou met 'n ooreenkoms dat een kontrakparty hom later kan vervang nie. In die geval van die verkoop van verhuurde grond gaan die regte van die verhuurder na die koper oor by wyse van uitdruklike of stilswyende sessie. Laasgenoemde se beweerde aanspreeklikheid vir die verpligtings van die verhuurder, vir sover dit iets meer is as die feit dat hy blootgestel is aan die *exceptio non adimpleti contractus* op grond van die nie-nakoming van die verhuurder se verpligtings, is tog wel anomalies en nie gebaseer op 'n kontrak vir substitusie tussen huurder en verhuurder opgevolg deur 'n substitusie kragtens daardie kontrak nie.

'n Beter vergelyking is die geval van "assignment" wat blykbaar ook 'n soort delegasie is. In *Henderson v Hanekom* (1903) 20 SC 513 520 gaan dit oor sessie van regte, met ander woorde die oormaak van verpligtinge word as delegasie gekategoriseer. In *Reeders and Wepener v Johannesburg City Council* 1907 TS 647 652 word verklaar dat waar die huurkontrak met die huurder "and their assigns" aangegaan is, die huurder homself as kontrakparty kan vervang deur 'n substituutparty wat dan skuldeiser en skuldenaar word. Die handeling word sessie genoem, maar presiesheid oor die term of die metode was nie deurslaggewend nie. In *Boshoff v Theron* 1940 TPD 299 302 bevestig die hof die waarheid dat die verhuurder as skuldenaar net met toestemming van die skuldeiser vervang kan word. In *Brittory Buildings (Pty) Ltd v Jones* 1946 WLD 447 450 gaan dit oor 'n onderverhuring en behandel die regter 'n "assignment" (wat daar nie was nie) as 'n geval van novasie. Daar is dus geen aanduiding dat dit as iets anders as delegasie of novasie behandel moet word nie.

Ek meen dus dat daar wel 'n delegasie van die *genus* novasie was. Of die novasie formeel moes wees of nie is dan 'n heel ander vraag. Die ou kontrak word gekanselleer – iets wat informeel kan geskied – en 'n nuwe kontrak word geskep tussen verkoper en derde. Dit wil voorkom asof dit 'n koopkontrak is en dat die een koop met 'n nuwe koop vervang word. Volgens hierdie redenasie moet dit dan aan die formaliteite van 'n koop voldoen.

Daar moet egter ook gewys word op die standpunte van ander skrywers. Nienaber het die verskynsel van vervanging van 'n koper deur 'n genomineerde in die *Daniel Pont-Huldigingsbundel* 250–262 257 as delegasie bestempel, maar dit in 1976 *TSAR* 89–93 anders gekonstrueer, naamlik as twee handelinge: eerstens 'n kontrak tussen verkoper en koper waarby die verkoper tot substitusie instem; en tweedens 'n ooreenkoms tussen koper en genomineerde waardeur die verbintenis tussen verkoper en koper vervang word met 'n verbintenis tussen ver-

koper en genomineerde. Erasmus en Lubbe het weer in 1976 *Annual Survey of South African Law* 103–115 105 die saak gekonstrueer as sou die verkoper 'n kontrak met die koper sluit en ook 'n aanbod (opsie?) aan die genomineerde maak wat die genomineerde kan aanvaar en so 'n kontrak tussen hom en die verkoper skep. Hulle verklaar dat die latere kontrak die kontrak tussen verkoper en koper noveer ofskoon dit identies daaraan is wat aard en inhoud betref.

Hierdie standpunte demonstreer die feit dat regskonstruksie nie maklik is nie, maar ondersteun tog die standpunt dat daar hier eerder skuldvernuwing is as 'n kontraksoorname.

DJ JOUBERT
Universiteit van Pretoria

MINISTER OF POLICE v MBILINI 1983 3 SA 705 (A)

Middellike aanspreeklikheid – optrede in die loop van die uitvoering van werk – laster en belediging deur werknemers

In hierdie saak het 'n sekere Fouche, 'n lid van die veiligheidstak van die Suid-Afrikaanse polisie, die eiseres in 'n sekere stadium met beledigende taal gedreig. Sy stel 'n aksie op grond van *iniuria* teen die minister van polisie in, en beweer dat Fouche in die loop van die uitvoering van sy diens die beledigende taal teenoor haar gebesig het. Dit was gemene saak dat Fouche op Woensdag 22-8-1949 die eiseres, wie se man kragtens veiligheidswetgewing aangehou is, ondervra het oor die eienaarskap van 'n motor wat sy bestuur het. Volgens sy getuienis was sy vrae bedoel om uit te vind wie die eienaar van daardie motor is in die lig daarvan dat hy oor inligting van veiligheidsbelang beskik het. Die appèlhof lei ook uit sy getuienis af dat hy vermoed het dat sy ook by ondermynende bedrywighede betrokke was. Tydens hierdie ondervraging het die eiseres, volgens Fouche se getuienis, nie haar samewerking gegee nie en die hof bevind dat hy hieroor gebelg en vererg was. Twee dae later, op Vrydag 24-8-1979, vind hy haar by 'n kruising agter die stuur van dieselfde motor, trek met sy voertuig langs haar in en dreig haar met woorde wat hy in Xhosa uiter en wat volgens die hof die Afrikaanse bedoeling sou gehad het van "jy gaan kak." In die landdroshof misluk haar aksie maar by appèl word sy in die gelyk gestel. Die minister van polisie appelleer na die appèlhof en die geskilpunt – wat nou bespreek sal word – was of Fouche op Vrydag 24-8-1979, toe hy die betrokke woorde geuiter het, wel in die loop van die uitvoering van sy verpligtinge opgetree het.

Die eerste belangrike deel van die uitspraak, gelewer deur waarnemende appèlregter Smuts, het betrekking op die bewyslas in sulke gevalle. Anders

as wat deur die hof *a quo* bevind is, bevind die appèlhof dat die bewyslas deurgaans op die eiser rus om te bewys dat die verweerder se werknemer in die loop van die uitvoering van sy verpligtinge opgetree het. Die onduidelikheid oor die ligging van die bewyslas in staatsaanspreeklikheidsgevalle het ontstaan na die uitspraak in *Mhlongo v Minister of Police* 1978 2 SA 551 (A) (kyk Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 308 ev). Hierdie onduidelikheid is nou uit die weg geruim.

Die tweede belangrike deel van die appèlhof se uitspraak behels die bevinding dat 'n eiser hom nie van sy bewyslas kwyt met betrekking tot optrede in die loop van 'n werknemer se diensbestek indien hy bloot bewys dat die werknemer op die relevante tyd op diens was nie. Dit word duidelik gestel dat op 'n oorwig van waarskynlikheid bewys moet word dat die werknemer ook daartydens in die loop van die uitvoering van sy verpligtinge opgetree het (711–712).

Om verder uit te maak of Fouche se optrede gedurende Vrydag 24-8-1979, toe hy die beledigende taal teenoor die eiseres gebruik het, in die loop van die uitvoering van sy verpligtinge plaasgevind het, sou dit volgens die hof nodig wees om 'n *nexus* te bevind tussen die besondere verpligtinge van Fouche as polisieman en die onregmatige daad wat hy gepleeg het. Met hierdie *nexus* word bedoel dat daar 'n funksionele verband moet bestaan tussen die diensverpligtinge van die werknemer en die onregmatige daad wat hy begaan het. In *Moosa v Duma and the Vereeniging Municipality* 1944 TPD 30 het die hof die volgende reël neergelê:

> "Where a servant having had a quarrel with a member of the public as a result of an interview arising out of the servant's work, assaults or defames the other party as a distinct act – doing it perhaps elsewhere than at his place of employment or after a considerable interval, one would not be disposed to hold the employer liable simply because the quarrel arose out of a matter falling within the servant's functions ... But where the quarrel arises at once out of the servant's performance of his work and is followed there and then by the tortious act it seems to me that the proper interpretation of the servant's behaviour is that he is improperly carrying out what he was employed to do and not that he was acting out of personal malice or caprice" (39).

Die vraag is dus of hierdie beledigende woorde op Vrydag 24-8-1979 deur die verweerder se werknemer as 'n "distinct act" beskou kan word. Dit sal die geval wees indien bevind kan word dat "he was acting out of personal malice or caprice" (kyk ook 715B van die onderhawige saak). Met hierdie gesag as agtergrond moes die hof dus vasstel of daar 'n direkte *nexus* tussen die beledigende aanmerking van Fouche en die uitvoering van sy verpligtinge as veiligheidspolisieman was. Om dit te bepaal, stel die hof in die eerste plek 'n ondersoek in na die verpligtinge van polisiemanne soos neergelê in artikel 5 van die Polisiewet 7 van 1958. Die hof bevind dat Fouche tydens sy onderhoud op Woensdag 22 Augustus 1979 met die eiseres ongetwyfeld in die loop van die uitvoering van sy verpligtinge opgetree het. Soos reeds genoem, het die antwoorde van die eiseres gedurende hierdie onderhoude Fouche gebelgd en vererg gelaat. Die vraag was dus of sy beledigende woorde teenoor haar twee dae later ook in die loop van die uitvoering van sy verpligtinge geskied het. Hierdie vraag beantwoord die hof (713G 714A) soos volg:

> "[I]t can fairly be assumed that the suspicion lingered and the annoyance festered in his mind and that when he saw her again two days later he was still disgruntled on account of her having defied his authority on the Wednesday and was highly critical of her activities. Against this background and under these circumstances the words which he flung at her on the Friday can only, in my view, be interpreted as a threat that she would get into serious trouble and would be severely dealt with under the security laws, not only for defying the authority of the security police but also for being personally involved in subversive activities . . . The inquiry is whether, *under these circumstances*, the offending words were spoken in the course and scope of his employment so as to render the defendant vicariously liable" (my kursivering).

Ter beantwoording van hierdie vraag verklaar die hof verder soos volg:

> "[T]he fact that he uttered a further threat on the Friday did not . . . affect the position. The lapse of time between Wednesday and Friday is of nò moment in the present case. I am accordingly satisfied that plaintiff proved that Fouche was acting in the course of his employment, albeit improperly, when he uttered the offensive words on the Friday and that the Court *a quo* was correct in coming to this conclusion."

Om op te som: Deel van Fouche se verpligtinge kragtens artikel 5 van die Polisiewet 7 van 1958 was om die binnelandse veiligheid van die Republiek te bewaar en om ondersoeke na 'n beweerde oortreding in te stel. Omdat hy die eiseres onder andere verdink het van ondermynende bedrywighede, het hy met haar die onderhoud op Woensdag 22-8-1979 gehad en daar daartydens gedreig. Hierdie dreigement het hy op Vrydag 24-8-1979 voortgesit terwyl hy haar nog steeds verdink het. *In hierdie omstandighede* was hy dus besig met die uitvoering van sy verpligtinge en die beledigende manier waarop hy haar aangespreek het, kom op 'n onbehoorlike uitvoering van daardie verpligtinge neer. Soos in die uitspraak van *Ciliza v Minister of Police* 1976 4 SA 243 (N) bevind die hof dus in wese dat wanneer 'n werknemer in die loop van die uitvoering van sy pligte en as deel daarvan met die eiser gepraat het, dit die werkgewer middellik aanspreeklik stel vir die beledigende manier waarop hy gekommunikeer het (kyk ook Scott *Middellike Aanspreeklikheid* 194). Met die resultaat van die uitspraak kan saamgestem word.

Die enigste kritiek wat teen die uitspraak geopper kan word, is die vraag of dit werklik sinvol is om die toets soos in die *Moosa*-saak (*supra*) neergelê, te gebruik. Is dit nie so dat in baie gevalle van middellike aanspreeklikheid geargumenteer kan word dat 'n werknemer wat tydens die uitvoering van sy verpligtinge iemand aanrand, beledig of belaster dit "out of personal malice or caprice" doen nie? Kwaadwillige arrestasie of vervolging is seker die beste voorbeelde hiervan. Volgens die hof se bevinding in die onderhawige saak was Fouche vererg en gebelg oor die eiseres se houding en optrede tydens hulle eerste onderhoud. As gevolge van hierdie gebelgdheid en verergdheid was hy dus daarop uit om iets te vind waarvoor hy die eiseres aan die pen kan laat ry. Wanneer hy haar dus in 'n latere stadium op 'n beledigende manier dreig, is dit vir my redelik om af te lei dat hy dit "out of personal malice or caprice" doen. Dieselfde kan gesê word van 'n polisieman wat tydens sy onderhoud met 'n persoon wat hy van 'n misdaad verdink, hom aanrand omdat hy hom vir hom vervies. Dieselfde kan ook gesê word van werknemers wat tydens die uitvoering wat

hulle verpligtinge daarvan afwyk ten einde iets in eie belang te doen (soos in *Feldman (Pty) Ltd v Mall* 1945 AD 733), en die werkgewer steeds vir 'n onregmatige daad wat so 'n werknemer tydens hierdie afwyking van verpligtinge pleeg, aanspreeklik gehou word. Dit is veral wanneer 'n mens op die grondslag van middellike aanspreeklikheid let, naamlik risiko-aanspreeklikheid (kyk Scott *Middellike Aanspreeklikheid* 30 ev), dat getwyfel word oor die werklike toepasbaarheid van die reëls wat ons howe soms neergelê het ter vasstelling van optrede in die loop van 'n werknemer se verpligtinge. Myns insiens is die agterliggende rede vir 'n werkgewer se middellike aanspreeklikheid geleë in die feit dat die opdrag of werk wat hy aan 'n werknemer toevertrou het, sekere risiko's skep waarvoor hy op grond van regverdigheid en billikheid teenoor derdes aanspreeklik gehou behoort te word (volledig gemotiveer in *Middellike Aanspreeklikheid* 30 ev veral 37 ev). Die vraag wat dus eintlik gevra moet word, is wat die aard en omvang van hierdie risiko's is wat die diensverpligtinge van die werknemer daarstel. Om dit te bepaal deur byvoorbeeld vas te stel of die werknemer op die relevante tydstip persoonlike motiewe (of wat ook al) in gedagte gehad het of nie, is myns insiens nie 'n goeie metode nie. Ooreenkomstig die aard en wese van risiko-aanspreeklikheid is dit noodsaaklik om na 'n kousale verband te soek tussen die aard van die werksaamhede of diensverpligtinge van 'n werknemer en die risiko's wat uit hierdie werk kan materialiseer. Hiervoor behoort die werkgewer aanspreeklik te wees. Met ander woorde, dit kan ook moontlik wees dat 'n werkgewer juis aanspreeklik behoort te wees vir kwaadwillige en persoonlike optredes van sy werknemer byvoorbeeld kwaadwillige vervolging of arrestasie deur werknemers van die staat of die bedrog wat iemand se agent of boekhouer pleeg. Indien sodanige persoonlike kwaadwillige optrede in die lig van die aard van 'n werknemer se werk juis 'n tipiese risiko is (kyk die betekenis van hierdie begrip bespreek in *Middellike Aanspreeklikheid* 48 ev) van daardie werk, behoort die werkgewer daarvoor aanspreeklik gehou te word. Ek het geargumenteer (kyk *Middellike Aanspreeklikheid* 196 ev) dat dit veral die geval behoort te wees waar die werknemer se verpligtinge kommunikasie met die publiek behels. Die aard van 'n polisieman se werk is juis dat hy ten nouste met die publiek kontak het en dat dit die moontlikheid daarstel dat hy mense kwaadwillig kan arresteer, aanrand, beledig, belaster ensovoorts. Daarom moet vasgestel word of daar 'n kousale verband tussen die aard van die werknemer se werksaamhede en die besondere delik wat hy gepleeg het, bestaan. Dit staan vas sodra 'n hof op 'n oorwig van waarskynlikheid bevind dat die aard van die werknemer se werk die moontlikheid van die pleeg van die onregmatige daad (soos laster, belediging, bedrog, aanranding, diefstal) objektief verhoog het. Indien die aard van die werksaamhede sodanige delikte dus moontlik maak, bestaan daar 'n kousale verband tussen die aard van die werk en die delik. Omdat sodanige toets die aanspreeklikheid van die werkgewer egter te wyd mag stel en daar behoefte vir 'n behoorlike aanspreeklikheidsbeperkingsmaatstaf bestaan, het ek voorgestel dat die kriterium van

Van Rensburg ook by risiko-aanspreeklikheid sinvolle aanwending kan vind (kyk 716H – die uitspraak van ar Viljoen in die onderhawige *Minister of Police v Mbilini*-saak en die volledige bespreking hiervan in *Middellike Aanspreeklikheid* 53 ev). Hierdie kriterium behels dat 'n hof ook op 'n oorwig van waarskynlikheid moet kan bevind dat die optrede van die werknemer en die kousale verloop van gebeure onder die betrokke omstandighede redelikerwys voorsienbaar was. In die onderhawige *Mbilini*-saak verklaar appèlregter Viljoen in verband met hierdie voorgestelde kriterium:

> "This is an interesting theory, but I do not think that there is any good reason why this Court should depart from the traditional approach adopted and the principles laid down by it in the past in such cases as *Mkize v Martens* 1914 AD 382; *Estate van der Byl v Swanepoel* 1927 AD 141; *Moosa's* case *supra*; *Feldman (Pty) Ltd v Mall* 1945 AD 733 and *South African Railways and Harbours v Marais* 1950 4 SA 610 (A)."

Ek kan egter nie heeltemal saamstem dat in hierdie sake altyd 'n duidelike en eenvormige standpunt ingeneem is ter bepaling van optrede "in the scope/course of employment" nie. Trouens, die kriterium wat ek voorgestel het, is juis ook ontleen aan uitsprake in twee van bogenoemde appèlhofsake en verteenwoordig myns insiens die sinvolste toets wat in appèlhofuitsprake oor hierdie onderwerp gevind het. Hier word verwys na die uitsprake van appèlregter Wessels in *Estate van der Byl v Swanepoel* (*supra*) en waarnemende appèlregter *Davis in Feldman (Pty) Ltd v Mall* (*supra*). Regter Wessels verklaar in die *Estate van der Byl*-saak (151):

> "The third party has no choice in the matter and if the injury done to the third party by the servant *is a natural or likely result from the employment* of the servant then it is the master who must suffer rather than the third party" (ek kursiveer).

Hierdie toets word deur regter Davis in die *Feldman*-saak (784) bevestig en hy verklaar die volgende in verband met die toepassing daarvan in gevalle waar die werknemer van sy verpligtinge afwyk en iets in eie belang doen:

> "[W]hen the servant has in fact shown himself untrustworthy, *this deviation from the scope of his employment must be of such a character that it might reasonably have been foreseen*" (my kursivering; kyk ook *Middellike Aanspreeklikheid* 53 155).

Toegepas op die feite van die onderhawige saak kan dus soos volg geargumenteer word: Die aard van 'n polisieman se werk behels onder andere die handhawing van die binnelandse veiligheid van die Republiek; die handhawing van wet en orde; die doen van ondersoeke na beweerde oortredings en die voorkoming van misdaad. Dit is ongetwyfeld so dat die aard van hierdie verpligtinge die moontlikheid dat polisiemanne verdagte persone onregmatig of kwaadwillig mag arresteer, aanrand, belaster, beledig en sovoorts verhoog. Dieselfde sou byvoorbeeld nie gesê kan word van die aard van die werksaamhede van 'n kantoorbode of van 'n voertuigbestuurder nie. Daar is dus 'n kousale verband tussen die belediging van Fouche en die aard van sy werksaamhede. Anders gestel, die belediging het uit die uitvoering van sy verpligtinge voortgespruit. Ten einde die aanspreeklikheid van die werkgewer op grond van redelikheid en billikheid behoorlik te beperk, kan in die tweede plek vasgestel word of die optrede van Fouche en spesifiek dan die kousale verloop van gebeure onder

die omstandighede redelikerwys voorsienbaar was. In die lig daarvan dat hy reeds op Woensdag 22-8-1979 met die eiseres se optrede vererg was, haar toe as gevolg daarvan gedreig het en haar deurentyd verdink het van die bedryf van ondermynende bedrywighede, is dit myns insiens redelik om te bevind dat verdere optrede van sy kant in die vorm van dreigemente en selfs beledigende dreigemente as 'n redelike waarskynlikheid voorsienbaar was. Omdat die werkgewer van Fouche juis vir hierdie risiko's in moet staan, kan dus op grond hiervan op 'n oorwig van waarskynlikheid bevind word dat die minister van polisie vir sy beledigende optrede middellik aanspreeklik is. Om egter te bevind dat die beledigende optrede van Fouche in funksionele verband met sy werk as polisieman staan, is myns insiens nie aanvaarbaar nie. Wat dit wel is, is dat dit 'n tipiese risiko van die aard van sy verpligtinge is waarvoor die werkgewer aanspreeklik gestel behoort te word.

WE SCOTT
PU vir CHO

S v GREY 1983 2 SA 536 (K)

Aanklag – wysiging – artikel 86 Wet 51 van 1977

Die beskuldigde het in die landdroshof tereggestaan op 'n aanklag van poging tot huisbraak met die opset om te steel. Hy pleit onskuldig. Die getuienis wat die staat aanbied, bewys daadwerklike huisbraak met die opset om te steel. Aan die einde van die staat se saak vra die aanklaer dat die aanklag in ooreenstemming met die getuienis na huisbraak met die opset om te steel gewysig word. Die beskuldigde wat onverdedig was, word noukeurig deur die hof aangaande die aansoek ingelig. Hy maak nie beswaar teen die wysiging nie en die aansoek om wysiging word toegestaan. Na skuldigbevinding word die beskuldigde ingevolge artikel 116 van die Strafproseswet 51 van 1977 vir vonnis na die streekhof verwys. Die streeklanddros het twyfel of die aansoek om wysiging van die aanklag toegestaan moes gewees het en lê die saak ingevolge artikel 116(3)(a) van die Strafproseswet aan die hooggeregshof vir hersiening voor.

Wysigings van 'n aanklag word gereël deur artikel 86 van die Strafproseswet, die Afrikaanse teks waarvan deur die staatspresident onderteken is. Artikel 86(1) lui soos volg:

> "Waar 'n aanklag gebrekkig is vanweë die gebrek aan 'n noodsaaklike bewering daarin, of waar daar 'n verskil blyk te wees tussen 'n bewering in 'n aanklag en die getuienis wat as bewys van so 'n bewering aangevoer word, of waar dit blyk dat woorde of besonderhede wat in die aanklag ingevoeg moes gewees het, daaruit weggelaat is, of waar woorde of besonderhede wat uit die aanklag weggelaat moes gewees het, daarby ingevoeg is, of waar daar 'n ander fout in die aanklag is, kan die hof, te enige tyd

> voor uitspraak, indien hy van oordeel is dat die aanbring van die toepaslike wysiging die beskuldigde nie in sy verdediging sal benadeel nie, beveel dat die aanklag, hetsy dit 'n misdryf openbaar of nie, vir sover nodig gewysig word, sowel wat betref die deel daarvan waar die gebrek, verskil, weglating, invoeging of fout voorkom, as wat betref 'n ander deel daarvan wat dit nodig mag word om te wysig."

Regter Williamson lewer die uitspraak waarmee regter Rose-Innes saamstem. Hy wys daarop dat die eerste vraag wat ontstaan, die vraag is of hierdie wysiging inderdaad 'n "wysiging" is binne die betekenis van artikel 86 (538D). Sekere wysigings kan inderdaad op 'n vervanging of substitusie neerkom afhangende van die graad van verskil tussen die oorspronklike en die nuwe. Hy verwys voorts na *S v Nesane* 1980 2 SA 103 (V) wat gesag bied vir die stelling dat waar daar nie benadeling is nie, substitusie van een misdaad deur 'n ander wel as 'n "wysiging" toelaatbaar sou wees (538F–H). Die regter neem die standpunt in dat die basiese toets dié van benadeling is. Wat die onderhawige geval betref, sê hy:

> "It is not necessary to decide how that test must, if at all, be linked to the test of what I shall call substantial identity between the old and the new, or indeed whether it is necessary at all to have regard to the question of substantial identity if the proposed alteration passes the prejudice test" (539A).

Hy maak dié stelling op grond daarvan dat daar in elk geval aan albei toetse voldoen word. Eerstens was daar nie benadeling nie: "[T]he position was properly explained to the accused who did not oppose the amendment nor did he require a postponement" (539B). Tweedens bevind hy dat hierdie in elk geval 'n wysiging was wat, selfs al sou dit 'n "substitutsie" wees, binne die grense van toelaatbaarheid val soos uitgespel in die *Nesane*-saak (539C–E).

Wanneer die uitspraak nader bekyk word, val dit op dat die hof twee duidelik afsonderlik en selfstandige vrae laat ineenloop, hoofsaaklik onder invloed van die *Nesane*-saak waarin presies dieselfde fout gemaak word. Wat die hof naamlik nie uitmekaar hou nie, is eerstens die vraag of 'n substitusie van een misdaad deur 'n ander as 'n "wysiging" ingevolge artikel 86 sou kwalifiseer, en tweedens die vraag of daardie "wysiging" die beskuldigde sal benadeel. Of daar benadeling is, kom by die eerste vraag glad nie ter sprake nie: al is daar geen benadeling nie, kan 'n substitusie alleen toegelaat word as dit as 'n "wysiging" ingevolge artikel 86 beskou kan word; dit gaan by beantwoording van die eerste vraag suiwer en alleen om 'n uitleg van die betekenis van die woord "wysiging" in artikel 86. Dit is tog duidelik uit artikel 86 dat "benadeling" 'n selfstandige voorwaarde is; die hof kan, indien hy van oordeel is dat die aanbring van die toepaslike wysiging die beskuldigde nie in sy verdediging sal benadeel nie, beveel dat die aanklag vir sover nodig gewysig word. Die *Nesane*-uitspraak wat deur die hof aangehaal word en waarop gesteun word, is verkeerd waar beweer word "dat substitusie soms wel met 'n wysiging plaasvind en dat die kerntoets dié van benadeling is" (105D).

Om vas te stel of die "wysiging" van artikel 86 'n substitusie van aanklagte sou toelaat, is dit eerstens nodig om 'n analise van die betrokke teks te maak. Dit val dadelik op dat artikel 86 baie duidelik die omstandighede waaronder 'n wysiging mag plaasvind, om-

skryf en beperk. Die omstandighede wat tot 'n wysiging aanleiding mag gee, is naamlik gevalle waar:

1 'n noodsaaklike bewering ontbreek;

2 'n bewering in die aanklag verskil van die getuienis wat aangebied is;

3 woorde of besonderhede foutiewelik ontbreek of foutiewelik ingevoeg is;

4 "daar 'n ander fout in die aanklag is" (a 86(1)).

Dit is baie duidelik dat 'n substitusie van aanklagte beslis nie deur een van die eerste drie gevalle gedek word nie. Word substitusie deur die vierde geval gemagtig? Daar word aan die hand gedoen dat dit nie die geval is nie en wel op grond van die volgende oorwegings:

1 Die teks verwys na 'n fout "in die aanklag" en nie na 'n "verkeerde aanklag" nie; daar word dus verwys na die *inhoud* van die aanklag wat 'n fout bevat. Die "aanklag" is immers nie die dokument wat die aanklag bevat nie maar die uiteensetting van die misdryf (vgl Hiemstra *Suid-Afrikaanse Strafproses* (3e uitg) 190). Die teks moet gelees word as 'n "fout in die uiteensetting van die misdryf."

2 Die laaste deel van artikel 86(1) handel oor die omvang wat by wysigings toelaatbaar is. Hier word die hof spesifiek gemagtig om wysigings aan te bring "sowel wat betref die deel daarvan waar die . . . fout voorkom, as wat betref 'n ander deel daarvan wat dit nodig mag word om te wysig." Die implikasie hiervan is duidelik: "fout" beteken 'n fout in 'n deel van die aanklag; "fout" beteken nie 'n foutiewe (verkeerde) aanklag nie.

3 Die "ander fout in die aanklag" is 'n klaarblyklike geval waar die *eiusdem generis*-reël van toepassing is (vgl Hiemstra 206). Die "ander fout" moet derhalwe gelees word as "ander fout, soortgelyk aan die voorafgaande." Daar is reeds op gewys dat die voorafgaande gevalle geen ruimte laat vir 'n substitusie van aanklagte nie.

4 As daar na die tersaaklike sinsnede in die lig van die breëre konteks van die wet as geheel gekyk word, is dit baie duidelik dat 'n uitleg wat substitusie toelaat, uit pas is met die algemene sisteem van die wet. In *SBI v Lourens Erasmus Edms Bpk* 1966 4 434 (A) 443 word daarop gewys dat dié uitleg verkies behoort te word wat blyk te wees "consistent with the smooth working of the system which the statute purports to be regulating." Volgens die breë strafprosessisteem word 'n beskuldigde van 'n bepaalde misdaad aangekla en word hy met bepaalde feite gekonfronteer. As hy eenmaal gepleit het, is hy geregtig op uitspraak en kan die aanklag nie meer teruggetrek word nie. Die staat is gebonde aan die aanklag en die nadere besonderhede wat hy verskaf het, kan nie nuwe aanklagte na pleit byvoeg nie en kan nie getuienis aanbied wat nie deur die aanklag gedek word nie. Die staat word tegemoetgekom deurdat hy aanklagte in die alternatief kan stel, sekere "bevoegde uitsprake" op bepaalde aanklagte kan kry en les bes, waar die aanklag nie korrek of toepaslike geformuleer is nie, dit na

pleit nog kan wysig. As hierdie wysiging egter 'n vervanging van die aanklag sou kon insluit, word die hele beginsel dat die beskuldigde vooraf van die aanklag in kennis gestel word, geweld aangedoen. Die Suid-Afrikaanse strafprosesreg is eenvoudig nie gebaseer op 'n sisteem waarvolgens getuienis eers gelei word en die staat *dan* sy keuse oor die presiese aanklag maak nie.

Hiemstra (206) kom op grond van die oorwegings wat hierbo as 3 en 4 bespreek is, tot die gevolgtrekking dat dit

> "onteenseglik waar [is] dat die artikel net wysigings beoog en nie substitusie nie. Om byvoorbeeld aanranding met opset om ernstig te beseer in die plek te stel van gewone aanranding sou te ver gaan."

Hy wys daarop dat die aanklaer se uitweg in sulke gevalle is om die saak in 'n voorlopige ondersoek te omskep. Steun vir die standpunt dat 'n "meerdere" misdaad nie in die plek van 'n "mindere" misdaad gestel kan word nie, is te vinde in *R v Mnyekwa* 1947 4 SA 433 (OD); *R v Marodiso* 1949 1 SA 594 (OD); *R v Crause* 1959 1 SA 272 (A) en *S v Collett* 1978 4 SA 324 (R). Hiemstra (206) verwys na *R v Mnyekwa* waarin die standpunt ingeneem is dat substitusie hoegenaamd nie gemagtig word nie en merk dan, vreemd genoeg, op dat dié standpunt nie as algemene reël kan geld nie. Na sy oordeel is dit wel toelaatbaar om een artikel in 'n wet in die plek van 'n ander te stel as dié artikels redelik gelyksoortig is. Hierdie standpunt is in ooreenstemming met die standpunt ingeneem in *R v Crause* (*supra*).

Bovermelde stelling van Hiemstra is soos volg in die *Nesane*-saak geïnterpreteer (105C):

> "Al wat in die bondige aantekening bedoel word, soos ek dit sien, is dat 'n wysiging 'n wysiging moet wees; en nie die daarstelling van 'n geheel nuwe misdaad waarop die beskuldigde nie voorbereid is of was nie."

Uit Hiemstra se "redelike gelyksoortigheid" en *Nesane* se "geheel nuwe misdaad" word *Grey* se toets van "substantial identity" gebore (539A). Daar is reeds op gewys dat die hof nie uitsluitsel gee oor die vraag of "substantial identity" en benadeling twee afsonderlike vereistes is èn of benadeling die enigste toets is wat aangewend moet word nie. Die hof bevind egter dat hier in elk geval "substantial identity" is want:

> "[T]he whole thrust of the charge was what the accused did at a particular time and place in relation to a particular house. The fact that the evidence established actual as opposed to attempted house-breaking still means that essentially the case dealt with the same basic complaint against the accused. That the amendment possibly introduced a more serious charge is a consideration but it is not a significant one in this situation" (539 C).

Daar moet ook met groot omsigtigheid na die hof se hantering van die "substantial identity"-toets gekyk word. Aanranding en moord kan albei draai om die vraag wat 'n beskuldigde op 'n bepaalde tyd en plek ten opsigte van 'n bepaalde persoon gedoen het. Om in so 'n geval te beweer dat daar "substantial identity" is, is tog ondenkbaar.

Soos hierbo aangetoon, wys 'n uitleg van artikel 86 uit dat *geen* substitusies gemagtig word nie, ook nie dié substitusies wat Hiemstra tog meen deurgelaat kan word nie.

Die uitspraak in *S v Grey* behoort gevolglik nie nagevolg te word nie. Daar moes bevind gewees het dat die substitusie van aanklagte nie toelaatbaar

is nie. Die hele vraag van benadeling moes dus nie ter sprake gekom het nie; benadeling van die beskuldigde kom as 'n tweede toets ter sprake eers nadat die vraag uitgemaak is of die aanklaer se handeling op 'n "wysiging" neerkom.

JT DELPORT
DE VAN LOGGERENBERG
Universiteit van Port Elizabeth

May I just point out once again that Maasdorp, as it is today, has been planned chiefly for the use of those who practise law. The decisions of the Appellate Division are binding upon all the superior and inferior courts of the Republic. Accordingly no criticism of those decisions is to be found in the four volumes of the Institutes. That field is left clear to those of the university professors who employ this method of displaying their erudition.

Having myself been a member of that honourable tribunal, I take the gravest exception to those legal pundits who decry its decisions and apparently regard them as being the best guesses of the court of ultimate conjecture. (Per *CG Hall* in preface to *Maasdorp's Institutes of South African Law* Vol IV 1972.)

BOEKE

PERSONE- EN FAMILIEREG

JD VAN DER VYVER en DJ JOUBERT

Juta Kaapstad en Johannesburg 1980; i – lxiv en 1 – 640 bl

Prys R48,00 (hardeband) R36,00 (sagte band)

Volgens die voorwoord word daar met hierdie boek beoog om die personereg te verken en was die aanvanklike bedoeling om 'n boek oor slegs die personereg te skryf. Die meeste universiteite kombineer egter die studie van die personereg met dié van die familiereg en vandaar ook 'n afdeling oor laasgenoemde onderwerp. Professor van der Vyver het die gedeelte oor die personereg geskryf en professor Joubert die gedeelte oor die familiereg.

Twee derdes van die boek word deur die personereg in beslag geneem. So 'n uitvoerige behandeling van die onderwerp is volgens die voorwoord nodig omdat

> "eerstens, in die Suid-Afrikaanse regsliteratuur, in die geval van veral die huweliksreg, nie dieselfde behoefte aan 'n gesaghebbende leerboek en naslaanbron (bestaan nie) as wat met die personereg die geval is nie. Daar kan nouliks, wat die huweliksreg betref, op Hahlo se standaardwerk verbeter word."

Hierdie stelling van die skrywers val vreemd op. Volgens die bibliografie is die skrywers bewus van Boberg se *The Law of Persons and the Family.* Boberg se behandeling van die personereg is minstens net so volledig as die van Hahlo oor die familiereg. Bowendien kan daar geen twyfel wees dat die boek van Boberg 'n gesaghebbende en uitstekende leerboek is nie.

Die skrywers se uitlating in die voorwoorde oor die behoefte in die Suid-Afrikaanse regsliteratuur aan 'n gesaghebbende leerboek en naslaanbron oor die personereg, noop 'n mens om hulle boek aan die eise van so 'n volledige naslaanwerk te toets. Die gedeelte oor die familiereg deur professor Joubert is egter nie 'n poging om 'n volledige naslaanbron daar te stel nie. Trouens, in die lig van die hervormingsmaatreëls wat reeds oor die huweliksgoederereg deur die Suid-Afrikaanse Regskommissie in die parlement ter tafel gelê is, sou dit volgens die skrywers self nutteloos wees om in hierdie stadium die familiereg volledig te wil probeer beskryf. Daar woord dan ook in die voorwoord die vertroue uitgespreek dat

> "die geleentheid spoedig nadat die veranderinge van die huweliksreg afgehandel is, aan ons gegun sal word om ook die familiereg meer omvattend uit te pluis."

Die eerste hoofstuk van die afdeling oor die personereg staan onder die opskrif "Begripspresisering" en is 'n basies wysgerige behandeling van Dooyeweerd geïnspireerde regsfilosofie. Die hoofstuk beslaan sowat vyftig bladsye en sal na alle waarskynlikheid vir die gemiddelde eerstejaarstudent (wat by die Afrikaanssprekende universiteite gewoonlik die regstudie met 'n kursus oor die personereg begin) hoofsaaklik onverstaanbaar wees. Op bladsy 1 – 2 word daar byvoorbeeld sewe verskillende betekenisse van die woord "reg" onderskei en word onder meer gesê dat die eerste betekenis van die woord "reg" is:

> "Die 'reg' as *werklikheidsverskynsel*, bv in die sin: 'Die sinkern van die reg is vergelding.' "

Sonder enige verdere verduideliking meen ek dat hierdie betekenis van die woord "reg" so esoteries is dat dit geen betekenis sal hê vir 'n leser wat nie onderlê is in die filosofie van Dooyeweerd nie.

Van der Vyver maak reeds in die eerste hoofstuk heelwat aanvegbare stellings waarvan sommige nie sonder enige kommentaar verbygegaan kan word nie. Op bladsy 7 sê hy onder meer:

> "Vir sover nalatigheid en/of opset 'n voorvereiste vir die onregmatigheid van 'n handeling is, kan iemand wat *doli incapax* (nie in staat om opset te kan hê nie) en/of *culpae incapax* (nie in staat om nalatigheid te kan hê nie) is, vanselfsprekend nie onregmatig handel nie."

Hierdie revolusionêre standpunt word sonder meer, sonder verwysing na enige gesag of enige verdere verduideliking, ingeneem. Daar word vandag in ons reg seker aksiomaties aanvaar dat skuld eers ter sprake kan kom nadat vasgestel is dat 'n handeling onregmatig is. Die afwesigheid van onregmatigheidsbewussyn kan immers die opset van 'n dader se handeling uitsluit. 'n *Infans* kan sekerlik onregmatig handel, maar word nie juridies daarvoor verwyt nie omdat hy ontoerekeningsvatbaar is. Die *infans* pleeg gevolglik nie 'n onregmatige daad as gevolg waarvan hy aanspreeklikheid vir die betaling van skadevergoeding oploop nie. Die feit dat die *infans* nie juridies verwytbaar is nie omdat hy ontoerekeningsvatbaar is, beteken egter nie dat hy nie die juridiese kompetensie het om deliktueel aanspreeklik te wees nie. So kan die *infans* wat die erfgenaam van 'n onderneming is, byvoorbeeld middellik aanspreeklik wees vir die delikte van sy werknemers (vgl Boberg aw 676). Daarbenewens is dit alomaanvaarde reg dat 'n mens in noodweer teen 'n kranksinnige of 'n *infans* kan optree omdat die aanval van laasgenoemde persone onregmatig kan wees. Die feit dat hierdie klasse persone nie juridies verwytbaar is nie, beteken nie dat hulle nooit onregmatig kan handel nie. Dit is inderdaad 'n vreemde gedagte om hoegenaamd te praat van

> "[t]oerekeningsvatbaarheid . . . [as 'n] . . . kompetensie om 'n onregmatige daad te kan pleeg" (bl 7).

Kompetensie beteken volgens die skrywer dit wat regtens gedoen kan word (sien bl 3). Alle mense kan onregmatig handel, maar nie alle mense is juridies verwytbaar vir hulle onregmatige handelinge nie. Daarbenewens kan die woord "kompetensie" in hierdie verband die verkeerde indruk skep dat sekere mense juridies toegelaat word om onregmatig op te tree. 'n Onregmatige daad is 'n regsfeit en nie 'n regshandeling nie en die gevolge wat die reg aan die gebeure sal heg, hang

af van verskeie omstandighede waaronder die toerekeningsvatbaarheid van die dader.

Op bladsy 8 vind 'n mens die volgende uitlating:

> "sou 'n derde wel op die uitoefening van die reghebbende subjek se genots- en beskikkingsbevoegdheid inbreuk maak, pleeg die derde 'n onregmatige daad."

Hierdie formulering is klaarblyklik onnoukeurig. 'n Onregmatige daad word eers gepleeg wanneer daar vasgestel is dat al die elemente van die onregmatige daad aanwesig is. Die inbreukmaking op die genots- en beskikkingsbevoegdhede van 'n reghebbende kan hoogstens *prima facie* op die aanwesigheid van onregmatigheid as een van die elemente van die onregmatige daad dui. Hierdie inbreukmaking kan byvoorbeeld geregverdig wees weens die aanwesigheid van die een of ander regverdigingsgrond en is dan nie eens onregmatig nie. Onnoukeurige formulering soos hierdie kan tot verwarring by die leser lei.

Daar word op bladsy 13 te kenne gegee dat die aanspraak wat 'n getroude persoon op die samewoning van sy gade het die totale betekenis van die begrip *consortium* in die familiereg is. Die inhoud van die begrip *consortium* is onder meer in *Grobbelaar v Havenga* 1964 3 SA 522 (N) omskryf en behels baie meer as net die reg op samewoning.

In 'n voetnoot op bladsy 13 word sonder meer verklaar dat die "familieregte" wat Van Apeldoorn *Inleiding tot de Studie van Het Nederlandse Recht* (1950) 148 as 'n afsonderlike kategorie regte klassifiseer, in die meeste gevalle in wese kompetensies en nie subjektiewe regte is nie. Hierdie stelling verdien sekerlik verdere verduideliking, aangesien die saak nie so eenvoudig is as wat dié voetnoot te kenne gee nie.

Op bladsye 7 en 13 word nalatigheid omskryf as 'n situasie waar

> "jy die gevolge van jou handeling nie voorsien het nie terwyl 'n redelike man dit in die betrokke omstandighede wel sou voorsien het."

Hierdie siening van nalatigheid is nie korrek nie. By nalatigheid gaan dit nie slegs oor die voorsienbaarheid van die gewraakte gevolge nie, maar ook oor die voorkoming daarvan. Wanneer 'n redelike man wel die intree van die gevolge sou voorsien het, maar nogtans sou gehandel het in dieselfde omstandighede, is die dader se optrede nie nalatig nie. So voorsien alle redelike mense die moontlikheid dat 'n motorbotsing kan volg wanneer daar in besige verkeer met motors gery word, maar nogtans ry almal en is die blote bestuur van 'n motor in besige verkeer nie nalatig nie.

Vir sover daar met hierdie werk beoog word om ook 'n naslaanbron daar te stel, altans ten opsigte van die personereg, is dit jammer dat daar so min verwysing na gesag is. 'n Stelling soos die op bladsy 16 dat

> "As eienaar van die aangrensende grond is A bevoeg om die takke bokant die grenslyn af te saag (hy mag die afgesaagde takke egter nie hou nie maar moet dit aan B gee)"

is uit die oogpunt van 'n naslaanwerk van weinig betekenis sonder verwysing na gesag. Op bladsy 49 word byvoorbeeld sonder verwysing na gesag verklaar dat dit 'n reël is dat 'n kind onder die puberteitsleeftyd nie kan trou nie. Hoewel dit waarskynlik waar is, is dit 'n disputabele reël en verwag 'n mens in 'n standaardhandboek en naslaanbron ietwat van 'n uitbreiding daarop of minstens 'n kruisverwysing na die

plek in die boek (bl 433) waar die probleem wel bespreek word.

Die omskrywing van die begrip "regsubjek" op bladsy 26 en verder, is afgesien daarvan dat dit baie ingewikkeld geformuleer is, myns insiens ook hiperkrities. Die skrywer bespreek 'n aantal definisies van dié begrip en vind hulle onaanvaarbaar om dan self die begrip "regsubjek" te omskryf as

> "die draer van juridiese kompetensies, subjektiewe regte (met die daarby inbegrepe bevoegdhede) en regsverpligtinge."

Hierdie definisie moet volgens die skrywer onderskei word van dié van byvoorbeeld Olivier *Die Suid-Afrikaanse Persone- en Familiereg* (1975) 1 (dieselfde definisie is te vinde in die tweede uitgawe van die boek wat in 1979 verskyn het). Olivier omskryf "regsubjek" as

> "enige wese wat die draer van regte, verpligtinge en bevoegdhede kan wees."

Hierdie definisie is vir die skrywer onaanvaarbaar, wat daarvolgens word regsubjektiwiteit omskryf:

> "rondom die potensie om draer van genoemde modaliteite te kan wees."

Die beswaar sentreer klaarblyklik op die woorde "kan wees" in Olivier se definisie. Daar word egter nie verder op die beswaar uitgebrei nie. Die leser moet egter nie hieruit aflei dat die skrywer 'n regsubjek sien as slegs iemand wat regte, verpligtinge en kompetensies het nie, want op bladsy 33 word daar in verband met regsubjektiwiteit gesê dat:

> "[d]ie regsubjektiwiteit van 'n persoon is basies geleë in sy vermoë om juridiese kompetensies, subjektiewe regte en verpligtinge te *kan hê*" (my kursivering).

Van Rensburg 1974 *THRHR* 94 se definisie van regsubjek as

> "iemand (of iets) wat onderworpe is aan die reg"

word gekritiseer op grond daarvan dat resobjekte ook aan die reg onderworpe is. Dit is inderdaad 'n vreemde gedagte dat 'n motor byvoorbeeld oortree wanneer die eienaar daarvan daarmee die snelheidsbeperking oorskry. Die skrywer as 'n klaarblyklike kenner van Dooyeweerd se wysbegeerte maak dit vir die leser wat nie so vertroud is met dié bepaalde filosofie nie, uiters moeilik om sy gedagtes te volg.

Op bladsy 29 en verder word die verskillende soorte persone bespreek. Familie- en gesinseenhede word sonder enige verdere verduideliking of verwysing na gesag as voorbeelde van regspersone aangedui. Hierdeur kan daar beslis 'n groot wanindruk by veral student-lesers geskep word. Om 'n gesinseenheid as 'n regspersoon te beskou, is immers geensins alomaanvaarde reg nie. So ook word daar op bladsy 42 bloot te kenne gegee dat 'n trust 'n regspersoon is – 'n stelling wat seker nie slegs terloops gemaak kan word nie.

Die oogmerk om 'n standaardhandboek en naslaanwerk oor die persoonereg te skryf, is myns insiens nie met hierdie poging bereik nie. Die eerste vereiste vir 'n standaardhandboek is seker dat dit as naslaanbron gebruik moet kan word en 'n mens vind dit jammer dat die skrywer nie deurlopend na gesag vir sy dikwels omstrede stellings verwys nie. As leerboek vir studente is die gedeelte oor die persoonereg enersyds te omvattend en andersyds te kontensieus om aan junior studente voorgeskryf te word. Die besondere waarde van hierdie afdeling van die boek is myns insiens veral

daarin geleë dat dit vir die ingewyde leser prikkelend kan wees en dikwels opnuut stof tot nadenke gee. Daarbenewens word die stof uitvoerig behandel en vind 'n mens 'n uitvoerige bespreking van onder meer die invloed van ras op 'n persoon se status, asook van diverse statusbeïnvloedende faktore soos politieke oortuigings, godsdienstige verbintenisse, lewenstandaard, ensovoorts (vgl hfst 7 en 9).

Die laaste bykans 200 bladsye van dié boek van 600 bladsye is deur professor Joubert geskryf en handel oor die familiereg. Dié onderwerp is in ses hoofstukke verdeel: inleiding tot die huweliksreg, die verlowing, die sluiting van die huwelik, die gevolge van die huwelik, die verhouding tussen ouers en kinders en die ontbinding van die huwelik.

Volgens hulle voorwoord konsentreer die skrywers met hulle bespreking van die familiereg hoofsaaklik op die behoeftes van die student. Hierdie afdeling van die boek behoort dus in die lig van dié oogmerk beoordeel te word en as leerboek oor die familiereg is dit myns insiens 'n besonder geslaagde werk. Professor Joubert gee 'n bondige en duidelike uiteensetting van die familiereg wat ook ontvanklik behoort te wees vir die oningewyde leser. Terwyl die huweliksreg in die smeltkroes van hervorming is, word daar ook telkens na die hervormingsvoorstelle van die Suid-Afrikaanse Regskommissie verwys waar dit relevant is. Hierdie wyse van behandeling van die hervormingsvoorstelle het myns insiens besondere waarde, veral vir die student wat daardeur reeds aan die begin van sy studie van die huweliksreg moet besef dat ook hierdie afdeling van die reg nie bo kritiek verhewe is nie, maar gedurig ondersoek behoort te word ten einde seker te maak dat dit by die behoeftes van die praktyk sal aanpas.

'n Mens is altyd verheug wanneer daar 'n nuwe handboek oor jou vakgebied verskyn en ek verwelkom baie graag hierdie boek op my boekrak. Die werk is oor die algemeen goed versorg. Dit is miskien jammer dat die skrywers nie deurlopend van voetnote gebruik gemaak het om na gesag te verwys nie. Gesag is in fyner druk in die teks aangehaal en soms ondervind 'n mens inderdaad probleme met die volg van 'n bepaalde sin tussen al die fyndruk deur (sien bv bl 82–83 89 159 210–211). Spelfoute en taalfoute kom altyd in enige boek voor, maar is hier tot 'n minimum beperk. Soms het die skrywers skynbaar self probleme om byvoorbeeld te besluit of 'n vrou aan die maritale mag van haar man "onderworpe" of "onderhewig" is (sien 238 240 241, waar "onderworpe" en "onderhewig" om die beurt in die verband gebruik word). Anglisismes soos "in terme van" 'n kontrak is altyd hinderlik al is dit klaarblyklik 'n glips (bl 141).

AH BARNARD
Universiteit van Suid-Afrika

SOUTH AFRICAN MERCANTILE AND COMPANY LAW
deur JTR GIBSON, bygestaan deur RG COMRIE
Juta Kaapstad, Wetton en Johannesburg 1983; xl + 636 bl
Prys R42,00 + AVB (hardeband) R32,00 + AVB (sagteband)

Hierdie boek is die vyfde uitgawe van 'n nou reeds baie bekende werk. Besprekings van vorige uitgawes het verskyn in 1962 *Acta Juridica* 160, 1963 *SALJ* 290, 1967 *THRHR* 91, 1967 *SALJ* 112 en 1978 *Acta Juridica* 380. Weens die wye veld wat gedek word, sal met 'n kursoriese oorsig volstaan moet word.

Waarskynlik die grootste gebrek in die vyfde uitgawe is die afwesigheid van 'n register. Dit is ietwat onverklaarbaar, want die vierde uitgawe het wel 'n register bevat. Hierdie leemte doen beslis afbreuk aan die gebruikswaarde van die boek. In 'n vorige bespreking is ook kritiek geopper teen die feit dat die volledige naam van 'n aangehaalde werk slegs by die eerste verwysing daarna gegee word, en dan verder volstaan word met 'n blote verwysing na die outeur se naam. In die vyfde uitgawe is slegs gedeeltelik aan hierdie kritiek gehoor gegee. Sommige werke word telkens volledig aangehaal (sien bv vn 3 op bl 2 en vn 6 op bl 4, maar vgl vn 4 op bl 3) en ander weer slegs by die eerste verwysing (sien vn 11a op bl 29). Hierdie werkswyse is steurend en tydrowend wanneer die leser 'n bepaalde verwysing wil opvolg. Dit kan tog nie te veel moeite wees om 'n bibliografie van ten minste die werke wat reëlmatig aangehaal word, in die boek op te neem nie. Positiewe kenmerke is die stewige bindwerk (wat veral in die geval van die sagtebanduitgawe belangrik is) en die min spel- en drukfoute.

Die werk is in veertien hoofstukke verdeel en dek die grootste deel van dit wat tradisioneel as handelsreg beskou word. In die inleidende hoofstuk word baie kortliks gelet op die bronne van die Suid-Afrikaanse reg, die verskillende howe, die proses van geskilbeslegting, die aard van subjektiewe regte en arbitrasie as buitegeregtelike geskilbeslegtingsmetode. Hierdie hoofstuk is egter so oppervlakkig dat dit plek-plek misleidend is. Voorbeelde hiervan is die uiteensetting van die *stare decisis*-leerstuk op bladsy 1, die verdeling (op bl 7) van subjektiewe regte in slegs twee kategorieë, en die suggestie (op bl 8) dat die Wet op Arbitrasie ook op mondelinge arbitrasieooreenkomste van toepassing is.

Wat die hoofstuk oor die algemeen beginsels van kontraktereg betref, geld sekere punte van kritiek wat in 'n bespreking van die vorige uitgawe (sien 1978 *Acta Juridica* 380) geopper is, nog steeds. So word op bladsy 10 en 29 nog steeds gesê dat die kontrak van 'n minderjarige sonder sy ouer of voog

se toestemming gesluit, eenvoudig nietig is. As dit so is, is die moontlike ratifikasie van so 'n kontrak moeilik te verklaar. Formaliteite (bl 11 e v) word ook nog steeds bespreek as 'n onderafdeling van die geoorloofdheidsvereiste vir 'n geldige kontrak. Sodoende word die verskil in die gevolge van uitvoering van kontrakte wat om verskillende redes nietig is, verdoesel.

Op bladsy 12 word verwys na die voorgeskrewe formaliteite ingevolge die Wet op Vervreemding van Grond (68 van 1981). Die indruk word geskep dat artikels 6 en 15 van toepassing is op 'n koopkontrak van *enige* grond indien die prys in meer as twee paaiemente oor 'n tydperk van meer as 'n jaar betaalbaar is. Dit is verkeerd. Artikels 6 en 15 geld slegs as dit gaan oor grond soos omskryf in artikel 1(1)(vi)(c) van die wet. 'n Hinderlike aspek van die uiteensetting van formaliteite op bladsy 12–13 is die feit dat soms slegs na 'n bepaalde wet verwys word, sonder vermelding van die artikel waarin die voorskrif vervat is.

Onder "sales of goodwill" (bl 20–22) word die toonaangewende appèlbeslissing in *A Becker and Co v Becker* 1981 3 SA 406 (A) glad nie genoem nie. In die lig van die jongste regspraak sou 'n mens ook 'n meer gebalanseerde uiteensetting verwag van die vraag op welke tydstip die redelikheid van 'n handelsbeperking getoets word (bl 22). Origens is die bespreking van ongeoorloofdheid op bladsy 14–28 buitengewoon volledig.

In die bespreking van handelingsbevoegdheid word op bladsy 34–35 gesê dat die Meester toestemming kan verleen vir die vervreemding van 'n minderjarige se onroerende goed indien die waarde daarvan nie R4 000 oorskry nie. Hierdie perk is in 1978 reeds verhoog tot R10 000. Verder dien daarop gelet te word dat hierdie perk, wanneer beswaring met 'n verband ter sprake is, met verwysing na die verbandskuld geld, en nie met verwysing na die waarde van die bate nie. Voorts is die stelling (op bl 35) dat 'n vrou wat buite gemeenskap van goed trou ten volle handelingsbevoeg is, verkeerd. Die man se maritale mag moet ook eers uitgesluit word. Hierdie fout word in die laaste paragraaf op bladsy 35 by implikasie reggestel.

In verband met die kwessie van dwaling by kontraksluiting is daar een aangeleentheid wat vermelding verdien. In voetnoot 42 op bladsy 69 aanvaar die skrywers dat skuld nie 'n vereiste is vir estoppel by kontraksluiting nie. Hierdie is 'n erg omstrede kwessie wat die appèlhof nog finaal sal moet uitmaak. Hoewel appèlregter Jansen in *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) sê dat die kwessie nog nie uitgemaak is nie, gaan hy voort en stel wel die skuldvereiste. Dieselfde het in *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) gebeur, hoewel die appèl daar ook op ander gronde van die hand gewys is.

In verband met wanvoorstelling word op bladsy 81 gesê dat 'n regsmiddel op grond van 'n opinie wat nie bewaarheid word nie, slegs beskikbaar is as dit nie 'n eerlike opinie was nie. Hierdie tradisionele standpunt is in *Kern Trust (Edms) Bpk v Hurter* 1981 3 SA 607 (K) sterk gekwalifiseer, en 'n mens sou graag wou sien wat die skrywers van hierdie aspek van die *Hurter*-saak dink.

Op bladsy 98 word gesê dat indien een solidêre skuldenaar die skuld betaal, die skuldeiser se regte teenoor die ander skuldenaars outomaties op die betalende party oorgaan. Dit is 'n vreemde verskynsel waarvoor geen gesag aangehaal word nie. Indien die solidêre skuld afgelos is, is daar tog niks meer wat op die betalende party kan oorgaan nie. Dit is ook nie nodig om van so 'n fiksie gebruik te maak om 'n verhaalsreg vir die betalende party te skep nie. So 'n verhaalsreg sal hy in elk geval gewoonlik ingevolge sy verhouding met sy medeskuldenaars hê (sien De Wet en Van Wyk *Kontraktereg en Handelsreg* (1978) 120 en 125).

Hoewel die skrywers in die deel oor die algemene beginsels van die kontraktereg oor die algemeen daarin geslaag het om baie in min spasie te sê, word die belangrike aangeleentheid van kontrakbreuk en die gevolge daarvan (bl 105–106) darem heeltemal te maklik en vinnig afgemaak (sien ook 1978 *Acta Juridica* 380 vir dieselfde kritiek op die vierde uitgawe). Daar word feitlik geen poging aangewend om die verskillende moontlike vorme van kontrakbreuk te onderskei nie. In voetnoot 81 op bladsy 105–106 word die indruk geskep dat die appèlhof in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) die standpunt van De Wet (nl dat die skuldenaar wat substansieel presteer het nie in sy eis vir die teenprestasie met die *exceptio non adimpleti contractus* afgeweer kan word nie) aanvaar het. Dit is egter nie wat gebeur het nie, en die leser word heeltemal in die duister gelaat oor wat die appèlhof se standpunt nou eintlik is. By 'n bespreking van skadevergoeding kan 'n mens eenvoudig nie die beslissing van die appèlhof in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) buite rekening laat nie.

Hoofstuk 3 bevat 'n goeie uiteensetting van die koopkontrak. Die belangrikste nuwigheid is 'n uiteensetting van sekere bepalings van die Wet op Vervreemding van Grond (68 van 1981). Op bladsy 165–167 word weer die indruk geskep dat hoofstuk II van die Wet op *enige* grond van toepassing is. Dit is verkeerd, soos reeds hierbo aangetoon is. Die leser moet ook in gedagte hou dat die wet na publikasie van die boek deur die Wysigingswet op Vervreemding van Grond (51 van 1983) gewysig is. Laastens moet daarop gewys word dat Regeringskennisgewings R722 en R723 van 1975-04-11 (waarna steeds op bl 174 verwys word) reeds deur Regeringskennisgewing R430 van 1981-02-27 ingetrek is.

In hoofstuk 4 is nou 'n nuwe deel oor die Wet op Kredietooreenkomste (75 van 1980) ingevoeg. Hierdie uiteensetting is egter maar min werd. Dit is feitlik slegs 'n weergawe van wat in die wet staan, terwyl die groot probleem juis die uitleg en betekenis van die wet is. Selfs oor sentrale definisies bestaan daar onhoudbare onsekerheid (vgl bv 1982 *De Rebus* 500 en 1982 *TSAR* 288–289). Die periode van drie maande waarvan bo-aan bladsy 186 melding gemaak word, is reeds deur Regeringskennisgewing R2233 van 1982-10-15 verleng tot ses maande.

Hoofstuk 5 bevat 'n goeie bespreking van huur van onroerende goed. In verband met huurbeheer kan net daarop gewys word dat Proklamasie 91 van 1980 (sien vn 38 op bl 219) na publikasie van die boek deur Prokla-

masie 32 van 1983 (soos gewysig deur Prok 99 van 1983) vervang is. In die bespreking van huurbeheer kon die skrywers darem gerus net gemeld het dat daar tans (met een klein uitsondering) nie huurbeheer oor besigheidspersele is nie.

In hoofstukke 6, 7 en 8 word die dienskontrak, verteenwoordiging en vennootskappe bespreek. Wat die dienskontrak betref, word gekonsentreer op gemeenregtelike beginsels, en na die magdom arbeidswetgewing word net kortliks verwys. 'n Bespreking van al hierdie wetgewing sou die perke van 'n boek van hierdie aard ver oorskry. Sommige van hierdie arbeidswette is na publikasie van die boek ook al weer gewysig of vervang. Wat die afdeling oor vennootskappe betref, word op bladsy 291 nog steeds na reël 11 (i p v reël 54) van die landdroshofreëls verwys (vgl 1978 *Acta Juridica* 381). Hoewel hierdie afdeling oor die algemeen 'n goeie beeld van die huidige posisie gee, is daar ongelukkig geen ag geslaan op sekere punte van kritiek op die vorige uitgawe nie (sien 1978 *Acta Juridica* 381).

Maatskappye word in hoofstuk 9, die langste enkele hoofstuk, bespreek. Die skrywers slaag daarin om baie te vermag in die 184 bladsye wat deur hierdie hoofstuk in beslag geneem word. Dit is egter jammer dat die skrywers nie meer aandag gegee het aan die kritiek wat op die ooreenstemmende hoofstuk van die vierde uitgawe uitgespreek is nie (vgl 1978 *Acta Juridica* 381–382). Na sekere toonaangewende beslissings word steeds nie verwys nie. Wat byvoorbeeld die betekenis van houer- en filiaalmaatskappy betref (bl 382–383), word die belangrike beslissing in *Sage Holdings Ltd v The Unisec Group Ltd* 1982 1 SA 337 (W) (tans op appèl na die appèlhof) nie vermeld nie (hoewel die beslissing op bl 438–439 in 'n ander verband taamlik uitvoerig aangehaal word).

In die hoofstuk oor verhandelbare dokumente word die stelling gemaak (bl 494) dat 'n tjek nie geaksepteer kan word nie. Vir hierdie stelling word nie gesag verskaf nie. Hoewel dit nie gebruiklik is nie, is daar niks wat aksep-tasie van 'n tjek verhoed nie. In hierdie verband sou 'n mens darem ook iets oor die sertifisering van tjeks verwag (vgl Malan en De Beer *Wisselreg en Tjekreg* 289–292).

Die bespreking van sogenaamde "maatskappyhandtekeninge" op bladsy 499–500 is selfs in 'n boek van hierdie aard, darem te oorsigtelik. 'n Ernstige gebrek is die feit dat die ander basiese vereiste vir wisselaanspreeklikheid, naamlik lewering, geen aandag kry nie.

Op bladsy 500–501 (vgl ook bl 518) word gesê dat die trekker en endossante bevry word indien 'n beperkte akseptasie aanvaar word sonder dat hulle magtiging vooraf of instemming agterna verkry word. Hierdie stelling is nie korrek sover 'n *gedeeltelike* akseptasie ter sprake is nie.

Die begrip "verhandeling" kry ook nie die aandag wat dit verdien nie. Die skrywers self gebruik die woord in verskillende betekenisse (vgl bl 501 met bl 503) sonder 'n behoorlike bespreking van hierdie begrip. 'n Ander belangrike aangeleentheid wat aandag behoort te kry, is die kwessie van onvoltooide stukke (a 18 van die Wisselwet).

Die hoofstuk oor versekering is baie kort en bondig, maar tog insig-

gewend. Die weglating van sekere definisies van polisse maak dit egter vir die leser moeilik om sekere van die bepalings van die Versekeringswet wat bespreek word, te begryp sonder om na die Versekeringswet te gaan kyk. Dit is verder nie duidelik waarom tuisdienspolisse nie ook onderaan bladsy 539 ingesluit word nie.

Die skrywers het gepoog om die kwessie van 'n versekerde se voorkontraktuele openbaarmakingsplig te vereenvoudig deur dit in agt reëls uiteen te sit. Die probleem met die openbaarmakingsplig is dat daar botsende gesag oor verskillende aspekte van die openbaarmakingsplig is. Soms word hierdie botsende standpunte bloot weergegee en sonder kommentaar verbygegaan, byna asof daar geen verskil van mening bestaan nie (vgl bl 548–549). Dit is 'n onbevredigende manier van doen, en verwar beslis die leser. Dit is verder (anders as wat die skrywers op bladsy 553 te kenne gee) glad nie so duidelik dat die beslissing in *Jordan v New Zealand Insurance Co Ltd* 1968 2 SA 238 (OK) na die invoeging van artikel 63(3) in die Versekeringswet anders sou moes wees nie.

Die hoofstukke oor die vervoerkontrak en sekerheidstelling is bondig, maar gee tog 'n goeie algemene oorsig van die belangrike aspekte. Daar kan net op gewys word dat artikel 51A van die Wet op Handelskeepvaart (sien bl 602) na publikasie van die boek deur die Wet op die Reëling van Admiraliteitsjurisdiksie (105 van 1983) herroep is.

Wat die laaste hoofstuk oor insolvensie betref, moet die leser in gedagte hou dat die Insolvensiewet na publikasie van die boek in verskeie opsigte deur die Insolvensiewysigingswet (101 van 1983) gewysig is. Die wysiging van artikel 84 van die Insolvensiewet is ook in ander hoofstukke tersake (sien bl 195 en 607). Die verwysing na die Drankwet onderaan bladsy 622 behoort te wees na artikel 25(1)(d) van Wet 87 van 1977.

Die grootste leemtes in die hoofstuk oor insolvensie is die afwesigheid van enige verwysing na artikels 21, 22, 26 en 27 van die Wet op Vervreemding van Grond (68 van 1981) en die afwesigheid van 'n bespreking van rehabilitasie en akkoord. 'n Aantal toonaangewende beslissings oor insolvensie verdien beslis vermelding, selfs in 'n werk van hierdie aard. 'n Mens dink byvoorbeeld aan beslissings soos *De Wet NO v Jurgens* 1970 3 SA 38 (A), *Santam Versekeringsmaatskappy Bpk v Kruger* 1978 3 SA 656 (A) (albei oor a 23(8) van die Insolvensiewet) en *Cronje NO v Paul Els Investments (Pty) Ltd* 1982 2 SA 179 (T) (oor a 2 en 34).

Die voorgaande kritiek ten spyt bly die boek van Gibson en Comrie steeds 'n belangrike deel van ons regsliteratuur. 'n Mens sien uit na 'n volgende uitgawe waarin verder op vorige uitgawes verbeter word.

AN OELOFSE
Universiteit van Suid-Afrika

The genesis of the "modernist"—"purist" debate: A historical bird's-eye view

Adrienne van Blerk
BIur LLB LLM
Associate Professor in Legal History, University of South Africa

OPSOMMING

Die Oorsprong van die "Moderniste"—"Puriste" -debat: 'n Historiese Oorsig

In hierdie artikel word die rol van regskrywers in die "purifikasie"- proses van die Suid-Afrikaanse reg ondersoek. Ten einde in die doel te slaag, word die argumente en teenargumente van die twee belangrikste denkrigtings beskryf en ontleed. Die groot twispunt was die verengelsing van die Suid-Afrikaanse reg. Die oogmerk van die sogenaamde puriste was om Romeins-Hollandse reg van die invloed van Engelse reg te bevry en die sogenaamde moderniste het gevrees vir die terugkeer van sewentiende-eeuse Romeins-Hollandse reg. Dit is welbekend dat die geskil nie tot die regsliteratuur beperk was nie. Mettertyd het studente, opgelei in die nuwe benadering, die regtersamp begin beklee en standpunte wat vroeër, by wyse van spreke, in die hof geminag is, het al meer weerklank gevind in die geregtelike arena. Dit het veral gebeur gedurende die sestiger jare toe 'n reeks beslissings ten gunste van die sogenaamde puristiese benadering in die hoogste howe, insluitende die appèlafdeling, te voorskyn gekom het. Gebiede van ons reg wat grootliks beïnvloed is, was veral die verbintenisreg en strafreg. Voorbeelde van veranderinge op hierdie gebiede word ondersoek met die hoop dat dit sal aandui dat die "nasionalisasie" van ons reg nie die enigste of selfs die hoofoorsaak vir die ommeswaai in die benadering tot Engelse reg was nie; dat, in weerwil van die algemene opvatting, die aanhangers van die nuwe benadering in werklikheid dikwels die voorhoede was van 'n beweging om ons reg te moderniseer en te hervorm; en dat in hierdie proses die bronne van ons reg – in hierdie geval die Romeins-Hollandse, maar ook die Engelse reg—aan kritiese en noukeurige ondersoek in die soeke na individuele geregtigheid onderwerp is.

Elsewhere the present writer has attempted to provide an overview of legal publications which preceded the era of writings with which this article will be concerned.[1] It was hoped that such an overview would indicate how little these early writings were concerned with an elucidation of the principles of the Roman-Dutch common law and of related Civil law systems and how deep the attachment was to English law and legal writings.

1 See unpublished thesis *The "Purists" in South African Legal Literature and their Influence on the Judgments of the Appellate Division in Selected Areas* (University of Natal 1982) chap I. Cf also "The Growth of South African Legal Literature" 1977 *De Rebus* 561; "The South African Attorneys' Contribution to South African Legal Literature" 1983 *De Rebus* 181.

In what follows it is proposed to examine, against the backdrop of the *laissez-faire* and English-oriented approach which prevailed in South Africa, the role of legal writers in the "purification" process of South African law. To this end the arguments and counter-arguments of the two schools of thought will be described and analysed. The major issue, of course, on which battle was joined was the anglicisation of South African law, with the so-called purists intent on rescuing Roman-Dutch law from English-law influence and the so-called modernists, who welcomed the contribution of English law, fearful of a return to seventeenth-century Roman-Dutch law. Undoubtedly, the political, linguistic and other elements which at the close of the nineteenth century had brought the two white races into conflict, have played a very real role in the outlook between lawyers.[2] However, it is hoped that the ensuing examination will indicate that, far from being the conservative and ultra-nationalist expounders and revivers of Roman-Dutch law which they have traditionally been labelled to be, the adherents of the new approach were often in fact pioneers of a movement to modernise, systematise and reform our law and that in their efforts to promote the progressive forces of the time, the sources of our law – in the event Roman-Dutch, but also English law – were subjected to critical and questioning scrutiny.

The new chapter in South African legal literature was opened by the reformation of legal education, begun simultaneously in the three newly constituted universities.[3] The new emphasis on academic, rather than vocational, training was to produce, and itself be sustained by, a new kind of textbook. Devoted principally to the systematic exposition of principle and intended especially for students, these works were to manifest a new scientific treatment of Roman-Dutch law which was in marked contrast to the old-time practitioners' compendia.

Within the ambit of this general overall improvement in South African legal literature there developed a schism in the outlook of legal writers to the correct approach to our law. Afrikaans-speaking academics, favouring a return to the old institutions or, in those instances in which the old authorities were unhelpful, a consideration of modern Continental law rather than English law, stressed the improper adulteration of the Civilian tradition. On the other hand, because of affection for the assimilated English law and its traditions and under the dictate of the *stare decisis* principle, English-speaking academics and most practitioners,

2 This national reaction in the legal sphere is not unknown in other countries which, as a result of British domination on the political front, have been exposed to the pervasive influence of English law.

3 By Acts 14, 13 and 12 of 1916 the University of Cape Town (formerly the South African College), the University of Stellenbosch (formerly the Victoria College) and the University of South Africa (formerly the University of the Cape of Good Hope) were chartered. The last-named was constituted as a federal university comprising six colleges: See generally Boucher *Spes in Arduis* (1973) 146 ff; Malherbe *Education in South Africa* vol I (1925) 420 ff; Hosten "The Law Faculty of Unisa: A Historical Survey" 1973 2 *Codicillus* 4 7. For details of the protracted negotiations to restructure higher education in the years preceding this legislative trilogy see Boucher *Spes in Arduis* 94 ff.

while not perhaps ignoring Roman-Dutch law, were inclined to maintain the English-law influence which had been wrought on the old law by a century of British rule. The new school which may be regarded as the child of professors Malherbe, Bodenstein and verLoren van Themaat,[4] has been variously designated – and mostly perjoratively – as the "purist," "antiquarian" and "historical" school. The new Afrikaans faculty at Stellenbosch and the Transvaal University College in Pretoria,[5] especially after the appointment of professor D Pont, provided the forums for the new approach;[6] an approach which did not go unnoticed or uncountered by the protagonists of the Common-law approach in the English universities.

1 A CONFLICT OF IDEALS

In 1931 I van Zyl Steyn, who was appointed to a Chair at Stellenbosch University at the age of 24, gave expression to the views of the new approach when he suggested that use be made of the comparative method in legal study in South Africa in order to restore "the connection between modern Roman-Dutch law and scientific doctrine as expounded in Europe."[7] The courts, according to Van Zyl Steyn, had had recourse to the comparative method only in so far as English law was concerned, often with undesirable consequences to our legal system. On the other hand, recourse to the Continental codes would have secured the more natural development of our law, particularly in the fields of obligations – including delict – and criminal law.[8]

The advice was not new. Somewhat ironically, some two decades earlier, the editor of the *Law Quarterly Review* had urged that South Africans turn their eyes "to the modern developments of the civil law contained in the German Code and other modern codes."[9] Not unexpectedly, it has turned out that, even more significant than reference to the Continental codes, has been reference to Continental legal writings – of both the pre-codal and post-codal era – in the

4 The appointment of Professors Malherbe and Bodenstein to the first chairs in the University of Stellenbosch resulted in the establishment, in 1921, of the first Afrikaans law faculty. They were assisted in their efforts by Dr H verLoren van Themaat on a part-time basis: See De Wet "In Memoriam: WMR Malherbe" 1964 *THRHR* 91 91.

5 The Transvaal University College, Pretoria, was converted into the University of Pretoria by the University of Pretoria (Private) Act No. 13 of 1930.

6 See generally Mostert *Die Romeins-Hollandse Reg in Oënskou* (1969) 4.

7 I van Zyl Steyn "The Comparative Method in Legal Study" 1931 *SALJ* 203 206. His untimely death at the age of thirty was a great loss to South African legal literature. The Chair vacated by Van Zyl Steyn was offered to Andrew Beyers, senior lecturer in law at the university (later Judge President of the Cape Provincial Division). Beyers, however, turned down the offer in order to commence a career at the Bar: Ellison Kahn "The Judges and the Professors or Bench and Chair" 1979 *SALJ* 560 564 n 6.

8 Van Zyl Steyn 1931 *SALJ* 203 205.

9 1910 *SALJ* 488 489.

making of the "purist" *Weltanschauung.*[10] It is interesting that as early as 1904, no less a reviewer than JC Smuts, writing at an early stage of his political career, had called attention to the benefits to be derived from a study of this latter source.[11]

If one looks back today, it is significant that the three areas indicated by Van Zyl Steyn as needing reassessment were in fact those in which the biggest reversal of the trend to English law took place. Undoubtedly, part of the reason relates to the reality that these were three branches where the anglicisation process had not reached the same degree of intensity as in certain other fields of our law and it was believed that the tide could be turned in these areas. Another reason could simply be the fact that the law of obligations and criminal law constitute in effect the two crucial areas of private and public law respectively.

2 THE LAW OF DELICT

The same viewpoint, at least with regard to the law of delict, was not espoused by McKerron. Some five years after his appointment as first professor of law at the University of the Witwatersrand, at the age of 26,[12] McKerron stated his approach in the pages of the *South African Law Journal.*[13] According to McKerron, our courts had adopted the principle of *stare decisis* and therefore it was his duty – as a teacher – to state the law in the light of the decisions of our courts; that, since, in the law of delict, as in many other branches, heavy reliance was placed on English law, a divorce had come about between the theory of the law and the practice of the law and therefore the chief task of the law schools was to re-state the theory so as to bring it more into accord with practice.[14]

The above emphatic pronouncement by McKerron had been prompted by the outspoken criticism by Melius de Villiers, Chief Justice of the Orange Free State and afterwards professor of Roman-Dutch law at Leiden,[15] of McKerron's

10 The "purists" have been criticised for their reliance on the "code-directed" case law of the Continent (more especially that of Germany) which, it is usually argued, is of less utility than the non-codified English case law (see *inter alia* Proculus Redivivus "South African Law at the Crossroads or What is our Common Law?" 1965 *SALJ* 17 20). However, what has not been sufficiently recognised is that it is not German case law or in fact the provisions of the German code which have significantly influenced our law but rather the modern legal writings of the German jurists of both the pre-codification and post-codification era.

11 Smuts 1904 *SALJ* 305.

12 McKerron later occupied a Chair in Law at the Rhodes University: Ellison Kahn "Retirement of Professor RG McKerron as Joint Editor of the Journal" 1959 *SALJ* 1 1. The South African School of Mines and Technology, a satellite of the University of South Africa, had ceased to be in 1922: See Hosten in 1973 2 *Codicillus* 4 8.

13 McKerron "Correspondence" 1931 *SALJ* 457 457.

14 *ibid.*

15 In 1905 Melius de Villiers, whose judicial career was ended by the Anglo-Boer War, accepted the Chair of Modern Roman-Dutch law in the University of Leiden. This university had long attracted many South African students. In 1907 the Council of Legal Education in London decided to appoint a reader in Roman-Dutch Law and the position was offered to De Villiers who, however, declined to accept: Anon "Melius de Villiers" 1910 *SALJ* 185 190.

view, put forward in an earlier number of the *Journal*,[16] that it was a mere fiction to maintain in the face of actual decisions that *animus iniuriandi* was the gist of an action for defamation.[17] During the years ensuing the publication by De Villiers of his work, *The Roman and Roman-Dutch Law of Injuries*,[18] the subject of injuries had become closely associated with the author. His insistent plea for the reinstatement of *animus iniuriandi* in defamation had long since caused the title of "purist" to be ascribed to him.[19] This early trace of "purism" is very marked in the writings of De Villiers[20] and, looking back from our present vantage point in time, it is clear that Melius de Villiers was one of the major precursors of an approach which only blossomed some forty years later. His approach to the law of delict in South Africa, namely, that it consists in what the Roman-Dutch writers have said or would say rather than in what is contained in the law reports of England, even if these have been followed by judges in this country,[21] was for more than four decades to be eclipsed to a great extent by the opposite view of McKerron. These two divergent views on the importance to be attached to the role of precedent represent one of the major points on which the two schools were to differ. An irony is that the great English writer, Pollock, apparently had more appreciation of the work of De Villiers than did McKerron, for certain statements in the work of De Villiers on *Injuries* elicited discussion and received support in the later editions of Pollock's *Torts*.[22]

McKerron's preference for precedent over principle and doctrine appeared clearly from the similar sentiments which he expressed in the preface to the first edition of his well-known work on delict[23] published in 1933,[24] two years after the above exchange of viewpoints. In the same year an anonymous reviewer

16 McKerron "Fact and Fiction in Law of Defamation" 1931 *SALJ* 154.

17 Thus according to De Villiers: "We have . . . in our law attained to a loftier level than that attained in English law, in which prevails the archaic principle that the frame of mind of the alleged offender in the matter of defamation is wholly immaterial" Melius de Villiers "On Fundamentalism in our Law" 1932 *SALJ* 199 200.

18 Cape Town 1899. In 1910 this work by De Villiers was described as one of the few South African legal works yet to appear which displayed any originality of treatment by the author: Anon 1910 *SALJ* 185 189.

19 Anon 1915 *SALJ* 241 241.

20 The critical approach of the author to the application of the law in South Africa and his style would indicate to the present writer that it could very likely be that Melius de Villiers is also the anonymous writer Vindex. In his writings the latter frequently pleaded for a return to the "fundamentals" of our law, an expression which is also very often employed by De Villiers.

21 Melius de Villiers "*Animus Iniuriandi*: An Essential Element in Defamation" 1931 *SALJ* 308 309.

22 Anon 1915 *SALJ* 241 241.

23 McKerron *The Law of Delicts in South Africa*. Successive editions of the work became *The Law of Delict*. A fact which was not mentioned by McKerron in the preface to the first edition but to which he adverts in the preface to the seventh edition (1971) is that the manuscripts of the book on which he had been working for some three years were lost in the fire which completely destroyed the central portion of the main block of the University of the Witwatersrand in December 1931 and the work had to be commenced almost entirely *de novo*.

24 Cape Town.

recorded the considerable criticism aroused in certain quarters by some of the views expressed by the author in his work.[25] When a second edition of McKerron's work made its appearance in 1939,[26] it is accordingly not surprising that it should have evoked two totally divergent expressions of opinion. So, ironically, according to one "modernist," the great merit of the book was its decidedly Roman-Dutch bias.[27] A counter-opinion was expressed by Pont who, in an elaborate analysis of the work,[28] severely censured the author for his self-confessed preference for English law. The analysis of Pont laid bare the basic tenets of the new school. Pont's point of departure was that there had been too glib an abandonment of the Roman-Dutch heritage; that the indiscriminate incorporation of English-law principles ought to be guarded against and that where reliance on English law in conflict with the cardinal principles of our own law, had already led to their adoption, they could be made to leave by the same door through which they had gained entry, namely, case law.[29] In any search for supplementary principles regard should rather be had to contemporary Continental legal systems such as those of Belgium, the Netherlands and France, which, because they rest on Romanist substratum, are more closely related to our legal system than English law.[30] It is significant that Pont voiced no objection to reference being made to English case law and doctrine provided that this was done with a true understanding of the basic principles of our law. What this author objected to was that South African law be understood and applied in the light of English legal principles.[31]

Over the years McKerron's approach remained the same.[32] In 1959 the fifth edition of his work appeared.[33] According to AM Honoré, then Rhodes Reader in Roman-Dutch law in the University of Oxford,

> "[l]ike the South African bench, the book virtually treats the South African law of delict and the English law of tort as a single system . . ."[34]

There can be little doubt that until then judicial sentiment had inclined towards English law. This was true not only of the law of delict. Hence it was that in 1951, Proculus, a self-styled "modernist," could – it seemed – safely dismiss the prospect of a "Professorenrecht" replacing the "law of the courts."[35]

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25 Anon 1933 *SALJ* 494 494.
26 Cape Town.
27 Anon 1939 *SALJ* 467 467.
28 See Pont's review of the work in 1940 *THRHR* 163.
29 "[M]aar indien dit in die verlede moontlik was om deur middel van regspraak 'n begrip wat nie in ons reg tuishoort nie vanuit die vreemde te introduseer, is dit tog seker moontlik om deur middel van dieselfde regspraak die onwenslike en ondienstige begrip weer te elimineer" Pont 1940 *THRHR* 163 166.
30 Pont 1940 *THRHR* 613 171–172.
31 *idem* 172.
32 "The aim and scope of the work and my general approach to the subject are indicated in the preface to the first edition . . ." McKerron *Delict* 7 ed (1971) preface.
33 Cape Town.
34 Honoré 1959 *SALJ* 341 341.
35 See Proculus "Bellum Juridicum – Two Approaches to South African Law" 1951 *SALJ* 306 312.

As is well known, the controversy relating to the law "as it ought to be" and the law "as it is" did not remain confined to the annals of legal literature. In the course of the time products trained in the new approach assumed judicial positions and propositions which were earlier, so to speak, laughed out of court, found an echo in the judicial arena in the 1960s when a series of judgments, in which a tendency in favour of the so-called purist approach became manifest, emerged from the highest courts, including the appellate division.[36] An area of our law which was greatly affected was the law of delict. This somewhat different turn of events, while producing an outburst from McKerron in the preface to the sixth edition of his work, published in 1965,[37] did not cause the author to change his approach. Thus the emphatic judicial pronouncements of the appellate division on three separate occasions that simple absence of *animus iniuriandi* constitutes a good defence in an action for defamation[38] were cursorily dismissed in footnotes[39] while the appellate division decision in *Regal v African Superslate (Pty) Ltd*[40] was dismissed with the perfunctory statement that

> "[a]lthough the contrary might be inferred from the judgment of Steyn CJ, the *Regal* case does not lay down any new law . . ."[41]

It is interesting that in glossing over definitive judgments of the highest court of the land, McKerron was employing that very strategem which Proculus in 1951 had so scathingly written of as characterising the right wing "antiquarian" school: "[A]s often as not," Proculus had written, "the views expressed by our most eminent judges are brushed aside [by the 'antiquarians'] as being contrary to the fundamental principles of Roman-Dutch law."[42] It seems, moreover, that in the preface to the above work, McKerron was guilty of some oversimplification in his accusation that the desire of the "purists" was to revert to the law of Holland of the eighteenth century. That it would have been truer to say that, basic to the "purist" philosophy, was not a blind allegiance to old Roman-Dutch authorities but rather allegiance to the principles inherent in the old authorities as developed and modernised in Continental dogmatics, emerges clearly from the "purist" writings. Thus in 1965 NJ van der Merwe, in reviewing the sixth edition of McKerron, recalled the words of Chief Justice Steyn in *Trust Bank van Afrika Bpk v Eksteen*[43] and stated:

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36 See *inter alia* the remarks in *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 410–411 and *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 106.

37 Cape Town. According to McKerron: "In several recent Appellate Division cases the Court – or at any rate some members of it – would seem inclined to attach more weight to the views expressed by the Roman and Roman-Dutch writers than to the law as expounded in previous decisions of the court. It is respectfully submitted that this is an unsatisfactory approach . . ."

38 *Jordaan v Van Biljon* 1962 1 SA 286 (A); *Craig v Voortrekkerspers Bpk* 1963 1 SA 149 (A); *Nydoo v Vengtas* 1965 1 SA 1 (A).

39 McKerron *Delict* 6 ed (1965) 161 n 7 194 n 60.

40 *supra* n 36.

41 McKerron *Delict* 6 ed (1965) 218 n 50a.

42 Proculus 1951 *SALJ* 306 306.

43 *supra* n 36.

> "Waar die Hoofregter en ander hulle dan verset teen onoordeelkundige verdringing van ons reg deur Engelse reg, gaan dit nie om 'n letterknegtelike verknogtheid aan die verouderde geskrifte van die Hollandse juriste van weleer nie, maar om die prinsipiële verskil in uitgangspunt tussen 'n regstelsel soos ons eie, wat vastelands geörienteerd is, en die Engelse reg."[44]

According to Van der Merwe, the work of McKerron was a mere compilation of decisions (predominantly English or American), whereas a work on delict, should, besides containing a systematic exposition of the law, lay the foundation for future development.[45] The latter declaration (not the first to issue from the "purist" ranks)[46] exemplifies that the entire methodology of the "purists" was, when stripped to its essentials, a clarion call to the judiciary to become involved in law reform and to indulge in far greater degree in judicial activism than is normally associated with judiciaries inspired by the English model.

When, in 1967, *Die Onregmatige Daad in die Suid-Afrikaanse Reg*[47] by NJ van der Merwe, in co-authorship with PJJ Olivier, appeared, retaliatory remarks were not long in issuing from the "modernist" quarter. The book, which has been described as the "De Wet and Swanepoel" of our law of delict,[48] broke away completely from the idea of a law of delicts and put forward the idea of a general law of delict which recognised that an action in delict will lie whenever a wrongful act is committed with fault and causes damage. Virtually in one breath, the new format elicited both measured praise and censure from the "modernist" quarter:

> "The real merit of the book lies in the fact that the authors have succeeded in constructing a logical structure for the whole of the law of delict. In several instances, however, this 'purist' approach results in an excessive pre-occupation with logic and theory."[49]

This somewhat illogical criticism of logic as a more preferable basis for legal analysis than illogical case law venerated by time is highly paradoxical. One merely has to compare one of the early editions of *Gardiner and Lansdown*[50] with the work of *Burchell and Hunt*[51] (dubbed the successor to *Gardiner and Lansdown*) to realise to what extent the "purist" concern for symmetry, dogma, logic and consistency has commended itself to even the most avowedly "modernist" protagonists.

Today, of course, in the field of delict, much of the dust churned up in the aforegoing intellectual debate has settled. However, a factor which is largely ignored is that certain of the changes which took place within its sweep were not achieved by a return to the *fontes*. Thus the development of our law of defamation shows compromise between the reaffirmation of principles of Roman-Dutch law and the retention of English-law principles which are compatible

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44 Van der Merwe 1965 *THRHR* 160 161 n 3.
45 *idem* 160.
46 See the text to n 87 below.
47 Pretoria.
48 See Stuart's review of Van der Merwe and Olivier's *Onregmatige Daad* 1 ed (1966) 1967 *SALJ* 362 368.
49 *idem* 363.
50 Gardiner and Lansdown *South African Criminal Law and Procedure.*
51 Burchell and Hunt *South African Criminal Law and Procedure* vol I (1970).

with it and with social realities. So, the English rule of strict liability of the press has been retained by our courts.[52] This is hardly surprising in view of the fact that Roman-Dutch law had nothing significant to contribute about the press[53] and also because the press and limitations on the freedom of the press in South Africa are very much imports from England. It is significant then that the views of JC van der Walt, who may be broadly classified as a "purist," were manifestly relevant in maintaining, clearly for social and practical reasons, something which had its origins in English law.[54] This surely underlines the mistaken and overly facile belief of "modernist" critics that the new approach was largely premissed on anti-English sentiments. At work here was much rather a sane appreciation of practical reality as honed by the lessons of English practice and legal literature. Moreover, if, as one writer has ventured to say, defamation in English law passed from being a wrong actionable only on proof of a specific intention to do harm, to one of strict liability, mainly as a measure against the press,[55] our law, which makes strict liability of the press an exception to the general rule, constitutes an advance over English law. By the same token it is ironical that Van der Walt remained unmoved by the thrust of German authority in respect of defamation by the press. In Germany, defamation, as a type of unlawful injury to personality, is primarily dealt with in a criminal context where the plaintiff has not suffered pecuniary loss.[56] It seems that in the final analysis the German law on this point is more functional; while strict liability of the press cannot be faulted, the sociological basis on which it rests is illusory, since it is only really the "well-off" man who can sue.

It is noteworthy that the solution put forward by Rumpff CJ in the *O'Malley* case and adopted by Kirk-Cohen J in the *De Flamingh* case, that is, that the Roman-Dutch principles of liability remain intact and that the necessary adaptation to cater for the problems flowing from the power of the mass media be seen as an exception to those principles, appears to be not very different from that mooted by Melius de Villiers in 1931 – although it seems that this author envisaged that it would be the legislature which would cater for this contingency.[57] However, his plea, if the present writer's interpretation of it as such is correct, fell on deaf ears.

The law laid down in the *Regal* case which, with characteristic economy of phrase, had been relegated by McKerron to a footnote because it had not

52 *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A); *Pakendorf v De Flamingh* 1982 (3) SA 146 (A).

53 See Melius de Villiers 1931 *SALJ* 308 308–310.

54 The most important spadework for the view that liability of the press ought to be strict had been done by Van der Walt: "Strict Liability in the South African Law of Delict" 1968 *CILSA* 49 and in "Die Aanspreeklikheid van die Pers op Grond van Laster" *Gedenkbundel HL Swanepoel* (1976) 41. These pioneering works clearly settled the matter for Rumpff CJ in the *O'Malley* case (*supra* n 52) 407.

55 See Curtis in *Canadian Bar Review* quoted by Van der Riet *Index to SALJ* Vol II iv.

56 See Van der Walt *Gedenkbundel HL Swanepoel* 41 42.

57 Melius de Villiers 1931 *SALJ* 308 309–310.

altered the law even "by a side-wind,"[58] produced an outburst of comment, either perturbed or eulogistic. Thus from the "modernist" quarter it was argued that the court in the *Regal* case rejected the nuisance concept in an attempt to "purify" our law.[59] However, if, as one "modernist" also suggested,[60] Roman and Roman-Dutch law did apply principles of strict liability, then the modern-day law, if the appellate division did in fact mean that Aquilian principles are to replace those of strict liability, does not proceed from a "purist" or historical approach. Other arguments from this quarter were that little or no consideration had been given to the implications of the move, for example, the "inequity" of the requirement of fault in nuisance,[61] or to the uncertainty which it would create.[62]

Surely, however, as has more recently been conceded from the "modernist" quarter,[63] the "inequity" of the requirement of fault in nuisance is not greater than in other spheres where fault is still a requirement, for example, in the case of the motorist who has to prove fault on the part of the person who has caused him damage on the highway. One must agree with two "modernists," Mathews and Milton, that "[j]ustice is better served by throwing the risk of potentially dangerous activity upon the doer."[64] But then the basis for strict liability in such a case ought to be potentially dangerous activity and the doer ought to be strictly liable *vis-à-vis* anyone who has suffered damage as a consequence and not only the neighbour. After all, it is the increase in the risk of harm of such activity which provides the theoretical justification for liability without fault. It is significant that in English law today the tendency is to assimilate the tort of nuisance with the tort of negligence.[65] Moreover, while there is certainly great merit in keeping the law certain – and perhaps herein lies the strength of the critics' case – it has already been seen that the so-called purists showed no great attachment to precedent where the latter conflicted with principle.

3 THE LAW OF CONTRACT

In 1948 *Die Suid-Afrikaanse Kontraktereg en Handelsreg*[66] by JC de Wet and JP Yeats appeared and the earlier salvoes of gunfire in the battle between academic jurists became a barrage of steadily mounting intensity. It is in the work

58 McKerron *Delict* 7 ed (1971) 232 n 62.
59 Milton "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123 183.
60 *idem* 185 ff.
61 Mathews and Milton "An English Backlash?" 1965 *SALJ* 31 39. See also Milton in 1969 *Acta Juridica* 123 183–185.
62 Mathews and Milton in 1965 *SALJ* 31 40; Proculus Redivivus 1965 *SALJ* 17 24.
63 Jaffey "Nuisance: South African, Roman and English" 1970 *SALJ* 436 437–438. See also Derek van der Merwe "The Fault of Nuisance or the Nuisance of Fault: A Discussion of the Judgment of the Swaziland Court of Appeal in *MF Johnson v Commonwealth Development Corporation* 6 May 1981" 1983 *CILSA* 65 77 82–83.
64 Mathews and Milton 1965 *SALJ* 31 40.
65 Milton 1969 *Acta Juridica* 123 253.
66 Durban.

of De Wet that the methodology of the new school has been stated to have reached its peak fruition.[67]

Kontraktereg en Handelsreg was preceded by two doctoral theses by De Wet, *"Estoppel by Representation" in die Suid-Afrikaanse Reg*[68] and *Die Ontwikkeling van die Ooreenkoms ten behoewe van 'n Derde.*[69] According to LC Steyn, the great merit of De Wet's work on estoppel lay in the fact that the author had given the legal profession a full exposition of the Roman-Dutch law and Continental learning in a field in which the courts had hitherto applied pure English law.[70] Describing the latter work of De Wet as a "masterly exposition," J Kerr Wylie ranked him as "among the leading legal historians of our time."[71] The *South African Law Journal*, which invariably was the forum for the so-called modernist approach (the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* providing an outlet for the "purists") maintained an inscrutable silence on the subject of De Wet's first contributions to current South African legal literature. With considerable understatement the appearance of De Wet's monograph on *Dwaling en Bedrog by die Kontraksluiting*, published in 1943,[72] was noted in the *Journal*:

> "The first section of it is as full of learning as an egg is full of meat, and the second part, which includes all the important cases which have been decided in the Courts of South Africa . . . is quite useful to the practitioner."[73]

With the appearance of *Kontraktereg en Handelsreg*,[74] however, unalloyed complacency gave way to manifest bewilderment. CG Hall, in reviewing the work, compared the authors' "measured tones which brook no contradiction" to the handling by Wille and Millin of the same material in their *Mercantile Law of South Africa* with something akin to wistfulness.[75] Others, however, had the temerity to react in more caustic terms. Thus in 1951 Proculus noted two characteristics of the "more extreme wing of the Antiquarian School," namely, hostility to English law and a condescending, contemptuous attitude towards judges.[76]

Shared sentiments of the author's uncompromising style prompted Leo van den Heever to publish a letter by Kotzé in the *South African Law Journal*[77] in

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67 WJ Hosten "Romeinse Reg, Regsgeskiedenis en Regsvergelyking" 1962 *THRHR* 16 26. For a conscious espousal of the historical, systematic and comparative approach of this school, see the thesis of WA Joubert, *Grondslae van die Persoonlikheidsreg* (Cape Town 1953).

68 Leiden 1939.

69 Leiden 1940.

70 See Steyn's review of the work in 1940 *THRHR* 288 288.

71 Kerr Wylie 1943 *THRHR* 94 94.

72 Cape Town.

73 See anon review in 1943 *SALJ* 313 313. Its possible "usefulness" no doubt prompted the *South African Law Journal* to state further that "[i]t seems a pity that De Wet did not offer his article to the *Law Journal* for publication rather than allow it to be born to blush unseen in the comparative obscurity of the University annals" *ibid.*

74 The work was the second Afrikaans textbook to appear within a year after the publication by Steyn of the first Afrikaans textbook *Die Uitleg van Wette* (Johannesburg 1946).

75 Hall 1948 *SALJ* 72 73.

76 Proculus in 1951 *SALJ* 306 306.

77 Leo van den Heever "Courtesy in Law: Past and Present" 1954 *SALJ* 268.

which the author had expressed regret at having levelled what he considered intemperate attacks against two of his contemporaries in his work on *Causa*. Struck by the fact that Kotzé's censure, for which he had felt an apology was owing, had been vastly more moderate in tone than that of De Wet, Van den Heever remarked that the contemporary junior practitioner would find the "purple passages" requiring such regretful apology by Kotzé very mild in comparison with his mentors of today who "customarily and, without apology, sneer, condescend and scold."[78] Certain statements from *Kontraktereg en Handelsreg* are then translated for the reader by Van den Heever.[79]

A second and, if anything more outspoken, edition of *Kontraktereg en Handelsreg* appeared in 1953.[80] With relentless energy, erring judges are taken to task for arriving at wrong decisions or at right decisions for wrong reasons. Thus of the then recent provincial division decision in *Allen v Du Preez*,[81] the authors declare, "[d]ie hele betoog van die hof in *Allen v du Preez* . . ., in antwoord op die aansoek om absolusie van die instansie, is onbegryplik en verward."[82] Many are the other judgments which come under fire so that "[t]he field is bloody with the mangled remains of slaughtered leading cases".[83] The extra-curial writings of judges, too, did not escape attack. Thus in an opening address delivered at the Annual Law Inter-Varsity of the Universities of Cape Town and Stellenbosch, Mr Justice MA Diemont ventured to hope that Diemont on *Hire-Purchase* was not as black as it was painted in *Kontraktereg en Handelsreg*.[84] Dismay, occasioned by the authors' uncomplaisant style, led Ellison Kahn to write of the second edition:

> "Academic writers have a distinct role to play in the development of the law. In a sense they are conscience of the profession. They alone sit in judgment on the highest courts. But sitting as an unofficial super-Appellate Division entails its responsibilities. With all due respect (a phrase which, as far as can be seen, is not once used in *Kontraktereg en Handelsreg*) the authors of the book, in their enthusiasm in pointing out the wrong turnings they allege the courts have taken in finding and applying the law of this country, have at times overlooked these responsibilities."[85]

Of the authors' failure to consider precedent, Kahn wrote:

> "In their learned, at times brilliant, analysis of the law, they often concentrate on the *ius constituendum* rather than on the law as the courts understand it to be."[86]

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78 *idem* 269.

79 "If Lord de Villiers had taken the slightest trouble to read the few passages from De Groot mentioned above, or even to read *carefully* the passages from Voet he refers to, he would have spared our law this false dogma." "It is almost amusing to see how Lord de Villiers wrestled with these concepts" *idem* 269–270.

80 Durban.

81 1950 SA 410 (W).

82 *Kontraktereg en Handelsreg* 2 ed (1953) 83 n (i).

83 See Ellison Kahn's review of the second edition of *Kontraktereg en Handelsreg* 1954 *SALJ* 185 187. In the third edition which appeared in 1965, Hunt, in reviewing the work, found that "the field is still strewn with 'onsuiwere,' 'verwarde' and 'verwerplike' judgments" 1965 *SALJ* 412 414.

84 Diemont "Law Teachers and the Law" 1968 *Acta Juridica* 1 1.

85 See Kahn in 1954 *SALJ* 185 185.

86 *idem* 186.

The "purist" view of the doctrine of precedent and the creative role which writers (and, by implication, judges) should play in the judicial process again emerges clearly from the contrary opinion of EM Hamman in his review of the first edition of the work:

> "Te veel was, en is daar miskien nog, die opvatting dat wat 'n hof beslis het, noodwendig die regte moet wees en te min was geregverdigde kritiek uitgeoefen."[87]

In the ensuing years subsequent editions of the work were defended and debated. So, in 1965, Hunt wrote of the third edition with patent indignation:

> "Part I is written with utter unconcern for the views of the courts and of other South African writers. *De Wet and Yeats* has spoken; *cadit quaestio* . . . the views propounded in De Wet and Yeats are too often influenced by inflexible logic and too seldom by considerations of equity and social policy."[88]

But these were the years when much of the content of *De Wet and Yeats* was being absorbed into the body of our case law and so it was with considerable equanimity that the other side could say:

> "Sonder aarseling kan gesê word dat nie 'n enkele ander Suid-Afrikaanse publikasie oor die onderwerp . . . meer vermag het as die onderhawige boek nie in die stryd, wat hier te lande steeds gevoer moet word, teen die verstrengeling, a la Engelsregtelike resep, van algemene beginsels deur die web van kasuistiek en blote gevallestudie.[89]

It will have been seen that a substantial part of the criticism of De Wet's work (De Wet's co-authors, Yeats and Swanepoel, were really, no one will surely doubt, for purposes of the "purist-pragmatist" dichotomy, no more than "sleeping partners") was aimed not only at the substance but at the robust and outspoken form in which it was couched. However, as has already been observed, the "purists" were not so wedded to precedent and the exaggerated respect for the judicial process which lurks behind the English application of the precedent doctrine. The new outspokenness, mild as it may be in comparison with what is common coin in America for example, came as a rude shock to people still espoused to the ethos of deference to the judicial office.

A second significant point is the curious rejection by academics, who in Kahn's words, ought to be the "conscience" of the profession, of the notion that a major part of academic concern ought also to be directed at the law as it ought to be — the *ius constituendum*. This criticism is clearly based on a narrow interpretation of the academics' role in the law.

Thirdly, it is certainly true that the authors rely heavily on German and other modern Continental systems, in comparison with which they see English law as being in many respects backward. However, it is also true that given the "purist" philosophy that the rule which fits the structure and which commends

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87 Hamman 1949 *THRHR* 218 221. This commendatory review runs to some 42 printed pages.

88 Hunt 1965 *SALJ* 412 413–414. Further, according to Hunt: "The texts and footnotes, though liberally peppered with references to various German and Dutch (but not modern French) writers, contain very few references to English decisions and none (that I could find) to Williston, Corbin or the *American Restatement*" *idem* 414.

89 See Van der Merwe's review of De Wet and Yeats' *Kontraktereg en Handelsreg* 3 ed (1964) 1964 *THRHR* 243 243.

itself on principles of justice be chosen, there is much to be said for employing a broader comparative approach. From this it also follows that there is little to support the more substantial criticism that De Wet's approach was an exercise in logic rather than equity, a misconception which becomes even more apparent in his exposition of criminal law.

Finally, the inability of modern critics to become acquainted or to sympathise with the writings and judgments of even the major "purists" and the antipathy which they feel towards the school has obscured the fact that its members had no hesitation in apposite circumstances in invoking English precedents, even at the expense of "outdated" Roman-Dutch authority. Thus even De Wet, the towering figure of the "purists," favours the more equitable rule of English law that allows cancellation of a contract on the ground of duress only if the duress is exercised by the other contracting party, and not also, as Roman and Roman-Dutch law allowed, in cases where it is exercised by a third party and is unknown to the other contracting party.[90] Again, in regard to the law relating to the repudiation of a contract, this author has asserted that, there being "by ons skrywers blykbaar niks te vind nie," the English doctrine as taken over by our courts is " 'n nuttige aanvulling van, en toevoeging tot, ons eie reg."[91] It may be seen, therefore, that De Wet's approach was not in the first place anti-English, but rather geared to the achievement of a logical system of contract, if needs be with the help of those principles of English law which commended themselves to his view of logic.

4 CRIMINAL LAW

In 1949 the casuistic approach of Gardiner and Lansdown was challenged by De Wet and Swanepoel in *Strafreg*.[92] The work of Gardiner and Lansdown had long dominated in the field of criminal law and was undoubtedly a potent force in the evolution of this field of law into a hybrid system. In the years before the appearance of this work, a few manuals on criminal law had made their appearance.[93] Because of the importance of the subject and the lack of literature dealing with it, Gardiner and Lansdown's comprehensive treatise immediately

90 *Kontraktereg en Handelsreg* 3 ed (1964) 43; 4 ed (1978) 44–45.
91 *Kontraktereg en Handelsreg* 1 ed (1948) 101.
92 Durban. Successive editions became *Die Suid-Afrikaanse Strafreg.*
93 For an overview of these see Adrienne van Blerk *The "Purists" in South African Legal Literature and their Influence on the Judgments of the Appellate Division in Selected Areas* 34. As the titles of these handbooks will indicate, they were merely résumés of statutory enactments with little or no attention given to the general principles of criminal law. The work of Anders and Ellson *The Criminal Law of South Africa* which had appeared in 1915 (Johannesburg) and which was a little broader in scope than any of the earlier publications was again based to such an extent on Kenny's *Outlines of Criminal Law* that little value, if any, could be attached to it. The smaller work on criminal law by William Pitman *Criminal Law in South Africa* which appeared in 1940 (Grahamstown) and which, like the work of Gardiner and Lansdown, made no pretence at any detailed scientific analysis, alone kept company with *Gardiner and Lansdown* in the years preceding the publication by De Wet and Swanepoel of *Strafreg.*

became the "bible" of judges, practitioners, magistrates and law students.[94] The reputation of the work was maintained by the authors with the appearance of successive editions. After the appearance of the fourth edition in 1939[95] a reviewer wrote of the work:

> "[T]he book is likely to retain its position as *the* authority on criminal law in South Africa. Should codification ever be attempted, all the necessary material will be found in these volumes."[96]

Gardiner and Lansdown could speak with great authority since, through their positions, they were not only able to draw on their sound knowledge and experience of criminal law practice in South Africa but could also substantially contribute to the development of criminal law in this country.[97] However, the aim of the authors was simply to provide the practitioner and law student with a faithful compendium of South African case law and statutes. In limiting their objectives to the extent to which they did, Gardiner and Lansdown deliberately sacrificed the opportunity of providing the profession with a comprehensive and scientific exposition of criminal law in South Africa. Their deliberate and studied policy of accepting without question the decisions of the courts[98] – an attitude which proceeds from a typical Common-law approach – meant that the authors could avoid all critical evaluation of the law which our judges were making; that conflicting decisions could be simply reproduced, with little or no concern for principle, and that gaps in our case law could be filled merely by reference to English precedent – which the authors explicitly acknowledge as having not only a profound but greatly beneficial influence upon our law.[99] The new approach was to diverge from that of Gardiner and Lansdown in three important respects: first, in regard to the importance to be attached to precedent in South Africa; secondly, and following on the first, in regard to the creative role of the judge – the endeavours of the "purists" to provide the basis for future reassessment of decisions by the courts themselves was a clear appeal for judicial activism; and thirdly, in regard to the concern for system and structure.

In the field of criminal law the new approach had been inaugurated by Bodenstein.[100] During the years when he was engaged with professor Malherbe in establishing the new law faculty at Stellenbosch, he taught the new approach

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94 Accordingly, it was said of the second edition (Cape Town 1924): " 'Gardiner and Lansdown' has come to be synonomous with South African Criminal Law, and it sometimes causes considerable discomfort to an unfortunate junior when he suddenly remembers that the title contains a proper name not usually mentioned in the presence of its owner without a prefix" Anon 1924 *SALJ* 147 147.

95 Cape Town

96 anon 1939 *SALJ* 236 236.

97 Both held the position of attorney-general in the Cape Province, were judges of various provincial divisions and respectively judge president of the Cape Supreme Court and Eastern Districts Local Division – Anon "Mr FG Gardiner, KC" 1912 *SALJ* 123 ff and anon "Mr Justice FG Gardiner" 1914 *SALJ* 426 426–427.

98 manifest in the prefaces to all the editions of the work.

99 See the preface to the first edition (1917) vol I.

100 See VerLoren van Themaat's review of the first edition of De Wet and Swanepoel's *Strafreg* 1951 *THRHR* 301 301.

with a view to establishing a more scientific treatment of criminal law in South Africa. After his departure from Stellenbosch, his work was built upon by Van Zyl Steyn.[101] The early death of Van Zyl Steyn in 1935 meant that the scientific study of criminal law was for many years confined to the University of Pretoria, where the tradition inaugurated by Bodenstein was carried on by LI Coertze.[102]

In the course of time De Wet, whose predominant interest lay in the field of private law, began to take an interest in criminal law. In *Strafreg*, written in collaboration with HL Swanepoel, De Wet presented the approach of the Afrikaans faculties to criminal law to a still sceptical public. Written in a dogmatic, even disputatious tone, the work represented the first essentially and profoundly analytical study of criminal law in South Africa.

Not surprisingly, *Strafreg*, to say the least, was frostily received in some quarters. JP verLoren van Themaat, in the most thorough analysis of the work up to date, was unstinting in his praise of the authors' full treatment of historical material.[103] Obviously though, even verLoren van Themaat as a "purist" was not entirely free from the spell of the aura surrounding the judicial office and he roundly condemned the argumentative presentation by the author of his views which, according to him, could only lessen their persuasiveness.[104] The groundwork which Bodenstein and Van Zyl Steyn had laid emerged clearly in the work and also, less happily for verLoren van Themaat, the tendency so marked in the writings of Van Zyl Steyn, "om . . . die strafreg in die eerste plek uit die standpunt van die individuele misdadiger te bekyk."[105] There is an ironic twist to the criticism of verLoren van Themaat that in effect De Wet was tilting the scales in favour of the individual against the larger community. More than a generation later, when these individualistic ideas of De Wet were to a great extent taken up in our case law, the almost identical criticism was levelled at De Wet (or rather at those judges who had accepted his views) over the vexed question of "wederregtelikheidsbewussyn" for criminal responsibility. Can it not be said that the measure of success of De Wet's campaign for individual justice lies in its triumph despite the fact that he was assailed on the same propositions

101 *idem* 301–302. Van Zyl Steyn had, during his period of study in Germany in 1930, made criminal law his field of research. On his return Van Zyl Steyn explained the new approach as follows: "The principles of our criminal law are to be found in the Roman-Dutch law as it obtained in Holland. The requirements of the modern age have, however, made changes and additions necessary. To a certain extent these have been effected by the legislature. Much, however, has been left to the judges. Unfortunately, they nearly always borrowed from the English law – 'unfortunately', we say, because the source from which they borrowed is in many respects even more unenlightened than the old Roman-Dutch criminal law, the study of which they either neglected or passed by with contempt. Our criminal law is sufficiently elastic to allow of its development along the lines of modern scientific thought as represented by works such as Van Hamel *Inleiding tot het Strafrecht* and the textbooks of Von Liszt-Schmidt, Allfeld, Kohler, Frank, Beling, Binding, Wachenfeld, etc, etc," Van Zyl Steyn 1931 *SALJ* 203 205.

102 See VerLoren van Themaat 1951 *THRHR* 301 302.

103 *idem* 303.

104 *idem* 303–304.

105 *idem* 303.

by both extremes of the legal ideological spectrum? The fact that De Wet never changed his approach to correspond to changes to the law of the country on which he originally based his theses, an accusation which has gained currency very recently,[106] may well be due to the fact, so clearly evident in his lifelong espousal of the subjective test, that justice is just only if it is just to the individual in the dock; a concern with which – it may be pointed out – his detractors seldom credited him.

Others assailed *Strafreg*, as they had done *Kontraktereg*, for a dogmatism which appeared to them to describe less and less practical justice as administered by the courts and, again, for the failure to consider authorities (English and American) which the courts regarded as persuasive. Accordingly, in 1950, EM Burchell, undoubtedly a "modernist" in his own eyes and the general repute, assailed the crucial elements of De Wet's *Weltanschauung*:

> "[T]he authors tend to ignore the fact that for over a hundred years our Courts have been shaping and developing our criminal law. The result is that too often the reader finds in *Strafreg* a statement of what the authors, in the light of the 'moderne vastelandse literatuur,' conceive the law should be rather than a statement of the law as it is actually applied by our Courts."[107]

It is interesting that when Burchell's own contribution to criminal law was reduced to book form[108] he was more willing to acknowledge – if the footnotes, with liberal references to De Wet and other authors whose works reflected Continental ideas, are any criterion – the possible usefulness of Continental sources.

In 1957 Gardiner and Lansdown published the sixth edition of their work.[109] From the preface it became immediately apparent that the authors had decided not to accept the challenge set by the new approach:

> "Following the precedent of previous editions the authors have refrained from venturing upon criticism of the accuracy of the decisions of the superior courts of the Union. These decisions, and the courts themselves, have the profound respect of the legal profession as of the country generally. Moreover, although in many places it has been found useful to set forth briefly the views of Roman and Roman-Dutch authors, close and critical examination of conflicting opinions among them has been deemed unprofitable, confusing and superfluous. The practitioner and the student want to know what the law actually is, not what it might be if certain points of view were adopted."

Today, of course, our case law bears ample testimony to the battle fought and won by De Wet. As has been seen, De Wet was criticised as antiquarian and anti-English. It is true that in his exposition of criminal law, De Wet adopted the historical-comparative approach, but the great appreciation which he had for the old Roman-Dutch authorities did not mean that he ever regarded them as being unconditionally authoritative of what the modern law should be. Our old Roman-Dutch criminal law was not of the same high standard as private law. It consisted of much that was antiquated or obscure, much, too, on which the opinions of the old writers conflicted. Not surprisingly then, the old authors

106 See Stassen "Regspraak: S v De Blom 1977 3 SA 513 (A)" 1977 *TSAR* 259 265.
107 See Burchell's review of the first edition of *Strafreg* 1950 *SALJ* 303 303.
108 See above n 51.
109 Cape Town.

had not succeeded in creating a scientific and logical doctrine of criminal liability based on the fundamental principle that *actus non facit reum nisi mens sit rea*.[110] On the other hand, De Wet's refusal to accept principles which have no rational basis and which are not fair or adequate brought him into conflict with English law – not with English law *per se* – but with its illogicalities, inconsistencies and, very importantly, its injustices.[111] From where then did the new content come? The answer is not far to find. Although the old sources are made the starting point and although the viewpoints in English law are carefully canvassed, it was primarily to the legal dogmatics of German law that this author, in imitation of his predecessors, turned in order to expound for South Africa the general principles of criminal liability.[112]

In *Strafreg* De Wet broke radically with the English-oriented model of *Gardiner and Lansdown*, with its basic analysis of criminal liability under the headings of *actus reus* and *mens rea*, and propounded a more nuanced classification of the elements of a crime which reflected traditional German legal dogma to a great extent.[113] In the ensuing decades these concepts were imperceptibly insinuated into the South African legal system, producing a result much more in line with German legal thinking that with either English or Roman-Dutch law. In the place of the *Gardiner and Lansdown* distinction between *mens rea* in its "highest degree," "a less and mediate degree," "a third degree" and "intermediately between these degrees" certain "indefinable stages,"[114] came the triology of *dolus directus, dolus indirectus* and *dolus eventualis*.[115] *Dolus eventualis*, as a third manifestation of *dolus*, was not found in either Roman-Dutch law or English law. It is a concept derived in the first place from German law.[116]

The most salient change occasioned by the new approach, of course, has been the more indulgent attitude towards the accused stemming from a stricter

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110 See *inter alia* Gie *'n Kritiek op die Grondslae van die Strafreg in Suid-Afrika* (1941) 24.

111 It has been pointed out that although the Roman-Dutch jurists' work on the general principles of criminal law was far surpassed by the later writers in Germany and the Netherlands, it was nevertheless superior to that which then prevailed in England – Burchell and Hunt *South African Criminal Law and Procedure* vol 1 (1970) 16. See also Van Zyl Steyn in 1931 *SALJ* 203 205.

112 A scrutiny of De Wet's major sources indicate that only two modern legal systems are consulted: German and Dutch law. Thirty years previously, Bodenstein had discussed the fault doctrine in our law with reference to modern German writers such as Von Liszt-Schmidt, Von Hippel and others – see Bodenstein "Phases in the Development of Criminal Mens Rea" 1919 *SALJ* 323 and 1920 *SALJ* 18. Ample use was made of the same sources by Coertze in his writings on criminal fault which appeared from time to time in the *THRHR* – Coertze "Wat Beteken *Culpa* in die Suid-Afrikaanse Strafreg" 1937 *THRHR* 85; "Bewys van Opset by Moord" 1943 *THRHR* 197. That the approach of these "purists" failed to exert any immediate and direct influence on practice is not surprising – it takes time before the products of a particular school of thought become elevated to the bench. The early twentieth-century judges who had been brought up in a different tradition, could scarcely be expected to be diverted by the new approach.

113 See Strauss 1970 *SALJ* 471 474.

114 Gardiner and Lansdown *South African Criminal Law and Procedure* vol I 1 ed (1917–1919) *passim*.

115 Basically De Wet follows the approach of Bodenstein.

116 See Bodenstein 1920 *SALJ* 18 26.

application of the principle that only blameworthy violations of the law are punishable – a position much more in accordance with modern-day justice than the previously prevailing state of affairs. Thus the swing from the objective to the subjective test for criminal intention, culminating in its adoption by the appellate division in *R v Nsele*[117] in 1955, became evident from 1951, merely two years after the appearance of *Strafreg*. The earlier attitude that if a consequence was probable then it was intended, while undoubtedly encouraged by English case law,[118] had also received support in the South African textbooks on criminal law during this period. So, for instance, according to *Gardiner and Lansdown*:

> "It is impossible to explore the recesses of a criminal's mind and consequently the law says that a person must be presumed to intend the reasonable consequences of his act."[119]

The advent of the subjective test for intention meant that the requirement of reasonableness for provocation, mistake of fact and mistake of law became anomalous. But it took time for our courts to realise this. Here, too, a major source of confusion had been the early textbook writers. Thus Solomon JA in *R v Butelezi*,[120] in holding that the Transkeian Penal Code correctly expressed our common law in regard to the law of provocation, had found support in *Gardiner and Lansdown*.[121] In *R v Mbombela*[122] De Villiers JA had quoted with approval the third edition of *Gardiner and Lansdown* in which it was categorically asserted by these authors that a mistake of fact, as well as being *bona fide*, must also be reasonable.[123] As late as 1960 in *R v Mkwanzi*[124] Jansen J, while expressing clear doubts about the requirement of reasonableness in regard to a mistake of law, felt himself sufficiently bound by *Gardiner and Lansdown*[125] to uphold the requirement.

The law-making of the appellate division in the last decade, however, is a manifestation of its determination, persuaded particularly by the writings of De

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117 1955 2 SA 145 (A).

118 In *R v Jolly* 1923 AD 176 at 186 Kotzé JA quoted with approval the remarks of Lord Ellenborough in *R v Dixon* 3 M & S 15: "It is a universal principle . . . that, when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law, resulting from the doing of the act."

119 Gardiner and Lansdown *South African Criminal Law and Procedure* vol II 6 ed (1957) 1552. The text remained virtually unaltered from the earliest edition.

120 1925 AD 160.

121 *R v Butelezi* (*supra* n 120) 162. The ruling of Solomon JA that the Transkeian Penal Code was a fair reflection of our law of provocation was to hold sway for more than two decades.

122 1933 AD 269.

123 *R v Mbombela* (supra n 122) 272. In *R v Ndara* 1955 4 SA 182 (A) 185, decided twenty two years after *Mbombela*, Schreiner JA also cited *Gardiner and Lansdown* 5 ed (1948)) as direct authority for the view that for a mistaken belief to operate in favour of the accused person, the belief must be reasonable. A year later, in *R v Stainer* 1956 2 SA 170 (SR) 172, this textbook was again referred to as authority for the view that the test is an objective one.

124 1960 2 SA 248 (N) 254–255.

125 The judge's reference is to the 6 ed (1957).

Wet,[126] to sweep away the last vestiges of Common-law casuistry based on objective criteria for criminal liability. Thus the earlier views of provocation have been abandoned and the pure subjective approach to provocation of De Wet adopted in relation to intention.[127] Accordingly, in the third edition of his work, this author was able to state, not for the first time, that the view propounded by him had been endorsed by the appellate division.[128] The elimination of reasonableness as a requirement for a mistake of fact took longer in coming and it was only in 1977 in *S v De Blom*[129] that the appellate division made the first clear pronouncement that such a mistake need not be reasonable.[130] However, it is in the court's decision in the same case that ignorance of the law, no matter how unreasonable, will exclude *dolus*,[131] that De Wet's absolute belief in the subjective notion of intention has had the most far-reaching consequences for our law. It has subsequently been pointed out that De Wet's views, which influenced the court, were based on those of German jurists of the pre-second World War era whose views have since been rejected in that country;[132] that in going this far the appellate division has leaned too much in favour of the accused person.[133] With regard to the first accusation the present writer has already adverted to the fact that postwar developments in Germany have not moved De Wet to change his stance in any respect, and the probable reasons for this. With regard to the second accusation, one may be forgiven for having thought that the more indulgent attitude of De Wet towards the accused (and by implication, of those judges who followed it) might have commended itself to this school.

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126 It is especially since the publication of the second edition of *Strafreg* in 1960 that this author's influence on the development of the law by the courts has been felt.

127 In 1959 in *R v Krull* 1959 3 SA 392 (A) Schreiner JA had rejected the ruling in *R v Tenganyika* 1958 3 SA 7 (FC) that provocation can reduce murder to culpable homicide even where there is an intention to kill. Schreiner's second ruling in the *Krull* case that where the accused's state of mind results from hot-headedness, idiosyncracy or timidity, his conduct must be adjudged by the objective test, however, not being in accordance with principle, was rejected by Holmes JA in 1971 in *S v Mokonto* 1971 2 SA 319 (A) at 326. It seems that in the *Mokonto* case, Holmes JA went further than De Wet in expressing the view that "subjectively considered" provocation may be relevant to the question of mitigation. According to De Wet (*Strafreg* 3 ed (1975) 135) provocation can mitigate a persons guilt only if it is reasonable: "Die man wat eenvoudig sy drifte botvier, verdien nie tegemoetkoming nie."

128 *Strafreg* 3 ed (1975) 134 n 185. In the same work (185–187) De Wet could also say that his view that an accomplice who participated in a murder only after the fatal injury was inflicted could not be guilty of murder, had been accepted by the appellate division.

129 1977 3 SA 513 (A).

130 *S v De Blom* (*supra* n 129) 530.

131 *idem* 529.

132 See Stassen in 1977 *TSAR* 259 265. Today in Germany, ignorance of the law is an excuse only if it is unavoidable, which for all practical purposes means that it must be reasonable, otherwise it is merely a factor which may be taken into account in mitigation see Whiting "Changing the Face of Mens Rea" 1978 *SALJ* 1.

133 Whiting 1978 *SALJ* 1 6; Kahn 1979 *SALJ* 560 574. But cf Mathews "Ignorance of the Law is no Excuse?" (1983) 3 *Legal Studies* 174 in which the justification of the doctrine for English law is questioned.

But it is perhaps the rejection by the appellate division of the *versari* doctrine that is the clearest single example of the "purist" approach exercising a direct influence on our law. Not only did the smaller works which saw the light of day during the first half of this century propound the English application of the doctrine;[134] even *Gardiner and Lansdown*, despite the manifest injustices which the doctrine produced, supported it.[135] There can be little doubt, too, that the espousal of the doctrine by both Kenny and Stephen, English writers who exerted a considerable influence on our law during the earlier part of this century,[136] had an important bearing on the frequent application of this doctrine by our courts.[137] In *S v Van der Mescht*[138] which struck a potent blow against the doctrine and *S v Bernardus*[139] in which it was dealt the final blow, the full spectrum of "purist" legal learing – the views of Bodenstein,[140] Coertze[141] and Swanepoel[142] – were placed under the judicial spotlight by Steyn CJ.[143] These "milestone" judgments have brought our law into line with Continental criminal law where the *versari* doctrine has long been regarded as outworn, being inconsistent with the fundamental principle that liability depends on proof of *mens rea* for the very crime charged.[144] They also constitute an advance over English law where the doctrine still finds application today although it has been subjected to considerable criticism and modification in recent times.[145]

Logically and philosophically the blows to the view that an *aberratio ictus* does not affect the liability of the accused and the refusal to allow voluntary drunkenness to excuse criminal liability, flow from the rejection of the *versari* doctrine and on this basis De Wet's influence can only be described as monumental.

The writings of the old authorities that the existence of *aberratio ictus* does not affect the liability of the accused were roundly condemned by this author

134 See below n 135.

135 So, for instance: "A person committing an unlawful act which undesignedly results in another unlawful act is criminally liable for the latter as well as the former" Gardiner and Lansdown *South African Criminal Law and Procedure* vol I 3 ed (1930) 32. Similar declarations appear in the works of Tredgold *Handbook of Colonial Criminal Law* (1897), Nathan *Common Law of South Africa* 1 ed (1907), Lansdown *Outlines of South African Criminal Law and Procedure* 2 ed (1960) and Anders and Ellson *The Criminal Law of South Africa* vol I (1915).

136 Most of the early South African textbooks cite these authors as authoritative as regards our law. See, for example, Anders and Ellson *The Criminal Law of South Africa* 7 8.

137 See *inter alia R v Wallendorf* 1920 AD 383; *R v Matsepe* 1931 AD 150.

138 1962 1 SA 521 (A).

139 1965 3 SA 287 (A).

140 1919 *SALJ* 323.

141 1937 *THRHR* 85.

142 *Die Leer van "Versari in re Illicita" in die Strafreg.*

143 These two judgments have been described as "illustrations of scholarly, scientific legal analysis" – Kahn "Retirement of the Chief Justice, Mr Justice LC Steyn" 1971 *SALJ* 1 2. See also Whaley "Criminal in our Courts: *Dolus Eventualis*" 1967 *Responsa Meridiana* 117 127.

144 See *S v Van der Mescht* (*supra* n 138) 523.

145 See De Wet and Swanepoel *Strafreg* 3 ed (1975) 104.

as being tainted with *versari*[146] and his own exposition of the exculpatory effect of a deflected blow is found, not in the outdated learning of the old books, but in modern Dutch and German legal writings (mainly the latter).[147] The presentation of De Wet of the law relating to *aberratio ictus* was accepted *in toto* by Young J in the case of *R v Mabena*[148] and by Holmes JA in that of *S v Mtshiza*.[149] The English doctrine which would secure the liability of the accused in a case of *aberratio ictus* by an application of the doctrine of transferred malice,[150] had found favour in our earlier case law[151] and in our early literature; for example, *Gardiner and Lansdown*[152] had opted for the statutory formulation of the English doctrine of transferred malice of the Transkeian Penal Code.[153]

De Wet's refusal to depart from what he holds to be a fundamental principle of enlightened criminal law, namely, that only blameworthy violations of the law are punishable, is manifest yet again in his strong criticism of the views of the Roman-Dutch writers on drunkenness[154] and in his condemnation of the appellate division's decision in *S v Johnson*[155] for relying on them and by doing so, exhuming the *versari* doctrine.[156] The old writers, according to De Wet, had erred and the court, relying upon them, had erred with them.[157] As is well known, recently the appellate division in *S v Chretien*[158] has clearly echoed De Wet's view by ruling that an accused who has committed an act in a state of self-induced intoxication is no exception to the fundamental principle,[159] a decision

146 *Strafreg* 3 ed (1975) 143.
147 *Strafreg* 2 ed (1960) 131 n 209; cf also *Strafreg* 3 ed (1975) 142 n 225.
148 1967 3 SA 525 (R) 131–134. The decision of Young J was reversed on appeal by Beadle CJ in *R v Mabena* 1968 2 SA 28 (RAD). See the pertinent criticism levelled at this latter decision by Milton "A Stab in the Dark: A Case of *Aberratio Ictus*" 1968 *SALJ* 115, by Burchell and Hunt *South African Criminal Law and Procedure* 143–144 and by De Wet and Swanepoel *Strafreg* 3 ed (1975) 146 n 246.
149 1970 3 SA 747 (A) 752–753. The judgment of Holmes AJ was a minority judgment. In the majority judgment the point was not adverted to.
150 See De Wet and Swanepoel *Strafreg* 3 ed (1975) 144; Milton 1968 *SALJ* 115 116.
151 for example, in *R v Koza* 1949 4 SA 555 (A) 557.
152 *South African Criminal Law and Procedure* vol I 3 ed (1930) 33. The view is maintained throughout all successive editions.
153 s 140.
154 *Strafreg* 2 ed (1960) 106. According to unanimous Roman-Dutch authority, drunkenness in itself is not an excuse for a crime, although it may in appropriate circumstances have a mitigating effect on sentence. See the review of the old authorities on the subject by Botha JA in *S v Johnson* 1969 1 SA 201 (A) 207–211.
155 *supra* n 154.
156 *Strafreg* 3 ed (1975) 126. According to this author: "Die jongste beslissing van die Appèlhof in hierdie verband, nl S v Johnson . . . is 'n onoordeelkundige versameling van mistastings" *ibid.*
157 "Dit is waar dat die ou skrywers dronkenskap nie as verskoningsgrond aanvaar het nie, maar slegs as strafversagtingsgrond, en dan ook maar met kwalifikasies. Dit is darem seker ook waar dat die meeste van die ou skrywers meer as twee eeue gelede geskryf het, en dat die strafregteorie en strafregpleging intussen darem 'n bietjie meer verfynd geraak het . . . Om hierdie verouderde denkbeelde teen die einde van die twintigste eeu as gesaghebbend te beskou, is onoordeelkundig, indien nie heeltemal naïef nie" *Strafreg* 3 ed (1975) 126.
158 1981 1 SA 1097 (A).
159 De Wet and Swanepoel *Strafreg* 2 ed (1960) 108. In his decision Rumpff JA pointed out that the problem was a universally vexed one and made mention of the fact that parliament

in line with Continental law on the point. Again, others to whom, one would have expected, such individual justice would have commended itself, welcomed the practical justice thought to be done in *S v Johnson*.[160]

In summing up, it is noteworthy that the legislature played no part in the developments sketched above. The changes were brought about entirely by judicial activity, and, most significantly, their mainspring of inspiration was the new academic learning. Each development is evidence of, and results from, the attitude of the "purist" approach that *actus non facit nisi mens sit rea*, or "geen straf sonder skuld." From what has been said above, the point has emerged that it is wrong to describe the move to the subjective test for intention and the rejection of the *versari* doctrine as flowing only from a historical approach: the rejection of *versari* and the emphasis of the subjective approach in criminal law flow from logic, principle and justice rather than from a return to the *fontes*. It was the critical reassessment of principles and institutions that swept away the decades of unprincipled Common-law casuistry.

5 CONCLUSION

In what has preceded attention was paid only to those works which reflected the schism which had developed in the legal minds of South African jurists. Nevertheless, it ought to be clear that legal scholarship has played a massively important role in South Africa. It did so even before the advent and application of the so-called purist movement, although basically the role of the early pre-academic writings was one of constituting a model of case and statute law for the bench. The "purist" school, in a more significant and revolutionary way, has steered the courts in a new direction which in many cases was a total departure from the *status quo*.

Today, with the benefit of hindsight, it is clear that a considerable part of the steam generated by the battle was really semantic. The new approach was given epithets such as "purist" and "antiquarian." But from what we have seen in selected areas of the law, the new approach was in fact not "purist" or "antiquarian." It is certainly true that the new school was bent on systematising the law and in that sense went back to the roots of our common law but, as we have seen, very often critically.

Nor must it be thought that the "purists" or "antiquarians" never broke ranks in their "dogmatic" zeal to foster the new approach – a misconception

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might think fit to create, as in certain Continental systems, a legislative offence of committing a crime while in a state of self-induced intoxication. De Wet had pointed out in the second edition of his work that this was the position in Germany, Austria and Switzerland – De Wet and Swanepoel *Strafreg* 2 ed (1960) 108n 107. De Wet appears to have no objection to similar legislation being introduced in South Africa. He does, however, denounce the practice in these systems of meting out punishment in proportion to the seriousness of the harm caused – *ibid.*

160 See Whiting in his review of the 3 ed of *Strafreg* 1976 *SALJ* 246 249 and Pain "Specific Intent" 1974 *SALJ* 467 487–488.

which has stolen its way into "modernist" folklore. So, for example, LC Steyn – regarded by most as the high-priest of "purism" – in an uncharacteristically robust fashion of expression, condemned the new outspokenness:[161]

> "There is an unmistakable tendency, not a general one, I am glad to say, but in some of the criticisms of our Courts, past and current, towards an irritated acidity, a somewhat overbearing snappishness, in short, towards offensiveness; a tendency to belittle and disparage, to make judges look ridiculous. At times the authors I have in mind seem to be as cross as two sticks, and intent upon showing their teeth in no uncertain way . . ."

The work of Van der Merwe and Olivier, *Die Onregmatige Daad*, came under heavy fire at the hands of De Wet. A few general extracts must suffice:[162]

> "Met die uitsondering van Hoofstukke 4 en 5 is die werk geskryf in 'n onaantreklike, bombastiese styl, wat nie maar net van gebrek aan taalvaardigheid getuig nie, maar ook van onafgeronde denke. Verder word die werk ontsier deur snaaksighede, wat regtig nie amusant is nie, soos 'dingetjie' (bl 70), die 'hartkloppings' (bl 9) e d m, en selfs aanstootlik kan wees, soos 'Griek A' en 'Griek B' op bl 43."

> "Die skrywers se behandeling van 'skuld' as element van die onregmatige daad (bl 70 e v) is pateties onbeholpe."

> "In Hoofstuk 3 word die 'remedies op grond van onregmatige daad' behandel, en hier loop dinge heeltemal deurmekaar."

Then again, even among themselves they differed as regards the emphasis to be placed on the relative importance of various sources of inspiration. So, for instance, what may be termed "pure purism" can be detected in the curial and extra-curial writings of LC Steyn. Thus it is on record that the late chief justice warned against "legal offerings from Westminister, Bonn and Paris and other legal centres . . ."[163] On other occasions, while acknowledging that responsible comparison with related legal systems can be valuable, Steyn has stressed that first and foremost we must look to our own legal foundations, however fragmentary the treatment is there.[164] It is noteworthy in view of these pronouncements of Steyn that in his work on interpretation of statutes, the term "ons skrywers" is used in the widest possible sense. So, for example, the appellation includes German Pandectists such as Glück and seventeenth and eighteenth century non-Dutch writers such as Eckhard and Averanius.[165]

A great deal of literature has emerged in the years succeeding the debate. Although to a predominant extent these ongoing endeavours have taken place without any concern for the heat generated in the "purist-modernist" fray, the

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161 Steyn "Regsbank en Regsfakulteit" 1967 *THRHR* 101 105.

162 See De Wet's review of the work 1970 *THRHR* 68 69 72 74.

163 See Kahn 1971 *SALJ* 88 1 2. Even less enthusiasm for the comparative approach was shown by Steyn in 1965. In an address delivered by him on the foundation of the University of South Africa's Institute of Foreign and Comparative Law in that year, Steyn said: "Wat langs vergelykende weg van elders kom, moet so ingekweek word dat dit ons eie nie sal verdruk nie en sy gesonde groei nie sal belemmer nie. Dit is 'n moeilike, delikate taak, en selfs die kenner met 'n ervare hand sal hom nie onnodig daaraan wil waag nie" "Instituut vir Buitelandse Reg en Regsvergelyking" 1965 1 *Codicillus* 43 44.

164 Steyn 1967 *THRHR* 101 102; *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) 410–411.

165 See the criticism levelled at Steyn in this regard by De Wet in 1946 *THRHR* 128 130 and by Kahn 1951 *SALJ* 451–452.

battle has nevertheless ensured that legal writing will never be the same again. By their call to arms to remodel the law along more logical, consistent and fundamental lines, more in fashion with the traditional approach of our authorities and trends on the Continent, they not only impliedly issued an injunction to the judiciary to play a more creative role than the one dictated to them by the *stare decisis* approach, but laid the foundation for an extension of their method in all areas of the law. Thus, although one must remain conscious of the fact that, in the words of Oliver Wendell Holmes, "[t]he life of the law has not been logic,"[166] it seems only reasonable to assume that, as a general rule in the vast majority of instances, order is better than disorder, logic better than illogicality, consistency preferable to inconsistency, comprehensibility more acceptable than confusion; and that the contribution of the "purists" is one that has been insinuated into the legal fabric in the process of time.

166 Oliver Wendell Holmes *The Common Law* (1881) 1.

Law is not an affair of bare literal precepts, as the mechanical school would make it, but is the sense of justice taking form in people and races. (Per *Sir Frederick Pollock* in Expansion of the Common Law.)

Ter beskerming van 'n reg op 'n voetpad

AB de Villiers
BA LLD
Professor emeritus, Stellenbosch

SUMMARY

Towards the Protection of Iter

In the classical era an owner entitled to *iter* had a *vindicatio itineris*, an *actio in rem* similar to the *rei vindicatio*. In the case of the servitude the relief sought was restitution by way of removal of any impediment, damages and security against future interference. With its *formula arbitraria* the *vindicatio itineris* led to the *iudex*, after pronouncing his *sententia* in favour of the plaintiff, making a *iussum de restituendo* in accordance with his *arbitrium* on the content of the restitution to be made to put the plaintiff *in integro*. A well-advised defendant, sensible to the impending *condemnatio pecuniaria* with its penal effect, would comply. The plaintiff would, in the result, be upheld specifically in the use of the right of way. Only in the event of the defendant's contumacious non-compliance would there have been a pecuniary condemnation, not by reason of any judicial discretion, but as a result of the rule *omnis condemnatio pecuniaria est*.

There was in the classical era an *interdictum de itinere actuque* to protect a landowner's user of a lane or other thoroughfare regardless of his having *iter* or not, provided only that his user was sufficient to create the semblance of a right. The praetor's interdictal order *extra ordinem* had a "police-administrative-law character," being directed against self-help. It served to protect the legal order generally and specifically as between neighbours in quarrels resulting from the use of lanes and the like. In the event of compliance with the *interdictum* the threatening self-help was nipped in the bud. In the classical era the *interdictum* could, however, give rise to a complicated set of actions in which the adjudication was based on *formulae* framed to arrive in the manner of the *ordo iudiciorum privatorum* at a decision on the user of and the entitlement to the lane.

In the Justinianic era a *vindicatio servitutis* came to be known as *actio confessoria*, it being seen as the counterpart of the *negatoria*, the owner's action to ward off servitutal encroachment. The *actio confessoria* in the case of *iter* now led to a judgment for restitution without further ado, giving rise to execution *manu militari* if need be. In the meanwhile the *interdictum de itinere actuque privato* was being obtained by an *actio* which was adjudged by *cognitio*, the ordinary procedure of the Byzantine era. By reason of its antecedents it was, however, classified in Justinian's codification under the rubric *De Interdictis sive Extraordinariis Actionibus, Quae pro His Competunt*, creating the wrong impression that an *interdictum* was a subsidiary remedy available only if there was no other.

The *actio confessoria* became part of our common law, retaining its character even if not consistently under that name, the *nomen actionis* having become obsolete according to some authorities. It led to an order for the removal of impediments (including bolts and the like on gates on a pedestrian lane) damages and an *interdictie* against further interference, the *interdictie* being the remedy which in Dutch practice had come in the place of the *cautio de in posterum ne turbando*, a remedy, let it be known, which the *Hooge Raad* confirmed from time to time without any vacillation.

During 1982 Van den Heever J sat in *Penny v Brentwood Gardens Body Corporate* on an application for an order directing the respondent to desist from locking a gate in a lane over a servient tenement, obviously a *vindicatio itineris*. The respondent tendered to make keys available but persevered in its claim to secure the gate (against unlawful thoroughfare) by "a self-closing and self-locking gate which will require a key only for opening." Respondent's counsel submitted inter alia: "By seeking an interdict applicants have vested the Court with a discretion and on the facts alleged it should not be exercised in their favour." Van den Heever J held that the locking of the date was a diminution of applicants' rights and granted the interdict. The judge dealt with counsel's submission on judicial discretion in the following dictum: "the facts placed before me neither satisfy me that the respondent had no other practical method of excluding people from its grounds who are not entitled to be there, nor that the situation of the [owner of the servient land] were the gate not permitted to be locked, would be so detrimentally affected that the Court should exercise any equitable jurisdiction it may have, or discretion, in respondent's favour."

In this article the opinion is expressed that Van den Heever J was right in desisting from exercising a discretion. It would, however, have been preferable if her resistance to counsel's submission had been more vigorous inasmuch as the dictum would seem to imply that in "a proper case" there is room for discretion and, in the event, for the refusal of an interdict, whether it be a *vindicatio itineris* or on an *actio negatoria* or for that matter, by the same token, on a *rei vindicatio*.

The discretion which a court is supposed to have in every case in which an interdict (whether "interlocutory" or "final") is sought, would seem to rest on the judgment of Innes JA in *Setlogelo v Setlogelo* 1914 AD 221, where Van der Linden's requisites for a *mandament poenaal* (which in Dutch practice *was indeed* an extraordinary remedy) were applied on an appeal against an order which was appealable as having "the effect of a final and definitive sentence." These requisites, together with the misleading classification in the Digest of the *interdictum* as an *actio extraordinaria* and the mistaken idea that the *actio confessoria* is obsolete and possibly also an unfortunate rendering by Gane of "*actio arbitraria*" with "discretionary action," have, it is believed, contributed to the errant (but it is hoped not arrant) belief that a court has a discretion to expropriate (albeit for "*'n paar pond tien*") an owner's *iter* (and by implication his ownership) if he seeks his due by way of an interdict.

1 ROMEINSE REG

1 1 Klassieke tyd

1 1 1 *Vindicatio servitutis*

Net soos die eienaar van 'n saak in die klassieke tyd van die Romeinse regsgeskiedenis sy saak wat by iemand anders was met 'n *vindicatio*, die *rei vindicatio*,[1] kon vorder, so kon die eienaar van 'n heersende erf wie se

1 Die formula van die *rei vindicatio, die petitoria*, het gelui: Seius iudex esto. Si paret rem qua de agitur ex iure Quiritium Auli Agerii esse, neque ea res arbitrio iudicis Aulo Agerio restituetur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato. Si non paret absolvito. Sien Lenel, *Das Edictum Perpetuum* (1927) (hierna *EP*) 185.

serwituutuitoefening belemmer is 'n *vindicatio*, die *vindicatio servitutis*,[2] laat geld om sy reg op die dienende erf af te dwing. Die *formula* van die *vindicatio servitutis* in die geval van 'n reg van weg het gelui:[3]

> "Seius iudex esto. Si paret Aulo Agerio ius esse per fundum illum ire agere neque ea res arbitrio iudicis restituetur, quanti ea res erit, tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato. Si non paret absolvito."

Die *formula* wat so pas aangehaal is, was 'n *formula arbitraria*.[4] Die opdrag aan die *iudex* in so 'n *formula* was om allereers die eiser se aanspraak soos in die *intentio* gestel, in die onderhawige geval op 'n reg van weg, te ondersoek.[5] Het hy dan tot 'n bevinding, *sententia*,[6] gekom dat die aanspraak suiwer was,[7] het hy as gevolg van die *formula*-snede *neque ea res arbitrio iudicis Ao Ao restituetur* nie direk tot *condemnatio pecuniaria* oorgegaan nie. Hy het eers sy *sententia* oor die aangevoerde reg by wyse van *pronuntiatio* gestel.[8] Daarop het 'n *iussum de restituendo*[9] ooreenkomstig die *iudex* se *arbitrium* gevolg:[10] as't ware arbitersbeoordeling van die restitusieverpligting van die verweerder.[11] Dié verpligting sou in die gegewe geval die oopstel van die weg, ook deur die verwydering van enige versperring, die oophou van die weg, sekerheidstelling ten opsigte van voortgesette oophou asook vergoeding van skade deur die eiser gely

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2 Die term kom voor in *D* 43 27 1 5 en in *D* 39 1 9; vgl ook *D* 8 5 6 *pr*; *vindicatio servitutis* is algemeen deur Romaniste van hierdie eeu as suiwer aanvaar: vgl o a Lenel *EP* 191 tit XV § 73; Siber *Römisches Recht II* (1928) 111; Jörs-Kunkel-Wenger *Römisches Privatrecht* (1946) (hierna Jörs-K-W) § 88 2; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) (hierna Van O *Pr*) 153; Schulz *Classical Roman Law* (1951) (hierna Schulz *CRL*) 692; Buckland *A Text-book of Roman Law from Augustus to Justinian* (1963) (hierna Buckland *TB*); Kaser *Das römische Zivilprozessrecht* (1966) (hierna Kaser *ZPR*) 151 250 vn 8 257 vn 5 313 vn 3; Kaser *Das römische Privatrecht* I (1971) (hierna Kaser *PR* I met *PR* II vir die tweede deel) § 106 VI; Thomas *Textbook of Roman Law* (1976) 198 *impliciter* (vgl t a p vn 32); Rodger "Acto Confessoria and Actio Negatoria" 1971 *SZ* 184 aanvaar blykbaar *vindicatio servitutis* naas *actio confessoria* as 'n term van die klassieke tyd alhoewel hy uitwys dat *vindicatio servitutis* slegs tweemaal in *D* (t a p hierbo in hierdie voetnoot) voorkom; hy gee a w 191 egter toe dat *vindicare servitutem* (es) baie meer dikwels in *D* voorkom.

3 Lenel *EP* 191; t a p is die *formula*snede wat hedendaags *clausula arbitraria* heet (Wenger *Insitutes of the Roman Law of Procedure* (Fisk-vertaling (1940) (hierna Wenger) § 14 vn 33) egter bewustelik nie opgeneem nie; Wenger § 14 vn 34 wys ook op meningsverskil i v m die *clausula* in die *formula* van die *vindicatio servitutis* (wat hy hier *actio confessoria* noem); vgl in hierdie verband ook Jolowicz en Nicholas *Historical Introduction to the Study of Roman Law* (1972) (hierna Jolowicz N) 214 vn 6; Kaser *ZPR* 257 getuig onomwonde vir opname, soos ook Van O *Pr* 153 en Schulz *CRL* 38; vgl ook Kaser *PR* I 447 vn 79 en 438 vn 61. Die *actio* waaroor dit in Kaser t a p gaan, is die *vindicatio usufructus*, waarvan die *formula* gelui het: Si paret Ao Ao ius esse eo fundo q d a uti frui neque ea res arbitrio iudicis restituetur, quanti ea res erit tantam pecuniam et rel; sien Lenel *EP* 190, waar hy vir *vindicatio usufructus* geen bedenkinge i v m die sg *clausula arbitraria* stel nie.

4 G 4 141 en 161; ook die *rei vindicatio* (hierbo vn 1) en ander *actiones in rem* se *formulae* was *arbitrariae*, asook dié van enkele *actiones in personam*; vgl Kaser *ZPR* 257; Schulz *CRL* 38.

5 Kaser *ZPR* § 48 III.

6 Kaser t a p vn 20, met verwysing na *D* 6 1 35 1 en *D* 8 5 8 4.

7 Het hy tot 'n ander *sententia* gekom, sou vryspraak sonder meer volg; Kaser t a p vn 21.

8 Kaser t a p, waar hy van die *iudex* se "feststellenden Zwischenbescheid" praat.

9 Kaser t a p.

10 Kaser *ZPR* § 48 II.

11 Kaser *ZPR* § 48 III.

as gevolg van versperring, kon omvat.[12] 'n Verstandige verweerder sou na aanleiding van die *pronuntiatio* besef het dat hy aan *condemnatio* blootgestel staan en sonder meer ooreenkomstig die *iussum* gerestitueer het. Daarmee sou die eiser se aanspraak op die reg van weg daadwerklik, in *natura*, verwesenlik wees,[13] maar as gevolg van logiese uitleg van die *formula* sou daar vir die verweerder *absolutio* volg.[14] Sou 'n onbesonne verweerder egter in onberadenheid die *iussum* verontagsaam het, kon daar geen *condemnatio in ipsam rem* weés nie;[15] 'n veroordeling in geld sou volg en die eiser sou sy reg van weg kwyt wees.[16] Die kans dat dit sou gebeur, was egter skraal, aangesien die formidabele *condemnatio pecuniaria* na aanleiding van die *iudex* se gebondenheid aan die eiser se *iusiurandum in litem* 'n verweerder sou afskrik van volharding in *contumacia*.[17]

Die gevolgtrekking kan dus gestel word dat die eiser wat in die klassieke tyd 'n reg van weg moes afdwing, gewoonlik sy aanspraak op 'n *Naturalrestitution*,[18] 'n *restitutio in forma specifica*, verwesenlik sou kry en dit ongeag die reël *omnis condemnatio pecuniaria est*.[19]

1 1 2 *Interdictum de itinere actuque privato*

In die klassieke tyd was daar naas die *vindicatio servitutis* ter beskerming van 'n reg van weg, 'n *interdictum*, die *interdictum de itinere actuque privato*,[20] wat die eienaar van 'n *fundus*[21] wat *de facto* 'n weg oor 'n *fundus vicinus* aan't gebruik was[22] se gebruik beskerm het selfs al kon hy nie bewys dat hy 'n reg van weg het nie.[23]

Die interdikbeskerming van so 'n gebruiker kan vergelyk word met die beskerming wat 'n *possessor* aan die sogenaamde *interdicta possessoria*[24] ontleen het. Trouens, volgens die teks van Gaius se *Institutiones* wat aan ons oorgelewer

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12 Vgl Levy *SZ* 68 (1951) 363 f en Schulz *CRL* 38.
13 Kaser *ZPR* § 48 II en III praat in die verband van "Naturalleistung."
14 Wenger § 14 36a 39; Kaser *ZPR* § 48 III *in fine*.
15 Weens die reël *omnis condemnatio pecuniaria est*; vgl Wenger § 14 vn 30.
16 Wenger t a p.
17 Vgl Wenger t a p sien ook Kelly *Roman Litigation* (1966) 79 ev i v m die "penal effect" van die *condemnatio pecuniaria* asook Kaser *ZPR* § 48 III *in fine* en IV i v m die *iudex* se gebondenheid aan die beëdigde waardebepaling.
18 Kaser *ZPR* § 48 IV; Schulz *CRL* 39 praat van "specific restitution."
19 Schulz *CRL* t a p.
20 Titel van *D* 43 19. Berger in *Paulys Realencyclopädie der klassischen Alterumwissenschaft* 9 1639 (hierna Berger *RE*) behandel die *leges* onder dié titel uitvoerig s v "Interdictum de Itinere Actuque Privato."
21 of sy inkomende opvolgers, sowel 'n koper as "Singularsukzessor" as 'n *bonorum possessor* as "Universalsukzessor," wat met *interdicta utilia* beskerm is; *D* 43 19 10, 'n teks wat, vir sover dit sy algemeenheid aangaan (vgl *et generaliter*), volgens Berger *RE* Bisantyns van herkoms is.
22 as sou hy serwituutgeregtigde wees; nie as hy maar 'n geleentheidsgebruiker was nie, bv omdat die openbare weg tydelik onbruikbaar was en hy dan selfs dikwels oor die *fundus vicinus*, as't ware by wyse van noodgang, gegaan het: Berger *RE*, met 'n beroep op D 43 19 1 6.
23 *D* 43 19 2; daarenteen moes by die *interdictum de itinere actuque privato reficiendo* bewys word dat die eiser wel 'n reg van weg het: *D* 48 19 3 14 en 15.
24 Vgl Schulz *CRL* § 776a i v m dié terminologie.

is,[25] word geleer[26] dat die *praetor* sy *auctoritas* om deur *interdicta* 'n einde aan twiste te maak hoofsaaklik uitgeoefen het waar die geskil oor *possessio* of *quasi possessio* gegaan het.[27] Onder die begrip *quasi possessio* moet by uitnemendheid verstaan word die feitlike uitoefening van bevoegdhede op andermansgrond met of sonder die bewys van 'n reg op 'n grondserwituut.[28]

Interdicta het dan by uitnemendheid gedien om eierigting te bekamp en die vrede te bewaar,[29] ook by buregeskille oor die gebruik van weë en water en om die soort geskille tot geregtelike beslegting te laat kom.[30] Dreigende eierigting kon juis by dié soort geskille effektief bekamp word deur 'n *imperium*draer se bevel[31] wat so subiet soos 'n *interdictum* verkry kon word.

Die eiser[32] kon te eniger tyd, selfs op *dies nefasti*,[33] die bevel by die *praetor* aanvra en hy het na aanhoor ook van die verweerder[34] en na 'n mate van *causae cognitio*[35] eventueel ingestem *interdictum reddere* of, so nie, *denegatio* gelas.[36] Die formulier van die bevel[37] het in die geval van die *interdictum de itinere actuque privato* gelui:

> "Quo itinere actuque, quo de agitur, hoc anno nec vi nec clam nec precario ab illo usus es, quo minus ita utaris, vim fieri veto."[38]

Die *interdictum* het nie die aanstelling van en 'n opdrag aan 'n *iudex* vir optrede in 'n tweede fase van die proses bevat nie.[39] Dit was 'n bevel, in hierdie geval 'n verbod, *interdictum prohibitorium*.[40] Dit was 'n *interdictum simplicium*[41]

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25 *Codex Veronensis* 235; vgl De Zulueta se uitgawe van die leerboek vn 2 by 4 139.
26 G 4 139.
27 Vgl Van O *Pr* § 69 oor die herkoms en bruikbaarheid van die begrip *iuris quasi possessio* en oor die oortuiging dat die woorde *quasi possessio* in 4 139 nie van Gaius se hand gekom het nie; Schulz *CRL* beklemtoon dit dat "our text of Gaius' Insitutes is not quite free from interpolations," d w s in die tekste oor *interdicta*.
28 Van O *Pr* tap.
29 Wenger § 24 3; Kaser *ZPR* § 62 e v en vgl Schulz *CRL* § 783.
30 *D* 43 20 *De Aqua Cottidiana et Aestiva*; *D* 43 21 *De Rivis*; *D* 43 22 *De Fonte*. Berger *RE* wys daarop dat die *interdictum de itinere actuque privato* veel gemeen gehad het met die "waterinterdikte."
31 "vouchsafing, in a speedy proceeding, like a police measure, administrative-law order in the community": Wenger § 24.3.
32 In die vervolg sal telkens van "eiser" en "verweerder" gepraat word alhoewel die terminologie "*actor*" en "*reus*" en die name Aulus Agerius en Numerius Negidius in die klassieke tyd volgens Schulz *CRL* § 113 nooit i v m die *interdictum* as sodanig voorgekom het nie; Schulz tap bestempel dié terminologie in G 4 159 onomwonde as geïnterpoleer.
33 Wenger § 24 4–5a; selfs in die naverloop van 'n *interdictum*proses was die verrigtinge nie gebonde aan die *actus rerum* nie; Kaser *ZPR* 323 vn 53.
34 wat nie die *in ius vocatio* in die wind sou geslaan het nie; Wenger § 24 4; Kaser *ZPR* § 62 V.
35 Wenger § 24 5a; Kaser *ZPR* t a p.
36 Vgl egter Wenger § 24 7 i v m terminologie *denegare interdictum*.
37 Schulz *CRL* § 107 *formula interdicti*.
38 Wenger § 24 42 n a v *D* 43 19 1 *pr*; Buckland *TB* 736–737 vertaal vry: "I forbid force to be done by which A is prevented from enjoying that right of way which he has been enjoying in the present year, his enjoyment not having been obtained from B by force or secretly or by permission"; vgl ook Wenger 415–416 se vertaling.
39 Kaser *ZPR* § 62 I.
40 G 4 140, *D* 43 19 1 2 en vgl Buckland *TB* 736.
41 G 4 157 en vgl 158.

wat teen die verweerder gerig is.[42] Dit het hom verbied om die eiser onder die bepaalde omstandighede wat in die *interdictum* gestel is in die gebruik van die weg te belemmer. Dié omstandighede het die materieelregtelike vereistes vir die trefkrag van die *interdictum* gestel. In die gegewe geval *de itinere actuque* was die vereistes: toereikende gebruik deur die eiser van die weg gedurende die betrokke jaar[43] en wel sonder geweld en sonder geheimhouding jeens die verweerder en ook sonder dat die verweerder as *precario dans* die gebruik van die weg deur die eiser gedoog het.[44]

Die verweerder B kon nou op verskillende maniere reageer:

(a) Hy kon berus en hom weerhou van belemmering van die eiser A se gebruik van die weg omdat hy erken dat A 'n reg van weg het. Die vrede is bewaar en A se gebruik van die weg is sonder meer deur die summiere *interdictum*prosedure beskerm.[45]

(b) B berus vereers en weerhou hom van belemmering van die eiser A se gebruik van die weg, nie omdat hy erken dat A 'n reg van weg het nie, maar omdat hy besef dat die *interdictum* hom tref weens A se toereikende gebruik van die weg *nec vi nec clam nec precario*; wil B egter desnietemin A se gebruik van die weg aanveg, sal hy die *actio negatoria*,[46] met die bewyslas wat dit vir hom as eiser meebring, moet instel om A se voortgesette gebruik van die weg af te weer. Die vrede is bewaar en A se gebruik van die weg is vereers deur die *interdictum* beskerm totdat vonnis op die *actio negatoria* in 'n gewone proses *per formulas* gewys is en, in geval van *absolutio* in die *actio*, het A intussen beskerming geniet en sou hy voortaan onaanvegbaar wees en prakties as serwituutgeregtigde geld.

(c) B berus nie, want hy erken nie dat A 'n reg van weg het nie en hy erken ook nie toereikende gebruik van die weg of dat dit sonder geweld was of sonder geheimhouding of *nec precario* was nie; dientengevolge verset hy hom deur 'n daadwerklike optrede[47] om A se gebruik van die weg te belemmer en sodoende die *interdictum* in gedrang te bring; hy glo immers nie dat hy deur die trefkrag daarvan geraak is nie. Deur sodanige optrede wil B die deugdelikheid van die *interdictum* vir die gegewe geval[48] in geskil bring, eventueel,[49] vir beregting deur die gewone prosedure *per formulas*. Die volhardende A stel nou die *actio ex interdicto* teen B in en B moet

42 Buckland *TB* t a p.
43 Volgens *D* 43 19 1 2 *non minus quam triginta diebus*; Berger *RE* bestempel die presiese tydsbepaling van minstens 30 dae as 'n interpolasie; die gebruik moes ook uitgeoefen gewees het asof dit deur 'n serwituutgeregtigde uitgeoefen is: vgl *D* 43 19 1 6 wat hierbo in vn 22 ter sprake is.
44 Vlg Schulz *CRL* § 753 C i v m *precarium* by die sg *interdicta possessoria*.
45 Vgl Wenger § 24 9; Kaser *ZPR* § 62 I.
46 Vgl vn 79 en 80 hieronder oor die afweringsaksie en sy naam.
47 Hierdie "daadwerklike optrede" van B sou egter "purely formal" (Buckland *TB* 737) gewees het.
48 "deugdelikheid van die interdictum" getoets aan toereikende gebruik van die reg van weg *nec vi nec clam nec precario*.
49 d w s as A wil volhard met die gebruik.

hom met die proses inlaat.[50] Na aanleiding van A se *provocatio*[51] word *stipulationes poenae* oor en weer afgelê: B beloof om A 'n strafbedrag 1 000 te betaal as die *interdictum* vir die gegewe geval deugdelik blyk te wees en hy dus deur sy daadwerklike optrede ter belemmering van A se gebruik van die weg teen die *interdictum* "gesondig" het; A op sy beurt beloof om B 'n strafbedrag 1 000 te betaal as die *interdictum* vir die gegewe geval weens ontoereikende gebruik of weens gewelddadige of heimlike of *de precario* gebruik ondeugdelik blyk te wees, en hy, B, dus nie teen die *interdictum* "gesondig" het nie. 'n *Condictio* vir 1 000 word sowel deur B as deur A ingestel en na dieselfde *iudex* vir verhoor verwys tesame met die *formula* van 'n derde *actio*, 'n *iudicium secutorium*, wat vir A moes dien om verdere belemmering van sy gebruik van die weg uit te skakel as hy op sy *condictio* sou slaag en dus materieel in die gelyk gestel sou word oor die kwessie van die deugdelikheid van die *interdictum*. As B met sy *condictio* geslaag het, het hy die strafsom verhaal; A is op sy beurt op sy *condictio* vanselfsprekend in die ongelyk gestel, die *interdictum* was kragteloos en van die *iudicium secutorium* het niks gekom nie. Wou A nog steeds volhard met gebruik van die weg, moes hy 'n *vindicatio servitutis* instel met die bewyslas wat dit vir hom as eiser ingehou het. Het A egter met sy *condictio* geslaag, het hy die strafsom verhaal, B se *condictio* is afgewys en die beregting van die *iudicium secutorium* het *apud iudicem* voor dieselfde regter voortgeloop. Dit sou vanselfsprekend in A se guns verloop en uiteindelik uitloop op 'n *restitutio* van A in sy gebruik van die weg of, by ontstentenis aan *restitutio*, 'n formidabele *condemnatio pecuniaria*. As B nou nog steeds A se gebruik van die weg wou afweer, sou hy 'n *actio negatoria* moes instel met die bewyslas wat dit vir hom as eiser ingehou het.[52]

Alhoewel die prosedure wat eventueel op 'n *interdictum de itinere actuque privato* in die klassieke tyd gevolg het, erg uitgerek en ingewikkeld was en toe alreeds oorryp vir rasionalisasie was,[53] moet nietemin aanvaar word dat die *praetor* se bevel dikwels effektief summiere beskerming teen eierigting gebied het aan 'n grondeienaar wat 'n weg oor andermansgrond in gebruik had.[54] Dit sou in elk geval, na aanleiding van die mate en manier van gebruik, heilsaam kon werk by die rolverdeling in 'n geding oor die bestaaan al dan nie van 'n reg van weg.[55]

50 Kaser *ZPR* § 63 1.
51 G 4 165.
52 Met G 4 165 as uitgangspunt is die verloop van die verrigtinge gerekonstrueer n a v Wenger § 24 10–12; Buckland *TB* 736 e v; Kaser *ZPR* § 63 I II 1.
53 Vgl Schulz *CRL* § 112.
54 Wenger § 24 vn 9; Kaser *ZPR* § 63 V *in fine*.
55 Kaser *PR* I § 105 VI 2.

1 2 Justiniaanse tyd

Reeds in die derde eeu het die prosedure *per formulas* se rol in die regslewe, ook van Rome, gaandeweg al hoe minder belangrik gaan word. Onder Diocletianus[56] mag 'n *formula* wel nog soms gedien het as basis vir die *cognitio* van die *iudex pedaneus*,[57] maar in die regslewe van die vierde eeu het die gewaande *aucupatio syllabarum*[58] van die *forumulae* net so ongewild geraak soos die *nimia subtilitas* van die *legis actiones* in die laaste eeu voor ons jaartelling. Met die vergrowwingsproses gaande in die regsdenke van destyds is die onderskeidingspotensiaal van *concepta verba* misken. Die *formula* is per slot van rekening as't ware wortel en tak op 23 Januarie 342 uitgeroei deur 'n *constitutio* van Constantinus se seuns.[59]

Die vulgarisasieproses het mettertyd in die vierde eeu met al hoe meer momentum verloop.[60] Veral op die gebied van die prosesreg was daar in so 'n mate vervaging van skeidslyne dat selfs die fundamentele onderskeid tussen 'n *actio in rem* en 'n *actio in personam* verlore geraak het,[61] asook dié tussen die *ordo*-prosedure en een wat *extra ordinem* verloop het.[62] Inderdaad, die onderskeiding tussen *actio* en *interdictum* wat eertyds so opvallend was,[63] het verdwyn[64] en die prosedure *per interdictum* het streng gesproke verval.[65]

Die materiële reg wat via die *interdicta* ontwikkel het, het egter bly geld,[66] maar 'n gedingsoorsaak wat daaraan ontleen is, is soos elke ander *actio* aanhangig gemaak by en bereg deur die burokratiese regter van die dominaat en wel met 'n prosedure deur *cognitio*, die prosedure wat onder Augustus as *extraordinaria* gegeld het, maar intussen die gewone prosedure geword het.[67] Schulz stel as slotsom in hierdie verband:

> "The interdicts became now simple actions by which the plaintiff might obtain restitution, discovery (*exhibere*), or damages."[68]

By die gedingsoorsake waarvoor die tipiese *interdictum*prosedure van die klassieke tyd gegeld het, het daar egter nog reste van snelverloop oorgebly: die oponthoud van vier maande met *litis denuntiatio* en allerlei ander tydrowende insidente kon uitgeskakel word.[68]

Vulgarisasie, wat ook op die gebied van die materiële reg nie uitgebly het nie, het by uitnemendheid ook by *servitutes* skeidslyne laat vervaag. Regte wat

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56 Kaser *ZPR* § 67 I II.
57 Vgl Jolowicz N 440.
58 *C* 2 51 1.
59 *C* t a p.
60 Vgl Jolowicz N t a p.
61 Jolowicz N t a p.
62 Vgl Schulz *CRL* § 112 en sien Jolowicz N t a p.
63 Wenger § 32 43; Schulz *CRL* § 111.
64 Schulz *CRL* § 112; Kaser *SPR* § 99 II; Jolowicz N t a p.
65 Schulz *CRL* t a p.
66 Wenger § 32 43; Kaser *ZPR* t a p.
67 Schulz *CRL* t a p.
68 Schulz *CRL* t a p.
69 Wenger § 32 44; Kaser *ZPR* t a p; Jolowicz N 441.

'n onderdaan aan publiekregtelike verordeninge ontleen het, byvoorbeeld dié ten opsigte van boubeperkings, asook gebruikregte ten opsigte van openbare weë en watervore, is met *servitutes* geïdentifiseer. *Iter* en *aquaeductus* het weliswaar as *servitutes* gegeld, maar is nie onderskei van die pasgemelde publiekregtelike verskynsels nie en ook nie van verbintenisregtelike bevoegdhede ten opsigte van weë en water nie.[70]

Justinianus het ook op die gebied van *servitutes* 'n mate van opruimingswerk gedoen. Met argaïserende drang word die *iura fundi* van die klassieke tyd uitgeken en oudergewoonte ingedeel in servitutes *praediorum urbanorum* en *rusticorum*.[71] Die laasgenoemde groep word egter uitgebrei.[72] Trouens, die begrip *servitutes* self is uitgebrei om ook *ususfructus*, *usus* en *habitatio* in te sluit. Dienooreenkomstig word daar tussen *servitutes rerum* en *servitutes personarum* onderskei. Die terminologie wat in *D* 8 1 1 op naam van Marcianus staan, is waarskynlik afkomstig van 'n Bisantynse *nomenclator*.[73] Dit bly nog steeds 'n struikelsteen vir die *iuventus cupida legum*, juis weens die amper onvermydelike misverstand wat dit skep ten opsigte van die fundamentele aard van vruggebruik en so meer.[74]

Ewenwel, by die regsmiddels ter beskerming van die regte wat ingesluit is in die Justiniaanse begrip *servitutes* word die *actio in rem* in ere herstel,[75] maar nie onder die naam *vindicatio*, hetsy *itineris*, *aquaeductus* ensovoorts of *usus-fructus*, *usus* ensovoorts, soos eertyds nie, maar onder die naam *actio confessoria*. Hierdie naam word aangewend by sowel die vruggebruik as by die grondserwituut as die *actio in rem* van die reghebbende.[76] Die naam is waarskynlik die produk van 'n Bisantynse *nomenclator*, moontlik 'n lid van Tribonianus se

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70 Kaser *PR* II § 241 IV 1 en § 246 I.

71 *I* 2 3 *pr* en 1. Schulz *CRL* § 684 wys daarop dat 'n *servitus praediorum rusticorum* soos *iter* wat gewoonlik vir landboudoeleindes gedien het, soms ook diensbaar kon wees vir 'n dorpseienaar wat 'n kortpad deur sy buurman se tuin nuttig vind en hy waarsku dan: "It would have been absurd to give such a ius itineris different treatment from that given to a right of way outside a town; accordingly the lawyer qualified it as a servitus praedorium rusticorum, i e as a servitude which as a rule occurred only in praediis rusticis." Hierdie waarskuwing van Schulz is insiggewend t o v die stelling wat in *D* 43 19 1 op Ulpianus se naam staan, n l dat die *interdictum de itinere actuque privato pertinens ad tuendas rusticas tantummodo servitutes*.

72 *I* 2 3 2.

73 Vgl Van O *Pr* 153 vn 207.

74 Van O *Pr* tap, maar vgl Schulz *CRL* § 662 i v m die waarde wat hy aan die "Byzantine terminology" heg. Van die misverstand wat die terminologie kan skep, vind mens blyke in die volgende stelling in Hall en Kellaway *Servitudes* (1973) (hierna Hall en K) 9: "From one point of view all servitudes are personal for they must necessarily operate in favour of certain persons, while from another point of view they are all praedial for they consist in rights in corporeal things."

75 Kaser *ZPR* § 88 I 3; Justinianus se argaïserende tendens het nie in die prosesreg in dieselfde mate as in dié materiële reg deurgewerk nie; Kaser *ZPR* § 77: "Die Rückkehr zu den *actiones, interdicta, in integrum restitutiones, exceptiones* usw. bleibt auf die materiellrechtliche Seite beschränkt und ergreift nicht die prozessualen Einrichtungen"; Kaser t a p vn 28.

76 *D* 7 6 56 *D* 8 5 2 pr *D* 8 5 21 *D* 8 5 23 *D* 85 42 *D* 8 5 45. Al die tekste staan op die naam van Ulpianus as ontleen aan sy *liber XVII ad edictum*.

ediktale komitee.[77] Hierdie "ontegniese" naam[78] is dan as tiperend gesien van die teenhanger van die *actio negatoria*,[79] die aksie van 'n grondeienaar om 'n *servitus*- of *ususfructus*aanspraak af te weer.[80]

Die *actio confessoria* was beskikbaar in die geval van *iter* vir die eienaar van die heersende erf teen die eienaar van die dienende erf wat die reg misken het en ook teen elke derde wat die gebruik van die weg belemmer het.[81] As die eiser in die gelyk gestel is, het hy 'n bevel tot reële eksekusie gekry wat selfs in die geval van 'n reg van weg *manu militari* uitgevoer kon word ten opsigte van versperring van die weg.[82] Voorts kon skadevergoeding gelas word ten opsigte van eiser se interesse dat die weg onbelemmer gebly het.[83]

In die Justiniaanse reg was daar ook 'n *actio Publiciana* ter beskerming van servituutuitoefening en by name dan ook ten opsigte van die gebruik van 'n weg waarop die gebruiker streng regtens gesproke nog nie geregtig was nie.[84] Iemand wat van 'n *non dominus* van 'n *praedium* 'n toesegging van weg oor die *praedium* gekry het en toegelaat is om dit te gebruik en wel ook gebruik het, kon met 'n *actio*, wat na analogie van dié van die sogenoemde bonitariese eienaar en die "publiciaansgeregtigde"[85] ook *actio Publiciana* genoem is,[86] teen derdes[87] ageer. Dié *actio* sou so iemand beskerm tot tyd en wyl die *statutum tempus* vir *praescriptio* verloop het.[88]

In naam het die *interdictum de itinere actuque privato* in die Justiniaanse wetgewing bly voortleef. Die betrokke stof is onder titel 19 in *D* 43 ingedeel. Nou is die titel van *D* 43 1: *De Interdictis sive Extraordinariis Actionibus quae*

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77 i v m *actio confessoria vis-à-vis vindicatio servitutis* vgl I A 1 vn 2 hierbo en veral Rodger a w *passim*, in besonder sy slotsom t a p 214. Vgl egter in Kaser *RP* II § 246 II 5 die woord "jetzt" met sy skoorvoetende toegif aan Rodger in *RP* I § 106 VI.

78 Kaster t a p en vgl Jörs-K-W § 88 vn 3.

79 Vgl G 4 31 waar *negativa* voorkom. I v m die herkoms van die benaming *actio negatoria* vgl Rodger a w 211 e v en sy slotsom op 214.

80 Vgl G t a p en vgl *D* 8 5 2 *pr.*

81 Kaser *PR* II § 246 II 5 (a).

82 *D* 6 1 68 en vgl *D* 8 5 7 waar selfs in die geval van 'n *servitus oneris ferendi* daar sprake is van 'n bevel *ad factum praestandum* t o v die instandhouding van die stutmuur. I v m "non-pecuniary condemnation" vgl Wenger § 30 I 3; Kaser *ZPR* § 93 II 2 c. I v m *obligationes faciendi* en *non faciendi* vgl Wenger t a p *D* 42 1 13 1 *in fine* en Jolowicz N 444 vn 6.

83 *D* 6 1 68.

84 *D* 6 2 11 1.

85 I v m "bonitariese" of "praetoriese eienaar" en die "Publiciaansch gerechtigde" vgl *Van O Pr* § 33 34. Albei hierdie figure het *in via usucapionis* verkeer en het intussen die praetoriese *actio in rem* gehad.

86 *D* 6 2 11 1 en vgl *Van O Pr* t a p en Kaser *PR* II § 246 II 5b vn 42.

87 Maar teen die eienaar van die *praedium* sou hy gewoonlik nie slaag nie, want dié sou hom kon afweer net soos die *dominus* in die klassieke tyd die sg Publiciaansgeregtigde met 'n *exceptio dominii* kon afweer; vgl Schulz *CRL* § 98 i v m *exceptio dominii in formula Publiciana*, wat egter in 'n gegewe geval met 'n *replicatio* ontsenu kon word.

88 Van so 'n *actio Publiciana* t o v servituutoefening sou daar vroeër, na die *Lex Scribonia* (ongeveer 50 vC) wat die verkryging van *servitutes* deur *usucapio* uitgesluit het, nie sprake gewees het nie; *statutum tempus* 10 jaar *inter praesentes*, 20 jaar *inter absentes*: Kaser *PR* II § 246 II 3b saamgelees met § 245 III laat blyk dat die *actio Publiciana* in die Justiniaanse era van veel minder aktuele belang as vroeër was.

pro his Competunt. Na aanleiding van die uitwissing van die onderskeid tussen *actio* en *interdictum* reeds in die voor-Justiniaanse era,[89] met voortlewing egter van die materiële reg wat ontwikkel het onder die skild van die *interdictum*-prosedure van vroeër,[90] is die titel aanvaarbaar, behalwe vir sover die buitengewoonheid van die plaasvervangende *actiones* oorbeklemtoon is. Al buitengewoonheid wat per slot van rekening oorgebly het, was enkele reste van snelverloop.[91] Van die heel besondere prosesverloop na aanleiding van 'n *imperium*-draer se bevel het so goed as niks oorgebly nie. Die terminologie *actiones extraorinariae* is egter misleidend, aangesien die indruk geskep word as sou daar *actiones ordinariae* wees vir die betrokke gedingsoorsake, want soos Wenger dit op 'n plek[92] stel:

> "A procedure is extra-ordinary only as far and as long as another procedure is valid as 'ordinary.' "

D 43 1 se titel *De Interdictis sive Extraordinariis Actionibus, quae pro his Competunt* het dan ook inderdaad gehelp met die stig van 'n vaste idee dat 'n aksie vir 'n interdik ter beskerming van 'n reg van weg, of wat ook al, 'n subsidiêre karakter het in dié sin dat dit slegs beskikbaar is as daar nie 'n ander middel tot redres is nie.

2 GEMENEREG

Actio confessoria

Groenewegen verduidelik in sy *De Legibus Abrogatis*[93] dat in sy tyd die name van aksies nie in prosesstukke vermeld word nie. Hy beklemtoon dit dat die aksiename nie so uitgestip word nie, maar dat die aard en feite van die betrokke geval so eenvoudig en suiwer gestel word dat die gedingsoorsaak presies uitgeken kan word.[94] Dientengevolge, vervolg hy, het die name van aksies vir alle praktiese doeleindes in onbruik verval.[95] Groenewegen waarsku egter direk dat elke hofpraktisyn weet dat die aksies[96] as sodanig nog steeds gebruik word. Wat Groenewegen eintlik sê, is dat die materiële reg wat in 'n gegewe geval met 'n bepaalde aksie afdwingbaar was, steeds bly geld het,[97] hoewel die aksie nie by naam uitgeken is nie.

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89 vn 64 hierbo.
90 vn 66 hierbo.
91 vn 69 hierbo.
92 Wenger § 25 vn 1.
93 *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vicinisque Regionibus* (1669) uitgegee en vertaal deur Beinart 1974.
94 a w *ad I* 4 6; vgl ook Wassenaar *Practyck Judicieel ofte Instructie op de Forme en Manier van Procedeeren* (1746) hfst II 42.
95 Groenewegen t a p.
96 as' t ware as *innominati*.
97 d w s die Romeinse reg, behalwe in soverre die *leges abrogatae sive inusitatae* was.

Met verwysing na sy voorgaande uiteensetting verklaar Groenewegen as hy daarby kom:[98]

> "Confessoriae et negatoriae actionis nomen exolevit, per ea quae dixi ad rubr Inst de actione."[99]

Dit blyk duidelik dat Groenewegen van oordeel was dat die *actio confessoria*,[100] soos dit in die Justiniaanse wetboek gereël is, nog in Holland gegeld het al was dit nie onder dié naam nie.

By Voet[101] kom die name *actio confessoria/actio negatoria* wél nog voor vir die aksies om 'n grondserwituut af te dwing/af te weer onder die *Digesta*titel *Si servitus vindicetur vel ad alium pertinere negetur.*[102] Die *actio confessoria* by grondserwitute, sê Voet, kom die eienaar van die *praedium dominans* toe[103] teen enigeen wat die uitoefening van die serwituut belemmer[104] om sowel toekomstige as bestaande belemmering uit te skakel en om skadevergoeding weens belemmering te verhaal.[105] *In fine*,[106] in sy kommentaar op hierdie titel, verwys Voet na wat hy in die algemeen oor die *confessoria* en die *negatoria* gesê het in verband met dié *actiones* by *usus fructus*.[107] Daar sê hy dat die *confessoria* 'n *actio in rem arbitraria* is.[108] Vir die formulier gebruiklik by die *actio confessoria*, verwys Voet na Wassenaar,[109] wat by wyse van 'n voorbeeld die volgende *conclusie* van eis stel:

> "Als daar komt Recht van servituit of diensbaarheit, so Concludeert den Impetrant Actione Confessoria, Ten fine verklaart sal worden de servituit, van aldaar geen licht te mogen betimmeren, hem Impetrant ofte zyn achterkamer te competeren, ende dat dienvolgende Gedaagde, als Possesseur van zyn huis, sal worden gecondemneert de constitutie van deselve servituit te lyden ende gedogen, ende alle hinder en letsel in prejudicie van

98 a w *ad D* 8 5 3.
99 Beinart vertaal: "The terms actio confessoria and actio negatoria are obsolete, as follows from what I have said ad the rubric of Inst 4 6."
100 in die *negatoria*.
101 *Commentarius ad Pandectas* vol 1 (1698) 8 5 1.
102 Welke titel deur Gane in *The Selective Voet being the Commentary on the Pandects* (*Paris Ed of 1829*) (1955) (hierna Voet Gane) vol 2 soos volg vry vertaal word: "The Declaratory and Negatory Actions on Servitudes." Chitty in sy vertaling *Voet's Titles on Vindicationes and Interdicta* (1893) was versigtiger met die titel van 8 5: hy laat die aksiename *confessoria* en *negatoria* deurgaans onvertaal. By die titel van *D* 7 6 *Si usus fructus petetur vel ad alium pertinere negetur* vertaal Gane vry met "Confessory and Negatory Actions on Usufruct." Gane se vertalings laad duidelik blyk hoe tegnies onsuiwer die teenstellende nomenklatuur *confessoria negatoria is*; vgl vn 78 hierbo.
103 Ander saaklikgeregtigdes, bv die verbandnemer, *emphyteuta, superficiarius*, is aktief gelegitimeer met *actiones utiles* geskoei op die lees van die *actio confessoria*: Voet 8 5 2.
104 Voet t a p.
105 Voet 8 5 3.
106 8 5 7.
107 *ad D* 7 6.
108 Gane vertaal *arbitraria* met "discretionary"; i v m die werking van die sg *clausula arbitraria* in die *formula* in die klassieke tyd sien vn 9–17 hierbo. Vir *arbitrium iudicis* (met sy *iussum de restituendo* (vgl vn 9 hierbo) is in die *Digesta officium iudicis* geïnterpoleer (n a v die verval van die reël m b t *condemnatio pecuniaria*), want in die Justiniaanse era was dit die regter se amptelike plig om 'n *iussum de restituendo*, d w s 'n bevel tot reële eksekusie, te gelas; vgl Van O *Pr* § 419.
109 a w hfst I 46 § 2.

> dien gedaan, kosteloos en schadeloos af te doen, met interdictie van gelyke meer te doen, Cum expensis etc."[110]

Van Leeuwen[111] laat duidelik blyk dat die Justiniaanse reg met betrekking tot "Dienstbaarheden," sowel "Huys-" as "Velddienstbaarheden," in Holland gegeld het, met dien verstande dat vestiging deur "overgift" deur 'n "opdraagen . . . voor den Geregte" moes geskied,[112] die termyn vir verkrygende verjaring "derdendeel van honderd Jaar"[113] was en dat plaaslike keure soms besondere andersluidende reëlings bevat het.[114] Aan die einde van die tweede boek van *Het Roomsch Hollandsch Recht* bespreek Decker met verwysing na Voet *ad D tit si servitus vindicetur*

> "het Roomsche Recht bekenden actien, genaamd confessoria en negatoria"

en die gebruik "derzelver" in sy tyd. Die *confessoria* is ingestel teen die eienaar van die

> "lydend perceel, onder anderen meede tot praestatie der Cautie de in posterum non turbando."

Dan vervolg hy egter, met verwysing na Groenewegen, dat die naam van die aksie "geëxolveert" geraak het en dat die

> "gemelde Cautie . . . niet meerder in aanschouw komt,"

maar verklaar dan direk:

> "Omtrent die laatsten echter moet ik aanmerken, dat de *interdictie van gelijke meer te doen* zichtbaar in plaatse van de voorsz cautie is gesubintreert"

en daaromtrent verwys hy na Wassenaar se voorbeeld van 'n *conclusie* van eis wat hierbo aangehaal is.

By Van der Linden[115] word twee voorbeelde van "Conclusien" van "actien betreffende servituuten" aangehaal. Die eerste voorbeeld lui:

> "Ende Eysch doende concludeerde, dat de Gedaagde zal worden gecondemneert het overpad, ten processe gemelt, te laaten in dien staat, als het zelve bij het doen van het Transport in dato den . . . is geweest, namelijk regt door over het erf van den Gedaagden, van de brug over de Dijksloot leggende af, tot aan het hek bij de gemeene weg toe ter breedte van zes voeten; dat voorts de Gedaagde zal worden gecondemneert te gehengen en te gedogen dat aldaar een vrije en onverhinderde passagie en overgang voor menschen en beesten ten dienste en behoeven van den Impetrant zal zijn en blijven."

Die tweede voorbeeld lui:

> "Ende Eysch doende concludeerde, dat de Gedaagde zullen worden verklaard onbevoegd te zijn tot het amoveren of doen amoveren van de oude stijl van de poort, gang, of uitgang ten processe gemeld, en het stellen of doen stellen, plaatsen of doen plaatsen, en houden van dezelve, zoodanig en ter plaatse, als zij Gedaagdens eigener auctoriteit en buiten kennis en toestemming van de Impetrant feytelijk hebben onderstaan die te doen stellen en plaatsen; als mede het invoegen en maniere voorsz. verhoogen van die voorgedagte gang of uitgang, het sluiten van dezelve gang of uitgang, en anderzints; dat voorts de Gedaagdens zullen worden gecondemneert al het zelve respectivelijk wederom te

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110 Die betrokke serwituut was die *servitus ne luminibus officiatur.*
111 *Het Roomsch Hollandsch Recht met Aantekeningen uitgebreid door C W Decker* (1780) II 19 20 21 22.
112 a w II 19 2.
113 a w II 19 3.
114 Vgl II 19 4 en II 20 5.
115 *Verhandeling over de Judicieele Practÿcq of Form van Procederen* (1794) II 6 5 (b).

herstellen of doen herstellen in den voorigen en behoorlijken staat, en den Impetrant daaromtrent van zijn voorig recht en gebruik vrij en onverhindert te doen en laten jouisseeren, alles met vergoeding van de kosten, schaden, en intressen aan de Impetrant door de bovengemelde usurpatien en feijtelijkheden reeds veroorzaakt, of nog te veroorzaaken."

In albei voorbeelde gaan dit oor 'n reg van weg wat die eiser met 'n *actio confessoria* beskerm sou wou kry. Vir dié doel word 'n interdik teen belemmering in die vooruitsig gestel, die regsmiddel wat soos Wassenaar en Van Leeuwen laat blyk het, in plaas van die "cautie de in posterum non turbando" gekom het.

Uit verslae van gevalle wat voor die *Hooge Raad* gedien het, is dit duidelik dat die Romeinse reg ten opsigte van serwitute telkens toegepas is[116] behalwe waar plaaslike keure 'n afwykende reëling bepaal het.[117] Oor 'n aantal gevalle waar dulding van 'n serwituut pertinent gelas is, word verslag gedoen. Lucius Titius het 'n *vindicatio servitutis actus* ingestel ten opsigte van drie *fundi vicini.* Die *Schepenbank* van Wateringen het ook die eienaar van die verste *fundus* op 15 Januarie 1707 tot dulding gelas na bewys van langdurige gebruik van die pad, die *Hof van Holland* het op 11 April 1710 'n appèl teen die vonnis verwerp en die bevel tot dulding bekragtig, soos ook die *Hooge Raad* per slot van rekening gedoen het nadat 'n formele gebrek ten opsigte van die bewyslewering aangesuiwer is.[118] Petronella het sonde met haar buurman gekry oor die gebruik van 'n gang vir die doel onder andere om "haar aschput to ledigen." Die *Hooge Raad* het 'n "sententie" gelas dat Petronella *pendente lite* toegelaat word om die gang te gebruik. Die buurman sluit die deur na die gang met 'n grendel. Petronella lê die "sententie ter executie bij gijseling" aan die *Hooge Raad* voor. Die buurman antwoord dat hy bereid is om die deur telkens oop te sluit as Petronella hom daartoe sou aanmaan. Die *Hooge Raad* besluit op 30 Januarie 1711 dat die grendels *omnino* verwyder moet word en dat Petronella nie met *preces vel*

116 Van Bynkershoek *Observationes Tumultuariae* (hierna *OT*) I 184 (1706) 422 (1708) 482 (1709) 492 (1709) 555 (1709) 675 (1711) 693 (1711) 734 (1711) 577 (1712); II 1695 (1720) 2444 (1728). In die pasvermelde geval 2444 gaan dit oor 'n *actio negatoria*: Maevius, die eienaar van 'n groot huis aan die Prinsegrag, het 'n klein huisie bekom wat 'n reg van weg en waterafloop oor Titius se erf aan die Keisersgrag het; Maevius omskep die klein huisie in 'n tuinhuis, slaan 'n poort in die muur tussen die groot huis en die klein huisie (nou tuinhuis); die vraag wat voor die *Hooge Raad* gedien het na aanleiding van die leerstuk *praedio utilitas* was of Maevius gedwing kon word om die poort toe te maak om hom sodoende as eienaar van die groot huis te verhinder om die reg van weg wat sy klein huisie (nou tuinhuis) toekom, te gebruik; die *Hooge Raad* was eenstemmig oor die toepaslikheid van die *praedio utilitas*-leerstuk; vier van die raadslede was van oordeel dat die muur afgesluit moet word of dat Maevius op 'n ander manier verhinder moet word *ut jure suo abuti posset*; die ander vyf raadslede kon nie akkoord gaan nie; hulle was van oordeel *satis esse rati sententia declarari quid juris sit, reliqua executioni esse reservanda.* Dit is duidelik dat as die raadslede se stemme in hierdie geval andersom was, daar ingevolge die *actio negatoria* reële eksekusie gelas sou gewees het.

117 Vgl *OT* II 1093, wat volgens die *Rotterdammenses leges de servitutibus* van 16 April 1674 (GPB IV 481) beslis is en waarin "reële executie" gelas is.

118 *OT* I 675.

admonitio hoef te kom vir geleentheidsgebruik van die gang nie. Vonnis word teen die *vicinus* gewys ook ten opsigte van Petronella se koste.[119]

Na aanleiding van voorgaande uiteensetting word die oortuiging gestel dat die eienaar van die heersende erf volgens die gemenereg sy serwituut reëel afgedwing kon kry met 'n regsvordering wat ons nie hoef te skroom om 'n *vindicatio servitutis* te noem nie. *Rei vindicatio* is alledaagse regstaalgebruik en dienooreenkomstig kan gerus ook maar van *vindicatio itineris*, *vindicatio aquaeductus*, *vindicatio tigni immittendi* en dergelike meer gepraat word. So 'n taalgebruik sou sowel gerief as suiwer regsdenke bevorder.

3 SUID-AFRIKA

Vindicatio itineris 1982

Die regshulp waarop aanspraak gemaak is met 'n *vindicatio itineris*, het in *Penny v Brentwood Gardens Body Corporate*[120] pertinent in gedrang gekom.

Die feite van die saak vir sover relevant vir hierdie stuk was: elkeen van die applikante was die eienaar van 'n erf en was as sodanig geregtig op 'n reg van voetpad, 3 voet 6 duim wyd, oor respondent se buurerf.[121] Op die dienende erf is langs die noordelike grens 'n muur opgerig met 'n poort daarin om deurgang, 3 voet 6 duim wyd, aan gebruikers van die voetpad te verleen. Die poort het met 'n veermeganisme vanself toegeklap en 'n outomatiese slot[122] het met die toeklap die poort sonder meer gesluit. Applikante het beswaar gemaak teen die sluit van die poort. Respondent het aangebied om sleutels vir elke applikant beskikbaar te stel, maar nietemin volhard met die "self-closing and self-locking gate, which will require a key only for opening."[123] Die applikante het op kennisgewing van mosie aansoek gedoen vir 'n bevel "directing the — respondent to desist from locking the gate erected on the northern boundary of the [servient] property . . ."[124] Die aksie wat ingestel is, was onteenseglik 'n *vindicatio itineris*, naamlik dat die voetpad nie belemmer word met so 'n poort met die outomatiese sluitmeganisme nie.[125]

Regter Van den Heever het na gedane ondersoek na die uitleg van die bepalings, waarin die reg van voetpad omskryf is, en na die feite, tot die gevolgtrekking gekom:

> "There can to my mind be no doubt whatever that the erection of a locked gate is a diminution of applicants' rights."[126]

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119 *OT* I 693: Petronella het slegs helfte van die koste gekry; geen bevel t o v die ander helfte nie *ob rationes quas referre nihil attinet*; 'n mens vra jouself af wat die kloeke Petronella misdrywe het om in so 'n mate die kostevoordeel te verbeur.

120 1983 1 SA 487(K).

121 Dat daar op die buurerf sg "deeltitelontwikkeling" onder die Wet op Deeltitels 66 van 1971 plaasgevind het na vestiging van die reg van voetpad, is vir doeleindes van die saak nie ter sake nie.

122 vermoedelik 'n Yale-slot.

123 490B–C.

124 488A.

125 Wat sou die kloeke Petronella van *OT* 693 (vgl vn 119 hierbo) met haar probleem met die *repagula*, die grendels, tog te sê gehad het oor so 'n Yale-slot?

126 490H.

Respondent se advokaat het in sy pogings om die aangevraagde bevel af te weer, onder meer aangevoer:

> "By seeking an interdict applicants have vested the Court with a discretion and on the facts alleged it should not be exercised in their favour.[127]

Hierop reageer regter Van den Heever soos volg:

> "There remains [counsel's] argument that since applicants seek an interdict they have conferred on me a discretion, which I should exercise in respondent's favour. He refers to Jones and Buckle *Civil Practice of the Magistrates' Courts in SA* vol I at 81. No other remedy was suggested by which the rights of the dominant tenements could be preserved. And the facts placed before me neither satisfy me that respondent has no other practical method of excluding people from its grounds who are not entitled to be there, nor that the [owner of the servient property] were the gate not permitted to be locked, would be so detrimentally affected that the Court should exercise any equitable jurisdiction it may have, or discretion, in respondent's favour."[128]

Die bevel wat deur applikante aangevra is, is met koste toegestaan.

Oor die toestaan van die *vindicatio itineris* word nie geredekawel nie. Inteendeel, dit word verwelkom dat regter Van den Heever in die gegewe geval nie vir die hof 'n "equitable jurisdiction, or discretion" aangematig het nie. Na aanleiding van die *dictum* wat hierbo aangehaal is, kan egter geredeneer word dat die hof in 'n ander geval wel die bevoegdheid het om 'n *vindicatio itineris*, trouens ook enige aksie ter handhawing van 'n grondserwituut, sy deugdelike trefkrag te ontneem onder die dekmantel van die uitoefening van 'n diskresie.[129]

So 'n diskresie sou 'n wesenlike bedreiging vir 'n grondserwituut inhou. Reeds sedert die klassieke tyd geld vir dié regte streng geldigheidsvereistes, ook om óórbelasting van 'n dienende erf te voorkom.[130] Boonop word van die eienaar van die heersende erf verwag om sy reg *civiliter modo* uit te oefen.[131] Ook dit dien om grondserwitute so min doenlik beswarend vir die dienende erf te maak. 'n Bykomstige beskerming vir die dienende erf na aanleiding van 'n diskresionêre bevoegdheid wat 'n hof sou hê om 'n *vindicans servitutis* eventueel 'n surrogaat van 'n paar rand vyftig in plaas van sy serwituut te gee, is ondenkbaar.[132] Dit sou die doodsklok vir serwitute kon lui. 'n Reg wat die draer daarvan nie sou kon waag om doelmatig af te dwing nie, sou in geen regstelsel op die duur lewensvatbaar bly nie.

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127 488G–H.
128 491E–G.
129 Dit sou eweseer kon geld vir die *actio negatoria* ter afwering van aangematigde serwituutuitoefening waar die eienaar hom dan by die aanvra van die interdik kwansuis ook sou blootstel aan "a discretion with which he has vested the Court."
130 Die reël *servitutes in faciendo consistere nequeunt* was in *Schwedhelm v Haumann* 1947 1 SA 127 (OK) en *Van der Merwe v Wiese* 1984 4 SA 8 (K) ter sprake en vorm ongetwyfeld nog deel van ons reg; vgl Van der Merwe *Sakereg* (1979) 337. Ook die leerstuk van *praedio utilitas* is nog deel van ons reg: Van der Merwe a w 330 en vgl *OT* II 2444 wat hierbo in vn 116 bespreek is. R Van den Heever, terloops, beskryf in die *Penny*-saak vn 120 hierbo die 3' 6"-voetpad "as not one clearly without utility."
131 Van der Merwe a w 328.
132 Vgl vn 146–147 hieronder.

4 SLOT

Ten slotte word die vraag gestel: Vanwaar Gehazi die advokaat met sy betoog dat 'n eiser wat 'n interdik om sy goeie reg op 'n voetpad gehandhaaf te kry, hom aan diskresie blootstel? Na my oordeel is die interdik by ons in die algemeen, maar in die besonder en veral by serwitute, omhul met 'n waas van verwarring wat deur 'n reeks van bydraende faktore gegenereer is. Enkele van die faktore is, glo ek, in die voorafgaande stuk uitgeken: Daar is byvoorbeeld die titel van *D* 43 1 wat die indruk skep dat 'n *interdictum* 'n *actio extraordinaria* sou wees;[133] voorts is daar die *clausula arbitraria* in die *formula* van die *vindicatio servitutis*, wat dan volgens Gane se vertaling van Voet van die *actio confessoria* (beter beskryf as die *vindicatio servitutis*) 'n "discretionary action" sou gemaak het.[134]

> Dan is daar ook nog diegene soos 'n Hall en Kellaway wat beweer dat die
>
> > "forms of action which were employed in Holland[135] are not recognized in our modern procedure,"
>
> en dat hulle vervang is deur
>
> > "a form of action [which] is a declaration of rights combined with . . . [a claim for] an interdict which it is in the discretion of the court to grant . . . an interdict [which] will not be granted when an award or damages provides an adequate remedy."[136]

Die stelling van Hall en Kellaway dat *die actio confessoria* (beter beskryf as die *vindicatio servitutis*) van die gemenereg in ons praktyk vervang is deur 'n aksie wat totaal ander regshulp tot gevolg gehad het, is nie aanvaarbaar nie.[137] Al wat volgens Groenewegen in onbruik geraak het, was die naam van die aksie.[138] Weliswaar, die *cautio de posterum non turbando* is deur 'n "inderdictie van gelyke meer te doen" vervang, maar dit het reeds in Wassenaar se tyd gebeur[139] en dit het niks afgeding van die wese van 'n aksie wat op 'n *condemnatio in ipsam rem*, 'n "Naturalleistung" gerig was nie.[140]

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133 Vgl die teks tot vn 84–92 hierbo.
134 Vgl vn 106 hierbo.
135 d w s die *confessoria* en *negatoria*.
136 Hall en K 153 154.
137 Geen oortuigende gesag vir die stelling dat die regshulp van die gemenereg nie meer beskikbaar sou wees nie, word aangehaal nie; In *Wade v Paruk* (1904) 25 NLR 219 224 word van die *actio negatoria* gesê: "Apparently the name of this action became obsolete." In *Setlogelo v Setlogelo* 1921 OPD 161 164 behandel rp De Villiers (weliswaar *obiter*) die *actio negatoria* as 'n lewende instelling van ons reg. Ander skrywers wat die indruk help skep dat die *vindicatio servitutis*, of *actio confessoria* soos hulle dit noem, in onbruik sou verval het, is o a Maasdorp *The Institutes of South African Law* vol 2 (1976) deur Hall hfst XVI s v "Actions Based on Servitudes"; Van der Merwe vn 387; vgl ook Silberberg *The Law of Property* (1975) 291 vn 32; Lee en Honoré *Family, Things and Succession* deur Erasmus, Van der Merwe en Van Wyk (1983) § 436 vn 1.
138 Vgl vn 93–100 hierbo.
139 Vgl vn 109–110 hierbo en vn 114 hierbo vir Decker op Van Leeuwen in dié verband.
140 Vgl bl 00–00 hierbo *in fine*.

Vervolgens, die standpunt van 'n Hall en Kellaway en andere[141] oor 'n diskresionêre bevoegdheid wat 'n hof sou hê in elke en iedere geval waar 'n interdik aangevra word, is eweneens nie aanvaarbaar nie.[142] Hierdie standpunt is die gevolg van 'n ongelukkige gelykstelling van elke interdik[143] met die mandament poenaal van die gemenereg, in elk geval wat die voorvereistes vir die verlening daarvan betref.[144] Hierdie gelykstelling het vermoedelik onder die invloed van die Engelsregtelike "injunction" gebeur.[145] Dit word ter oorweging gegee dat hierdie gebeure deurtastende navorsing verdien wat ook uit regshistoriese gesigspunt benader moet word. Sodanige navorsing kan eventueel voorkom dat die vraag op 'n dag gestel word of die "equitable jurisdiction, or discretion" wat dan by 'n *vindicatio itineris* sou geld, nie eweseer vir die *rei*

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141 Nathan *The Law and Practice Relating to Interdicts* (1939) 1 *et passim*, veral hfst V: Harms "*Interdict*" *LAWSA* 2 (red Joubert) § 309 e v, veral §§ 319 320; Jones en Buckle *The Civil Practice of the Magistrates' Courts in South Africa* deur Baker, Erasmus en Farlam (1980) 67 e v, veral 78–82.

142 Van so 'n diskresie is daar, in elk geval wat die *vindicatio servitutis* betref, nòg in die Justiniaanse reg (vn 82 hierbo) nòg in ons gemenereg enige sprake.

143 d w s of dit nou 'n sg "interim interdict" is wat *ex parte* of na kennisgewing aan die teenparty aangevra is, en of dit nou 'n sg "final interdict" is.

144 *Setlogelo v Setlogelo* 1914 AD 221 227. In hierdie saak het ar Innes die "requisites for an interdict" soos volg saamgevat: "a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy." Geen gesag is aangehaal spesifiek vir hierdie "well known requisites" nie, maar uit wat volg op die samevatting is dit duidelik dat die "requisites" ontleen is aan Van der Linden se vereistes vir die mandament poenaal (*Institutes of Holland* waarna verwys is deur ar Innes — Juta se vertaling (1897) van *Regtsgeleerd Practicaal en Koopmans Handboek* (1806) 3 1 47 waarmee ook Van der Linden se *Verhandeling over de Judicieele Practijck, of Form van Procederen* (1794) II 19 § 1 vergelyk kan word). Die "requisites" het eintlik ter sprake gekom i v m die vraag of die element "irreparable injury" ook nog bewys moet word as "a clear right" reeds bewys is; die ander "requisites" het nie pertinent ter sprake gekom nie. Die vereistes is deur Van der Linden vir die mandament poenaal uitgeken as voorvereistes vir 'n buitengewone middel wat meermale summier verleen is om die *status quo* te bewaar, gewoonlik wanneer daar *periculum in mora* was en wat 'n bevel was waaraan 'n besondere hoë strafsom vir ongehoorsaamheid gekoppel is. Van der Linden (*Judicieele Practijcq* t a p) sê dan ook dat die howe "in het verleenen van de Mandamenten zeer difficiel" was (*Kersteman Hollandsch Rechtsgeleerd Woorden-boek* (1777) bestempel dan ook die "mandament poenaal" (sinoniem vir "interdictie") as "odieus en hatelyk," "egter 'n Interdictie zoo odieus niet als een arrest"). Dat hierdie vereistes na 1914 nagenoeg konsekwent toegepas is i v m 'n sg "final interdict," is ten dele daaraan te danke dat vir die kwessie of vir appellant Setlogelo wel 'n appèl beskikbaar was, die appèlhof moes uitmaak of die weiering deur die hof *a quo* om die bevel *nisi* te bekragtig die effek van "a definite sentence which is subject to appeal" gehad het — Lord De Villiers op 226 van die verslag. I v m die verdere verloop van die gelykstellingsproses, vgl die geskrifte van die skrywers waarna in vn 141 hierbo verwys is. Terloops, as Lord de Villiers in sy uitspraak liewer die beginsels van die *actio Publiciana* sou toegepas het n a v Voet 6 2, veral 6 2 11, sou ons waarskynlik ar Innes se uitspraak gespaar gebly het. Vir enkele besonderhede i v m die *actio Publiciana* in die Justiniaanse reg, vgl vn 85 hierbo.

145 Vgl Harms a w § 311: "The rules relating to the prerequisites for the granting of an interdict are founded upon Roman Dutch law [met beroep op *Setlogelo v Setlogelo* hierbo en Van der Linden se a ww *Koopmans Handboek* en *Judicieele Practijcq*]. The practical application of those rules has been affected by English judgments dealing with injunctions. The English law relating to injuctions is very similar to South African law but there are some important discrete [sic] differences."

vindicatio geld nie.[146] Na my oordeel moet die punt van 'n ysberg wat eventueel die *rei vindicatio* sou kon kelder, betyds uitgeken word.[147]

146 Dat daar al 'n mate van ongerustheid in hierdie verband is, blyk uit Harms a w § 320: "The discretion of a court to refuse a final interdict, provided the abovementioned three requisites [van Van der Linden vir die mandament poenaal] are present, is very limited and depends exclusively upon the question whether the alternative remedy is adequate." Dat 'n "discretionary power" gevaar vir 'n eienaar kan inhou, selfs in die regsbedeling in Engeland, blyk uit *Halsbury's Laws of England* 4e uitg vol 24 § 936: "The power of awarding damages in lieu of an injunction is discretionary and must be exercised with an intimate knowledge of the facts and so as to prevent people being compelled to sell property against their will at a valuation. Moreover a defendant must not be encouraged to believe that he may do a wrongful act on the payment of a given sum in terms of money." As hierdie waarskuwing vir die regsbedeling in Engeland gestel moet word, geld dit seer sekerlik *a fortiori* vir ons; vgl De Wet en Yeats *Kontraktereg en Handelsreg* deur De Wet en Van Wyk (1978) 191 i v m daadwerklike vervulling van 'n kontraktuele verpligting: "Daar bestaan geen rede om reële eksekusie te weier waar die skuldenaar kan presteer nie. Hierdie reël kan miskien in die Engelse reg inpas waar reële eksekusie by wyse van 'n guns aan die eiser toegeken word, maar by ons het die eiser aanspraak op reële eksekusie en kan dit hom slegs op gegronde redes geweier word. Dat hy skadevergoeding op die verweerder kan verhaal, is geen rede om sy eis vir reële eksekusie af te wys nie. Daar word selfs beweer dat 'n hof gewoonlik nie reële eksekusie sal beveel by *obligationes faciendi* nie. Hiervoor is in ons gemene reg geen steun te vind nie. Ook in ons praktyk is vir hierdie stelling nie voldoende steun aan te wys nie. In baie gevalle het ons howe al reële eksekusie toegestaan by 'n verpligting om iets te doen." *Van Wyhe v Nothnagel* 1951 3 SA 815 (N) is skadevergoeding in plaas van 'n interdik teen die belemmering van 'n reg dan ook nie ernstig oorweeg nie (817C–D, maar met verwarrende motivering) en in *Stuttaford v Kruger* 1967 2 SA 166 (K) is dit glad nie oorweeg nie.

147 In *D* 25 2 9 staan 'n waarskuwing op Paulus se naam: *non enim aequum est invitum suo pretio res suas vendere*; vgl ook *D* 6 1 70 waar op Pomponius se naam staan: *ne in potestate cuiusque sit per rapinam ab invito domino rem iusto pretio comparare.*

Kom die vermetelheid, dan kom die skande, maar by die beskeidenes is wysheid. (Spreuke 11 : 2.)

Amendments to the divorce act – a question of priorities*

ID Schäfer
BA LLB PhD
Senior Lecturer in Law, Rhodes University

OPSOMMING

Wysigings aan die Wet op Egskeiding: 'n Kwessie van Prioriteite

Alhoewel die Wet op Egskeiding van 1979 in sommige opsigte te kort skiet, het dit broodnodige veranderinge in die materiële egskeidingsreg teweeggebring. In die breë gesien het egskeidingshowe ook positief op hierdie nuwe uitdaging gereageer.

Dit is egter onvermydelik dat die bepalings van die Wet op Egskeiding onder die soeklig geplaas moet word. Daar word voorgestel dat daar op die moontlike hervorming van die prosedure van die egskeidingsaak gelet moet word eerder as om die wyse van verbetering van die kwaliteit van die materiële reg, as een van die periferale besonderhede van egskeiding, te beklemtoon. Daar word byvoorbeeld voorgestel dat moontlike metodes van uitskakeling van die afkeurenswaardige kenmerke van die adversoriese stelsel ondersoek moet word en dat daar gekyk moet word na wyses om betekenisvolle samewerking tussen howe en sosiale en gedragswetenskaplikes te verseker.

INTRODUCTION

The Divorce Act[1] must be seen in its historical context for a proper appreciation of its main provisions. When the influence of the canon lawyers was at its peak round about the twelfth century AD divorce was absolutely forbidden[2] because marriage was accorded a sacramental character on the basis of "what therefore God hath joined together, let no man put asunder."[3] An important step towards the re-secularisation of the divorce law took place at the time of the Reformation as a result of which divorce was again permitted, but only on the grounds of adultery and malicious desertion. This, for its time, constituted a remarkably progressive step. For example, by way of comparison, the process towards the secularisation of the English divorce law initially proceeded at a much slower

* This article was written before publication of the recommendations of the Hoexter commission.

1 70 of 1979. The act came into operation on 1 July 1979 (s 19).

2 See generally Hahlo *The South African Law of Husband and Wife* (1975) 1–14; Wessels *History of the Roman-Dutch Law* (1908) 468–472. On the hypocritical reaction of the canon lawyers to the reality that marriages continued to break up notwithstanding the ban on divorce see Schäfer *The Concept of Family Courts in South Africa* (unpublished thesis University of Natal (Durban) (1982)) 255–257.

3 Matthew 19:6; Mark 10:9.

pace.[4] It was only in 1857 that divorce as of right was permitted by the Divorce and Matrimonial Causes Act,[5] and then only on the ground of adultery on the part of the wife, or of adultery plus incest, or bigamy, or sodomy, or cruelty or desertion on the part of the husband.

Despite the assertion of Schreiner JA in *Daniels v Daniels*[6] that our divorce law did not stop growing when our forebears came to South Africa, adultery and malicious desertion stood the test of time for some three centuries until 1979. Before that, the next significant step in the development of our divorce law was the promulgation of the Divorce Laws Amendment Act[7] which created two further grounds of divorce, namely, seven years' incurable insanity[8] and imprisonment for five years after being declared an habitual criminal.[9]

And so it eventually came to pass that the Divorce Act found its way into the statute books in 1979. This act now permits divorce on two grounds only: irretrievable breakdown and mental illness or continuous unconsciousness.[10] Given the fact that the development of our divorce law has been a slow and at times painful process, it must nevertheless be conceded that the Divorce Act represents both a dramatic and a welcome change from the old to the new. That this change has taken place is by no means surprising in the climate of divorce law reform virtually the world over.[11] It is trite that the South African family law is also in a state of flux.[12] However, notwithstanding the fact that some long overdue changes have been effected to our divorce law, the main purpose of this article will be to try and show that there has been an undue emphasis on a call to reform those sections of the act in respect of which certain teething difficulties have been experienced but which are not necessarily in need of urgent attention. For example, it could be argued that sections 3, 4 and 5 of the Divorce Act in their present form, while not perfect, are not in need of urgent overhaul.

4 For a comprehensive treatment of the historical background to the English law of marriage and divorce see Jackson *The Formation and Annulment of Marriage* (1969) 7–77; *Putting Asunder – A Divorce Law for Contemporary Society* (1966) (A report of a group appointed by the Archbishop of Canterbury in January 1964) 88–95. See also Rayden *Law and Practice in Divorce and Family Matters in All Courts* 1 (1979) 1–17.

5 20 and 21 Vict c 85.

6 1958 1 SA 513 (A) 523.

7 32 of 1935.

8 s 1(1)(a).

9 s 1(1)(b).

10 s 3. It could be argued that the Dissolution of Marriages on Presumption of Death Act 23 of 1979 creates a third ground of divorce. (Cf Hahlo and Sinclair *The Reform of the South African Law of Divorce* (1980) 21.) This, however, is not relevant for the purposes of this article.

11 Schäfer *supra* 146 n 1.

12 E g, in the 1975 *Annual Report of the South African Law Commission* (RP 45 of 1975) 10 it is acknowledged that "[t]he law must keep pace with developments in all spheres of life. We live in a time when developments in many fields are taking place rapidly. Changing circumstances require continuous adaptations in our law and often rules of law which applied for many years must be reconsidered." Cf also in this regard the questionnaire of the South African Law Commission of April 1982 which was directed towards an evaluation of the Divorce Act.

Furthermore, it could be argued that the increase in the divorce rate since the coming into force of the Divorce Act is not necessarily indicative of the fact that the act itself is in need of urgent remedial attention.[13] Indeed, the legislature might be better advised not to rush into hasty amendments to the act for fear of creating a "patchwork quilt of changes."[14] In this regard, the following words of Hahlo[15] are most appropriate:

> "A code cannot provide detailed rules for every situation that can arise in practice. It can only lay down general propositions, of the kind that are trite law in any legal system, leaving it to the courts to decide to what concrete factual positions they are to be applied.[16] Before the ink of a code is dry the work of judicial interpretation commences. Every case that resolves one question gives rise to new ones. Every amending statute raises fresh legal points for interpretation."

Instead, it will be submitted that greater attention should be focussed on those matters for which the Divorce Act has made no, or inadequate, provision.

THE GROUNDS OF DIVORCE

It is inevitable that the profundity of the changes brought about by the Divorce Act should invite a close scrutiny of its main provisions[17] by both the courts and legal commentators.[18] What emerges from the comprehensive discussion on the recent cases concerning sections 4 and 5 is that at least two of the legal commentators[19] have called for amendments to these sections, principally on the basis that they are irreconcilable. It is reasoned that the legislature intended to distinguish between the grant of a divorce on the ground of irretrievable breakdown, and the grant of a divorce on the ground of either mental illness or continuous unconsciousness. Yet, this intention is being frustrated by the gloss put on sections 4 and 5 by cases such as *Dickinson v Dickinson*,[20] the effect of which is to allow a plaintiff a choice whether to proceed under section 4 or section 5 in circumstances where the facts suggest that the plaintiff should properly proceed under section 5. It is further reasoned that this choice permits a

13 Cf Kovacs "Maintenance in the Magistrates' Courts: How Fares the Forum?" 1973 *Australian Law Journal* 725 734, who refers to the unfortunate habit "of looking to legal institutions for the correction of social ills, a practice which is both naive and evasive."

14 Cf Hahlo "100 Years of Marriage Law in South Africa" 1959 *Acta Juridica* 48.

15 "And Save Us From Codification" 1960 *SALJ* 432 433–434.

16 It is submitted that, in the main, the courts have succeeded admirably in this task in so far as the Divorce Act is concerned.

17 especially s 3, 4 and 5, which Hahlo and Sinclair *supra* 16 correctly refer to as the "hard core of the Divorce Act."

18 See in this regard *Dickinson v Dickinson* 1981 3 SA 856 (W); *Krige v Smit* 1981 4 SA 409 (K); *Smit v Smit* 1982 1 SA 606 (O) in the court *a quo* and 1982 4 SA 34 (O) for the full bench judgment. Comment on all these cases has already been published (i e with the exception of the full bench judgment in *Smit's* case) by Midgley "The Divorce Act; Reconsideration Necessary?" 1982 *SALJ* 22; Kaganas "In Sickness and in Health" 1982 *SALJ* 345; Van Loggerenberg "Enkele Opmerkings Oor die Verhouding tussen Artikels 4 en 5 van die Wet op Egskeiding" 1982 *THRHR* 174.

19 viz Midgley and Van Loggerenberg.

20 *supra.*

plaintiff to circumvent the protective provisions of sections 5(3),[21] 5(4)[22] and 9(2).[23]

Other misgivings have also been expressed as regards sections 4 and 5. These concern the apparent *lacunae* in the Divorce Act exposed by cases such as *Krige v Smit*[24] and *Smit v Smit*.[25] In *Krige's* case the defendant, though not institutionalised or unconscious, had suffered serious brain damage as the result of a condition described as aneurism[26] which was inoperable. In *Smit's* case the defendant had been virtually bedridden for about six and a half years ever since the birth of her youngest daughter during the course of which she had had an emergency caesarian operation. Three years after the birth of her youngest daughter an emergency brain operation revealed the presence of a malignant tumour. She was at the time of the action for divorce in an institution in the section for enfeebled persons. As in *Krige's* case, the defendant in *Smit's* case was neither institutionalised nor unconscious in the way prescribed by section 5. In each of these cases, it was clear that there was no possibility of the respective parties continuing with a normal marriage relationship so that it could be truly said that the marriages had irretrievably broken down[27] notwithstanding the fact that the evidence clearly suggested the presence of mental illness or physical disability in so far as the defendants were concerned. It was precisely because of this evidence that the question was raised whether the plaintiff in each case should not have been obliged to proceed under section 5. If the plaintiffs were obliged to proceed under section 5, would this not have meant that in each case they

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21 This provides for the appointment (which, it should be noted, is not peremptory) of a legal practitioner to represent a defendant in proceedings under s 5(1) or 5(2) at the possible expense of the plaintiff.

22 This requires the furnishing of security where necessary in respect of any patrimonial benefits to which a defendant in proceedings under s 5(1) or 5(2) may be entitled.

23 This prohibits the grant of a decree of forfeiture of the patrimonial benefits of a marriage where a divorce is granted under the provisions s 5(1) or 5(2).

24 *supra.*

25 *supra*: i e in the judgment of Brink J in the court *a quo.*

26 the abnormal enlargement of the brain.

27 A full discussion of the principles relating to irretrievable breakdown does not form part of this article. However, it is significant to note that a breakdown is said to have occurred when one of the parties to the marriage has evinced a fixed and settled determination to proceed with a divorce. In this regard Kotze AJ correctly observed in the full bench judgment in *Smit v Smit supra*: "Wat duidelik is, is dat geen egskeiding verleen sal word as een van die partye nie daarvoor vra nie en dit is dus vanselfsprekend dat dit onontbeerlik vir 'n egskeiding is dat minstens een van die huwelikspartye van voorneme moet wees 'om nie die status quo langer te aanvaar nie' . . . Daar sal dus altyd by minstens een (en meestal altwee) van die partye 'n subjektiewe bedoeling om te skei teenwoordig wees . . . [Maar die] voorvereiste is dat die Hof . . . oortuig moet wees dat die huwelik onherstelbaar verbrokkel is. Die faktore wat sodanige oortuiging kan bewerkstellig is nie definieerbaar nie . . . Dit kan wees dat een van die partye, sonder oënskynlike regverdiging, so vasbeslote is om nie met die huwelik voort te gaan nie dat dit . . . die Hof oortuig dat daar geen redelike vooruitsig op 'n normale huweliksverhouding bestaan nie" (40C–E). Cf *Dickinson v Dickinson supra* (860) and *Krige v Smit supra* (414C–G). See also n 36 below.

would have had to wait a further two years after the defendants had been formally committed to institutions in terms of the Mental Health Act[28] before being able to obtain a divorce?[29]

For her part Kaganas[30] in her criticism of Brink J's judgment in the court *a quo* in *Smit v Smit*, takes the view that remedial legislation is not really necessary. She correctly points out, for example, that section 9(1) of the Divorce Act gives the court sufficient discretion to ensure that the patrimonial benefits accruing to a defendant are protected where mental illness or physical disability is clearly evident but in circumstances where section 5 would be inapplicable. In fact, it is significant to note that in *Krige v Smit* the defendant's interests were more than adequately protected. Thus a *curator ad litem* had been appointed to look after the defendant's interests because he was unable to manage his own affairs.[31]

Subsequently, a legal representative was appointed by the court in terms of section 5(3) to represent the defendant in the divorce proceedings. Similarly, in *Smit v Smit*, the court was most conscious of the defendant's interests and welfare since she was represented by senior counsel and no orders as to costs or forfeiture of benefits were made. Furthermore, generous provision appears to have been made for her maintenance and support.[32]

That the difficulties surrounding the reconciling of sections 4 and 5 are probably more imagined than real seems to be the view of Kotze AJ in *Smit v Smit*[33] who accepted

> "dat 'n huwelik ontbind kan word, òf op grond van die geestesongesteldheid, òf voortdurende bewusteloosheid weens fisiese ongesteldheid van 'n verweerder . . . òf op grond van onherstelbare verbrokkeling van die huwelik, weens welke ander rede ook al."[34]

The judge then continued to stress that

> "die bedoeling wat art 5 onderlê was nie om in hierdie artikel alle gevalle van sogenoemde 'onmoontlikwording' te betrek nie, *maar slegs om daardie twee gevalle wat daarin genoem word, te betrek.*"[35]

The point stressed by Kotze AJ makes it clear that any mental or physical condition of the defendant not falling within the ambit of section 5(1) or section

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28 18 of 1973.

29 Van den Heever J provided a realistic answer to this question in *Krige v Smit supra* as follows: "Waar dit gemenesaak is dat die pasiënt se toestand beide geestelik en liggaamlik onherstelbaar is, is ek oortuig dat daar geen redelike moontlikheid bestaan dat sy permanent van hierdie voorneme sal afsien nie en sou dit sinneloos wees om haar te verplig om dit vir twee jaar uit te stel en die pasiënt, wat in die hospitaal versorg word, eers te laat opneem in 'n Staatsinrigting" (416D–E). It also emerged (*ibid*) that the plaintiff, a young and attractive woman, wished to re-marry.

30 *supra* 350–351.

31 411F.

32 42–43 of the full bench judgment.

33 *supra*.

34 38E.

35 38F, emphasis supplied.

5(2) can be considered as a fact which may be indicative of the irretrievable breakdown of the marriage.[36]

Kotze AJ did not consider it necessary to deal with the question whether a plaintiff should be permitted a choice of proceeding either under section 4 or section 5 where the evidence reveals that the defendant falls within the ambit of section 5.[37] However, it is submitted that where *Dickinson v Dickinson* has the effect of permitting such choice it was wrongly decided.[38] In this regard *Dickinson's* case is distinguishable from *Krige v Smit* and *Smit v Smit*. In the last two cases the defendant did not fall within the scope of either section 5(1) or section 5(2). There was, accordingly, no question of a choice involved at all. It is true that section 5 is not couched in peremptory terms whereby it is obligatory to proceed in terms of section 5 if the defendant falls within that section. However, as Hahlo and Sinclair[39] correctly point out, section 5 constitutes special law and as such should take precedence over section 4 which constitutes general law.[40] Accordingly, if the defendant does not come within the ambit of section 5 then the plaintiff will be able to proceed only under section 4 even though the defendant is suffering from a mental illness or physical disability. This condition may well be indicative of the irretrievable breakdown of a marriage as in *Smit v Smit*.[41] If the distinction made by Hahlo and Sinclair is the correct one (and it is submitted it is) then there can be no difficulty at all in reconciling the provisions of sections 4 and 5 in the above way.[42] It is submitted that if the question of the plaintiff's choice of proceeding under either section 4 or section

36 In this regard it is submitted that Coetzee J was correct in *Dickinson v Dickinson supra* when he said: "Die enigste vereiste is die objektiewe feit van onherstelbare verbrokkeling wat ookal die rede daarvoor mag wees. Daar is geen skuldvereiste van enige aard nie en al wat die Hof van oortuig moet wees is dat die huweliksverhouding tussen die partye so 'n toestand van verbrokkeling bereik het dat daar geen redelike vooruitsig op die herstel van 'n normale huweliksverhouding tussen hulle bestaan nie" (860D–E). See also n 27 above.

37 39C.

38 It will be recalled that the only reason why the plaintiff in *Dickinson v Dickinson* never proceeded under s 5(1) was because he apparently could not afford to pay for the expert psychiatric evidence required by that section. Coetzee J nevertheless indicated that he would have been prepared to grant the divorce on the ground of irretrievable breakdown but did not so grant the divorce only because there had been a defective service of the summons on the plaintiff (861D–E).

39 *supra* 38.

40 It is interesting to note that Hahlo (1979 *Annual Survey* 49–50) employs a similar argument (but with less conviction) in regard to the question whether a person between the ages of 18 and 21 who has been declared a major under the Age of Majority Act 57 of 1972 requires parental consent to marry. He suggests that it is "just arguable" that as "special law" s 24 of the Marriage Act 25 of 1961 should take precedence.

41 *Krige v Smit* is distinguishable from *Smit v Smit* in this respect because in the former case Van den Heever J found that the marriage had irretrievably broken down because "dit wel bewys is, *nie deur haar getuienis aangaande die pasiënt se beroerte en huidige toestand nie*, maar in haar getuienis dat sy iemand gevind het met wie sy weer wil trou" (416D, emphasis supplied).

42 Cf Barnard *The New Divorce Law* (1976) 64 and Olivier *Persons and Family Law* (1980) 297–298.

5 should come up for consideration before a higher court *Dickinson's* case should not be followed.[43]

With regard to the possible prejudice to a defendant who is divorced in terms of section 4 where mental illness or physical disability is a factor in the irretrievable breakdown, it is submitted that Kotze AJ in *Smith v Smit* had the opportunity of effectively disposing of any possible problems in this regard. Unfortunately, although on the right track he did not go far enough. Thus he held[44] that "dit nie ontken kan word dat die Wet wel 'n diskresie aan die Hof verleen nie."[45] However, Kotze AJ cautioned against the arbitrary exercise of this discretion by saying,[46] in effect, that the court would exercise its discretion in this regard only in terms of either section 4(3)[47] or section 6(1).[48] He did not feel it was necessary for the purposes of his judgment to decide whether the court's discretion was any wider than this. This, it is submitted, is a pity. The judge could have gone further by holding that the grant of an order for divorce (where there is evidence that the defendant is suffering from a mental illness or physical disability in circumstances falling outside the scope of section 5) could be postponed until the plaintiff has made adequate arrangements for the maintenance and welfare of the defendant.[49]

In fact, it may be mentioned that in reality the court's discretion is not so much concerned with the discretion to *refuse* as with the discretion to *postpone* the granting of divorce pending compliance with certain conditions. Previous arguments regarding this discretion appear to have missed the point that what is envisaged is the power of the court to postpone the granting of a divorce order.[50] The court has always had an inherent right to postpone divorce proceedings and the Divorce Act does not appear to have interfered with this discretion in any way.[51]

If this is the correct interpretation of the court's discretion then there would seem to be no reason why it should be limited in the way suggested by Kotze

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43 Indeed, if *Dickinson's* case on this point were to be held to have been correctly decided then the difficulty of reconciling s 4 and 5 would be more easily understood.

44 41E–F.

45 By so holding the learned judge rejected the view of Hahlo and Sinclair *supra* (16–21) that the court should have no discretion. For his part Barnard *supra* (27–28) argued in favour of the court's having a discretion, albeit in a circumscribed form.

46 41H.

47 S 4(3) is designed to afford the parties an opportunity to attempt a reconciliation.

48 S 6(1) enables the court to postpone the grant of an order for divorce where it is not satisfied that adequate provision has been made for the maintenance and welfare of any minor or dependent children of the marriage.

49 Such a postponement was unnecessary in *Smit's* case: see above.

50 E g, in Hahlo and Sinclair *supra* 16 the following appears: "If it [the word 'may'] has to be construed as mandatory, the court, once all the statutory requirements are satisfied, cannot refuse a divorce, except where the Act expressly says so, as in sections 4(3) and 6(1)." In fact, neither of these two sections gives the court the power to refuse the grant of a divorce. S 4(3) states, *inter alia*, that "the court may postpone . . ." while s 6(1) clearly states that "a decree of divorce shall not be granted until . . ." certain conditions are complied with.

51 An example of the court's exercising its power of postponement before the passing of the Divorce Act is *Underhay v Underhay* 1977 4 SA 23 (W).

AJ. Moreover, this interpretation would make the call for remedial legislation on this point harder to justify. Of course, it may well be asked: how is the court to know when to exercise this discretion when all that it is concerned with is the objective fact of irretrievable breakdown and not with the reasons for it?[52] In reality, evidence is usually led of the causes of, or the factors leading up to, the irretrievable breakdown. The reasons for this are obvious. In the first place the court has to hear evidence to be satisfied that

> "the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship."[53]

Secondly, although the fact of divorce is usually conceded by most parties to a divorce action[54] they usually have in mind the consequences of divorce when the causes of the irretrievable breakdown become relevant. Thus, evidence of the factors leading to an irretrievable breakdown (in particular, the conduct of the parties) is essential for the court to be able to give proper expression to sections 6(1),[55] 7(2),[56] 9(1)[57] and 10.[58]

Should it emerge from the evidence that the defendant is suffering from a mental illness or is physically incapacitated, but in circumstances not falling within the ambit of section 5, there would seem to be nothing to prevent the court from exercising its inherent discretion to postpone the granting of a divorce order until such time as the plaintiff has made adequate arrangements regarding the maintenance and welfare of the defendant. Moreover, the court could appoint a *curator ad litem* to look after the interests of such a defendant.[59] It may also be mentioned that there is undoubtedly a legal and ethical duty on the plaintiff's legal representatives to draw the court's attention to a defendant's inability, for whatever reason, to look after his or her own interests.[60] In practice, then, it is most unlikely that a court will be unaware of a defendant's incapacity to look after his or her own interests. It may be safely assumed that a court will always

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52 *Dickinson v Dickinson supra* 860D–E.

53 s 4(1).

54 The *Report of the South African Law Commission* on the law of divorce and matters incidental thereto (RP 57 of 1978) §7 1 points out that more than 90% of all divorce actions are uncontested.

55 which provides for the safeguarding of interests of the dependent and minor children of a marriage.

56 which prescribes the factors that may be taken into account by the court with regard to maintenance by the one party of the other: see *Rousalis v Rousalis* 1980 3 SA 446 (C); *Swart v Swart* 1980 4 SA 364 (O).

57 which deals with the order for the forfeiture of the patrimonial benefits of a marriage: see *Rousalis v Rousalis supra*; *Koza v Koza* 1982 3 SA 462 (T).

58 which deals with the order for costs; see *Swart v Swart supra* 379.

59 A *curator ad litem* was appointed in *Krige v Smit*. In *Dickinson v Dickinson supra* it was accepted that the functions of a legal practitioner appointed in terms of s 5(3) are identical to those of the *curator ad litem*.

60 Cf r 6 of the International Code of Ethics published in Lewis *Legal Ethics* (1982) 317–318 which states, *inter alia*: "Lawyers shall never knowingly give to the Court incorrect information." This is not to say that the plaintiff's legal representatives are expected to assist the defendant. However, the hallmark of their general duty is fairness: see Lewis *supra* 159. In any event, the duty in this regard is not to the defendant but to the court. It is also trite that a court can be just as easily misled by an act of omission as by an act of commission.

be on its guard to ensure that such a defendant's interests are not unfairly prejudiced.[61]

THE DIVORCE RATE

The preoccupation with the unacceptably high divorce rate is nothing new.[62] The coming into force of the Divorce Act has done nothing to curb this preoccupation and the recent questionnaire of the South African Law Commission[63] is largely the result of this. It is a truism that the South African divorce rate is among the highest in the world and that the unacceptably high divorce rate represents an undermining of the institution of marriage which Erasmus J rightly regards[64] as being

> "the cornerstone of society and [which] is prima facie responsible for that complex whole which includes morals, knowledge, belief and all other capabilities acquired by man as a member of society".

But the question remains: is the need for alarm today any greater than it was in the years immediately prior to 1979?[65]

The following are the relevant divorce statistics for the Whites, Coloureds and Asians for the period 1975–1980:[66]

	Whites	*Coloureds*	*Asians*
1975	10 730	1260	265
1976	10 850	1187	292
1977	9 864	1165	364
1978	11 456	1560	316
1979	13 816	1486	391
1980	16 543	2088	519

It is true that the divorce rate has increased significantly since the passing of the Divorce Act. This may undoubtedly be attributed to the elimination of the fault elements such as adultery and malicious desertion as far as grounds for divorce are concerned. But, more important, it is now possible for those who were formerly precluded from obtaining a divorce to do so, as occurred, for example, in *Kruger v Kruger*.[67] However, it is submitted that it is most likely

61 This does not mean, e g, that a defendant who has been physically or mentally incapacitated and who is divorced on the basis of irretrievable breakdown cannot have an order for the forfeiture of the patrimonial benefits of the marriage granted against him. Cf the example cited by Barnard *supra* 64 n 21.

62 See, e g, the *Report of the South African Law Commission* on the law of divorce and matters incidental thereto (RP 57 of 1978) 2–3 and Schäfer *supra* 2 n 2 255.

63 See n 12 above.

64 in *Campher v Campher* 1978 3 SA 797 (O) 802.

65 By raising this question it is not intended to imply that we have cause for complacency. The divorce statistics suggest otherwise.

66 *Bulletin of Statistics* vol 16 for the quarter ended June 1982 §1 3.

67 1980 3 SA 283 (W). Cf Petersen "Divorce Law Reform" 1971 *SALJ* 478 482 who observes that within the first eight weeks of the new Italian divorce law 300 000 petitions for divorce were filed.

that the divorce rate will settle down to a more consistent rate of increase in the future and it is, therefore, fallacious to blame the law entirely for the high divorce rate.[68] The reasons for this must also be sought elsewhere.[69]

OMISSIONS OF THE LEGISLATURE

If a finger is to be pointed at the Divorce Act in so far as the high divorce rate is concerned then, it is submitted, this can be done only in respect of what the act has failed to make provision for rather than in respect of what it has attempted to make provision for.

Some of the main failures of the legislature in this regard may be briefly tabulated as follows:

a The failure to effect long overdue reforms to the divorce law procedure.[70] There still seems to be a misplaced emphasis on the adversary procedure in divorce[71] – a procedure which obliges the parties to face each other in an adversary atmosphere thereby fermenting the bitterness, distress and humiliation which is present in all divorce actions[72] and a procedure which is unnecessarily costly to the parties.

b The failure to make adequate provision for the safeguarding of the interests of the dependent and minor children of a marriage when the parents divorce each other.[73]

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68 As Hahlo and Sinclair *supra* 63 have pertinently observed: "All the indications are that, while the divorce rate will continue to rise or fall in response to oecumenical events such as war, revolution, an economic depression, prolonged civil strife or . . . the advent of a new social or religious order, changes in the divorce law which do not result in the virtual abolition of divorce on any ground or put it financially beyond the reach of the ordinary man and woman are unlikely to lead to a significant rise or fall in the divorce rate. The likelihood is that the incidence of divorce in South Africa will not be greatly influenced, one way or the other, by the changes made in the law by the Divorce Act."

69 Other extra-legal causes for the high divorce rate are, *inter alia*, (1) inadequate marriage preparation; (2) less control by parents over the courtship and mate-choice of their children; (3) less respect for the traditional supports for the family (the church, schools and the state); (4) greater sexual freedom; (5) increasing awareness of women's rights; (6) increasing independence of women holding jobs independently of their husbands; (7) decreasing stigma attaching to divorce. See generally Eekelaar and Katz *Marriage and Cohabitation in Contemporary Societies* (1980) xi–xii. On the question of pre-marital counselling as opposed to pre-marital education see Schäfer *supra* 314–315; Schäfer "Some Reflections on the Divorce Act, 1979" 1982 *Social Work* 237 238–240.

70 Schäfer *supra* 257–259.

71 It would be beyond the scope of this article to consider in depth the advantages and disadvantages of the adversary procedure in the context of divorce but see generally Schäfer *supra* 114–121 and 296–299.

72 This effectively renders a provision such as s 4(3) worthless. E g, in cases such as *Smit v Smit supra* 39–40 and *Kruger v Kruger supra* it is convincingly shown that the possibility of reconciliation exists only if the parties desire it. See also Schäfer *supra* 316–318.

73 Schäfer *supra* 164–167 246–253 301–302. By way of contrast the Australian Family Law Act 53 of 1975 (s 60–70) has a number of provisions designed to secure the welfare and custody of the children of a marriage: see also Barblett "Custody of Children in Divorce, Separation and Similar Disputes: The Australian Experiment" 1980 *Australian Law Journal* 489. Mr Justice Barblett is described as the chairman of judges of the family court of Western Australia.

c The failure to recognise the vital contribution that can be made by the behavioural and social scientists[74] towards the attempted resolution of the many problems of divorce. They could, for example, play a vital role in regard to both pre-divorce counselling[75] and post-divorce counselling.[76]

CONCLUSION

It cannot be doubted that certain difficulties are being experienced with regard to the Divorce Act. The act, after all, represents a dramatic change from the old to the new which calls for a readjustment of philosophy and outlook for those who administer its provisions and who have for many years been schooled in the fault-orientated grounds of divorce. The act also represents a substantial reform of the substantive law of divorce. Its defect, however, lies in what it has omitted to provide for and these omissions have resulted in an inability to give proper expression to the now almost universally accepted objectives of a good divorce law:[77]

> "A good divorce law should seek to achieve the following objectives:
>
> (i) to buttress, rather than to undermine the stability of marriage; and
>
> (ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."

The law cannot hope to make a significant contribution to the attempted resolution of the many problems of divorce unless it comes to grips with the fact that the

> "reform of the divorce laws will do no good unless we can establish new procedures in courts which are especially designed and equipped for that purpose."[78]

If one accepts this conclusion then one is inevitably driven to a consideration of the concept of family courts as a significant part of the attempted resolution

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74 On the present state of the relationship between the courts on the one hand and the social and behavioural scientists on the other, see Schäfer *supra* 219–253.

75 With regard to their suggested role in the field of pre-divorce counselling see Schäfer *supra* 316–321.

76 As to post-divorce counselling see Schäfer *supra* 322. The emphasis in both pre- and post-divorce counselling is on conciliation counselling, which is designed to "enable the parties to go their separate ways with the least pain and damage to themselves and their children" (Sir Jocelyn Simon PC on the occasion of the 1970 Riddell Lecture under the title "Recent Developments in the Matrimonial Law"), as opposed to reconciliation counselling. Generally speaking, reconciliation counselling has a remote chance of success: see n 71 above.

77 As formulated by the British Law Commission in 1966 in its report on the *Report of the Grounds of Divorce: Field of Choice* Cmnd 3123 §15. Cf the objects of the law of divorce which are referred to by the South African Law Commission in its report on the law of divorce (RP 57 of 1978) §4.

78 Per Alexander "Legal Science and the Social Sciences: The Family Court" 1956 *Missouri Law Review* 105 108. See also Hahlo ("Fighting the Dragon Divorce" 1963 *SALJ* 27 37) who, in dealing with the problems of divorce, states that "wherever the solution may be found, it won't be in reforming the [substantive] divorce law." In *Putting Asunder supra* §28 it is noted that "procedural change is one of the necessary conditions of reforming the substantive [matrimonial] law."

of these problems.[79] It is submitted that the establishment of family courts in South Africa will go a long way towards curing the omissions referred to above. Is it too much to hope that the legislature, having done half its job in effecting the necessary reform of the substantive law of divorce, will now give serious consideration to completing the other half?[80] It is submitted that the answer to this question really concerns the sorting out of priorities.

79 It is not intended in this article to set out the possible ways in which family courts could be established in South Africa. Nor is it intended to cover the practical obstacles to the establishment of such courts. But see generally Schäfer *supra*.

80 In this regard the views of the commission of inquiry into the structure and functioning of the courts under the chairmanship of Mr Justice G G Hoexter concerning family courts are eagerly awaited. Among the commission's comprehensive terms of reference was the question of considering the desirability of establishing a family court as a branch of the proposed intermediate court system "or otherwise" (GG 676 of 30 November 1979). The South African Law Commission, in its report on the law of divorce (§13), has already indicated that it is not in favour of the concept of the unified family court system.

Consumer protection and the Credit Agreements Act*

NA Cassim
BProc LLM Dip Tax Law
Senior Lecturer, Department of Adjectival and Clinical Law, University of Natal, Durban

OPSOMMING

Verbruikerbeskerming en die Wet op Kredietooreenkomste

Dit is van belang om die verbruiker van regsweë te beskerm, veral waar kredietooreenkomste ter sprake is, omdat die verbruiker in 'n swakker posisie as die ander kontrakterende party staan. Laasgenoemde het die voordeel van groter kennis, ondervinding en vaardigheid op die gebied van die handel. Omdat die gemenereg nie voldoende beskerming vir die verbruiker bied nie, is dit noodsaaklik dat die wetgewer intree.

Die belangrikste maatreël vir die beskerming van die verbruiker in krediettransaksies is die Wet op Kredietooreenkomste 75 van 1980. Die bepalings van die wet word ontleed en sy sterk punte en tekortkominge uitgestip. Daar word verwys na wetgewing wat in ander regstelsels in hierdie verband aangeneem is en ten slotte 'n aantal aanbevelings gemaak met die oog op meer doeltreffende beskerming van die verbruiker wat terselfdertyd nie onregverdig werk teenoor die ander kontraktant nie.

1 INTRODUCTION

It is said that consumer interest is involved whenever citizens enter exchange relationships with institutions like hospitals, libraries, police forces and various government agencies, as well as businesses.[1] Whether one is prepared to acknowledge such a varied scope for consumerism or not, one cannot deny that consumer protection is linked with the cause of the consumer as a citizen. At the head of all Ralph Nader[2] publications are the words:

> "There can be no daily democracy without daily citizenship. If we do not exercise our civic rights, who will? If we do not perform our civic duties, who can? The fibre of a just society in pursuit of happiness is a thinking active citizenry."

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* This paper was delivered at the 10th South African Law Conference.

1 Aaker and Day *Consumerism* (1974) xvii.

2 Ralph Nader in the United States has done much to equate the term consumer with citizen: cf McCarry *Citizen Nader* (1972) 317 320.

2 WHY PROTECT THE CONSUMER?

An important consumer protection measure in Australia was justified as follows:

> "In consumer transactions unfair practices are widespread. The existing law is still founded on the principle known as caveat emptor – meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. Now the marketing of goods and services is conducted on an organized basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law."[3]

The law cannot, however, reconcile the conflicting expectations of the seller and the buyer, the supplier and the recipient of services. The principal purpose of consumer law[4] is to prevent the abuse of superior bargaining power by the sellers and suppliers of goods and services.

Legal protection for consumers in South Africa is not adequately provided by the common law. No phrase in the commercial world is more misleading and untrue than the words "freedom of contract" when referring to the relationship between suppliers of goods and services and consumers. Our courts have often enforced contractual provisions which are harsh and oppressive on the basis that they have been freely and voluntarily entered into by both parties to the contract.[5] The classical theory of contract assumes that the parties are free to bargain about conditions and terms of agreements from positions of equal strength.[6] It fails to take into account that true equality rarely exists. Moreover, it fails to recognise that the law ought to ensure that contracts conform to prevailing standards of fairness and decency.

It is unlikely that businesses will introduce self-regulatory measures contrary to their interests. Business malpractices are the cause for the consumer's concern; and this prompts the law to take sides in the economic interest of the community.

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3 Senator Murphy, the Australian attorney-general, introducing the Trade Practices Bill of the Commonwealth of Australia in the senate – quoted in Goldring "Consumer Protection and the Trade Practices Act" (1974–1975) 6 *Federal Law Review* 288.

4 Rothchild and Carroll argue that defining "consumer law," like all attempts at classification and categorisation, is an artificial exercise which is valuable only in that it aids constructive thinking and comparison. The authors consider the following legal categories centrally involved in consumer law:

i those dealing with the sale of goods and the provision of credit to the purchaser of goods;

ii the law relating to the furnishing of services and their use by the consumer (the authors contend that there is no rational ground for the immunity awarded to defective professional services, the more so since delictual liability is difficult to prove and restrictive);

iii land sale, use and financing; and

iv consumer bankruptcy. Cf Rothchild and Carroll *Consumer Protection: Text and Materials* (1973) 10–18.

Consumer law may therefore be defined as the law which protects a customer, purchaser or one who uses a commodity or service, or one who uses up an article of exchangeable valuc; in other words one of the buying public. Cf McQuoid-Mason "Common-Law Protection of the Consumer in South Africa" 1974 *Acta Juridica* 53–54.

5 See for instance *Wells v South African Alumanite Company* 1927 AD 69; *SA Sentrale Koop Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A): *Natal Motor Industries Ltd v Crickmay* 1962 2 SA 93 (N).

6 Cf Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 13.

The blame for the failure of private law to protect the consumer adequately lies with the lawyers. Frequently a cautious and positivistic judiciary is reluctant to bring the law into line with modern social conditions without the legislature's intervention.

Thus consumers look to the legislature for protection. This is particularly so in the field of consumer credit transactions. There are a number of existing statutes designed to protect the credit receiver, buyer, lessee and other consumers.[7] The Hire Purchase Act of 1942[8] attempted, in the words of Millin J, to remedy

> "the mischief of poor persons being enticed into shops and being sold goods of more or less value at prices which they can ill afford to pay and on terms which are harsh and unconscionable."[9]

The modern basis for the protection of consumers in credit transactions is the Credit Agreements Act of 1980,[10] which has repealed the Hire Purchase Act, and its amendments.[11] The act is supposedly designed to regulate the inequality of bargaining power in credit agreements between sellers and suppliers of goods and services and the consumer. This paper will attempt to analyse the consumer protection provisions of the act.[12]

3 SCOPE OF THE ACT

The act applies to such credit agreements as the minister[13] may prescribe, other than those specifically excluded in terms of the act.[14] A credit agreement includes:

a a "credit transaction"[15] or a "leasing transaction" or

b any transaction or transactions having the same import as a credit or leasing transaction.[16]

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7 For instance, the Trade Practices Act 76 of 1976 makes provision for the formation of an administrative agency to protect the interest of consumers, and authorises the minister to prohibit a trade practice if he is satisfied that it is necessary in the interest of consumers. Similarly, in terms of the Price Control Act 1964 the controller may by notice in the *Gazette* fix the maximum price at which goods may be sold by one person to another, and also fix the maximum charge that may be made by any person for a specified service.

8 Act 36 of 1942.

9 *Smit and Venter v Fourie* 1946 WLD 9 13.

10 The act was passed by parliament on 1980-06-04 and promulgated in the *Government Gazette* on 1980-06-18. The act came into operation on 1981-03-01 by virtue of notice R2572 issued by the minister of industries, commerce and tourism, in terms of s 2 of the act, and in *GG* 7328 1980-12-12.

11 Act 75 of 1980 s 29.

12 Where appropriate, the word "consumer" is used interchangeably with the term "credit receiver" who is protected in terms of the act.

13 s 1(xi): "'Minister' means the Minister of Commerce and Consumer Affairs."

14 s 2(1). In terms of the first notice gazetted by the minister (notice R2572 in *GG* 7328 1980-12-12) the act will initially apply to credit and leasing transactions in respect of a similar range of durable consumer goods (cars, furniture, electrical appliances etc) as those affected by the Hire-Purchase Act, where the cash price does not exceed R100 000 and the duration of the transaction exceeds three months.

15 A credit transaction is defined to include an "instalment sale transaction," which embraces the traditional hire-pruchase contract (s 1(v)(a).

16 s 1(ii).

While cash transactions are clearly excluded from the scope of the act, many types of credit business that were previously uncontrolled have now been brought within the ambit of the act.[17]

The statutory protection afforded to consumers is limited somewhat by the following provisions:

i The act adopts a narrow view of comsumer interests and focuses mainly on persons entering into transactions to obtain products and services from commercial enterprises.[18] The act confines itself to transactions involving goods[19] and services. The underlying idea is that the ultimate consumer is protected.

ii Credit agreements in which the state is the credit grantor are exempt from the provisions of the act.[20] There appears to be no rational justification for arbitrarily excluding the state.

iii Similarly, professional persons have been excluded.[21] There seems to be no good reason for distinguishing professional services from other services provided for consumers. The legislature should abolish the artificial distinction between professional and non-professional services for the purposes of the act.[22]

iv Paradoxically, the major limitation on the applicability of the act is the very provision that brings it into operation. The provisions of the act are required to be brought into force by the minister.[23]

Pressure groups are an accepted feature of our capitalist society, and among the strongest are those representing commerce and industry. Consumer groups lack the ability to counter the power of business interests.[24] This is best illustrated by the inequality of bargaining power between suppliers and consumers. It follows, therefore, that policy decisions by the minister will be influenced by the interest of business, which may differ from those of consumers. Thus the minister

17 e g banking; credit cards; cheque and voucher trading; mail order business.

18 The act is not applicable to a credit agreement in terms of which a person buys or hires goods for the sole purpose of selling, letting or using them in connection with mining, engineering construction, road building or a manufacturing process (s 21(a)). This is generally regarded as falling outside the ambit of consumer protection legislation. See for instance McQuoid-Mason *op cit* 53 as regards which consumers require protection.

19 Goods are defined by the act as "movable goods" (s 1(vi)).

20 s 2(1)(b).

21 The services rendered or performed are those of members of a profession whose names are entered on a roll or register in terms of an act of parliament: s 1(xiii).

22 It is submitted, however, that the act does not exempt defective goods supplied by professionals from the scope of its provisions.

23 In terms of s 2(1), the provisions of the act shall apply to such credit agreements or categories of credit agreements as the minister may determine from time to time by notice in the *Gazette*. The minister is further authorised to exempt any person or category of persons from any or all of the provisions or conditions of the act (s 2(2)).

24 See for instance Olson *The Logic of Collective Action* (1971); Tivey, "The Politics of the Consumer" (1968) 39 *Pol Q* 181. At 192 Tivey lists two factors which weaken the influence of consumers: (i) consumer bodies lack resources when compared with pressure groups representing business interests; and (ii) competition among consumer bodies within the very broad context of consumer interest.

must ensure that the influence of business does not negate the interests of consumers.

4 MAKING THE AGREEMENT

Section 3 of the act contains a preliminary requirement for disclosure of certain information to the consumer as specified by regulation. Such regulations should specify that would-be credit receivers are given fair and accurate information about the credit facilities available to them in the credit market.[25]

The act attempts to ensure that there is equality in the bargaining process by requiring the parties to include certain terms[26] in their agreement which must be in writing.[27] In order to ensure that the credit receivers are made fully aware of the financial burden being placed upon them, the provisions of the Limitation and Disclosure of Finance Charges Act[28] are applicable. This act requires credit agreements to reflect the actual costs of the credit, as well as information concerning the rate of interest.[29]

Failure to comply with the provisions of section 5 and the Limitation and Disclosure of Finance Charges Act constitutes an offence, but does not render the contract invalid.[30] In terms of the English Consumer Credit Act, non-compliance with similar requirements results in the agreement being enforceable against the debtor or hirer on an order of the court only.[31] Cranston is of the view that the non-enforceability provision is not regarded as a sanction since, in practice, the English courts enforce agreements, despite, for instance, the

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25 s 3(1) authorises the minister by way of regulation to prescribe:
- a the maximum period within which the full price under a credit agreement shall be paid;
- b the portion of the cash price to be paid as initial payment or rental;
- c the manner in which the price of any goods or service shall be displayed or advertised;
- d any such conditions as he may find fit in regard to any credit agreement.

26 Every agreement must:
- i state the names of the parties and their business or residential addresses or, if they do not have such addresses, any other address in the Republic;
- ii state the amount of initial rental or payment;
- iii describe the goods and services involved as well as any goods delivered as payment, in order that they may be readily identified;
- iv if it is an instalment sale transaction, state any conditions as to reservation and passing of ownership of the goods concerned;
- v if it is an instalment sale transaction or a leasing transaction, state any conditions as regards the right of the credit grantor to the return of the goods;
- vi contain a reference to the provisions of s 13, which deals with the credit receiver's right to cancel;
- vii be in the official language which the credit receiver may request in writing.

27 s 5(1) stipulates that a credit agreement must be reduced to writing and signed by or on behalf of every party to the agreement.

28 73 of 1968, as amended by Act 90 of 1980. The "Ladofca" Amendment Act applies to credit, money lending and leasing transactions.

29 s 3(2) and 3(2A).

30 Act 75 of 1980 s 5(2) forbids a person to be a party to a defective agreement, but provides that the agreement will not be invalid merely for want of compliance. See also Act 73 of 1963 s 3(6) and (7).

31 The Consumer Credit Act 1974 s 61.

creditor's failure to send a copy of the agreement within the time limits required, as long as the consumer is not, in the court's view, prejudiced thereby.[32] In other words, the creditor must make sure that a copy of the agreement reaches the consumer before legal proceedings are commenced.

5 THE RIGHT TO COPIES

Consumers entering into credit agreements are entitled to receive a copy of the agreement within fourteen days from the conclusion of the agreement, where such credit transaction forms a normal part of the credit grantor's business.[33] In any other event the credit grantor is required to furnish, on written demand, a copy of the agreement and a statement setting forth such particulars as the principal debt owing at the conclusion of the agreement, the finance charges and the amount already paid.[34] Where no request for a statement is made, a statement must nevertheless be sent after the commencement of the agreement and a further statement every three months.[35] This ensures that consumers are informed of moneys already paid and the sums outstanding and thereby makes it more difficult for credit grantors, money lenders and lessors to engage in fraud.

6 THE RIGHT TO CANCEL

One of the most important reforms introduced by the act is that of permitting the credit receiver to resile freely from the contract within five working days of its conclusion, provided that

i the initiative for the agreement emanated from the credit grantor or his representative; and

ii the agreement is signed by the consumer away from the credit grantor's business premises;[36] and

iii the written transaction was not initiated and concluded "entirely by means of the official state postal service of the Republic."[37]

The "cooling-off" provisions thus apply mainly to door-to-door transactions. There are, however, other situations which could arise: for instance, an agreement for the sale of a second-hand car signed while on a test run. Unscrupulous door-to-door operators could avoid the effects of the cooling-off provision by soliciting the consumer at home and then taking him to his business premises to sign the agreement. Similarly, finance institutions could avoid the provision by not signing agreements away from their premises, and, if they do,

32 Cranston *Consumers and the Law* (1978) 193.
33 Act 73 of 1968, as amended, s 10(1). The section applies to a moneylender, credit grantor and lessor. Consumers would be borrowers, credit receivers and lessees respectively.
34 Act 73 of 1968, as amended, s 10(2).
35 Act 73 of 1968, as amended, s 10(3).
36 s 13(1).
37 Notice R2572, in *GG* 7328 1980-12-12 s 3.

by not delivering the goods until the five-day period is up.[38] The limitation of the cooling-off provision to mainly doorstep transactions ignores the fact that pressure can also be applied to consumers at business premises. Cranston argues that, as a matter of policy, it is desirable to allow consumers some time for reflection with *all* credit agreements because of the onerous and complicated subject-matter involved.[39] Cranston maintains that there can be no prejudice to businesses if the cooling-off period is made compulsory in all cases. Credit grantors need simply refrain from delivering goods or providing services or advancing credit until the cooling-off period has elapsed.

A cooling-off period is of little value if consumers are not fully informed of their right to cancel within the time set for its exercise.[40] The act achieves this by providing that the prospective credit grantor, or his agent, shall, before entering into a credit agreement away from his business premises, appraise the consumer (by way of a separate notice from the agreement itself) of the cancellation provisions.[41] The act does not, however, enable the consumer to enforce his rights in the event of the credit grantor's failing to inform him of the cooling-off provisions. The credit grantor commits an offence,[42] but the agreement stands. Thus the very object of section 13 is defeated. The act should be amended by a provision that no agreement entered into at a place other than the credit grantor's business premises, shall be of any force or effect unless the credit receiver was adequately appraised of the cancellation provisions.[43]

The effect of cancellation is to entitle the consumer to repayment of any sums paid, the consumer tendering, with the notice of cancellation, the return of any goods delivered to him. Should the credit grantor fail to repay within ten days of the receipt of the notice of cancellation, he commits an offence.[44] The consumer then has to recover moneys already paid by way of civil action. The act should follow the English-law approach and permit the consumer to enjoy a lien[45] over any goods in his possession pending repayment.[46]

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38 See, for instance, Payne "Guide to New Credit Acts" *Sunday Times: Business Times* 1981-3-15.

39 Cranston *op cit* 194.

40 The Crowther committee *Report on Consumer Credit* (1971) 289 recommended that all consumers should be provided with a notice of cancellation which could simply be signed and posted within the stated period, because many consumers may find it difficult to write even the simplest letter, and it is possible that for this reason many consumers who would like to exercise the right to cancel do not do so.

41 s 4.

42 s 23.

43 It is submitted that where the agreement is invalid as a result of non-compliance with the provisions of the act, the credit receiver may recover from the credit grantor all sums paid to the latter under the agreement (cf *Van Zyl v Credit Corporation of SA Ltd* 1960 4 SA 582 (A)). In such a case the credit receiver's remedy will be a *condictio*, and not an action based on the contract, for in fact there is no contract on which to base any action (cf *Van Zyl's* case 590–591).

44 s 10(1).

45 The lien itself does not confer a right of action for the claim, but merely affords a ground of defence to an action brought by the owner to recover his property; in such a case the court will indeed order the possessor to restore the property to the owner, but subject only to the latter's paying the possessor the expenses to which he is entitled. Cf Wille and Millin *Mercantile Law of South Africa* 7 ed 337–338.

46 Cf English Consumer Credit Act s 73.

7 INVALID PROVISIONS IN AN AGREEMENT

The act deems certain harsh and oppressive provisions in the contract to be of no force or effect.[47] For example, no agreement may contain a provision to the effect that

a an implied warranty is excluded or restricted;[48]

b a person agrees to enter into a credit agreement;[49]

c the credit grantor is not liable for the acts, or representations of a person acting on his behalf;[50]

d the credit receiver acknowledges that he has inspected any goods to which the credit agreement relates.[51]

Thus it can be seen that the act has attempted to reduce the effectiveness of the doctrine of *caveat emptor.*

8 FINANCIER'S LIABILITY FOR RETAILER'S BREACH

One of the most prominent features of modern business practice is the growth of those finance institutions[52] whose business it is to finance credit agreements. The object of the act is clearly to impose joint liability on the finance company and the supplier for damage suffered by the consumer as a result of any misrepresentation or breach of contract.[53] This undermines the basic principle of privity of contract. The legislature in its wisdom has decided that the consumer is more likely to succeed if he can claim against the financing institution or the supplier than if he can claim only against the supplier, as was the position in

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47 s 6(1).

48 s 6(1)(d). The credit grantor thus warrants (a) that the consumer will not be lawfully evicted from possession of or deprived of the use of the goods sold (Donovan *Mackeurtan's Sale of Goods in South Africa* (1972) 224–237); and (b) that the goods sold are free from any latent defects that would render them wholly or partly unfit for the purpose for which they are ordinarily used (MacKeurtan *op cit* 238–271). By preventing suppliers from escaping liability, the quality of consumer goods and services can only improve.

49 s 6(1)(a). Where this is not the case it might be possible to circumvent many of the requirements of the act. Cf *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 3 SA 226 (W) 229. This provision does not apply in respect of any contract relating to goods that are, in terms of the contract, imported into the Republic for sale to the prospective consumer (s 6(1) (3)).

50 s 6(1)(c). Cf Diemont, Marais and Aronstam *The Law of Hire Purchase in South Africa* (1978) 81.

51 s 6(1)(l).

52 These institutions have become known by a wide variety of names, such as "credit companies," "discount companies," "finance companies." Cf Diemont Marais and Aronstam *op cit* 167.

53 A "credit grantor" is a seller, lessor or a person who renders a service *and* includes a person to whom the rights or the rights and obligations of such seller, lessor or person rendering such service have passed by assignment, cession, delegation or otherwise (s 1(iii)(a)).

the past.[54] This should have the effect of encouraging finance houses to use their economic clout to discourage malpractices by retailers.[55]

9 DEFAULT NOTICE

Section 11 operates where the credit receiver is in breach of the agreement. Its effect is to prevent the credit grantor from claiming the return of the goods until a default notice has been served upon the credit receiver giving him an opportunity to put right his default within a stated period.[56] The credit grantor can, however, enforce a provision for the payment of damages, or any forfeiture or penalty or the acceleration of payments without giving the credit receiver a chance to put things right.[57] Otto rightly points out that this inconsistency can easily be avoided if the credit receiver is given an opportunity to remedy his default before permitting the credit grantor to proceed for damages, forfeiture or acceleration of payments.[58]

10 CONTROL OVER CREDIT TERMS

The Crowther committee emphasised the need for credit grantors to assess the creditworthiness of people seeking credit.[59] In practice, the committee commented, credit-granting bodies would frequently grant credit without making any enquiries about the creditworthiness of the credit receiver:

> "Sometimes the same creditor is issuing judgment summonses against a debtor while through its agents it is persuading the debtor to accept extra credit."[60]

The act does not restrict the credit grantor's freedom to grant or deny facilities to whomsoever it chooses. There are, however, provisions that regulate the terms of credit:

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54 In the past, the finance company acquired the trader's rights by virtue of a cession, and did not thereby assume any of the trader's obligations. The consumer therefore had to look to the trader and not the finance company for any reduction of the purchase price if defects emerged (Mackeurtan *op cit* 252). Thus where the *actio redhibitoria* was invoked the price paid had to be reclaimed from the trader and not the finance company (*Milner v Union Dominions Corporation (SA) Ltd* 1959 3 SA 674 (C). The Credit Agreements Act, it is submitted, permits the consumer to proceed against either the trader or the finance company, or both.

55 Cf the Crowther report *op cit* 279.

56 The stated period of not less than thirty days is calculated from the date of the handing over or posting of the default notice. If two previous demands have been made for failures in the past, the period is reduced to fourteen days (s 11).

57 The Hire Purchase Act 36 of 1942 provided that a seller could not enforce a provision for the payment of damages, any forfeiture or penalty or the acceleration of payments unless he had by letter handed over to the buyer, or sent by registered post to him at his last known residential or business address, demanded that the buyer carry out the obligations in question within a period stated in the demand, being not less than ten days, and the buyer had failed to comply with that demand (s 12).

58 Otto "The Credit Agreements Act" (1981) 10 *Businessman's Law* 99.

59 Crowther committee *op cit* 145.

60 Crowther committee *op cit* 140.

i In terms of section 3 the minister is empowered to prescribe minimum deposits[61] as well as the maximum periods[62] applicable to any credit agreements or in respect of any goods or services.

Cranston argues that although "terms control"[63] has had some effect in curbing consumer default in Britain, its application is discriminatory, insasmuch as it only applies to certain forms of consumer credit and limited products.[64] Similarly, our law vests the making and applicability of term control regulations in the discretion of the minister, thereby leaving it to the government to regulate consumer expenditure. Non-compliance with regulations is an offence but does not affect the validity of the agreement.[65] Cranston submits that the motivating factor should be consumer protection policy. He cites the main drawbacks of terms control as:

a the fact that a consumer can pay a large deposit does not necessarily guarantee that he can repay instalments;
b terms control can be easily evaded in practice by inflating the trade-in price of an item which may be delivered as an initial payment or rental.[66]

Cranston accordingly points out that terms control is no substitute for a credit grantor's properly assessing creditworthiness.[67]

ii Where, in order to secure payment of any amount, the credit receiver cedes or pledges any portion of any periodical amount payable under a contract of service or towards the maintenance of any person, such cession will, to the extent that it exceeds twenty five per cent of that amount, be of no force and effect.[68] The act further empowers the credit receiver to revoke any such stop order at any time.[69]

iii The poor and less educated, because of their ignorance about the credit market and the protection afforded to them by the law, are frequently placed in a position where their ignorance can be abused by credit grantors.[70] Section 20 attempts to prevent this abuse. It provides that a credit agreement in terms of which the credit price exceeds R100 may not be concluded with a person subject to an administration order[71] whose gross monthly income is

61 s 3(1)(b). The act uses the terms "initial payment" and "initial rental" to describe the amount to be paid on the date of the credit agreement (s 1(vii) and (viii)).
62 s 3(1)(a).
63 Cranston uses the phrase "terms control" to describe requirements that purport to control the terms of credit (*op cit* 198).
64 Cranston *op cit* 199.
65 s 23.
66 Cranston *op cit* 199.
67 *ibid.*
68 s 9(1).
69 s 9(2).
70 Cf Aronstam *op cit* 65.
71 In terms of s 74(1) of the Magistrates' Court Act 32 of 1944 a magistrate's court may, in certain circumstances and subject to certain conditions, make an order providing for the administration of an estate of a person who, amongst other things, is unable to meet his financial obligations.

less than R250, without the written consent of his administrator. An agreement in contravention of section 20 is unfortunately not declared invalid, but the credit grantor is dissuaded from entering into such agreement as he commits an offence.[72]

11 TERMINATION OF THE AGREEMENT

11 1 By the Credit Receiver

Most consumer credit agreements terminate when the consumer repays the credit grantor in the manner anticipated by the agreement. Consumers may, however, wish to pay the balance before the agreement is due to expire. In terms of the Limitation and Disclosure of Finance Charges Amendment Act, the credit receiver (or borrower)[73] is entitled to terminate an agreement by payment in one amount of the outstanding sum on ninety days' written notice.[74] Such payment may be made, provided a period of ninety days has elapsed since the inception of the agreement.[75] In this event the finance charges must be recalculated up to the date of payment and the credit receiver (or borrower) is not liable for any future finance charges.[76] The six-month period before an agreement may be terminated ensures that the credit grantor is compensated for the cost of setting up the agreement.

There seems to be no reason why the consumer should not be given the right to terminate an instalment sale transaction where he is able and willing to tender the return of the goods and the credit grantor is placed in the financial position he would have been in had the agreement expired after regular performance of all the obligations under it.[77] In such event the credit grantor would suffer no prejudice, more particularly as the goods returned to him would be valued by a competent and unbiased person designated by the credit grantor.[78]

11 2 By the Credit Grantor

When a credit receiver fails to fulfil his obligations under a credit agreement the credit grantor may sue for specific performance, or alternatively terminate the agreement and sue for damages.[79] In the case of instalment sale transactions

72 s 23.
73 Leasing transactions have their own rules.
74 "Ladofca" s 3A(1)(a).
75 "Ladofca" s 3A(1)(b).
76 In terms of the Hire Purchase Act the buyer could have paid his instalments prematurely and was entitled to a rebate of 7½ % a year if he paid all the instalments at once. (Cf Diemont Morris and Aronstam *op cit* 110.)
77 as was the position under s 14(a) of the Hire Purchase Act 36 of 1942.
78 s 16(1).
79 Damages consist of a sum of money sufficient to put the seller in as good a position financially as he would have been in if the breach had not occurred (*Versveld v South African Citrus Farms Ltd* 1930 AD 452 454). In terms of the agreement the credit grantor may also claim for forfeiture of instalments.

the credit grantor will probably wish to terminate the agreement and recover the goods.[80]

11 3 Repossessions

Section 12(1) of the act contemplates a situation where the credit grantor repossesses the goods without instituting any proceedings once the buyer has defaulted.[81] The credit grantor's power to repossess the goods without recourse to the courts appears somewhat inconsistent with his duty to guarantee that the buyer will have free and undisturbed possession and use of the goods.[82]

It is submitted, however, that credit grantors should not repossess goods without permission of the consumer or a court order, for the following reasons:

a The credit grantor is not entitled, in the absence of permission given at the time of the entry, to enter any premises to repossess goods.[83] An unlawful entry would make the credit grantor criminally liable for:[84]

i trespass under the Trespass Act 6 of 1959;

ii the more serious offence of housebreaking with intent to commit an offence;[85]

iii malicious injury to property if any damage is caused to the buyer's property.[86]

b The consumer could sue the seller civilly for invasion of privacy where the invasion takes the form of an intrusion upon the consumer's physical solitude or seclusion.[87]

c The statute imposes a duty on the credit grantor to retain the goods for at least thirty days in order to give the consumer an opportunity to make up the amounts claimable and unpaid plus the credit grantor's reasonable costs

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80 Generally, the courts will not order specific performance where damages would adequately compensate the seller (cf Gibson *South African Mercantile and Company Law* (1977) 101). In an instalment sale transaction ownership of the goods does not pass to the credit receiver merely by the transfer of the possession of such goods. In the event where it is agreed upon that ownership does pass, the credit grantor may reserve the right to the return of the goods if the credit receiver fails to comply with any term of the transaction (s 1(ix)(b) and (c)). The credit grantor thus maintains a right to the goods.

81 A precondition of termination and return of the goods is the service on the credit receiver of a default notice.

82 Cf Diemont Marais and Aronstam *op cit* 79. Cf *Dollar's Motors v Mfuba* 1961 1 PH A 18 (N).

83 s 6(1)(e) outlaws any provision in a contract that authorises the credit grantor (or his agent) to enter upon any premises to retake possession of the goods or relieve him from liability for such entry.

84 Cf McWilliams "The Hire-Purchase Act: A Focus on Repossession" 1978 *NULR* 186 193. Cf Cassim "Hire-purchase Repossessions" (1980) 9 *Businessman's Law* 157.

85 See Hunt *South African Criminal Law and Procedure* II (1982) 713; *S v Wilson* 1968 4 SA 447 (A) 481.

86 Hunt *op cit* 778.

87 See Prosser *Law of Torts* (1971) 807; McQuoid-Mason *The Law of Privacy in South Africa* (1978) 137.

incurred in the return of the goods.[88] The credit grantor's failure to return the goods on payment will render him liable to prosecution.[89]

In the English Consumer Credit Act 1974 the credit grantor's ability to recover possession of the goods is restricted in several ways.[90] First, the credit grantor is not entitled, in the absence of permission given at the time of the entry, to enter any premises to take possession of the goods unless he has a court order entitling him to repossess.[91] Secondly the credit grantor is not entitled to seize possession of "protected goods" from the consumer without first obtaining a court order.[92] "Protected goods" are those in respect of which the consumer has paid or tendered to the credit grantor one-third or more of the total price of the goods.[93] Thus where the goods are either inside premises or are "protected goods," the credit grantor will have to bring a court action to recover them unless the credit grantor can persuade the consumer voluntarily to hand them over. The credit grantor will, however, be free to seize the goods if they are not on the consumer's premises (for example, a car parked in the street) or if the consumer has abandoned them.[94] Should the credit grantor seize the goods in violation of the requirements, the agreement is automatically terminated and all payments made in terms of the agreement are returnable to the consumer, who is relieved of further liability.[95]

It is submitted that the English provisions are more equitable and appropriate, and should be incorporated in our law.[96]

11 4 Enforcement of Judgment Debts

Section 19 prohibits civil imprisonment decrees in respect of unsatisfied judgments obtained against consumers who have defaulted, unless the goods have been destroyed, lost or seized under the provisions of the Customs Act,[97] and the credit grantor is not responsible for such loss or seizure.[98]

12 CONCLUSION

The Credit Agreements Act is aimed at countering the inequality of bargaining power whereby one party draws up the terms of a contract as a result of ex-

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88 s 12(1). The consumer's right to the return of the goods and to be reinstated in his rights and obligations against payment is conditional upon his not having terminated the agreement.

89 Even though the consumer pays or tenders the arrears, he cannot be certain of the return of the goods. In terms of s 23 the credit grantor commits an offence, but the act leaves it to the consumer to claim the return of the goods.

90 s 90, 91 and 92. See Guest and Lloyd *The Consumer Credit Act 1974* (1975) part VII.

91 Consumer Credit Act 1974 s 92(1).

92 Consumer Credit Act 1974 s 90(1).

93 Consumer Credit Act 1974 s 90(1)(b).

94 Cf Dobson *Essential Business Law Consumer Credit* (1979) 69.

95 Cf Borrie and Diamond *The Consumer Society and Law* (1974) 166–170. The writers suggest that English law should emulate Scottish law, where the courts do not permit a snatch-back in any circumstances. A court order is always necessary if the consumer does not voluntarily surrender the goods (Borrie and Diamond *op cit* 170).

96 Cf McQuoid-Mason "Putting the 'Con' in Consumer Protection: The Credit Agreements Bill and the Consumer" 1978 *NULR* 203.

97 Act 91 of 1964. See s 19(d)(iii).

98 Similarly, the act prohibits the attachment of any debt or emoluments due to the consumer to satisfy the judgment for the payment of any sum due under a credit agreement (s 19(b) and (y)).

perience, long consideration, and expert advice, while the other has no more than a hasty opportunity to scrutinise its contents. The significant factor is that the legislature imposes certain terms and conditions on the parties. Friedman would argue that this makes such contracts largely the legal expression of economic and social policies rather than a reflection of the wishes of the parties.[99]

In order to increase the bargaining power of consumers, parliament should make provision for the following:

i The act should set out the criteria upon which the minister may exempt credit agreements, or categories of persons from any or all of the provisions of the act. All other credit agreements should fall within the ambit of the act.

ii The "cooling-off" provisions should be applicable to all credit agreements. Consumers should be given adequate notice in the credit agreement of their right to rescind the agreement within the "cooling-off" period. Such notice should appear in a conspicuous place in the contract, for instance, adjacent to or immediately above the credit receiver's signature.[100]

iii The credit grantor should be prohibited from terminating the agreement and proceeding for damages, forfeiture or acceleration of payments unless the consumer has been given notice of his default and a reasonable opportunity to remedy such default.[101]

iv The credit grantor should be required to obtain an order of court before repossessing any goods unless the consumer consents to repossession.[102] Furthermore, the credit grantor should be prohibited from "requiring or inducing" a consumer to surrender the goods to the credit grantor.[103]

v The consumer should be entitled to cancellation of the agreement and to the return of his money whenever the credit grantor contravenes any of the provisions of the act, unless the consumer has consciously affirmed the contract.[104] It is submitted that this is the most effective way of ensuring that credit grantors comply with the provisions of the act.[105] The provision of

99 Cf Friedman *Law in a Changing Society* (1959) 90–125.

100 Cf Morganstern *Legal Protection for the Consumers* (1973) 7.

101 Cf Hire-Purchase Act 36 of 1942, as amended, s 12(b).

102 s 12 (3) provides that a credit grantor shall not "require or compel" a credit receiver to sign any document in which he terminates the agreement and agrees to return the goods, unless at least thirty days have expired.

103 Such requiring or inducing is not consistent with the concept of volition.

104 In terms of the Hire-Purchase Act 36 of 1942 (s 4(1)) any agreement not reduced to writing was of no force or effect. In terms of the Credit Agreements Act such an agreement is not declared invalid, but the credit grantor commits a criminal offence. It is submitted that this provision of the Hire-Purchase Act should not have been repealed as it ensures that the consumer is made aware of his responsibilities.

105 At present the act operates through the medium of the criminal law. The act authorises inspectors, who are appointed by the secretary for commerce and consumer affairs, to gather information in order to determine whether the provisions of the act are being complied with (s 26). S 23 contains a general penal provision stating that any person who contravenes or fails to comply with any provision of the act is guilty of an offence and liable to a fine up to R5 000 or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

civil remedies will ensure that consumers obtain redress even though hard-pressed law enforcement agencies are reluctant to press criminal charges in what may appear (to them) to be trivial cases.

vi Finally, it is submitted that our courts should be authorised to control the abuse of bargaining power. The American courts, for instance, invoke the Uniform Commercial Code,[106] which permits a judge to declare that a particular clause or an entire contract is unconscionable if it results in oppression or unfair surprise[107] to a consumer. The German and Swedish courts likewise exercise almost unlimited power in dealing with unfair exploitation where there is inequality of bargaining power in contract.[108]

It is submitted that the time is long overdue for the legislature to permit the judiciary to take a more active role in consumer protection.

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106 s 2–302(1) of the Uniform Commercial Code provides:
"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid an unconscionable result."
Cf Aronstam *op cit* 192.

107 American Law Institute Uniform Laws Annotated, Uniform Commercial Code comment 101–102.

108 articles 138 and 242 of the German Civil Code and s 1 of the Swedish Act Prohibiting Improper Contract Terms 1971. Cf Aronstam *op cit* 195–198 and 202–204 respectively.

AANTEKENINGE

VERKEERSONGELUKKE - BRON VAN SKADEDRAGINGSPROBLEME BY UITSTEK

Soos veral in die afgelope twee dekades reeds elders gebeur het, word tans ook hier te lande ondersoek gedoen oor belangrike kwessies rakende die hantering van vergoedingsaansprake wat uit beserings en saakskade as gevolg van motorvoertuigongelukke ontstaan. Dit volg op die aanstelling van 'n kommissie in Mei 1981, wat reeds wyd menings ingewin het maar nog verslag moet doen. In hierdie bydrae word 'n beginselstandpunt oor die onderhawige problematiek, wat na my mening dringende aandag verdien, na vore gebring.

Die Huidige Posisie

Dit is goed bekend dat ons danksy die Wet op Verpligte Motorvoertuigversekering 56 van 1972 (en sy voorganger Wet 29 van 1942) 'n stelsel het ingevolge waarvan 'n sogenaamde derdeparty by 'n ongeluk waarby 'n versekerde motorvoertuig bètrokke was, vir die nadele wat vir hom uit sy beserings ontstaan (wat pyn en lyding, ontsiering, verlies aan lewensgenietinge, mediese en hospitaalkoste en verlies aan verdienste insluit) van die versekeraar op die voorgeskrewe wyse vergoeding kan verhaal. In sekere gevalle kan van 'n statutêre fonds verhaal word. Met verloop van tyd het dit nodig geword om verskeie leemtes of probleme deur wetswysiging op te los (byvoorbeeld met betrekking tot saamryklubs en diensplig tiges). Veral twee probleemvrae het egter oorgebly, te wete (1) of nie ook vir vergoeding van die steeds stygende saakskade op 'n beter manier as ingevolge die geykte aanspreeklikheidsreg voorsiening gemaak kan word nie; en (2) of dit in elk geval houdbaar is dat 'n vergoedingseis (selfs teen 'n derdepartyversekeraar) slegs kan slaag indien die versekerde voertuig op 'n skuldige (nalatige) wyse bestuur is.

Die belangrikste besware wat teen die tradisionele wyse van skadedraging ingevolge die geykte aanspreeklikheidsreg geopper word, is dat dit lomp en omslagtig is en gevolglik te stadig werk om die slagoffer van 'n verkeersongeluk te help wanneer dit die nodigste is (die litigasieproses sou die hoofrede hiervoor wees); dat 'n te klein gedeelte van die bedrae wat ter sprake is, nadat die regsproses sy loop geneem het, wel by die suksesvolle eiser uitkom; dat net sekere soorte nadeel van spesifieke kategorieë van benadeeldes hoegenaamd vir vergoeding in aanmerking kom; dat die gebruik van baie deskundige getuies om die oorsake en omvang van die eiser se benadeling vas te stel tot vertraging en

hoë koste lei; en dat dit alles net vererger word deur die nalatigheidsvereiste waaraan voldoen moet word. Ook die laasgenoemde beswaar hou met die lengte van die litigasieproses verband, want om nalatigheid te bevind, moet 'n afleiding uit die getuienis gemaak word dat die verweerder in 'n gesindheid van verwytbare onagsaamheid opgetree het.

Juis die feit dat die meeste besware eintlik teen die litigasieproses gemik is, behoort mens na my mening versigtig te stem, want dis algemeen bekend dat 'n baie klein persentasie van die vergoedingseise wel voor die howe kom. Hoe dit egter ook al sy, kom die besware daarop neer dat die tradisionele stelsel 'n te klein gedeelte van 'n te klein kring van benadeeldes se nadeel, te lank na intrede daarvan en met 'n te groot verlies aan bokoste om die stelsel te bedryf, kan dek.

Opdrag van die Kommissie

Die aanvanklike opdrag behels onder meer 'n ondersoek na (1) die wenslikheid daarvan dat balans van derdepartyversekering (dit wil sê wat saakskade van die ander party dek), ten opsigte van motorvoertuie verpligtend gemaak moet word; en (2) die wenslikheid daarvan dat skuldlose aanspreeklikheidsversekering van toepassing en verpligtend gemaak moet word. In Julie 1982 is die opdrag uitgebrei om ook (3) die wenslikheid daarvan te ondersoek om in die plek van die verpligte versekering van motorvoertuie 'n heffing op brandstof te plaas waarmee sekere verliese of skade deur motorvoertuie veroorsaak, vergoed kan word.

Faktore van Belang by so 'n Ondersoek

Wat hier onthou moet word, is dat die vraag na die dra van skade voortvloeiend uit motorvoertuigverkeer nie in isolasie benader kan word nie. Na die mate waarin die reg wat elke gemeenskap moet orden, 'n produk van onder andere die kultuur-historiese bestel van daardie gemeenskap is, word die skadedragingskwessie deur elke gemeenskap op 'n besondere wyse gehanteer. Van die skadedragingsproblematiek is verkeerskade net een aspek (weliswaar 'n belangrike) en gevolglik kan dit nie los van die hele skadedragingsfilosofie en -tegniek van daardie gemeenskap benader en beoordeel word nie. Dit het belangrike implikasies vir die onderhawige ondersoek:

1 Volledige inligting (teoreties en empiries) oor hoe skadedraging in die algemeen by ons gehanteer word, is onontbeerlik. Dit hou onder meer in dat vasgestel moet word watter oogmerke of kombinasie daarvan met die vestiging van vergoedingsaansprake nagestreef word (waarby veral die oogmerke van die volledigs moontlike skadevergoeding, straf, afskrikking en rehabilitasie aan die orde kom, maar waarby ook motiewe soos skadeverspreiding volgens kapitaalkragtigheid, versekureerdheid en die vermoë om die skadelas deur prysverhoging te versprei, in gedagte gehou moet word).

2 Daarna moet teoreties en empiries vasgestel word hoedanig die hantering van vergoedingsaansprake na aanleiding van verkeersongelukke by die algemene skadedragingsoogmerk(e) en -tegniek(e) inpas en tot watter hoogte die gewenste

resultate tans bereik word. Hierby kan buitelandse inligting en statistiek ons bedroef min help en of daar tans reeds toereikend genuanseerde inligting oor die posisie in Suid-Afrika bestaan en beskikbaar is, is nie bekend nie.

3 Vervolgens sal besluit moet word watter oogmerke nagestreef moet word en dan moet dit praktiese beslag kry.

Nou lyk dit vir my of die kommissie se opdrag eintlik die kar voor die perde span deur op tegnieke van skadedraging te fokus alvorens die grondliggende geregtigheidsvraag uitgemaak is. Dit sou tot ongewenste resultate kon lei. Gestel byvoorbeeld daar sou geoordeel word dat 'n nuwe verpligte versekeringstelsel ingevoer moet word. Die koste daaraan verbonde sal dan ongelukkig uiteindelik deur die privaat motoris gedra word, want hy is die enigste een wat sy premies en bybetalings nie in die vorm van verhoogde pryse verder kan deurgee nie. Dieselfde sal volg indien 'n heffing op brandstofpryse geplaas sou word. Is dit nou regverdig dat die privaat motoris sy eie koste en 'n gedeelte van ander se koste wat as verhoogde pryse of belasting op hom neerkom, moet dra?

Die teenargument dat markkragte sal voorkom dat die privaat motoris té swaar belas word, gaan nie op in 'n ekonomie waar die ideale vraag-aanbodewewig deur allerlei kontrolemaatreëls belemmer word nie. 'n Verdere teenargument is dat enige nuwe stelsel bloot die huidige stelsel sal vervang en dat daar dus nie 'n verswaring van die privaatmotoris se las hoef te wees nie. Met die verhoging van koste wat egter noodwendig sal volg indien aan meer benadeeldes vir meer soorte nadeel meer volledige vergoeding uitbetaal moet word, twyfel ek sterk daaraan of die ondersoek na 'n goedkoper stelsel as die huidige sal lei. In elk geval gaan dit nie net om koste vir die individu nie, maar oor die las wat op die landsekonomie geplaas word. Waar dergelike stelsels elders ingevoer is, is dan ook gevind dat dit nie juis goedkoper is as die tradisionele stelsel nie.

Standpuntinname

Die uitgangspunt met skadevergoeding moet deurgaans wees dat werklik gelede skade so volledig moontlik vergoed moet word. Daar moet dus nie primêr (regstreeks of onregstreeks) gepoog word om veroorsakers van verkeerskade daarvoor te straf, of van voertuiggebruik af te skrik, of tot beter toekomstige gedrag te rehabiliteer, of om tot 'n maksimale kosteverspreiding te kom nie. Sodanige sekondêre implikasies van skadevergoedingstoekenning moet uiteraard egter nie uit die oog verloor word in die soeke na nuwe oplossings nie, maar dit moet eerder planmatig gebruik word om die gewenste resultaat te bereik. Daardie resultaat moet myns insiens steeds met die gedagte van gelykmakende geregtigheid klop.

Hierdie uitgangspunt hou in dat empiries bepaal moet word wat die volledige beeld van die ontstaan van verkeerskade is. Daarby moet onderskei word tussen verskillende oorsake van verkeerskade om die relatiewe bydrae van elkeen te bepaal, byvoorbeeld bestuurderopleiding en -gedrag, padtoestande, voertuiggehalte, diere, fietse en voetgangers. Verder moet byvoorbeeld onderskei word

tussen beroepsverpligte en toevallige, en tussen ervare en jong verkeersdeelnemers, tussen versigtiges en ongeluksvoëls, en sal enkelvoertuigongelukke afsonderlik beoordeel moet word. Slegs wanneer al hierdie inligting saam oorweeg word, kan die proporsionele bydrae tot die totale koste op 'n selektiewe wyse aan elke bydraende faktor toegewys word. Die koste kan dan byvoorbeeld deur 'n gemengde stelsel van heffings en onregstreekse belasting oor al die bydraende faktore versprei word.

By die ontwerp van enige stelsel moet onthou word dat in die moderne regsdenke 'n duidelike klemverskuiwing van gelykmakende na verdelende geregtigheid voorkom. Hierdie verskuiwing, gesien die werklikhede van ons jong land – waar eerste en derde wêreld in noue kontak leef en saam moet ontwikkel, en waar uiters kosbare menselewens en -gesondheid asook skaars produksiemiddele goed opgepas en verstandig aangewend moet word as ons hier ons taak wil verrig – sal toenemende invloed uitoefen op beleidsbesluite soos die wat in die onderhawige verband geneem sal moet word.

CHRIS VAN DER WALT
PU vir CHO

NOTICE TO THE STATE

There are a number of provisions in different acts of parliament which make it peremptory for the plaintiff in cases where he wishes to sue the state to give written notice of his intention to do so.

Examples of these provisions are section 32 of the Police Act (7 of 1958), section 113 of the Defence Act (44 of 1957), section 90 of the Prisons Act (8 of 1958) and section 29 of the Public Service Act (54 of 1957).

There are a variety of other acts which contain similar provisions. Most of the reported cases which discuss what constitutes notice to the state are those where members of the police have been involved and where notice is required to have been given in terms of section 32 of the Police Act.

The principles of these "police cases" can be equally applied to similar provisions of the other acts. Section 32 of Act 7 of 1958 reads as follows:

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the Defendant one month at least before the commencement thereof."

It therefore follows that if the state is the defendant notice to it must be given prior to the institution of the action against it.

The courts have held that notice to the district commandant of police is not sufficient compliance with the section: *Minister of Police v Mount Currie*

Motels (Pty) Ltd (1971 3 SA 410 (E)); neither does notice to a divisional commander or the state attorney meet the requirements: *Minister of Police v Mamazela* (1977 1 SA 113 (T)).

Prior to the promulgation of section 32(2) of the Police Act which expressly laid down that notice to the commissioner of police is notice to the state it was held in *Van Biljon v The Minister of Justice* (1961 3 SA 586 (T)) that such notice was *prima facie* notice to the state, as the commissioner is, in terms of section 4 of the said act, in command of all the members of the South African police force.

Notice to the minister has always been regarded as sufficient notice to the state. In certain cases there are indications that notice to the minister of the department concerned, is, in the absence of anything to the contrary, the only notice which can be regarded as valid: *Minister of Police v Mount Currie Motels (Pty) Ltd* (above 405C) and *Kruger v Minister of Law and Order* (unreported judgment of Berman AJ in the Cape Provincial Division (case number 553C/81)).

Hart AJ in *Mount Currie Motels (Pty) Ltd* was of the opinion that as, in that case the defendant was the minister of police, service of the notice on any other official could not be effective. Had the plaintiff, however, framed his claim against the state, Hart AJ was of the opinion that other considerations might have applied.

It is my opinion that a fundamental error that Hart AJ commits is to regard the minister in his nominal capacity as a different legal *persona* or entity from the state itself, rather than merely a different mode of citing the state when legal proceedings are brought against it.

Section 2 of the State Liability Act (20 of 1957) provides for the citation of the minister of the department concerned as nominal defendant where the state is the defendant. It neither makes it compulsory for the plaintiff to cite the state as the minister nor does it create a separate legal entity to sue.

In section 32(1) of the Police Act, when notice is to be given to the defendant, the defendant referred to is the state. There is no reference to the minister in that subsection as nominal addressee or defendant; neither is there any reference to the State Liability Act or any portion thereof in the said section of the Police Act.

The reason for the validity of the notice which is given to the minister is, it is submitted, that such notice must be given to someone who is able to investigate the allegations contained in it and to decide whether or not to defend the intended action. The minister, in his capacity as such, is empowered so to do.

There is no reference in any of the provisions of section 32 of the Police Act limiting the claimant's right to the giving of notice to the minister (or another expressly authorised official such as the commissioner of police or chief of the defence force) where notice "to the state" is required.

In *Marais v Union Goverment* (1911 TPD 127) an objection was raised that the correct respondent in the circumstances ought to have been the minister of railways rather than the government. Curlewis J, however, concluded that while the plaintiff could have cited the minister he was free to cite the Union government which would, in either case, be the party against which judgment would be given and which would eventually pay (132).

The concept of "state" has a variety of different meanings depending upon the circumstances in which it is used. See VerLoren van Themaat *Staatsreg* (3rd ed by Wiechers 5 and 6) and Baxter "The State in Public Law" (1981 *SALJ* 212).

Although there has been criticism (see, for example Wiechers 1964 *THRHR* 161), where the state is involved in litigation or civil proceedings, it may be cited as and referred to as "The Government of the Republic of South Africa."

In this regard reference may also be made to the Deeds Registries Act (47 of 1937) where land belonging to the State is registered in the name of the "Government of the Republic of South Africa."

In *Die Regering van Suid-Afrika v Santam Versekeringsmaatskappy Bpk* (1964 1 SA 546 (T) 548) Vieyra J stated:

> "The State has many facets, executive, legislative and judicial and accordingly where rights and duties arise similar to those of an ordinary juristic person, natural or otherwise, it is expedient that the Government i.e. the executive power, should be considered as the embodiment of the State's position in such regard."

Baxter is of the opinion that to regard the government as the "state" for certain purposes is sensible (231). If this is so, then I am of the opinion that notice to the prime minister as head of the executive or even to the state president, will constitute notice to the state. Such giving of notice will be of particular use where a number of government departments are involved, where a certain act of the wrongdoer may be in pursuance of more than one act of parliament or where it is unknown which government department is involved as it is unknown to which government department such wrongdoer is attached.

Contrary to Hart AJ's opinion in *Mount Currie Motels (Pty) Ltd* I am of the opinion that if notice is given to the minister of a department, the state may still be cited as the Government of the Republic of South Africa. So, too, if notice is given to someone other than the minister, the state may, in my opinion, still be cited as the minister in his nominal capacity.

In these cases there is no change in the defendant but only in the method of citation of the defendant. Thus in *Marais v Pongola Sugar Milling Co Ltd* (1961 2 SA 698 (N) 700) the question was raised whether it was necessary to join two government departments which might both be involved in a dispute. Wessels J was of the opinion that if the purpose was merely to make the state a party to the action then only one minister need be cited.

In *Groenewald v Minister van Justisie* (1972 3 SA 596 (O)) evidence had been led that the plaintiff had been arrested by a member of the South African

police. Although the minister of police had not been cited as defendant, the court held that in the circumstances the state and not the minister of justice was the real defendant. Kumleben AJ added that section 32 of the Police Act envisaged the state as the defendant where actions were brought for the acts of members of the South African police. He stated, however, that in cases where the minister of the department and not the state was the true defendant an objection to the citation of the wrong minister may well be upheld (602B–F).

Although the notice is usually addressed to the minister (or such persons such as the commissioner of police or chief of the defence force in terms of the Police Act and Defence Act respectively), the minister himself is personally given written notice only in exceptional cases. The notice as a rule receives the attention of those officers or servants of the state whose delegated function it is to deal with such matters. In this sense "notice to the state" refers to notice to the office of the minister or notice to a duly authorised employee of the minister (see *Dease v Minister van Polisie* (1962 2 SA 302 (T)) where it was held that the arrival of the notice at the office of the minister of police constituted compliance with section 32(1) of the Police Act).

Notice to public officers inferior in rank to the minister would therefore be notice to the state where such persons are authorised to receive such notice and act upon it.

The notice need not be addressed to the minister of the department concerned provided it arrives at the office concerned within time: see *Atson v Minister van Polisie* (1979 4 SA 95 (C)).

Despite the strict approach the courts have followed, I am of the opinion that notice to persons other than the minister, or commissioner or chief of the defence force where such notice is competent, should be sufficient compliance with the provision requiring notice to the state.

In *Van Biljon v The Minister of Justice* (above), in arriving at the conclusion that section 32(1) had been complied with, Boshoff J had regard to the purpose of the section and the character of the state. Further considerations where that the state had knowledge of the claim, that such knowledge was as a result of the written notice and that the state was not prejudiced by notice being given to the commissioner (588B–C). It is submitted that the approach of Boshoff J was correct.

The purpose of section 32 of the Police Act and other related provisions is discussed in *Hartman v Minister van Polisie* (1983 2 SA 489 (A)) and the cases referred to there. The purpose of such sections is to give the government departments an opportunity at an early stage to investigate the allegations against their servants, to collect evidence that is deemed necessary and to determine whether the claim ought to be contested or not. As the government departments have many employees in many different areas and as there is a high turnover of public servants, such notice at an early stage is necessary in order to prevent the state from being prejudiced in its investigations (497F–498A).

It is my opinion that notice to the state will have been given where timeous written notice is given to those public officers or employees who are empowered or authorised to do the following:

a order that investigations be made concerning the allegations contained in the notice;

b gather information and evidence relating to the alleged cause of action; and

c decide whether such intended action against the state ought to be defended or not.

In this situation the state will have knowledge of the intended claim. It should be sufficient notice if such persons are given the opportunity to perform the above acts and it will be irrelevant whether they perform them or not.

Even if notice is given to the minister it is no defence to say that he did not carry out the required investigations or obtain the necessary statements. He is empowered to do so and that is sufficient. Whether or not notice to the "state" has been given will therefore depend upon the facts of each case.

Of course, the "state," in regard to the notice, will be limited to a few designated persons, but may include such persons as the director-general or secretary of a government department, his assistants, other senior officials or their duly authorised agents.

Thus although a divisional commissioner or district commandant may have the necessary authority to order that investigations be made or that statements be obtained, he has no power to decide whether or not to contest the intended action and therefore it is clear that notice to him, unless it is forwarded to some authorised official within the time limits allowed, will not constitute the required written notice.

The state attorney has no power or authority to order the conduct of investigations, take statements, or to decide whether or not to defend the intended action unless he is so authorised. Like any other attorney he acts on the instructions of his client. However, unlike the ordinary attorney he has been appointed as attorney to the different government departments by virtue of the State Attorney Act (56 of 1957). Therefore his appointment as the "client's" attorney is not dependent upon the receiving of instructions from such "client" but has its origin in statute.

In the unreported case of *The Minister van Polisie v Gouws* (Transvaal case number 41/77) Theron J refers to the state attorney as "'n instrument" or "amptenaar" of the state. He is therefore employed by the same legal person as the client whoever his "client" may be.

In *Gouws's* case (above) the required notice was addressed to the "Minister van Polisie" but sent to the office of the state attorney who subsequently corresponded with the plaintiff's attorneys indicating that certain instructions had been sent to him to act on behalf of the minister. There was, however, no direct evidence that the written notice had been forwarded to the minister. Theron J

was of the opinion that the state attorney's conduct fell under the presumption of *omnia praesumuntur rite esse acta* and that it would be useless for him to say that he threw it away or kept it somewhere.

Taking into consideration the following:

a the state attorney is a public servant whose powers are derived from statute,

b by virtue of his appointment as attorney he is obliged to give his "clients" his legal opinion and recommendation concerning legal matters,

c the written notice is usually a legal pre-requisite before the issue of summons which notice requires legal consideration,

d the state attorney is employed by the same person as his "clients,"

I am of the opinion that despite *Mamazela's* case written notice to the state attorney should constitute compliance with the provisions requiring notice to the state.

Although the mere fact that the legislature authorises service of certain documents on a certain person is not authority for accepting that any other document may likewise be served on such person, it would be anomalous in my opinion to regard service of summons on the state attorney of a province in terms of rule 9(3)(g) of Act (32 of 1944) and rule 4(9) of the Supreme Court Act (59 of 1959) as valid service on the state while service of a written notice would not be so regarded.

Situations can be envisaged where in the same matter, the written notice is sent to the minister while summons is served on the state attorney without any prior warning to him of the intended action. In these circumstances the state would have been at an advantage had the required notice first been sent to the state attorney who, in addition to forwarding it to his "client" (as he would have to do in respect of any summons served on him) would have an opportunity to apply his mind to the matter.

The purposes of the provision requiring written notice would in such circumstances be achieved more efficiently.

IP GOUGH
Assistant State Attorney (*Natal*)

REGSUBJEKTIWITEIT VAN DIE DIER

1 Algemeen

Oor die inhoud van die begrip "regsubjektiwiteit" bestaan daar nie eensgesindheid onder regswetenskaplikes nie. (Vgl in dié verband Van der Vyver in Van der Vyver en Joubert *Persone- en Familiereg* (1980) 33; Van Zyl in Van Zyl en

Van der Vyver *Inleiding tot die Regswetenskap* (1982) 371; Van der Vyver "Regsubjektiwiteit" 1973 *THRHR* 266; Van Rensburg "Regsubjektiwiteit en die Regsubjek se Kompetensies" 1974 *THRHR* 94.) In die onderhawige aantekening verwys die begrip "regsubjek" (en "regsubjektiwiteit") na 'n draer van regte en verpligtinge.

Nieteenstaande die feit dat dit wyd in sekere ander lande gedebatteer word, het die regsposisie van die dier in Suid-Afrika nog weinig aandag geniet. In hierdie aantekening word beoog om 'n oorsigtelike beeld van die problematiek in dié verband te gee en om sodoende ook ander regswetenskaplikes se belangstelling daardeur te prikkel.

2 Die Dier as Skendingsubjek

In dié verband kan weer onderskei word tussen:

2 1 Die Dier as Sanksieskendingsubjek

Die vraag in dié geval is of 'n hof na 'n sekere regsproses 'n dier tot normskender kan verklaar en 'n sanksie, soos 'n strafsanksie of deliksanksie, teen hom in werking kan stel. Andersom gestel: kan 'n dier byvoorbeeld 'n misdaad of 'n delik pleeg? Die geskiedenis leer ons dat daar 'n stadium was toe diere aangekla en gestraf is. (Vgl Hyde "The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times" 64 *University of Pennsylvania Law Review* 701.) In 'n uitstekende artikel ("The Ox that Gored" *Transactions of the American Philosophical Society Held at Philidelphia for Promoting Useful Knowledge* (1981) 5 5–6) wys Finkelstein daarop dat dié optrede, naamlik die bestraffing van diere, beperk was tot wat genoem kan word die vroeëre Westerse beskawing:

> "[T]he principle underlying the biblical laws of the goring ox has had direct literal and near-literal counterparts in the legal experience of later Western society, where we find the curious phenomenon of trials and punishment of domestic animals for attacks upon persons. In contrast, we shall see that such behaviour is unknown to any society, past or present, which falls outside the Western cosmological tradition, and that this observation is valid also for 'primitive' or 'savage' societies, concerning which there remains much misapprehension in this connection."

As gevolg van die proses van humanisering wat die strafreg ondergaan het, word diere vandag nie meer gestraf nie. Die rede waarom 'n dier nie 'n misdaad of 'n delik kan pleeg nie, waarom hy nie normskendend kan optree nie, is geleë in die feit dat hy nie 'n aanspreeklikheidswil kan vorm nie en dit hang weer saam met die feit (waarop weer teruggekom word) dat hy nie 'n analitiese selfbewussyn het nie. Clark ("The Rights of Wild Things" 1979 *Inquiry* 171 172) wys daarop dat mens slegs regte kan hê teenoor hulle wat in staat is om dit te erken. Dit wil voorkom of die bogenoemde aanspreeklikheid van diere beperk was tot strafregtelike aanspreeklikheid. Ek het nêrens 'n geval teëgekom waar 'n dier byvoorbeeld delikregtelik aanspreeklik gehou is nie.

2 2 Die Dier as Situasieskendingsubjek

Ter illustrasie van die problematiek in dié verband kan na die volgende hipotetiese voorbeelde verwys word:

a A bekruip B se hond van agteraf en skiet hom in die been. A word aangekla van saakbeskadiging.

b C se hond bestorm D en byt hom. D verwond die hond sodat hy sy greep kan los. D word insgelyks van saakbeskadiging aangekla.

A is volgens ons reg skuldig aan saakbeskadiging terwyl D nie strafregtelik aanspreeklik is nie. Hoe verklaar mens dit? Die wesenlike verskil lê in die optrede van die hond in voorbeeld (b). D se reg op sy liggaamlike integriteit is deur die hond aangetas. Die hond het die norm wat D se reg op sy liggaam omvat, geskend wat aan D die reg gegee het om hom te dood. Hierdie regsuitoefening van D staan in die reg bekend as optrede in noodtoestand. 'n Diepere analise van dié verskynsel bring mens egter onvermydelik tot die konklusie dat die hond 'n reg van D geskend het en daarom ook 'n norm geskend het, aangesien 'n reg noodwendig 'n norm as teenkant het; regskending sonder normskending is nie moontlik nie. Die hond se optrede het nie tot gevolg dat (na 'n regsproses) die straf- of deliksanksie teen hom in werking gestel word nie, maar dit het D die reg gegee om in die situasie (dit is 'n noodtoestandsituasie) waarin hy verkeer het op te tree soos hy opgetree het.

3 Die Dier as Funksiesubjek

'n Dier kan nie as funksiesubjek in die regsverkeer optree nie, dit wil sê hy kan nie byvoorbeeld kontrakte sluit, testamente maak, administrateur van 'n boedel, ensovoorts wees nie.

McCloskey ("The Right to Life" 1975 *Mind* 403) beklemtoon in dié verband die kwessie dat 'n dier nie keuses kan maak nie. Hy sê die volgende hieroor:

> "It is when the notion of choice, possible or actual choice, enters the picture that the idea of a right possessed by the holder of the right gets some sort of grip. When there is evidence of the possibility of choice and of the making of rational choices including moral choices, and more so, when there is evidence of a language used to express thoughts, decisions, wishes, choices, that we move from the idea of duties *concerning the being* to the idea of the being *as a possessor* or potential or possible possessor of rights. It seems then quite evidently not simply to be our duty to act in certain ways towards the being who can and does choose to do certain things; such a being comes to be thought to have entitlement, to have some sort of right to respect for his existence and choices, and he/it to be a possessor of rights which impose duties on others"(413).

Hy gee vervolgens die volgende redes waarom keuse en beslissing vir hom in dié verband so belangrik is:

> "If I am right in this, we need to consider why choice and decision, including moral choice and decision, are so basic and important. The reason seems to lie in part in the idea of the immense worth of free existence, in part in the idea that the decider's life and development are his to determine, if and because he can determine them. The thought is that a decider and chooser must be rational, he must be a thinker, who makes *his* decisions, which affect him, how he is, what he becomes, what he does. Such a being, logically, can possess rights, entitlements to be, to do, to become, to have done. He is not a thing to which things simply happen. He is a being capable of possessing, deciding,

> doing, becoming; he is capable of accepting or rejecting rights, of exercising or yielding up and forgoing rights. The problem is why we believe that such a being in fact possesses rights, including the right to life, and why we think that only such being, or beings who are either actually or potentially choosers can be and are possessors of rights" (414).

Volgens hom kan slegs outonome wesens regte hê. (Vgl ook Margolis "Animals Have No Rights and Are Not the Equal of Humans" 1974 *Philosophic Exchange* 119; McCloskey "Rights" 1965 *Philosophical Quarterly* 115 125. Vgl egter Regan "McCloskey on Why Animals Cannot Have Rights" 1976 *Philosophical Quarterly* 251; Regan "Frey on Interests and Animal Rights" 1977 *Philosophical Quarterly* 335.)

Die feit dat 'n dier nie keuses kan uitoefen nie, vloei myns insiens voort uit die feit dat 'n dier nie 'n analitiese selfbewussyn het nie; hy kan hom gevolglik nie met ander diere en dinge vergelyk nie en kan homself nie in die toekoms projekteer nie. In dié verband sê Narveson ("Animal Rights" 1977 *Canadian Journal of Philosophy* 161 166):

> "Well there is a difference . . . the capacity to have a conception of oneself, to formulate long-range plans, to appreciate general facts about one's environment and intelligently employ them in one's plans, and rationally to carry out or attempt to carry out such plans. Now, a being which has those capabilities has, I suggest, *a future*, something(s) to live for, as we say, in a sense in which beings lacking these capacities do not. The latter, by contrast, presumably experience only more or less isolated sensations and uninterpreted feelings. If such beings are killed, all that happens is that a certain series of such feelings which would otherwise have occurred, do not occur. We might speculate that such beings lack, literally, 'individuality,' the sense of a distinctive significance to one's particular life, which typical humans have. And it seems to me plausible to argue that beings lacking these qualities do not have the right to life, as distinct from the right not to suffer. When beings having a future are killed, they lose that future; when beings lacking it are killed, they don't. So no interest in continued life is lost in their case. And the lack of individuality, in turn, suggests that it is not out of order to sacrifice one of such beings merely for the welfare of others; for since no appreciation of its unique life exists, what difference is there between securing a future benefit for it rather than any other sentient being?"

Om in die algemeen, soos soms gedoen word, te beweer dat 'n dier nie 'n selfbewussyn het nie, is myns insiens nie korrek nie. Indien 'n dier nie bewus was van sy eie bestaan nie, nie 'n selfbewussyn gehad het nie, sou hy homself nie teen 'n aanval verweer het nie. Daarbenewens is wetenskaplike toetse al uitgevoer wat daarop dui dat sekere diere wel 'n selfbewussyn het. (Vgl Dawkins *Animal Suffering* (1980) 16 105. Vgl in die algemeen Midgley "The Concept of Beastliness: Philosophy, Ethics and Animal Behaviour" 1973 *Philosophy* 111.)

4 Die Dier as Beskermingsubjek

Artikel 2 van die Dierebeskermingswet 71 van 1962 skep 'n groot aantal misdade wat basies daarop gerig is om die mishandeling van diere te voorkom. (Vgl Milton en Fuller *South African Criminal Law and Procedure* 3 (1971) 706.) Artikel 2 (m) stel byvoorbeeld voorskrifte vir die vervoer van diere. (Vgl verder Von Loeper "Zur neueren Entwicklung im Recht der Tierhaltung" 1980 *Agrarrecht* 233; Holzer "Aktuelle Probleme der Massentierhaltung in Österreich" 1980 *Agrarrecht* 236.) Hierbenewens bestaan daar verskeie wetgewingstukke wat die

beskerming van sekere diersoorte teen uitwissing ten doel het. (Vgl Rabie "Wildlife Conservation and the Law" 1972 *CILSA* 145.)

Volgens die opvatting van ons howe word nie beoog om die diere ter wille van hulleself teen mishandeling te beskerm nie, maar om die menslike gevoelslewe te beskerm. In *R v Maoto* 1947 1 SA 490 (O) 492 sê regter Van den Heever:

> "Die oogmerk van die wetgewing was nie om diere tot regsgenote te verhef nie en hierdie verbod is nie bedoel om aan hulle beskerming te verleen nie. Die oogmerk was klaarblyklik om te verbied dat een regsgenoot so ongenadig teenoor diere optree dat hy daardeur die fyner gevoelens en gewaarwordings van sy medemense leed aandoen.
> Die verbod is gerig aan hierdie volk wat in hierdie eeu leef en het dus as agtergrond die normale sedelike opvattings van die deurslag beskaafde mense van vandag."

(Vgl ook *S v Edmunds* 1968 2 PH H 398 (N); Broadie en Pybus "Kant's Treatment of Animals" 1974 *Philosophy* 375 382.) Karstaedt ("Vivisection and the Law" 1982 *THRHR* 349 351–352) kritiseer die howe se benadering: eerstens verklaar dit nie waarom mishandeling wat in privaatheid geskied ook bestraf word nie en tweedens,

> "the very people whose sensibilities are said to be protected in this explanation are precisely those who would insist that the protection belongs primarily to the animals themselves, not merely to their own tender feelings."

Die belangrikste punt van kritiek teen die howe se benadering is myns insiens dat alle misdade op die een of ander wyse terugherlei kan word tot die skending van die menslike gevoelslewe: die aanranding van 'n slaaf deur sekere mense byvoorbeeld, is in die verre verlede nie as 'n misdaad beskou nie omdat dit nie 'n genoegsame verontwaardiging by genoeg (invloedryke) mense ontlok het nie.

Karstaedt kom tot die konklusie dat diere in ons reg nie regte het nie. Hulle is bloot saaklike regsobjekte. Die vraag is of 'n entiteit beide 'n regsobjek en 'n regsubjek kan wees. Neem die volgende voorbeeld: A rand B lewensgevaarlik aan. Volgens ons reg het B 'n reg om A (in noodweer) te dood. Momenteel het B dus 'n reg op A se lewe (en sy liggaamlike integriteit). Op daardie moment bly A egter die eienaar van sy motor en daarom 'n regsubjek. A is dus terselfdertyd beide regsobjek en regsubjek. (Vgl ook my artikel "Noodweer ten aansien van Nie-fisiese Persoonlikheidsgoedere" 1975 *De Jure* 59 66, waar op nog 'n voorbeeld gewys word.)

Frey ("Animal Rights" 1977 *Analysis* 186 186) wys daarop dat die belangstelling in die vraag of diere regte het, veral veroorsaak is deur die "recent surge of interest in animal welfare" en in die voor- en nadele "of eating animals and using them for scientific research." (Vgl ook Scott "Humane Considerations in the Use of Experimental Animals" 1978 *Journal of the South African Veterinary Association* 159.) In laasgenoemde gevalle sal die vegetariërs en die teenstanders van die gebruik van diere vir wetenskaplike navorsing se hande volgens Frey versterk word as aan diere wel regte toegeken word. Die voorstaanders van regte vir diere gebruik die argument dat as babas en ernstige geestesbelemmerdes ("severely mentally-enfeebled") regte het, diere dit ook het.

Frey (188) voer aan dat daar drie argumente is waarom babas en ernstige geestesbelemmerdes reghebbendes kan wees en diere nie:

a 'n Baba is potensieel 'n rasionele wese terwyl 'n dier dit nie is nie.

b Die gelyksoortigheidsargument, wat hy soos volg verduidelik:

> "One might try to include the severely mentally-enfeebled by means of the *similarity argument*: in all other respects except rationality and perhaps certain mental accomplishments, the severely mentally-enfeebled betray strong similarities to other members of our species, and it would and does offend our species horribly to deprive such similar creatures of rights. If this argument is rejected, on the ground that rationality is the requirement for possessing rights and other similarities are beside the point, then the severely mentally-enfeebled do not have rights. On the other hand, the similarity argument does separate the severely mentally-enfeebled from Fido, who does not bear anything like (even) sufficient physical similarities to ourselves to warrant similar inclusion.
>
> Animal liberationists, of course, will also object to the similarity argument on the ground that it smacks strongly of speciesism. For it does enshrine, if not advocate, active discrimination against other species in favour of our own."

(Vgl ook oor dié onderwerp Pluhar "Must an Opponent of Animal Rights Also Be an Opponent of Human Rights" 1981 *Inquiry* 229; Smart "General Desires as Grounds for the Wrongness of Killing" 1981 *Inquiry* 242.)

c Babas en ernstige geestesbelemmerdes het onsterflike siele en diere nie.

Jamieson en Regan ("Animal Rights: A Reply to Frey" 1978 *Analysis* 32) het op die artikel van Frey geantwoord. Dit is gepas om hulle argumente in detail hier aan te haal:

> "If we suppose that part of what it is to be rational is to be able to make inferences; to be able to select the most efficient means of achieving certain ends; to be able to symbolize; to be able to analyse concepts into their constituent features; and to be able to recognize instances of general concepts; then it is at least arguable that some infant animals (e g, infant primates) are, to some degree, 'potentially rational', in which case the potentiality argument, 'if it stands at all' as a defence of the view that (normal) human infants have rights, does not, or at least does not appear to, 'specifically exclude (all) animals from the class of right-holders.'
>
> Similarly in the case of the similarity argument: given any basis (for example, physical appearance) in terms of which to judge the relative similarity of other beings to normal human beings, cases will arise where some animals will betray stronger similarities to these paradigm humans than do some non-paradigmatic humans (e g, some physically deformed humans who are severely mentally-enfeebled). Thus, if these latter humans should be accorded rights, on the grounds of their similarity to these paradigm humans, then those animals who betray the same or a greater degree of similarity ought also to be accorded rights. *If*, then, the similarity argument 'stands at all', it does not, or at least it does not in any clear way, 'specifically exclude (all) animals from the class of right-holders'. The case of the religious argument may be somewhat different, but enough already has been said, without going into attempts to ground rights on the existence or non-existence of souls, to make it clear that it is at least arguable that some animals should be accorded rights, if the potentiality and similarity arguments happen, in Frey's words, to 'stand at all' "(35).

(Vgl ook Clark "Animal Wrongs" 1978 *Analysis* 147; Regan 1977 *Philosophical Quarterly* 335; Regan "Narveson on Egoism and the Rights of Animals" 1977 *Canadian Journal of Philosophy* 179; Singer "All Animals are Equal" 1974 *Philosophic Exchange* 103.)

Rodman ("Animal Justice: The Counter-revolution in Natural Rights and Law" 1979 *Inquiry* 3) wys daarop dat die natuurregsleer van Grotius, anders as dié van die Romeine, postuleer dat die natuurreg slegs vir mense geld. Hierdie

hominisentriese of antroposentriese natuurregsleer van Grotius het 'n groot invloed op die latere menslike denke uitgeoefen.

Sprigge ("Metaphysics, Physicalism, and Animal Rights" 1979 *Inquiry* 100) voer myns insiens korrek aan dat indien dit verkeerd is om op 'n sekere wyse teenoor 'n dier op te tree, dit gesê kan word dat daardie dier die reg het dat nie op so 'n manier opgetree word nie. Aansluitend hierby is die opmerking van Lawry ("Natural Rights: Men and Animals" 1975 *South Western Journal of Philosophy* 109) dat 'n subjek wat regte het, nie noodwendig ook pligte hoef te hê nie. Hy sê:

> "Following virtually everyone who has addressed the topic, except Wasserstrom and Hobbes, I maintain that the predication of rights does not involve the predication of duties to the subject of the rights because the term 'right' refers to the person to whom others have some duty. Rights and duties are 'correlative,' or, as Professor Brandt puts it, 'to have a moral right to something is for *someone else* to be morally *obligated* (in the objective sense) to act or refrain from acting in some way in respect to the thing to which I am said to have the right.' Hence, to predicate a right is to predicate a duty of others to the entity to which the right is attributed. The predication of a right, then, involves no predication of duties to the subject of the right" (114).

Fox ("Animal Liberation: A Critique" 1977–1978 *Ethics* 106) erken dat diere belange het

> "in the sense that they are capable of distinguishing between states of consciousness which are painful and those that are pleasurable or accompany physical well-being, and that they seek the latter and avoid the former as much as possible."

(Vgl ook Sprigge 1979 *Inquiry* 118.) Hy kritiseer egter Regan en Singer se benadering dat (morele) regte hulle oorsprong het in die vermoë om pyn te ondervind 110). (Vgl ook Fox "Animal Suffering and Rights: A Reply to Singer and Regan" 1977–1978 *Ethics* 134; Regan "Utilitarianism, Vegetarianism and Animal Rights" 1979 *Philosophy and Public Affairs* 305.)

Dat diere fisiologies en psigologies pyn en ongerief kan ervaar, staan bo twyfel. (Vgl Dawkins aw.) Diere het myns insiens 'n belang daarin (en gevolglik 'n behoefte daaraan) om nie onnodige pyn te ly en ongerief te verduur nie. (Vgl Karstaedt 1982 *THRHR* 362; Hanula en Hill "Using Metaright Theory to Ascribe Kantian Rights to Animals within Nozick's Minimal State" 1977 *Arizona Law Review* 242 254; Clark 1979 *Inquiry* 171 173 179.) In die lig hiervan is filosowe en die openbare mening dit eens dat dit ontoelaatbaar is om wreed teenoor diere op te tree. Passmore ("The Treatment of Animals" 1975 *Journal of the History of Ideas* 195 201) stel dit soos volg:

> "Animals can feel pain; men can feel pity for their pain: And the man who often feels pity for suffering animals is more likely... to have compassion on his fellowman."

(Vgl ook Haworth "Rights, Wrongs, and Animals" 1977–1978 *Ethics* 95 103.)

'n Dier het dus, in die lig van ons positiewe reg (hierbo uiteengesit) 'n reg om nie mishandel te word nie. 'n Dier se fisiese integriteit (in die sin van vermyding van onnodige pyn) word deur die reg beskerm. 'n Analise van die regswerklikheid bring mens gevolglik tot die konklusie dat die dier wel regsubjektiwiteit in dié verband het, naamlik wat genoem kan word beskermingsubjektiwiteit. Die bewering wat dikwels gemaak word dat 'n dier nie regsubjektiwiteit

kan hê nie, is niks anders as 'n voor-analitiese postulering van 'n analitiese resultaat nie; dit is 'n vooruitgedateerde konklusie en moet as onwetenskaplik verwerp word. So 'n benadering is gebaseer op 'n oordrewe antroposentristiese spesisisme wat nie verband hou met die regswerklikheid nie.

In die geval van 'n wilde dier wat deur die reg teen uitwissing beskerm word, het die dier 'n reg op sy lewe en die mens het 'n plig om hom nie te dood of te skend nie. (Vgl in die algemeen Mayrand "The Rights of Animals or the Rights of Men?" 1961–1962 *Criminal Law Quarterly* 48; Sagoff "On Preserving the Natural Environment" 1974–1975 *The Yale Law Journal* 205 223.) 'n Mens kan die vraag vra waarom die mens sekere diersoorte en ook ander natuurdinge wil beskerm. Die antwoord op die vraag kan vanuit 'n sekere hoek gesien, myns insiens tot die volgende stelling gereduseer word: hoe meer die mens van die natuur behou, hoe meer kan hy van homself te wete kom. Die beskerming van die natuur hou dus, van een hoek af gesien, verband met die mens se soeke na homself. Daarbenewens het die natuur natuurlik sy eie inherente estetiese waarde.

Die vraag of die dier nie in 'n groter mate juridies op gelyke vlak met die mens behandel moet word nie en of byvoorbeed vegetarianisme gevolglik regtens sanksioneer moet word, word vir die doeleindes van dié aantekening nie in bespreking geneem nie.

Die feit dat diere nie self hulle regte kan afdwing nie, skep ook geen probleme nie omdat daar ook ander entiteite (soos regspersone en *infantes*) is wat nie self hulle regte kan afdwing nie. (Vgl Van Heijnsbergen "The Rights of Animal and Plant Life" 1977 *Environmental Policy and Law* 85; Murphy "Has Nature Any Right to Life?" 1970–1971 *Hastings Law Journal* 467; *Twenty-third Commonwealth Parliamentary Conference: Report of Proceedings Canada* 1977 266–268; Stutzin "Die Natur der Rechte und die Rechte der Natur" 1980 *Rechtstheorie* 344 346. Vgl ook Ho "U N Recognition of the Human Right to Environmental Protection" 1976 *Earth Law Journal* 275.)

5 Die Dier as Bevoordelingsubjek

Benewens die feit dat 'n dier 'n beskermingsubjek kan wees, kan hy ook 'n *bevoordelingsubjek* wees. 'n Dier kan byvoorbeeld die bevoordeelde uit 'n trust wees.

JMT LABUSCHAGNE
Universiteit van Pretoria

VONNISSE

SMIT v SUID-AFRIKAANSE VERVOERDIENSTE 1984 1 SA 246 (K)

Deliktuele aanspreeklikheid weens late – onregmatigheid – nalatigheid

Die feite in *Smit v Suid-Afrikaanse Vervoerdienste* sien kortliks soos volg daar uit: Sekere werknemers van die verweerder gebruik karbied as brandstof vir hul lampe. Hierdie stof verbind hewig met water om asetileengas vry te stel, welke gas vlambaar is en aldus 'n goedkoop bron van energie daarstel. Die volume asetileengas wat in die proses vrygestel word aan die atmosfeer is aansienlik; sodanig so dat indien dit in 'n toe houer geplaas sou word, dit 'n maklik ontplofbare artikel sou vorm – 'n ware bom. Die vindingryke kinders van Touwsrivier was ten volle bewus van die bommaak-potensiaal van karbied, aangesien dié stof na gebruik in oop asblikke op die Touwsrivierstasie gestort is waar enige nuuskierige en ondernemende skoolkind dit maklik in die hande kon kry (284A). Dit verg nie 'n groot verbeeldingskrag nie om te raai hoe die bommakery onder die kinders proefondervindelik vervolmaak is deur die afvalkarbied (in die vorm van stukkies gruis (248F)) in verskillende houers te plaas (van grondboontjieblikke (248B) tot toeskroefkoeldrankbottels (t a p)), dit met water te bedek en dan dig toe te maak. Normaalweg skyn die bommakers groot sukses te behaal het, soos die algemene populariteit van die speletjie genoegsaam bewys. In die onderhawige geval het twee skoolseuns, te wete die Coetzee-broers, een Sondagmiddag besluit om 'n demonstrasie te gee aan die eiser se twaalfjarige seun, Willie, en dié se broer. Die speletjie het egter 'n treurige wending geneem toe die koeldrankbottel wat as houer gedien het, ontplof het en glasskerwe die niksvermoedende Willie se linkeroog feitlik verblind het. Die feite in hierdie saak was hoegenaamd nie in geskil nie, dog wel of die feite in hierdie vordering van Willie se vader wat namens sy seun ageer op 'n oorwig van waarskynlikhede bewys daarstel:

> "(a) dat verweerder se werknemers nalatig was; en
> (b) dat daardie nalatigheid oorsaak was van bedoelde beserings; en of verweerder derhalwe aanspreeklik is om uit hoofde daarvan die seun se skade te vergoed" (247E).

In haar beoordeling van die optrede van die verweerder ten einde die nalatigheidsvraag te beslis, beroep regter Van den Heever haar op die welbekende formulering van die nalatigheidstoets in *Kruger v Coetzee* 1966 2 SA 428 (A) 430 waar appèlregter Holmes die volgende bepaal:

> "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."

Regter van den Heever vind dit vir doeleindes van vasstelling van moontlike nalatigheid aan die verweerder se kant alleen nodig om te ondersoek of die verweerder se optrede klop met dié van die *diligens paterfamilias* soos uiteengesit in stadium (a)(i) van die pasgesketste toets, aangesien sy by voorbaat by implikasie bevind dat die optrede van verweerder te kort skiet aan die toets soos gestel in (a)(ii) en (b) (249C). Die vraag kom na vore of dit hoegenaamd regswetenskaplik houdbaar is om 'n beslissing aangaande laasgenoemde bene van die toets te vel voordat die vraag na die eerste been besleg is. Indien die bekende *dictum* van appèlregter Greenberg in *SAR & H v Marais* 1950 4 SA 610 (A) 622, waarin hy die "duty to take care" – leerstuk se werking gelykstel het aan dié van die toets van die redelike man ten einde nalagtigheid in 'n geëigende geval te bepaal, as uitgangspunt geneem sou word (sien veral Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 133–134), stel die werkmetode van die regter in die onderhawige saak beslis 'n *petitio principii* daar. Die gelykskakeling van hierdie toetse kom daarop neer dat die vraag of daar 'n "duty" bestaan en been (a)(i) hierbo identies is; die vraag of die "duty" verbreek is – *en dit impliseer noodwendig dat daar wel 'n "duty" is* – korrelleer met bene (a)(ii) en (b) hierbo. Deur dus te kenne te gee dat die verweerder nie redelike stappe gedoen het om die nadeel van die slagoffer af te wend nie, dat die "duty" teenoor die slagoffer dus verbreek is, gee die hof implisiet te kenne dat daar wel 'n "duty" in die eerste plek bestaan het! Myns insiens sou dit meer bevredigend gewees het om eenvoudig te konstateer dat die ondersoek na (a)(ii) en (b) regtens nie ter sprake behoort te kom voordat 'n positiewe antwoord op (a)(i) verkry is nie. (Hiermee word daar nie te kenne gegee dat ek van oordeel is dat die "duty to take care" –toets in bovermelde tipe aanwending sonder regswetenskaplike probleme is nie. Vir kritiek teen hierdie Engelsregtelike konsep wat moeilik in te pas is in die byderwetse "elementologiese" benadering tot die reg insake die onregmatige daad, sien Van der Merwe en Olivier t a p; vgl Van der Walt in Joubert (red) *The Law of South Africa* vol 8 par 22.)

Die *obiter*-opmerkings (gesien die toegewing deur die hof (251B) dat dit foutief mag wees om in die onderhawige geval 'n bevinding te maak dat die verweerder se optrede nie onregmatig was nie) van regter Van den Heever met betrekking tot die delikselement onregmatigheid verdien besondere vermelding. Die volgende aksiomatiese stelling word deur haar gemaak:

> "Aanspreeklikheid teenoor 'n ander vir skade ontstaan nie noodwendig waar en slegs op grond daarvan dat daar *culpa* soos hierbo omlyn aanwesig is nie" (249E).

Hierdie stelling word dadelik gemotiveer deur 'n beroep op die klassieke

gewysde *Herschel v Mrupe* 1954 3 SA 464 (A) waar appèlregter Van den Heever hom soos volg uitlaat:

> "[T]he act or omission complained of must be an unlawful incursion into another's economic sphere (485A)... [T]he Aquilian action in respect of *damnum injuria datum* can be instituted by a plaintiff against a defendant only if the latter has made an invasion of rights recognised by the law as pertaining to the plaintiff" (490A).

Sonder om in besonderhede op die ontleding van gewysderegtelike bewysplase in te gaan, kan daarop gewys word dat daar vandag algemeen aanvaar word dat *culpa* onregmatigheid impliseer (McKerron *The Law of Delict* (1971) 13; Van der Walt a w par 36; Van der Merwe en Olivier a w 115). Daarom val dit vreemd op dat die *culpa*-begrip in die onderhawige saak skynbaar "ontkoppel" word van die onregmatigheidsbegrip, in die sin dat regter Van den Heever die bestaanbaarheid van *culpa* sonder dat daar onregmatig opgetree is, aanvaar. Haar beroep op die *Herschel*-saak (spesifiek 490A) bevestig myns insiens juis die huidige "akademiese" standpunt dat daar van *culpa* alleen sprake kan wees indien dit vasstaan dat die verweerder ook onregmatig opgetree het. (Dit is veelseggend dat McKerron a w 13 vn 3 hom in sy dergelike betoog op dieselfde bladsy van die *Herschel*-beslissing beroep.) Hoewel die beklemtoning deur regter Van den Heever van die onregmatigheidselement in die onderhawige saak daarop dui dat sy die *culpa*- en onregmatigheidsbegrip *in wese* nie ontkoppel wil sien nie en my kritiese opmerkings dus moontlik as blote semantiese besware geïnterpreteer mag word, kan dit moeilik oorbeklemtoon word dat juridiese terme soos "*culpa*" en "onregmatigheid" met die uiterste versigtigheid aangewend moet word, veral in verhouding tot mekaar, ten einde begripsuiwerheid te behou en selfs te bevorder. Juis met die oog op laasgenoemde kan die algemene strekking van regter Van den Heever se siening dat onregmatigheid as delikselement in die onderhawige tipe geval nooit uit die oog verloor mag word nie, beslis verwelkom word.

Wat besonder veelseggend is in regter Van den Heever se uitspraak, is dat sy die netelige probleme wat verband hou met die vasstelling van die onregmatigheids- en die *culpa*-element (wat betref haar bespiegelinge oor nalatigheid kan dit insgelyks as *obiter* aangemerk word, in die lig van haar uitlatings op 250H) wil benader (sien veral 249F–250A) soos dit gedoen is deur appèlregter Van den Heever in *Herschel v Mrupe* (*supra* veral 485D e v). Sy beweer dan ook met instemming, verwysende na appèlregter Van den Heever se woorde, dat "*nalatigheid* nie slegs een betekenis het nie; en dat... Regters nie 'n algemene diskresie het nie om wetgewend op te tree deur te besluit wanneer nalatigheid = *culpa* ook nalatigheid = gedinggrond is" (249G). Hierdie benadering kontrasteer sy self (250D–G) met 'n *dictum* uit appèlregter Holmes se uitspraak in die toonaangewende gewysde van *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 373E–H.

Waar die regter die term "nalatigheid = gedinggrond" aanwend, sou dit volgens die huidige stand van sake (gesien die ontwikkeling in die gewysdereg wat uiteindelik afsluit met *Minister van Polisie v Ewels* 1975 3 SA 590 (A)) myns insiens teoreties suiwerder wees om te praat van "onreg-

matige late = gedinggrond," gesien die feit dat nalatigheid as verwyt (Van der Merwe en Olivier a w 132) of verwytbare gesindheid (De Wet en Swanepoel *Strafreg* (1975) 153) kwalik as gedinggrond bestempel kan word.

Hoewel vermelde *dictum* van appèlregter Holmes in die *Munarin*-saak (*supra*) meerendeels gesien word as sou dit suiwer op die nalatigheidsvraag (aanwending van die tweeledige toets) betrekking hê (vgl Van der Walt a w par 22), blyk dit onteenseglik dat regter Van den Heever appèlregter Holmes se algemene benadering as verwysende na die vasstelling van die onregmatigheidselement by 'n *omissio*-geval opneem, welke siening van haar haar noop om standpunt teen die *dictum* in te neem. Die kern van appèlregter Holmes se stellings sien soos volg daaruit:

> "[I]t is sufficient to say, by way of general approach, that, if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter – the duty of care" (373H).

Hierdie breë benadering word deur regter Van den Heever op regspolitieke gronde bevraagteken:

> "Ons reg word hierdeur, met respek, gelaat in 'n stuurlose posisie waar die Howe inderdaad kasuïsties wetgewend kan optree."

Hierdie vrees vir 'n ongebreidelde regterlike diskresie wat dan die ganse materiële reg met betrekking tot die onregmatigheidselement sou beduiwel, word natuurlik nie deur regter Van den Heever alleen gekoester nie. Na die beslissing van *Minister van Polisie v Ewels* (*supra*) waarin hoofregter Rumpff se uitspraak as die hoogwatermerk in Suid-Afrika insake die onregmatige *omissio* as gedinggrond in die reg insake onregmatige daad aan te merk is (vgl bv Van der Walt 1976 *TSAR* 101; Van Rensburg 1976 *THRHR* 175; Amicus Curiae 1976 *SALJ* 85), was daar nie slegs lof vir die bevinding dat die "regsoortuiging van die gemeenskap" (*boni mores*) as toetssteen gebruik moet word vir die vasstelling van die feit of 'n late onregmatig is en dus as aksiegrond *ex delicto* kan dien nie. Amicus Curiae (a w 87) in die besonder het ernstige bedenkings geopper:

> "[O]n the face of it Ewels's case would seem to have substituted judicial discretion for principle. It would have been preferable, one respectfully suggests, if the Court of Appeal had found it possible to resolve its difficulty by restating the conditions under which, or the principles upon which, omissions are actionable, by redefining them where necessary or . . . by recognizing additional ones. Anything beyond that was for the legislature, rather than for the social consciences of individual judges, purporting to reflect the unascertainable, and largely non-existent, views of an ill-defined body of people."

Dat hierdie aanhaling een honderd persent in ooreenstemming is met die sentimente van regter Van den Heever, kan nouliks ontken word. Juis in hierdie opsig is dit te betreur, en val dit enigsins vreemd op dat daar geen verwysing is na die regsposisie soos dit in die *Ewels*-saak uiteengesit is nie. Benewens laasvermelde gewysde sou ook nog met vrug kennis geneem kon word van die redelik resente beslissings in *King v Dykes* 1971 3 SA 540 (RAD) 544 en *Minister of Forestry v Quathlamba* 1973 3 SA 69 (A) 85. Kemp (*Delictual Liability for Omissions* (ongepubliseerde LLD-verhandeling UPE 1979)) se ontleding van hierdie twee sake ten opsigte van die onder-

hawige problematiek is veelseggend met verwysing na die feite van die saak tans onder bespreking: Eerstens, beweer hy (a w 378–379), toon die gewysdes duidelik aan dat 'n baie belangrike faktor in die vasstelling van die aan- of afwesigheid van onregmatigheid is:

> "[W]hat steps were objectively reasonable to demand from the omitter[?] If a defendant landowner therefore has greater resources at his disposal than the ordinary landowner, more may be expected from him. In general terms, what is objectively reasonable to demand of a defendant will vary from defendant to defendant, taking into account his ability (including financial and physical aspects) to prevent the harm in question. A rich man may therefore be expected to spend more money that a poor man where the steps required to prevent the harm involve the spending of money" (378–379).

Veral met die oog op die persoon van die verweerder in die onderhawige saak, dui hierdie stelling daarop dat mens geredeliker 'n positiewe handelingsplig op hom sal lê, en in die lig van hierdie feit moet regter Van den Heever se vrees dat regters Robin Hood sal wil speel om "'n aksie te gun waar die armoedige enkeling vermoënde regspersone aandurf" (250H) beoordeel word: Dat 'n minder bevoorregte eiser wel ten koste van 'n kapitaalkragtige verweerder bevoordeel mag word, is 'n onomstootlike moontlikheid maar dan, moet mens byvoeg, sal só 'n "bevoordeling" nie noodwendig op misplaaste jammerhartigheid berus nie – iets wat ten alle koste vermy moet word – dog op die naakte eise van die werklikheid wat die vermoë van elke persoon om nadeel van 'n ander af te wend objektief as *factum probans* in aanmerking neem. Hoe maklik dit vir die verweerder in die onderhawige saak was om die gewraakte nadeel te voorkom, blyk uit die feit dat daar sedert die voorval met die bom 'n staalkas aangebring is waarin die karbied uitgegooi word, welke kas selfs van 'n waarskuwing ("Kalsium karbied. Moenie water gebruik in geval van brand.") voorsien is (248F).

Tweedens, verklaar Kemp (a w 379):

> "[T]he mere fact that the defendant was a mere omitter in relation to the harm, places him in a different category to a defendant who has actually caused the danger of harm, in that less exacting steps are required from the former."

(Ook uit *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 116, 'n bekende mylpaal in die *omissio*-sage, blyk duidelike steun vir hierdie interpretasie.) Dit bring my by die geval onder bespreking waar mens juis te make het met die klassieke *omissio per commissionem*-tipe geval: Die werknemers van die verweerder het naamlik die potensieel gevaarlike toedrag van sake geskep, en nie iemand anders soos 'n regsvoorganger in titel nie. (Sou laasgenoemde die geval wees, sou dit beslis sin uitgemaak het om in te gaan op die vraag of die kinders wat die karbied verwyder het dalk "licensees" was ten einde die verweerder se *omissio* te beoordeel; die feit dat regter Van den Heever dus nie pertinent 'n mening wil uitspreek oor die hoedanigheid van die karbiedgaarders op die spoorwegterrein nie – naamlik as "licensees' of "trespassers" (sien oor hierdie terminologie McKerron a w 243–244) – laat ek vir doeleindes van die bespreking daar.)

Dit wil voorkom of regter Van den Heever van mening is dat die feit dat verweerder se werknemers "niks on-

wettigs" gedoen het deur hul karbiedlampe op die spoorwegperseel uit te krap nie, 'n faktor sou kon wees wat kan dui op die afwesigheid van onregmatige optrede aan die verweerder se kant (250H). Sonder om hier in besonderhede in te gaan, kan net kortliks daarop gewys word dat veral die sogenaamde "munisipaliteitsake" (sien Van der Merwe en Olivier a w 31 e v) daarop dui dat die voorafgaande handeling (*commissio; factum praecedens*) hoegenaamd nie "onwettig" hoef te wees ten einde die latere versuim (*omissio*) onregmatig te kleur nie; dit is juis die *omissio* wat in eie reg beoordeel word, met verwysing na die geykte kategorieë wat deur die reg daargestel is, as uitkristalliserings van en addisioneel tot die toets van die "regsoortuiging van die gemeenskap" (vgl hieroor veral Kemp a w 364) – waarmee ten ene male nie ontken wil word nie dat die inherente onredelikheid van die *factum praecedens* 'n faktor kan wees in die beoordeling van die resulterende *omissio*.

Om terug te keer tot regter Van den Heever se argumente van 'n regspolitieke aard, sal dit die moeite loon om na haar *ipsissima verba* aan die einde van haar uitspraak te kyk:

> "[E]rkenning van 'n geldige gedinggrond aan eiser in hierdie geval [sou] verreikende maatskaplike implikasies hê. In beginsel sou dit ook beteken dat indien ek 'n pistool in my klerekas laat, ek aanspreeklik is vir die dood van die bankteller wat sterf sou my tuinjong die vuurwapen verwyder en daarmee 'n bankroof pleeg. Die pistool is nie *per se* gevaarlik nie. In die verkeerde hande of vir verkeerde doeleindes kan dit gevaarlik word. Net so is karbied nie gevaarlik op sigself nie, en wat verweerder se mense daarmee gedoen het, het dit ook nie gevaarlik gemaak nie" (251A–B).

Hierdie uiteensetting het kennelik te make met die onregmatigheidsproblematiek en sluit nou aan by die uitspraak van appèlregter Van den Heever in die *Herschel*-saak (*supra*). Die standpunt dat om te bevind dat die aanvanklike *omissio* (te wete die laat lê van die rewolwer sonder om voorsorgmaatreëls te tref teen verwydering of diefstal daarvan) onregmatig is, ook die onregmatigheid van die nalater se optrede ten aansien van alle resulterende nadeel laat vasstaan, kom op die reinste toepassing van die *versari*-leer neer en is as sodanig verwerplik. (Oor die finale verwerping van hierdie leer te lande, sien *S v Van der Mescht* 1962 1 SA 521 (A); *S v Bernardus* 1965 3 SA 287 (A): beide gewysdes is van meer resente herkoms as *Herschel v Mrupe* (*supra*).) Dat 'n handeling met betrekking tot een gevolg daarvan onregmatig kan wees, dog ten opsigte van ander gevolge regmatig, toon Van der Merwe en Olivier (a w 125 215–216) oortuigend aan deur gebruikmaking van 'n voorbeeld; veral die feit dat die tuinjong in regter Van den Heever se voorbeeld uit eie beweging en *opsetlik* die doodslag gepleeg het, behoort 'n faktor te wees wat 'n effek sal hê op die regsoortuiging van die gemeenskap en wat 'n bevinding van afwesigheid van onregmatigheid aan die kant van die rewolwereienaar sal ondersteun. Volgens 'n ander denkskool sou daardie onafhanklike optrede van die rower as 'n *novus actus interveniens* bestempel word, wat die juridiese, ofskoon nie die feitelike kousale band nie, tussen die aanvanklike late en die uiteindelike gevolg verbreek. (Vgl egter Van der Merwe en Olivier a w 215 e v se kritiek teen hierdie standpunt: volgens hulle goedgemotiveerde standpunt is die sg *novus actus* maar net een van die faktore wat in aanmerking kom by die

beoordelingsproses vir onregmatigheid.) Uit bovermelde moet geensins die afleiding gemaak word dat ek van oordeel is dat verwyderde gevolge nie ook as onregmatig bestempel kan word nie – regter Van den Heever se voorbeeld kan hier weer as aanknopingspunt dien: Gestel dit is nie die tuinjong wat die rewolwer neem nie, maar een van my woelwaterkinders wat versot is op "cowboys and crooks." Met die rewolwer hardloop hy uitgelate na buite en skiet uit pure baldadigheid 'n skoot na die munisipale lesermeter wat vir hom soos "Billy the Kid" lyk waar hy oor die watermeter buk. Myns insiens is dit beslis toelaatbaar om in hierdie geval my late met betrekking tot die meterleser se vleiswond as onregmatig aan te merk sonder om in die *versari*-strik te val.

Die verdere argument dat 'n rewolwer as sodanig nie gevaarlik is nie (net soos karbied sonder water doodveilig is) en 'n late ten aansien van die veilige bewaring daarvan *om daardie rede* nie onregmatig kan wees nie, lyk kunsmatig: daar is talle voorbeelde van voorwerpe wat opsigselfstaande nie gevaarlik is nie, dog potensieel gevaar inhou indien dit op 'n sekere wyse gebruik word (bv die keistene in *Halliwell v Johannesburg Municipality* 1912 AD 590; die sleepwa in *SAR v Estate Saunders* 1931 AD 276 ens). Die feit dat 'n ander persoon eers die potensieel gevaarlike objek moet "aktiveer" tot 'n saak waarmee nadeel veroorsaak word, kan hoogstens een van die faktore wees wat in aanmerking geneem word by vasstelling van die onregmatigheid van die late. (Indien hierdie standpunt van my met betrekking tot die oorspronklike voorbeeld van regter Van den Heever die teenargument sou uitlok dat dit vir die *diligens paterfamilias* in my skoene tog voorsienbaar was dat die rewolwer gesteel kon word en vir misdadige doeleindes aangewend kon word, en dat hy die diefstal maklik kon voorkom deur byvoorbeeld die kas te alle tye gesluit te hou, en dat my optrede dus te kort skiet aan dié van die redelike man en ek *daarom* aanspreeklik behoort te wees vir die teller se dood, kan daarop gewys word dat my bevinding van afwesigheid van onregmatigheid in daardie voorbeeld juis as korrektief dien vir 'n te wye potensiële *culpa*-aanspreeklikheid: waar 'n gevolg naamlik nie onregmatig is nie, is die redelike voorsienbaarheid en voorkombaarheid daarvan as nalatigheidskriteria irrelevant, aangesien 'n skuldverwyt 'n dader nooit ten aansien van sy regmatige handeling kan tref nie (vgl Van der Merwe en Olivier a w 223).)

Ten slotte moet die *ratio decidendi* vir die afwysing van die eiser se vordering oorweeg word. Soos reeds daarop gewys, bevind regter Van den Heever dat toepassing van been (a)(i) van die nalatigheidstoets soos uiteengesit in *Kruger v Coetzee* (*supra*) daarop dui dat die verweerder nie redelikerwys kon voorsien "dat iemand wat genoeg verstand het om van die eienskappe van karbied bewus te wees, so min van daardie verstand sou gebruik het dat hy dit juis op hierdie wyse sou aanwend nie" (251D). Tog is die ganse reg insake onregmatige daad deurspek met voorbeelde van mense wat hul verstand nie na wense aanwend nie – juis hierin is die wese van nalatigheid as skuldvorm geleë (soos blyk uit die gemeenregtelike skrywer Van der Linden *Koopmans-Handboek* se omskrywing van *culpa*, as "niet behoorlijk

gebruiken van zijn verstand en opletendheid;" sien veral De Wet en Swanepoel a w 153). Wat die regter in effek hier sê, is dat indien dit eenmaal vasstaan dat 'n persoon presies weet waarmee hy hom besig hou, die redelike man kan aanvaar dat hy met die nodige sorgsaamheid ten aansien van daardie potensieel gevaarlike objek sal optree sodat hyself en derdes nie benadeel sal word nie. Die normatiewe trant van die pasaangehaalde passasie uit regter Van den Heever se uitspraak is myns insiens nie vir 'n ander interpretasie vatbaar nie. Dit behoef egter nouliks enige betoog dat die meeste gevalle van nalatige optrede juis voorkom waar die dader deeglik geskool is in die aktiwiteit waarmee hy hom besig hou. Hier kan as voorbeelde melding gemaak word van motoriste, vuurwapengebruikers en medici; trouens, die bestaan van 'n reël soos dié van *imperitia culpae adnumeratur* toon juis aan dat dit nie buite die redelike man se ervaring is dat selfs hooggeskooldes hul dikwels aan juridies verwytbare gedrag skuldig maak nie. Hierby kom dan nog die feit dat ons *in casu* met die optrede van kinders te make het, juis 'n kategorie wat in ons reg met groot omsigtigheid bejeën word: In die *locus classicus Farmer v Robinson Gold Mining Company Limited* 1917 AD 501 stel hoofregter Innes dit baie duidelik:

> "[A] reasonable man would have regard to the class of person likely to be brought in contact with a possible danger in determining upon the amount of care to be exercised. An object may constitute a *strong attraction* to a child, which would have little effect upon an adult; and those of tender years are more imprudent and less able to restrain their impulses than grown persons. These are considerations which ... would influence the conduct of a reasonable man" (524, my kursivering).

(Sien ook *Transvaal Provincial Administration v Coley* 1925 AD 24 27–28; *Eggeling v Law Union and Rock Insurance Co Ltd* 1958 3 SA 592 (D) 595–596; Macintosh en Norman-Scoble *Negligence in Delict* (1970) 200 e v; McKerron a w 244–245; Van der Walt *LAWSA* 8 par 23; Van der Merwe en Olivier a w 150.)

Die gekursiveerde woorde in hoofregter Innes se aangehaalde *dictum* verwys na dít wat in die regsliteratuur algemeen bekend staan as 'n "allurement" (lokmiddel, attraksie) en wat veral 'n swaarder las op die beheerder van 'n potensieel gevaarlike voorwerp plaas jeens kinders wat daardeur "aangetrek" mag word. Dat karbiedstukkies as onderdeel van 'n maklik vervaardigbare bom 'n besondere aantrekkingskrag sal hê vir 'n normale, ondernemende kind wat kennis dra van die eienskappe van karbied – 'n kennis wat waarskynlik gretiger op die speelgrond as in die skeikundeklas bekom word – is myns insiens redelikerwys voorsienbaar. 'n Beter skoolvoorbeeld van 'n "allurement" is moeilik te bedink. (Hiermee word natuurlik allermins by implikasie betoog dat toerekeningsvatbare kinders juridies minder verwytbaar is vanweë die feit dat hulle geredeliker swig voor hul onbesonne voornemens. Dít sou in stryd wees met die huidige stand van die reg soos duidelik uiteengesit in gewysdes soos *Jones v SANTAM Bpk* 1965 2 SA 542 (A); *Roxa v Mtshayi* 1975 3 SA 761 (A) en *Weber v SANTAM Bpk* 1983 1 SA 381 (A).) Addisioneel tot my betoog kan verwys word na die feit dat die verkoop van vuurwerke te lande streng beheer word en dat kinders selfs

verbied word om dit aan te skaf van 'n handelaar: is dit nie juis 'n aanduiding van die onbetroubaarheid van kinders waar dit gaan oor die hantering van plofbare stowwe nie?

Die laaste sin in regter Van den Heever se uitspraak is beslis, letterlik opgeneem, vir hewige kritiek vatbaar. Dit lui soos volg:

> "Dit was, les bes, die dade van die Coetzee broers wat oorsaak was van Willie se beserings, nie dié van die wieltêppers [werknemers van die verweerder] nie" (251D).

Hierdeur word die indruk geskep dat die *omissio* van die verweerder om te waak teen die benadeling van derdes deur die karbiedstukkies nie kousaal gekoppel is aan die kind se besering nie. Hoewel geredelik toegegee word dat toepassing van die *conditio sine qua non*-kousaliteitstoets, waar dit om 'n late as antesedent gaan, soms groot hoofbrekens kan besorg, behoort daar nie *in casu* veel probleme te wees met die toepassing van hierdie toets ten einde 'n feitelike kousale verband te lê nie: indien die verweerder nie toegelaat het dat die karbiedstukkies rondlê nie sou die kinders dit nie kon vind nie, sou hulle dus nie die bom gemaak het nie en sou die besering van Willie nie plaasgevind het nie (vgl veral *Minister of Police v Skosana* 1977 1 SA 31 (A)). Wat die regter moontlik bedoel, is dat hoewel die feitelike kousale ketting nie verbreek is nie, die *juridiese* kousale verband tussen die handeling (*omissio*) en gevolg hier ontbreek. 'n Bespreking hiervan sou mens bring op die ganse terrein van normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf. Vir doeleindes van my bespreking word hierdie aangeleentheid daargelaat, behalwe vir die konstatering van die feit dat daar sterk te argumenteer is vir 'n bevinding dat daar 'n juridies kousale verband tussen sowel die *omissio* van die verweerder as die positiewe dadigheid van die Coetzee-broers, en Willie se oogbesering bestaan: Dit beteken dat daar in hierdie geval van mededaders sprake is.

In die lig van bovermelde uiteensetting word daar in oorweging gegee dat die verweerder se optrede aan al die deliksvereistes voldoen het en dat die eiser dus moes geslaag het. Oor die moontlikheid van 'n regresreg (ingevolge a 2(6)(c) van die Wet op Verdeling van Skadevergoeding 34 van 1956) teen die Coetzee-broers as mededaders kan daar tans net bespiegel word, gesien die feit dat daar geen besonderhede verstrek word met betrekking tot hul toerekeningsvatbaarheid, moontlike nalatigheidsgraad ensovoorts nie. Die feit dat dit onwaarskynlik is dat 'n substansiële bedrag van hierdie tipe mededaders verhaal sal kan word, behoort natuurlik glad nie enige effek op die beoordeling van die aangeleentheid te hê nie: hierdie is die noodwendige gevolg van die feit dat mededaders solidêre aanspreeklikheid opdoen.

JOHAN SCOTT
Universiteit van Pretoria

BHAMJEE v MERGOLD BELEGGINGS (EDMS) BPK 1983 4 SA 555 (T)

Persoonlike serwituut – aard van – oordraagbaarheid

Die vereenvoudigde feite van hierdie saak is soos volg: die applikant het aanspraak gemaak op handelsregte wat hy van die regsopvolgers van die serwituuthouer (persoonlike serwituut om handel te dryf) gekoop het. Die serwituuthouer het sy regte aan Stein en Manasewitz verhuur wat hulle regte uit die huurkontrak aan die boedel van Young gesedeer het. Uit die boedel van Young is die regte aan die boedel van Roux gesedeer. Tweede verweerder beweer dat hy hierdie regte van sy moeder geërf het wat dit op haar beurt uit die boedel van Roux geërf het. Na bewering het tweede verweerder sy regte aan eerste verweerder oorgedra en dit vestig laasgenoemde se aanspraak op die regte en sy belang in hierdie saak.

In die verhoorhof het regter Human bevind dat die saaklike reg in die vorm van 'n serwituut om op 'n sekere eiendom handel te dryf wat die serwituuthouer gehad het, op sy regsopvolgers kon oorgaan en dat die applikant reghebbende van die serwituut geword het. Betreffende die huurkontrak waarop die verweerders hulle regte baseer, het die regter bevind dat die huurkontrak beëindig is met die dood van die oorspronklike huurders en dat die sessionarisse van die huurkontrak en hulle regsopvolgers vanaf daardie stadium geen regte meer gehad het nie.

By appèl bevind die volle regbank by monde van regter Spoelstra (regters Irving Steyn en Gordon het saamgestem) soos volg:

> "Na my mening is die gevolgtrekking onvermydelik dat, op die datum waarop die applikant die aansoek aanhangig gemaak het, die serwituut wat ten gunste van die serwituuthouer geregistreer was, tot 'n einde gekom het. Dit was beëindig by die dood van die serwituuthouer omdat die serwituut 'n persoonlike serwituut ten gunste van die serwituuthouer was."

Alhoewel daar weinig fout met regter Spoelstra se uitspraak self gevind kan word, noop die hele aangeleentheid 'n mens om sekere aspekte van die reg insake persoonlike serwitute nader te beskou.

Eerstens ontstaan die vraag hoe dit moontlik is dat 'n persoon op 'n serwituut aanspraak kan maak sonder dat daar registrasie in sy naam plaasgevind het. In die onderhawige geval kon die applikant nie eens om uitvoering, dit wil sê, registrasie van die serwituut in sy naam, vra nie, aangesien selfs die regsopvolgers van die serwituuthouer nie eens 'n serwituutskeppende ooreenkoms met die applikant kon aangaan nie.

Die belang van registrasie van 'n serwituut word volledig in *Willough-*

by's Consolidated Co Ltd v Copthall Stores Ltd (1918 AD 1 16) uiteengesit (sien ook Van Warmelo 1960 *Acta Juridica* 106 111).

In die onderhawige geval was die serwituut geregistreer, maar in naam van die oorspronklike serwituuthouer. By sy dood het die serwituut dus verval.

Dit bring mens by die volgende aspek van persoonlike serwitute, naamlik dat sodanige serwitute slegs aan 'n bepaalde persoon toekom en met sy dood verval (sien *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 267 282):

> "From the very nature of a personal servitude, the right which it confers is inseparably attached to the beneficiary. *Res servit personae.* He cannot transmit it to his heirs, nor can he alienate it; when he dies it perishes with him. (*Voet* 8 1 4; *Louw v Van der Post* etc)."

Die advokaat wat namens die applikant opgetree het, het betoog dat 'n persoonlike serwituut so bewoord kan word dat dit nie slegs aan een bepaalde persoon toekom nie, maar dat dit vir 'n onbepaalde tyd kan voortbestaan ten gunste van die reghebbende en sy regsopvolgers. Regter Spoelstra het "bloot vir doeleindes van hierdie beslissing ten gunste van" (561 *in fin*) die advokaat aanvaar dat dit moontlik is en bevind dat die bewoording van die betrokke klousule sodanige interpretasie in elk geval nie regverdig nie (562C e v).

Myns insiens kan sodanige argument egter om die volgende redes hoegenaamd nie aanvaar word nie:

1 Dit negeer die basiese onderskeid wat sedert die Romeinse reg tussen persoonlike en erfdiensbaarhede gemaak is, naamlik dat persoonlike serwitute tot voordeel van 'n persoon is en saaklike serwitute tot voordeel van 'n grondstuk (sien Kaser *Römische Privatrecht* 2 216; Voet *Commentarius* 7 1 1 7 1 2; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281 282). Persoonlike serwitute kom dus ook tot 'n einde by die dood van die reghebbende (Van der Merwe *Sakereg* 385). Wanneer partye dus wil hê dat 'n saaklike reg ten gunste van 'n persoon en sy regsopvolgers gevestig moet word, sal hulle dit as 'n erfdiensbaarheid moet registreer, mits natuurlik aan al die vereistes van 'n erfdiensbaarheid voldoen word. Indien die reg wat verleen word nie daaraan voldoen nie, sal die partye wel 'n serwituutskeppende ooreenkoms kan aangaan met as inhoud dat die serwituut ook aan regsopvolgers van die serwituuthouer sal toekom. Die serwituutverlener sal egter telkens opnuut byvoorbeeld na die dood van elke serwituuthouer die serwituut in naam van die regsopvolger moet laat registreer. As die serwituutverlener egter doodgaan, sal die serwituut slegs voortduur solank die persoon wat in daardie stadium serwituuthouer is, leef.

2 Artikel 66 van die Registrasie van Aktes Wet van 1937 bepaal ook dat geen persoonlike serwituut van vruggebruik, *usus* of *habitatio* wat bedoel is om voort te duur na die dood van die reghebbende, geregistreer mag word nie en dat 'n sessie van so 'n persoonlike serwituut aan iemand anders as aan die eienaar van die daarmee beswaarde grond nie geregistreer mag word nie. Alhoewel die bekende erkende persoonlike serwitute uitdruklik hier genoem word, sluit die bepaling myns insiens ook die registrasie van ander persoonlike serwitute onder dieselfde omstandigheid uit. Sien ook Hall en Kellaway *Servitudes* (3e uitg) 162:

> "[A]nd when other servitudes are recognized they are generally regarded as governed by the same limitations as those servitudes (usufruct, *usus* and *habitatio*) are."

3 Die gesag (Hall en Kellaway *Servitudes* (3e uitg) 163) waarop die advokaat vir die applikant in die onderhawige saak hom beroep, is om verskeie redes vir kritiek vatbaar. Alhoewel hierdie werk beskou word as "the most comprehensive treatment of the topic of servitudes in South African law" (1974 *SALJ* 271 273), weerspeël dit die positiewe reg nie korrek nie en druk die skrywers hulle dusdanig onsuiwer uit dat dit moeilik is om vas te stel of hulle die aard van 'n serwituut verstaan. Vervolgens sal die relevante gedeelte oor persoonlike serwitute dus krities ontleed word:

As uitgangspunt vir die behandeling van persoonlike serwitute word verwys na die volgende aanhaling uit *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281:

> "Now a personal servitude is one in which *res non servit rei*, but *res servit personae*. The books deal mainly under this head with *ususfructus, usus* and *habitatio*, not because there are no others, but because these servitudes from their nature must always be personal, and are therefore regarded as the personal servitudes par excellence. (See *Voet* 7 1 2)."

Die skrywers gaan voort deur te sê dat

> "the personal servitudes 'par excellence' will be dealt with in detail later, but other *personal rights* which may or may not fall within the category of servitudes require to be considered" (my kursivering).

Hall en Kellaway tref dan 'n onderskeid tussen persoonlike en saaklike serwitute – 'n onderskeid wat volgens hulle (en dit blyk in ooreenstemming met die *Willoughby's Consolidated-saak supra* 281 te wees) daarin geleë is dat 'n saaklike serwituut aan 'n persoon in sy hoedanigheid van eienaar van 'n bepaalde grondstuk toekom, terwyl 'n persoonlike serwituut aan 'n besondere persoon in sy persoonlike hoedanigheid toekom. Die skrywers kom tot die gevolgtrekking dat "[a] right of this kind is a real right and a burden upon the land which is subject to it (*Ex parte Geldenhuys*, 1926 OPD 155)" (162).

Myns insiens is dit uit die aangehaalde gedeeltes nie duidelik of die skrywers 'n onderskeid tussen saaklike en persoonlike serwitute, wat albei saaklike regte is, wil tref nie en of hulle probeer aantoon dat sekere persoonlike regte as persoonlike serwitute (dus as saaklike regte) registreerbaar is. Die gebruik van die woorde *personal rights*, sonder 'n nadere presisering daarvan is moontlik hier die oorsaak van onduidelikheid, maar die eerste sin in die volgende paragraaf verwar die leser weer verder, want hulle sê:

> "The owner of a particular piece of land may even grant a personal servitude over his land to a neighbouring landowner by stipulating that the servitude shall continue only as long as he owns his particular tenement (cf *Ferguson v Pretorius* 4 SAR 246). Such rights are merely binding upon the owner of the land for the time being and do not constitute *jura in re aliena* over land, nor are they registrable against it (*Ex parte Geldenhuys* 1926 OPD 155)."

Hieruit wil dit voorkom of die skrywers sê dat 'n persoon mag meen dat hy 'n persoonlike serwituut verleen, maar dat dit inderdaad slegs 'n persoonlike reg is as die reg getoets word aan die vereistes wat vir 'n saaklike reg gestel word. Met ander woorde, dit lyk of hulle weer besig is met die onderskeid tussen persoonlike en saaklike regte en tog kom die skrywers dan tot die volgende gevolgtrekking:

> "The test whether a servitude is real or personal does not depend upon the nature of the obligation in relation to the land. If the obligation creates a burden upon the land it is registrable irrespective of whether the servitude is a personal or a praedial one."

In die laaste paragraaf oor die aard van persoonlike serwitute verwys hulle dan na 'n geval waar 'n verkoper 'n gedeelte van 'n stuk grond verkoop het en aan die koper die uitsluitlike reg om drank te verkoop op die hele eiendom verleen het. Die skrywers wys daarop dat dit as erfdiensbaarheid (saaklike serwituut) ten gunste van die koper se stuk grond geregistreer is. Wat hulle hiermee te kenne wil gee, is onduidelik, behalwe miskien as hulle wil aantoon dat daar by erfdiensbaarhede altyd twee erwe moet wees. Myns insiens kon die skrywers dus maar volstaan het met hulle inleidende aanhaling uit die *Willoughby's Consolidated*-saak, aangesien die verdere bespreking geensins duidelikheid bring oor die aard van persoonlike serwitute (saaklike regte) nie.

Vervolgens behandel Hall en Kellaway die vervreemding (*alienation*) van persoonlike serwitute. As uitgangspunt verwys die skrywers na die stelling uit die *Willoughby's Consolidated*-saak *supra* 282 hierbo aangehaal. (Sien verder ook die *Willoughby's Consolidated*-saak *supra* 283.) Met 'n beroep op *Dreyer v Ireland* 4 Buch 193 202 kritiseer hulle dan hierdie stelling as sou dit slegs korrek wees ten aansien van *usus* en *habitatio* en nie ten aansien van vruggebruik nie. In *Dreyer v Ireland supra* 201 is regter Watermeyer se uitgangspunt egter ook dat "*use, like all other personal servitudes*, must cease with the usuary's life, and cannot be transmitted to his heirs" (my kursivering). Uit die daaropvolgende bespreking, waarop Hall en Kellaway steun, is dit egter nie duidelik watter regte volgens regter Watermeyer oorgedra kan word nie, want hy praat van die vruggebruiker of die gebruiker "se reg" sonder dat dit duidelik is of hy na persoonlike regte, saaklike regte of bevoegdhede verwys. Regter Watermeyer kom dan tot die gevolgtrekking: "And therefore personal rights (*sic*) of this nature on *praedia* appear to be placed in the category of the non-transferable" (202). Myns insiens steun *Dreyer v Ireland* nie die skrywers se standpunt dat persoonlike serwitute oordraagbaar is nie en al sou ek verkeerd wees, verwerp die *Willoughby's Consolidated*-saak, synde 'n appèlhofuitspraak van 'n latere datum (1913), in elk geval dié standpunt.

Hall en Kellaway (163) verwerp voorts die volgende onderskeid wat sedert die Romeinse reg gemaak is:

> "It is true that the books sought to distinguish between the alienation of the right to enjoy the fruits of the usufruct and the alienation of the personal right (*sic*) (see Van Leeuwen *Cens For* 1 2 15 25 quoted in *Van der Merwe v Van Wyk*, 1921 EDL at 301; Maasdorp's *Institutes* vol II 9th ed p 170), but this is a distinction without a difference for, in actual fact, if the right of enjoyment for the full term of the usufruct is alienated, nothing whatsoever remains for the usufructuary."

Afgesien van die feit dat genoemde skrywers eenvoudig die gesag waarna hulle verwys, negeer, toon hulle motivering vir die verwerping van die onderskeid weer eens dat hulle nie 'n behoorlike onderskeid tussen saaklike en persoonlike regte maak nie. As die vruggebruiker sy gebruiksbevoegdheid (*right of enjoyment*) aan iemand afgestaan het, bly hy nog steeds vrugge-

bruiker (saaklik-geregtigde). Dit is wel waar dat die vruggebruiker sommige van sy bevoegdhede aan 'n derde kan afstaan, maar dan verkry die derde slegs persoonlike regte teenoor die vruggebruiker en geen regte teenoor die eienaar nie. Dit is dus nie korrek om te sê dat die vruggebruiker in die omstandighede niks oor het en gevolglik sy vruggebruik self oorgedra het nie. Op dieselfde wyse sou dan geargumenteer kon word dat 'n eienaar wat sy motor verhuur het, nie meer eienaar is nie, omdat hy, deur sy motor aan 'n ander te verhuur, niks meer oor het nie en dus sy eiendomsreg oorgedra het.

Nadat Hall en Kellaway op hierdie wyse bepaal het dat vruggebruik oordraagbaar is, gaan hulle soos volg voort:

> "So far as other personal servitudes are concerned they will only be inalienable if it appears from the intention of the parties to be gathered from the terms of the contract, construed in the light of the relevant circumstances, that the right granted was limited strictly to the individual (cf *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD at p 16)" (163).

Die gesag waarop die skrywers hulle hier beroep, steun hulle geensins nie, aangesien hoofregter Innes in die betrokke gedeelte eers die onderskeid tussen die serwituutskeppende ooreenkoms en die vestiging van 'n serwituut bespreek en dan die vraag wanneer 'n oënskynlik persoonlike reg uit 'n kontrak as 'n serwituut beskou kan word:

> "Whether a contractual right amounts in any case to servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude, the *onus* is upon the person affirming the existence of one to prove it."

Vervolgens kom Hall en Kellaway tot die gevolgtrekking dat dit partye by die vestiging van persoonlike serwitute vrystaan om sodanige serwitute oordraagbaar ter keuse van die serwituuthouer te maak en selfs ewigdurend indien dit moontlik is. Hulle gee darem toe dat "many of these contractual rights" nie werklik serwitute is nie, maar dat hulle so nou daaraan verwant is dat hulle as serwitute beskou kan word. Die kontraktuele regte waarna verwys word, is die minerale regte wat in *Van Vuuren v Registrar of Deeds* 1907 TS 289 294 ter sprake is, waar hoofregter Innes hom soos volg oor die aard daarvan uitlaat:

> "Such a right, if constituted in favour of the beneficiary personally, and not in his capacity as owner of another property, would be of the nature of a personal servitude, *but* freely assignable and passing to his heirs" (my kursivering).

Met ander woorde, die regter beklemtoon hier self die onderskeid naamlik dat minerale regte, anders as persoonlike serwitute, oordraagbaar en oorerflik is. (Sien ook Van Warmelo 1960 *Acta Juridica* 106 107.) Die kontraktuele regte om 'n syspoor op te rig in *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 word deur hoofregter Innes soos volg beskryf:

> "And the grant ... amounted in my opinion to be a contract for the creation of a personal servitude enduring for the term of the lease" (474).

Hier word dus geensins na die oordraagbaarheid of oorerflikheid van persoonlike serwitute verwys nie – die gewraakte serwituut was selfs nog nie eens gevestig nie. Hoofregter Innes bepaal slegs dat indien dit as 'n persoonlike serwituut geregistreer was, dit alleen vir die duur van die huurkon-

trak sou voortbestaan. Die laaste geval waarna Hall en Kellaway verwys, is *Vereeniging Municipality v Vereeniging Estates* 1919 TPD 119 (*sic*) (159). Regter Wessels bevind dat die kontraktuele reg om elektrisiteit aan 'n woongebied te verskaf 'n konsessie is en nie 'n persoonlike serwituut nie, omdat dit nie voldoen aan al die eienskappe van die bekende persoonlike serwitute nie (163).

Hierdie bespreking oor die vervreemding van persoonlike serwitute word afgesluit met die gedeelte waarop die advokaat vir die applikant in die onderhawige saak steun as gesag vir die standpunt dat persoonlike serwitute oordraagbaar is:

> "The idea that personal servitudes are inalienable and that they die with the holder appears to be an inheritance from Roman law (*Digest* 7 1 12 2 and 23 3 66), but the development of mining and mineral rights during modern times has made this doctrine untenable, and the alienability of personal servitudes has become entirely a matter of the intention of the contracting parties. A personal servitude which is restricted in its operation to the individual to whom it has been granted and unlimited as to time lasts for the lifetime of that individual, and where the holder is a corporation, for a hundred years (*SAR and H v Paarl Flour Mills, Ltd* 1921 CPD 62)."

Hierdie stelling kan om verskeie redes nie aanvaar word nie: soos hierbo aangedui, steun dit op geen gesag nie, in der waarheid negeer dit die positiewe reg en is dit 'n verdraaiing van die ware regsposisie. Die skrywers se wyse van argumentering is ook onaanvaarbaar. Hulle argumenteer byvoorbeeld soos volg: omdat minerale regte 'n ooreenkoms met persoonlike serwitute vertoon, kan hulle as sodanig getipeer word en omdat minerale regte oordraagbaar is, kan persoonlike serwitute ter keuse van die kontrakterende partye oordraagbaar gemaak word. Oor die presiese aard van minerale regte bestaan daar verskil van mening in ons reg (Van Warmelo 1960 *Acta Juridica* 106 107; Van der Merwe *Sakereg* 401; Franklin *LAWSA* 18 par 9), maar waar dit wel as persoonlike kwasie-serwitute beskou word (sien *Van Vuuren v Registrar of Deeds supra*), word, met verwysing na die feit dat dit oordraagbaar is, juis klem gelê op die feit dat dit 'n kwasie-serwituut is, omdat dit nie al die eienskappe van persoonlike serwitute vertoon nie.

Alhoewel die werk van Hall en Kellaway die omvattendste oor die onderwerp is, toon hierdie bespreking dat praktisyns, dosente en studente dit met die grootste omsigtigheid moet benader.

SUSAN SCOTT
Universiteit van Suid-Afrika

S v SWANEPOEL 1984 2 SA 361 (W)

Criminal law – Section 49(2) of the Criminal Procedure Act 51 of 1977 – Justifiable homicide of person resisting arrest or fleeing in order to prevent arrest.

Although this case is only briefly referred to in the appendix to the April 1984 South African Law Reports, the decision of the court (per Le Roux J)

is of particular importance.

Section 49(2) of the Criminal Procedure Act 51 of 1977 reads as follows:

> "Where the person concerned is to be arrested for an offence referred to in Schedule 1 [which contains a list of serious offences] or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide."

There have been many cases dealing with the application of these provisions (see, for example, Hiemstra *Suid-Afrikaanse Strafproses* (1981) 96–99; Visser and Vorster *General Principles of Criminal Law through the Cases* (1981) 174–176).

It has traditionally been held that it is for the accused (who is charged with murder, culpable homicide or assault for example) to prove that he is entitled to the protection afforded him by section 49(2). (See e g *R v Britz* 1943 3 SA 293 (A).) However, in *Matlou v Mathubedu* 1978 1 SA 946 (A) 956A we find the following *obiter dictum*:

> "Die standpunt dat daar in 'n geval soos hierdie in 'n strafsaak 'n bewyslas op die beskuldigde rus, kan moontlik vandag nie meer aanvaar word nie, nieteenstaande artikel 37 [now section 49(2) of Act 51 of 1977] 'n verregaande beskerming aan 'n beskuldigde verleen. Daar kan miskien gesê word dat, vir sover dit bewyslas betref, daar geen verskil behoort te wees nie tussen 'n beroep op noodweer en 'n beroep op artikel 37. Dat die artikel weens sy inhoud streng vertolk moet word, spreek, myns insiens, vanself."

This *obiter dictum* is supported by Kotzé 1980 *De Jure* 126 134–135. In the brief report on the *Swanepoel* case (with which this note deals) the following appears in this regard:

> "*Quaere:* whether the *onus* should not be upon the State to establish that an accused invoking s 49(2) is not entitled to the protection afforded him thereby, as opposed to the accused having to establish that he is entitled to the protection afforded."

It would seem that this matter has now reached the stage where the appellate division (or any other division of the supreme court) should hold, in an appropriate case, that it is completely out of step with modern criminal law developments still to place an *onus* on an accused to prove a defence essentially concerned with the unlawfulness of his actions. The fact that section 49(2) authorises the killing of a human being (*prima facie* a serious incident) should not make the slightest difference to the fact that the *onus* of proof rests on the state to prove the unlawfulness of the conduct of the accused. Just like in the case of private defence, for example, the accused would, of course, be called upon to adduce some evidence justifying a reasonable conclusion that he acted in terms of section 49(2). This is, however, something entirely different from suggesting that he must actually convince the court on a balance of probability that his conduct is justified in terms of section 49(2). It is to be hoped that when this question comes up for decision again, the supreme court will finally settle the matter by deciding that an accused has no *onus* of proof if he bases his defence on section 49(2) (subject to the duty on him to adduce some evidence in regard to his defence).

Another matter with which the *Swanepoel* case deals, is the question of the liability of an accused who has exceeded the bounds of reasonable conduct in terms of section 49(2). In

Swanepoel, where the accused was charged with murder, the court stated its views in this regard as follows:

> "Where an accused on a charge of murder invokes s 49(2) (the 'justifiable homicide' provision) of the Criminal Procedure Act 51 of 1977, and it transpires that he *bona fide*, albeit erroneously, believed that his actions were covered by s 49(2), he will not be guilty of murder, for the element of *dolus*, whether *directus* or *eventualis*, will not have been established in the absence of knowledge of unlawfulness."

It is submitted that this *dictum* correctly reflects the application of the general principles of criminal liability. Until this decision there has always been some confusion in regard to when an accused, who killed someone in the purported exercise of the powers under section 49(2), for example, will be guilty or not guilty of murder, culpable homicide or assault.

This confusion is also reflected in Hiemstra *op cit* 96:

> "Die Staat moet eers bo redelike twyfel bewys dat die beskuldigde die oorledene opsetlik gedood het. Daarna rus daar op die beskuldigde die las om elk van die volgende vier punte op 'n oorwig van waarskynlikheid te bewys . . ." (i e the requirements for justifiable action in terms of section 49(2)).

Even if one leaves aside the matter of the incorrect placing of the *onus* of proof on the accused, this statement is not an accurate reflection of the general requirements for murder. In *S v Ntuli* 1975 1 SA 429 (A) 437 it is clearly stated that a person is acting intentionally (for the purpose of murder and assault) only if he *inter alia* realises that his actions are unlawful (or foresees this possibility). It is therefore impossible to say that where X deliberately shoots Y, he is acting intentionally (in the strict sense of the word) without also considering the question of whether he actually realises or foresees that his conduct may be unlawful. Where the state has proved an intentional killing ("opsetlike doodslag") it has proved its case because unlawfulness is a prerequisite for intention and knowledge of unlawfulness an element of intention. In such an instance it will not be possible, as Hiemstra suggests, to call on the accused to prove anything. This point is made only to demonstrate how the term (intention, i e *dolus* or "opset") is incorrectly used to describe conduct which is only deliberate but not necessarily "intentional" in the full sense of the word. The following statements of Hiemstra 97 must (on *inter alia*, the authority of *Ntuli supra*) be dismissed as incorrect and as no longer reflecting the position in our legal practice:

> "Opsetlike wederregtelike doodslag is nie altyd moord nie. Waar die perke van noodweer oorskry word, bly die doodslag opsetlik maar die bevinding sal manslag wees, al is so 'n bevinding volgens onderliggende beginsels onlogies."

In this regard the decision in *Swanepoel* is to be welcomed. It brings clarity in regard to the effect of an unsuccessful raising of section 49(2) where there has been too much unnecessary confusion in our law for too long.

In conclusion I submit that, in view of the *Swanepoel* case and the appellate division authorities on the general principles of criminal liability, the position as regards the statutory ground of justification contained in section 49(2) is as follows when someone is charged in a situation where he has allegedly exceeded his powers of using force in effecting an arrest:

Where he is charged with assault
The state has to prove beyond reason-

able doubt that the accused exceeded the statutory provisions regarding the infliction of bodily harm (i e he inflicted harm unnecessarily or unreasonably) and that he knew or foresaw that he was acting unlawfully. (See in general *S v Bradshaw* 1977 1 PH H60 (A).)

Where he is charged with murder The state has to prove beyond reasonable doubt that the accused exceeded his statutory authority to kill (i e he killed where a reasonable person would not have killed) and that he knew or foresaw that he was acting unlawfully. Where the reasonable man in the position of the accused would have foreseen the unlawfulness of the killing (and the accused did not foresee this) the accused may be convicted of culpable homicide (see e g *S v Van As* 1976 2 SA 921 (A)).

Where he is charged with attempted murder Here too the state has to prove the unreasonableness of the conduct of the accused (unlawfulness) and the fact that the accused intended to kill while realising or foreseeing that his conduct was unlawful.

PJ VISSER
University of South Africa

CURATOREN OF PIONEER LODGE NO 1 v CHAMPION 1879 OFS 51

Mandament van spolie – spoliatus ante omnia restituendus est – nemo sibi ius dicere potest

1 Inleiding

Die uitspraak in hierdie saak is op 28 Julie 1879 gegee deur hoofregter FW Reitz en regters J Buchanan en M de Villiers. Soos die res van die beslissings in hierdie reeks ("Zaken beslist in het Hooge Gerechtshof van den Oranje-vrijstaat" 1879–1883, vier volumes wat elk een jaar dek, in een band) is die beslissing in Nederlands gerapporteer. Sover vasgestel kon word, is dit slegs Price (*The Possessory Remedies in Roman-Dutch Law* (1947) 86) wat na die beslissing verwys, en dan ook net baie vlugtig (sien ook Van der Walt 1983 *THRHR* 238–239). Tog bevat die uitspraak interessante gegewens oor die toepassing van die mandament van spolie. Daarom is dit nodig om vandag – na 105 jaar – weer eens die aandag daarop te vestig.

2 Feite

Ten tyde van die ontstaan van die onderhawige geskilpunt het daar twee losies van die *Independente Orde van Good Templars* te Bloemfontein bestaan, te wete die *Pioneer Lodge No 1* en die *Steadfast Lodge No 2.* Die *Pioneer Lodge No 1* was eienaars van 'n gebou bekend as die *Good Templar's Hall*, waar hulle gereelde byeenkomste

gehou het. Ingevolge 'n mondelinge ooreenkoms het die *Steadfast Lodge No 2* die gebou gehuur vir gebruik op Dinsdagaande, en hulle het verder hulle regalia, dokumente en ander voorwerpe daar gebêre.

As gevolg van 'n geskil oor die toelaatbaarheid al dan nie van die gebruik van *hopbier* het die meerderheid lede van *Steadfast Lodge No 2* besluit om hulle losie van die Amerikaanse konstitusie los te maak, en dit as die *Steadfast Lodge No 1* onder die Engelse konstitusie te vestig. Hierdie besluit is deur 'n klein minderheid van die betrokke losie en deur die *Pioneer Lodge No 1* teengestaan, as gevolg waarvan die *Pioneer Lodge No 1* blykbaar geweier het om die lede van die *Steadfast Lodge No 2* toegang te verleen tot die *Good Templar's Hall* en tot hulle goed wat daarin opgeberg was. In antwoord hierop het agtien lede van die *Steadfast Lodge No 2* op 'n goeie aand, terwyl die lede van *Pioneer Lodge No 1* daar vergader was, die *Good Templar's Hall* betree en sonder toestemming al hulle regalia (uniforms ensovoorts), 'n Bybel, 'n stembus, briewe en dokumente, 'n harmonium en musiekstoel, en 'n geraamde wapen van hulle losie verwyder. Dit is duidelik uit die feite dat hulle op die oormag van hulle getalle staatgemaak het in die verwyderingsproses; en dit is ewe duidelik dat die lede van die *Pioneer Lodge No 1* op 'n kwaadwillige wyse die eiendom van die *Steadfast Lodge No 2* teruggehou het in 'n poging om die afstigting te dwarsboom.

Ná die verwydering van die goed het die *Pioneer Lodge No 1* se kuratore in die Bloemfonteinse landdroshof 'n aksie ingestel om die *Steadfast Lodge No 2* te dwing om die betrokke goed, wat wel die *Steadfast Lodge No 2* se eiendom was, aan die *Pioneer Lodge No 1* terug te gee. Die landdros het die aksie met koste van die hand gewys omdat die goedere aan die *Steadfast Lodge No 2* toegekom het terwyl die *Pioneer Lodge No 1* geen aanspraak daarop bewys het nie.

3 Beslissing

Die beslissing van die landdros is by appèl deur die hooggeregshof omvergewerp, en die respondente is gelas om die genoemde sake binne 36 uur aan die applikante terug te lewer. Daarvoor is die volgende redes deur die regters gegee.

3 1 *Hoofregter Reitz*

Die beslissing hang nie af van enige bewyse van die reg op besit of bewaarneming nie, maar wel van die vraag of die appellant die *recht van dadelijke detentie* of *possessio naturalis* van die betrokke sake gehad het. Vanweë die feit dat appellante die gebou en toegang daartoe beheer het, kan afgelei word dat hulle wel *possessio naturalis* van alle sake in die gebou gehad het. Hierdie *possessio naturalis* is die appellante met geweld ontneem deur die respondente se optrede – "om publiek geweld te plegen is het genoeg indien men zijne eigene rechter wordende aan een ander iets ontneemt die hij ongewillig is af te geven" (53). Dit was genoeg om spoliasie daar te stel, en *spoliatus ante omnia restituendus est.* Voordat die hof enige kwessie oor eiendomsreg of besitsreg beslis, behoort hy eers die respondent te gelas om die sake terug te gee van waar dit weggeneem is.

Die regter steun op Voet vir die term *possessio naturalis*, maar sonder verwysing (hy het waarskynlik die onderskeid in Voet 41 2 3 3 in gedagte gehad). Verder haal hy Sanders se kommentaar op die *Institute* 2 1 45 en Thymor Boeij *Woorden Tolk* 580 onder *redentegratie* aan. Laasgenoemde bron voorsien die belangrike stelling (54) dat, op grond van die beginsel dat *spoliatus ante omnia restituendus est*, enige geval van spoliasie *ante omnia* herstel moet word om die openbare rus en orde te bewaar. Verder word na Voet 5 1 1, 5 1 7 en 6 2 2 verwys.

3 2 *Regter Buchanan*

Die regter het ingestem met alles wat die hoofregter gesê het, maar het homself tog – op grond van die erns van die saak – verplig gevoel om enkele bykomende opmerkings te maak. Die reg is duidelik soos die hoofregter dit uiteengesit het, en behoort só toegepas te word:

> "Deze is eene der belangrijkste zaken die voor dit Hof ooit kan gebracht worden of gebracht is, niet wegens de waarde der goederen die er in betrokken zijn, maar wegens die voorname principen die er in opgesloten zijn. Wanneer in dit hoofdstad van den Oranjevrijstaat het toegelaten zou kunnen worden dat eene bende van achttien personen sou gaan om op eigen gezag goederen weg te voeren terwijl die zijn in het bezit van anderen waartoe zij geen recht van ingang hadden, dan zou men bijna kunnen zeggen dat de gerechtshoven maar moeten gesloten worden, want 'de sterkste man is baas'. Dit zou slaan aan den wortel van de veiligheid der maatschappij" (54).

Hierby het die regter baie duidelik gevoeg dat die hof met die spoliasiebevel nie beslis wie eienaar van die saak is nie, maar slegs dat die versteurde *dadelijke detentie* van die appellant herstel moet word. Daar kan nie geduld word dat die respondente die reg in eie hande geneem het nie, en onder die omstandighede is dit beter dat die appellante geen teengeweld toegepas het nie. Deur die spoliasiebevel word die waardigheid van die reg en die geregshowe beskerm.

3 3 *Regter de Villiers*

Die regter omskryf *besit* vir doeleindes van die mandament van *complaincte* as die "dadelijke detentie van eene zaak, met oogmerk om die voor zich te houden." (Van der Linden 1 13 1 1 13 2 1 5 3; Voet 43 17 2.) Die appellante gebruik die woord *besit* in hulle pleitstukke, en noem daar die aksie 'n mandament van *complaincte*. Vir daardie aksie is *besit* wel 'n vereiste, "d w z hij moet hebben de detentie dier goederen met oogmerk dat dezelve de zijne zullen zijn" (54). Dit is egter duidelik dat die appellante nie *besit* in hierdie sin kan bewys nie omdat hulle geensins die *animus domini* gehad het nie. Die pleitstukke is dus verkeerd bewoord en moes *possessio naturalis* of *dadelijke detentie* beweer het, wat voldoende is vir verkryging van die mandament van spolie. Die regter vermaan dus die appellant om "in de pleidooien van een rechtsgeding woorden in derzelver rechtsgeleerde zin . . ." te gebruik (55).

Sodra dit vasstaan dat die applikant *detentio* van 'n saak gehad het en dat dit hom met geweld ontneem is, verg die reëls dat *nemo regulatiter sibi jus dicere potest* en *spoliatus ante omnia restituendus est* dat die saak eers aan hom teruggelewer word voordat die hof beslis of die *detentio* met eiendomsreg of besit gepaard gegaan het. Vir die pleeg van geweld is enige handeling van eierigting voldoende.

4 Kommentaar

Verskeie aspekte van die beslissing verdien kommentaar in die lig van latere regspraak.

4 1 Daar word nou algemeen aanvaar dat *possessio naturalis/detentio/houerskap/beheer* van sake voldoende is om vir die mandament van spolie te kwalifiseer (*Yeko v Qana* 1973 4 SA 735 (A) 739E).

4 2 Die hele debat rondom die geweld-vraag (sien bv meer resente beslissings soos *Kotze v Pretorius* 1971 4 SA 346 (NK) 350A en *Coetzee v Coetzee* 1982 1 SA 933 (K) 936A) is onnodig in die lig van die onderhawige uitspraak: optrede teen die sin van die *spoliatus*, en sonder die gesag van 'n regsproses, is voldoende om openbare geweld vir die doeleindes van die mandament daar te stel.

4 3 Die meer resente hofbeslissings en skrywers eggo meestal die gedagte dat die doel van die mandament is om eierigting te voorkom (Price 107–108; Van der Merwe *Sakereg* (1979) 88; Sonnekus *Sakereg Vonnisbundel* (1980) 54 61; Delport en Olivier *Sakereg Vonnisbundel* (1981) 73 87; Schoeman *Silberberg and Schoeman – The Law of Property* (1983) 135; Erasmus, Van der Merwe en Van Wyk *Lee and Honoré – Family, Things and Succession* (1983) 249; Taitz 1982 *SALJ* 355; *Nino Bonino v De Lange* 1906 TS 120 125; *Greyling v Estate Pretorius* 1947 3 SA 514 (W) 516–517; *Yeko v Qana* 1973 4 SA 735 (A) 739G). Hierdie gedagte behoort egter meer doelbewus uitgewerk te word in die praktiese toepassing van die mandament, sodat dit eerder te maklik verleen word as te moeilik. Daar bestaan wel gesag daarvoor dat die aksie wyd eerder as eng verleen moet word (Van der Walt 1983 *THRHR* 238–240).

4 4 Die vermaning wat regter De Villiers met betrekking tot die term *besit* gerig het, asook die prysens- en navolgingswaardige konsekwentheid-waarmee die regters by die terme *dadelijke detentie*, *detentie* of *possessio naturalis* hou, behoort vandag ter harte geneem te word. Die nuutste publikasies op die gebied van die *sakereg* toon duidelike tekens van 'n gewilligheid om De Vos (*Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1971) 214–216) se indeling van *besitters* (persone wat die saak *animo domini* beheer, *bona fide* of *mala fide*) en *houers* (of okkupeerders: dit is persone wat die saak regmatig of onregmatig – laasgenoemde *bona fide* of *mala fide* – beheer sonder die *animus domini*) na te volg (Delport en Olivier 60–61; Schoeman 150–151; Erasmus, Van der Merwe en Van Wyk 255–256). Ongelukkig kom die skrywers en howe nog nie so ver om die terme *besit* en *beheer/houerskap* volgens hierdie indeling konsekwent te gebruik nie. CFC van der Walt (1983 *THRHR* 334) het wel onlangs 'n welkome stap in die regte rigting gedoen deur 'n meer konsekwente gebruik van die terme te bepleit. *Besit* moet verkieslik gereserveer word vir fisiese beheer *animo domini*, dit wil sê met die oog op verkrygende verjaring. Alle ander persone wat fisiese beheer oor 'n saak uitoefen en wat nie eienaar daarvan is nie, moet verkieslik as *houers* beskou word, en hulle verhouding tot die saak is *houerskap* of *detentio* of *possessio naturalis* of, dalk die beste term, *beheer*.

Beheer kan omskryf word as fisiese beheer oor 'n saak met die be-

doeling om die saak te beheer of om die een of ander voordeel uit sodanige beheer te verkry; maar dan sonder dat die houer eienaar van die saak is (objektief) of die *animus domini* het (subjektief). Beheer kan regmatig uitgeoefen word (ingevolge 'n erkende regsgrond soos 'n huurooreenkoms, huurkoop, pand, ensovoorts), of onregmatig (wanneer só 'n erkende regsgrond ontbreek). As die onregmatige houer weet dat daar geen regsgrond bestaan nie, is hy 'n *mala fide* onregmatige houer; as hy byvoorbeeld onbewus is van die feit dat sy huurkontrak ongeldig is, is hy 'n *bona fide* onregmatige houer.

Deur van hierdie terme gebruik te maak, kan baie verwarring in die reg aangaande saaklike regte uitgeskakel word. Dit is dan byvoorbeeld nie vanselfsprekend om net die *beskerming van besit* te bespreek nie – soos die handboeke tans doen – maar eerder die *beskerming van besit en houerskap/beheer*. 'n Klein bietjie terminologiese dissipline hoef ook nie tot dogmatiese verstarring te lei nie – dalk wel tot groter helderheid van spraak.

5 Slot

Die uitspraak in *Curatoren of Pioneer Lodge No 1 v Champion* kan ten sterkste aanbeveel word as 'n kort, helder en konsekwente samevatting van die kernbeginsels rondom die mandament van spolie. Sowel die beginsels as hulle formulering word op 'n leersame en navolgingswaardige wyse toegepas. Die beslissing behoort vir studente voorgeskryf te word en verdien meer erkenning in die howe.

AJ VAN DER WALT
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SMITH v ATTORNEY-GENERAL, BOPHUTHATSWANA 1984 1 196 (BSC)

Criminal procedure – Refusal of bail at behest of Attorney-General in terms of s 61A of Act 51 of 1977 (RSA) inserted by Act 33 of 1980 (B) – Null and void

The appellant, who was being held on various charges of fraud and theft of money from the state, had been refused bail by the magistrate of Molopo. When the appellant applied for bail, the Attorney-General personally opposed the application, invoking section 61A of the Criminal Procedure Act 51 of 1977 (RSA), inserted in that Act by Act 33 of 1980(B). In terms of this section the Attorney-General may prevent the granting of bail to accused who are permanently or ordinarily resident outside the jurisdiction of the Supreme Court of Bophuthatswana if he is of the opinion that is it likely that the accused will not appear at the time and place appointed for his trial and that he will

be beyond the area of jurisdiction of the Supreme Court of Bophuthatswana at that time. The crucial provision is contained in subsection (2), which states that any notification by the Attorney-General in relation to the above-mentioned circumstances "shall be conclusive and final proof of such matters."

The main issue before the court was the contention that section 61A is unconstitutional since it impinges on the safeguards for personal freedom contained in section 12(3)(b) of the Constitution Act of Bophuthatswana, and is therefore null and void in the light of section 7 of the Constitution, which provides that any law passed subsequent to the Constitution which is inconsistent with the provisions of the Declaration of Fundamental Rights in the Constitution shall, to the extent of such inconsistency, be void.

Hiemstra CJ pointed out that two issues arise from this contention: (a) does section 61A impinge upon section 12(3)? (b) if so, is it not covered by section 18 of the Constitution, which contains a derogation clause?

As regards the first submission, section 12(3), which forms part of the Declaration of Fundamental Rights, commonly called the Bill of Rights, provides that a person may be deprived of his liberty when arrested on reasonable suspicion of having committed an offence—

> "provided that such a person shall be brought promptly before a [judicial officer] and shall be entitled to trial within a reasonable time or to release pending trial."

If bail is refused, the suspect may be held for ninety days, after which he may approach the court for bail if his trial has not yet begun. As Hiemstra CJ pointed out, the essence of the matter is:

> "Is it an infringement of s 12(3)(b) to provide that on the mere *ipse dixit* of the Attorney-General a court is bound to refuse bail for 90 days?" (198H).

The judge found that, although ninety days is not an unreasonable time to wait for trial, the crucial question was whether the legislature could "place the right of bail entirely in the hands of a civil servant, to the exclusion of the court's discretion" (199A). He then continued to discuss the policy considerations involved in the interpretation of a constitution such as that of Bophuthatswana, and emphasised the delicacy of the court's task in this regard:

> "The question opens issues of great constitutional importance to Bophuthatswana, namely the impact of the Bill of Rights on the powers of a sovereign Legislature. The Bophuthatswana Parliament operates under self-imposed restraints which are foreign to the Westminister system of a supreme parliament clothed with unfettered legislative powers" (199B).

When faced with the task of implementing a constitution with a Bill of Rights, the court could find itself on the horns of a dilemma: on the one hand,

> "[a] Court which is over-active in striking down legislation can destroy the exalted instrument it is trying to bring to life" (199C),

and, on the other,

> "the court dare not abdicate its function as upholder of the long-term aims and ideals of the constitution" (199E).

Furthermore, as Hiemstra CJ pointed out, the court in question has been schooled in the positivist tradition, which requires that statutes be interpreted in accordance with their strict

meaning; but a Bill of Rights cannot be approached from a positivist point of view, since a Bill of Rights is a declaration of values and it is the duty of the court to interpret it in a way that it is identifiable as such (199F—H). The judge sounded the warning that although the Bill of Rights of the Constitution of Bophuthatswana is based on the European model, it has been "superimposed on a society that traditionally was, and still is, strongly authoritarian" (199H). The court must therefore be careful not to undermine the evolution of democratic consciousness in a developing state whose democratic political processes are in their infancy.

> "In such a situation the court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not with a sledgehammer" (200C).

Having thus set out what he regarded as the approach which the court should adopt in constitutional matters, Hiemstra CJ then examined the provision in issue and concluded unequivocally:

> "A statute which eliminates the judicial process in matters of personal liberty is plainly unconstitutional" (200G),

adding that this did not necessarily hold good for internal security laws, since other considerations apply to them.

A particularly interesting and valuable feature of the judgment is the application by the court of the "principle of proportionality" to the interpretation of the Bill of Rights ("Verhältnismässigkeit" in German law). This principle governs the constitutional limitation of the state's power in both legislation and administrative action, and provides that interference with rights that are guaranteed in the Constitution is legal only when it is:

a permitted by the Constitution;

b capable of achieving its purported objective;

c necessary to achieve its objective; and

d reasonable or *proportional* in the sense that the purported objectives of such interference are as such lawful, adequate, necessary and of *equal or superior weight*, when balanced against the affected right (201A–C).

Now this criterion contains nothing really foreign to South African law: after all, the first thing any aspiring lawyer is taught is that the function of the law is to achieve a balance between conflicting interests; the interests of individuals in private law and the interests of the individual on the one hand and the state on the other, in public law. However, the express acknowledgment of the principle of proportionality in consitutional matters constitutes a significant step towards the establishment of a framework within which not only the law of Bophuthatswana, but that of South Africa too, can operate on sound constitutional principles.

Applying the abovementioned criteria to the case in point, the court came to the conclusion that the "remedy" provided by section 61A "is quite disproportionate in its rigour to attain the purpose aimed at" (201F); the purpose of the provision (the "mischief" sought to be prevented, if you will) is that the course of the law shall not be frustrated by the accused; this purpose can be fulfilled by the traditional means of a judicial decision in the matter of bail.

Again the judge stressed that security legislation may constitute an exception, but it is clear that the principle of proportionality may serve equally well in this field, since curtailment of individual rights in the interests of state security is a prime example of the case where the necessity of the proposed interference must be such that the affected individual right is outweighed.

Another extremely welcome aspect of the judgment lies in the exposition of the *audi alteram partem* rule (usually associated only with administrative law and not with constitutional law in the narrower sense) as a facet of the concept of due process. It is generally accepted that in South African law the legislature may at will exclude the right to be heard. Although the courts are often reluctant to accept the implication that the rules of natural justice (embodied in the principle of *audi alteram partem*) have been excluded by statute, there is little more to be said if the exclusion is express and unequivocal. But as far as Bophuthatswana is concerned, the position is clear:

> "*Where due process is entrenched*, as it is in this constitution, *audi alteram partem is also necessarily entrenched*" (202B, italics supplied).

So much for the first issue before the court, viz whether section 61A infringes upon the rights contained in section 12. The second question was whether the infringement is not, after all, perfectly legal in terms of section 18 of the Constitution, which provides:

> "(1) The rights and freedom referred to in ss 9 to 17 may be restricted only by a law of Parliament and such a law shall have a general application.
>
> (2) Except for the circumstances provided for in this Declaration, a fundamental right and freedom shall not be totally abolished or in its essence encroached upon."

The question is therefore whether section 61A is such that it "in its essence encroaches upon" the individual's right to due process. If it is, the fact that the encroachment has been sanctioned by Parliament will not cure its invalidity. Again the court turned to German law for guidance. In German law this concept of "essence" is rendered by the term "Wesensgehalt" which assumes its own characteristics in relation to each fundamental right in accordance with its weight and meaning within the system as a whole (202E).

> "Before the court will strike a law down because it seems to encroach upon the essence of a fundamental right, it will apply the process of an interplay of forces, or 'Wechselwirkung' as the Germans call it" (202F).

If it is possible for the court to reconcile these opposing forces by applying a restrictive interpretation to the infringing provision "it would prefer to uphold the infringing law under a truncated meaning rather than declare it unconstitutional" (202H). Again the principle is one with which South African law is familiar – *ut res magis valeat quam pereat*. However, the judge is adamant:

> "Even this approach cannot save s 61A. There is no artifice of construction which can avoid the fact that 'due process' is denied the suspect. Due process of law is so fundamental in respect of all deprivation of freedom (outside security action) that its elimination is unmistakably an encroachment upon the essence of a fundamental right.
> The Attorney-General can therefore in my view not rely on s 18" (202H).

Technically, of course, this judgment relates only to Bophuthatswana and has no significance for South

Africa. But, in fact, like the judgment in *S v Marwane* 1982 3 SA 717 (A), it is of vital importance to South African constitutional jurisprudence. The problem of devising a system which, on the one hand, provides adequate and effective protection of individual rights and, on the other, does not render the government powerless to protect itself, has not been solved by the passing of the Constitution Act of 1983. The clamour for an entrenched Bill of Rights continues, as does the insistence on the part of opponents of Delcarations of Fundamental Rights that such declarations are worth no more than the paper they are written on, and that common-law remedies afford all the protection an individual could ever require.

It is therefore of some interest to enquire whether an accused in a similar position to Smith would enjoy the same protection in South African law. For one thing, no court would have been competent to test the validity of section 61A, whether it infringed the principle of due process or proportionality or not. It could be argued that a South African court would be competent to enquire into the way in which the Attorney-General's discretion had been exercised, whether he had in fact applied his mind to the matter, whether he had not acted *mala fide* or unreasonably or had exercised his powers for an ulterior purpose, etc. In principle this is correct, but in practice it is submitted that no South African court would interfere unless some obvious and gross irregularity is present. As for the entrenchment of the *audi alteram partem* principle as a corollary of due process, South African legislation abounds with exclusions of the rules of natural justice as it does with ouster clauses excluding the jurisdiction of the courts. Admittedly the courts will override ouster clauses where *mala fides* or a gross excess of power is clearly manifest, but they will not do so where the effect of the statutory provision is merely harsh or disproportionate to the potential "mischief" involved. It is therefore difficult not to incline towards the view that a Bill of Rights does provide more comprehensive protection than common-law remedies which are at the mercy of the legislature.

It cannot be denied that state security is the one issue that raises most difficulty in regard to Bills of Rights and derogation clauses. It may be argued that the Smith judgment does not shed much light here, since Hiemstra CJ is at pains to emphasise that the considerations he postulates do not apply to security legislation. It is, however, not only in this field that individual rights are encroached upon by legislation: many instances of encroachment may be found in the field of administrative law, in particular. Provisions exluding the rules of natural justice and the jurisdiction of the courts, and relieving administrative organs from the obligation to give reasons for their decisions are two a penny in our law.

To return to the judgment itself: the problem that arose in *S v Marwane*, i e that the provision which was being challenged as unconstitutional, was part of the law inherited from South Africa and was not legislation adopted subsequent to the commencement of the Constitution, did not arise here. Nevertheless, because section 61 of the

South African Criminal Procedure Act "which belongs to the large mass of inherited pre-independence legislation" (203A), did arise, albeit obliquely, the court felt obliged to comment on it. As Hiemstra CJ pointed out, this provision would, if the *Marwane* judgment were to be accepted, be void for the same reasons as section 61A. The judge, however, rejected the *Marwane* judgment in fairly strong terms:

> "One might ask, if future legislation is expressly exposed to invalidation, why inherited legislation is pointedly left out. One might also ask what the purpose of s 7(2) might be, if it was not to safeguard inherited legislation" (203G).

Acknowledging that the portion of the judgment dealing with section 61 was *obiter*, the court nevertheless found it necessary to state its views "in order to restore certainty to the validity of inherited legislation" (204A). Hiemstra CJ concluded (204B):

> "The *Marwane* case is a typical example of over-eager invalidation leaving a large *lacuna* in a country's legislation as it stood at the time of the relevant proceedings . . . A Bill of Rights is not a wide-open door to the invalidation of legislation."

That the minority judgment in *Marwane* was technically correct cannot be disputed. It is perfectly in line with the basic principles of interpretation of statutes as we known them in South Africa. Moreover, it is difficult to quarrel with Hiemstra CJ's contention that the judgment has opened the door to uncertainty about the validity of inherited legislation.

Marwane has, nevertheless, been favourably received in many quarters, for the very reason that the majority of the court saw fit to depart from positivism and to put their faith in a more creative and imaginative approach, at a time when there is a feeling abroad that South African judges tend to stick too closely to the maxim *iudicis est ius dicere sed non dare.* (And, after all, some of our most significant judgments have been open to criticism on technical legal grounds — *Van der Linde v Calitz* is the judgment which springs to mind immediately.)

GRETCHEN CARPENTER
University of South Africa

BOEKE

EENVORMIGE HOFREËLS
C J M NATHAN, M BARNETT en A BRINK
3e uitgawe deur C J M Nathan en M Barnett Juta en Kie Bpk, Kaapstad 1984; lxii en 794 bl
Prys R84 + AVB

Die vorige twee uitgawes van Nathan, Barnett en Brink se bekende tweetalige kommentaar op die Eenvormige Hofreëls, en die werk se voorganger, Nathan en Barnett se *Rules and Practice of the Supreme Court of South Africa, Transvaal Provincial Division, Witwatersrand Local Division and Appellate Division*, word reeds jarelank as 'n gesaghebbende kommentaar beskou waarna daar dikwels in hofuitsprake verwys word. Die werk bevat 'n magdom inligting en is 'n onontbeerlike hulpmiddel vir die praktisyn. Daarom is dit so jammer dat 'n mens by die deurblaai van die jongste uitgawe van die werk vervul word met 'n steeds toenemende gevoel van teleurstelling.

Die derde uitgawe het aan die begin van 1984 verskyn. In die "Voorrede by die Derde Uitgawe," wat die datum November 1983 dra, word vermeld dat "[h]ofbeslissings, tot Maart 1982, waarin die Reëls uitgelê, bespreek en toegepas is . . . in die kommentaar oor die betrokke reël bygebring" is. Dit is omvermydelik dat daar altyd 'n gaping sal wees tussen die datum waarop die manuskrip van 'n boek voltooi word en die datum van verskyning van die boek: In die geval van 'n boek wat primêr bedoel is as *vademecum* vir praktisyns, is 'n gaping van meer as agtien maande egter heeltemal onaanvaarbaar. Daar is talle uitsprake wat tydens 1982 en die eerste helfte van 1983 gerapporteer is wat in die derde uitgawe opgeneem moes gewees het. Alhoewel daar kennis geneem is van die wysigings in die reëls wat op 1 April 1983 in werking getree het as gevolg van die inwerkingtreding op dié datum van die Wysigingswet op Appèlle 105 van 1982, is die boek wat regspraak betref by verskyning reeds in 'n mate verouderd.

'n Verdere beswaar is dat daar haas geen kennis geneem word van ander wetenskaplike literatuur nie. Alhoewel daar nie veel geskryf word oor die burgerlike prosesreg nie, verksyn daar tog van tyd tot tyd bydraes daaroor in die toonaangewende Suid-Afrikaanse regstydskrifte. In die *Annual Survey of South African Law* verskyn daar elke jaar, onder verskillende hoofde, bydraes waarvan kennis geneem behoort te gewees het: 'n mens dink hier veral

aan professor Ellison Kahn se voortreflike bydraes oor jurisdiksie. Wat jurisdiksie betref, sê die skrywers (579) dat 'n uitvoerige bespreking van die onderwerp buite die bestek van die boek is, en vir " 'n meer uitgebreide bespreking" word die leser verwys na Pollak *South African Law of Jurisdiction* (1937). Reeds in 1966, in 'n bespreking van die eerste uitgawe van die boek, het Beuthin daarop gewys dat Pollak se boek, "[a]dmirable as this work is . . . was published almost thirty years ago [dit is nou amper vyftig jaar gelede!] and is out of print, and the present authors would have done a most useful service if they had devoted some consideration to a more comprehensive treatment of the subject" (1966 *SALJ* 232). Die leser kan minstens na meer onlangse en beskikbare werke oor jurisdiksie verwys word, byvoorbeeld die titel "Jurisdiction" deur Brooks in *LAWSA* II (red Joubert) en Bennett se hoofstuk oor jurisdiksie in Forsyth *Private International Law* (1981). Op 305 en 411 word die leser verwys na Rubin *The Law of Costs in South Africa*. Ook hierdie werk, wat in 1949 verskyn het, is uit druk, onverkrygbaar en verouderd: 'n verwysing na Cilliers se *Law of Costs* (1972) en, wat taksasie betref, na Jacobs en Ehlers se *Law of Attorney's Costs and Taxation thereof* (1979) sou veel meer vanpas gewees het.

Die boek bestaan uit 'n kommentaar op die verskillende hofreëls en die artikels van die Wet op die Hooggeregshof 59 van 1959. Dit bring mee dat 'n bepaalde onderwerp dikwels nie op een plek volledig behandel word nie, dat die leser soms moet rondskarrel op soek na die volle verhaal en dat daar 'n mate van herhaling voorkom. Dit is onvermydelik in 'n boek van hierdie aard. Wat egter wel vermy kan word, is die inkleding van die kommentaar in die vorm van 'n opeenvolging van 'n reeks losstaande opmerkings. In 'n bespreking van die 1959-uitgawe van die voorganger van hierdie werk, merk Kahn op: "the discussion . . . of attachment to found . . . jurisdiction gives the impression of a series of isolated dooms, not of principle" (1959 *SALJ* 347). Hierdie "absence of principle" (Kahn se frase) kenmerk ook hierdie uitgawe van die werk en bemoeilik die gebruik daarvan as naslaanwerk. As voorbeeld kan die volgende genoem word: op 580 word gesê: "in regard to the doctrine of *causae* (sic) *continentia* see ibid: *Gronow v Estate Maletzki* 1968 3 SA 35 (SWA)." In die Afrikaanse deel van die kommentaar op 581 verskyn hierdie stelling nie. Op 583 (Engels 582) verskyn (vreemd genoeg, onder die hoof "Onderwerping aan jurisdiksie") die stelling: "Met betrekking tot uitbreiding van jurisdiksie kragtens die leerstelling *causa continentia*, sien *Roberts Construction Co v Wilcox Bros* 1962 4 SA 326 (AA); *NCS Plastics (Pty) Ltd v Erasmus* 1973 1 SA 275 (O); *Gronow v Estate Maletzki* 1968 3 SA 35 (SWA)." Onmiddellik hierop, en nog steeds onder die hoof "Onderwerping aan jurisdiksie," volg daar dan die stelling dat "[i]ndien 'n hof regsbevoeg is wanneer 'n geding ingestel word, ontneem latere gebeurtenisse hom nie daardie regsbevoegdheid nie."

Voormelde werkwyse lei verder daartoe dat die kommentaar op 'n bepaalde hofreël of wetsartikel dikwels nie volledig is nie en ook nie 'n sinvolle geheel uitmaak nie. Twee voorbeelde kan by wyse van illustrasie vermeld word. Een van die kernbepalings van

artikel 19 van die Wet op die Hooggeregshof 59 van 1959 is vervat in subartikel (1) (*a*), naamlik dat 'n provinsiale of plaaslike afdeling regsbevoegdheid besit "met betrekking tot alle gedinge wat daar ontstaan" ("all causes arising . . ."). Hierdie frase, wat reeds 'n artikel 30 van die *Charter of Justice* van en daaropvolgende wetgewing oor die die jurisdiksie van die verskillende afdelings van die hooggeregshof voorkom, is by verskeie geleenthede deur die appèlhof ontleed, byvoorbeeld in *Steytler NO v Fitzgerald* 1911 AD 295, *T W Beckett and Co Ltd v Kroomer Ltd* 1912 AD 324 en *Estate Agents Board v Lek* 1979 3 SA 1048 (A). Hiervan word daar geen woord gerep in die kommentaar op artikel 19 nie; *Steytler NO v Fitzgerald* 1911 AD 295 word nie eens in die boek vermeld nie. *Estate Agents Board v Lek* 1979 3 SA 1048 (A) word terloops in 'n ander konteks vermeld (sien hieronder), ten spyte daarvan dat die uitspraak volgens Kahn lig werp op "several dark corners of the law of jurisdiction" (1979 *Annual Survey* 504). 'n Tweede voorbeeld: In die kommentaar op artikel 26 (1) van die Wet op die Hooggeregshof 59 van 1959 word daar op 621 gesê, met verwysing alleenlik na *Curbera v SA Pesquera Industrial Callega* 1969 3 SA 296 (K), dat 'n provinsiale afdeling regsbevoegdheid het om beslaglegging *ad fundandam jurisdictionem* te beveel van 'n bate wat fisies binne die regsgebied van 'n ander afdeling is. Slegs indien die leser die kruisverwysing na die kommentaar op artikel 19(1) opvolg, sal hy op 577 en 579 verwysings vind na *Ex parte Boshoff* 1972 1 SA 521 (OK) en *Hare v Banimar Shipping Co SA* 1978 4 SA 578 (K), waarin bevind is dat *Curbera v SA Pesquera Industrial Callega* 1969 3 SA 296 (K), *Bock & Son (Pty) Ltd v Wisconsin Leather Co* 1960 4 SA 767 (K) en *Ex parte Gerald by Coyne (Pty) Ltd* 1971 1 SA 624 (W) oor die trefwydte van artikel 26(1), verkeerd beslis is. Die onsekerheid en teenstrydige beslissings oor die trefwydte van artikel 26(1), veral ná die wysiging daarvan in 1963, behoort tog volledig bespreek te word in die kommentaar op die betrokke artikel. Op 579 word daar, in hierdie verband, verder volstaan met 'n lakoniese "Kyk ook *Estate Agents Board v Lek* 1979 3 SA 1048 (AA)." Inderdaad het die appèlhof in hierdie saak die beslissings in *Ex parte Boshoff* 1972 1 SA 521 (OK) en *Hare v Banimar Shipping Co SA* 1978 4 SA 578 (K) onderskryf en bevind dat die bedoeling van artikel 26(1) bloot is om prosedure te reël en dat dit nie inbreuk maak op die "fundamental concept of the territorial jurisdiction of the divisions entrenched in the SC Act of 1959" (1062).

Die wyse waarop uiters belangrike beslissings soos *Estate Agents Board v Lek* 1979 3 SA 1048 (A) en *Ex parte Prokureur-Generaal, Transvaal* 1978 4 SA 15 (T) afgemaak word met 'n blote "kyk ook . . ." (579) of "kyk egter . . ." (593) is verder illustratief van die lukrake en inderdaad oppervlakkige manier waarop nuwe materiaal in die boek verwerk is. Die versuim om sodanige materiaal behoorlik in die kommentaar te integreer, gee soms daartoe aanleiding dat die kommentaar òf onvolledig òf selfs misleidend en verkeerd is. Byvoorbeeld, op 65 word *Harrow-Smith v Ceres Flats (Pty) Ltd* 1979 2 SA 722 (T) en *Wollach v Barclays National Bank Ltd* 1980 (4) SA 133 (K) aangehaal as gesag vir die stelling dat slegs 'n gedeelte van 'n eiser se

totale eis by wyse van voorlopige vonnis verhaal kan word. Op 70 word gesê dat "mits die verskuldigde bedrag duidelik deur 'n sertifikaat . . . bewys word, sal voorlopige vonnis op grond van 'n borgakte of garansie toegestaan word." In die eerste van hierdie stellings kom die werklike belangrikheid van die *Harrow-Smith-* en *Wollach*-beslissing nie na vore nie. Die tweede stelling is verkeerd en misleidend. Tydens die sewentigerjare is in 'n aantal beslissings aanvaar dat voorlopige vonnis op 'n skriftelike stuk soos 'n dekkingsverband of borgakte verleen kan word as die skuldenaar daarin erken dat hy 'n onbepaalde bedrag tot 'n bepaalde maksimum verskuldig is, mits die stuk verder bepaal dat die omvang van die skuldenaar se aanspreeklikheid op enige gegewe oomblik by wyse van 'n sertifikaat bewys kan word (sien bv *Bro-Trust Finance (Pty) Ltd v Pieters* 1973 3 SA 520 (T) en *Rich v Lagerwey* 1974 4 SA 748 (A)). Die belangrikheid van die *Harrowsmith*-beslissing en van *Barclays Western Bank Ltd v Pretorius* 1979 3 SA 637 (N) (waarna nie verwys word nie) is daarin geleë dat daar bevind is dat likiditeit nie as't ware terugwerkend verleen kan word deur die ooreengekome uitreiking van die sertifikaat nie, en dat voorlopige vonnis nie in sodanige gevalle toegestaan kan word nie. Hierdie twee beslissings is gevolg in die *Wollach*-saak en in *Volkskas Bpk v Scott* 1981 2 SA 471 (OK), en is deur die appèlhof onderskryf in *Wollach v Barclays National Bank Ltd* 1983 2 SA 543 (A)). Laasgenoemde is een van die beslissings wat tydens die eerste helfte van 1983 gerapporteer is waarna die skrywers kon, en moes, verwys het. Die héél belangrikste resente ontwikkeling betreffende die likiditeitsvereiste by voorlopige vonnis word dus eenvoudig deur die skrywers genegeer asof dit nooit plaasgevind het nie.

Enkele foute wat in die tweede uitgawe voorgekom het, word in hierdie uitgawe herhaal. In die kommentaar op reël 35(7) word gesê dat die hof in *Pelidis v Ndhlamuti* 1969 3 SA 563 (R) een dag se koste nie toegestaan het nie "ten einde sy afkeer te toon aan die versuim om bloot te lê." Die belangrike van hierdie beslissing is egter dat die eiser by wyse van 'n ontneming van 'n gedeelte van sy koste gepenaliseer is vanweë sy versuim om blootlegging *aan te vra.* In hierdie verband kon die skrywers miskien ook verwys het na die interessante situasie wat ontstaan het in *Ottawa (Rhodesia) (Pvt) Ltd v Highams Rhodesia (1969) (Pvt) Ltd* 1975 3 SA 77 (R). In die kommentaar op 303 word daar nie vermeld dat die appèlhof in *Pledge Investments (Pty) Ltd v Kramer NO in re Estate Selesnik* 1975 3 SA 696 (A) 703 bevind het dat *Nicolau v Navaronne Investments (Pty) Ltd* 1971 3 SA 883 (W) verkeerd beslis is nie. Op 335 word gesê dat by 'n siviele appèl vanaf die landdroshof die kennisgewing van appèl die afdeling van die hooggeregshof moet meld waarna appèl aangeteken word: hierdie vereiste het reeds in 1972 verval met die skrapping van landdroshofreël 51(7)(c) deur GK R947 van 2 Junie 1972. Op 581 word na die Wet op Regsbevoegdheid in Matrimoniële Regsake 22 van 1939 en die Wet op Huweliksaangeleenthede 37 van 1953 verwys in plaas van die Wet op Egskeiding 70 van 1979.

Die Afrikaanse vertaling van die bykomende kommentaar is op be-

kwame wyse versorg deur dr J A v S d'Oliveira. Die duplisering van teks en kommentaar in albei amptelike tale is, by die verskyning van die eerste uitgawe in 1966, 'n "radical innovation," selfs 'n "extravagance" genoem, en is daar opgemerk dat "[t]he authors' admirable objective could better have been achieved by the publication of separate volumes" (Beuthin 1966 *SALJ* 320–1). In die lig van die prys van die huidige uitgawe moet hierdie opmerkings onderskryf word.

H J ERASMUS
Universiteit van Stellenbosch

INTERPRETATION OF STATUTES
deur GM COCKRAM
(2e uitgawe) Juta, Johannesburg 1983; 312 bl; prys R16,50 plus AVB (sagteband)

Die eerste uitgawe van Cockram se *Interpretation of Statutes* is nie juis, om dit sagkens te stel, met ongekende entoesiasme ontvang nie. Die tweede uitgawe is dus met 'n redelike mate van belangstelling ingewag, veral weens die gebrek aan 'n goeie Engelse handboek oor die uitleg van wette in Suid-Afrika.

Met die eerste kursoriese oogopslag het die nuwe uitgawe baie belowend gelyk. Die werk is slegs in 'n aantreklike slapbanduitgawe beskikbaar, wat op sigself reeds 'n verbetering is op die vorige uitgawe (wat eerder na 'n traktaat gelyk het as 'n regshandboek). 'n Kort opsomming van die nuwe 1983-Grondwet verskyn as voorwoord, en die boek is voorsien van 'n vonnisregister en indeks. Veral die gedeeltes oor die verskante bepalings in die Grondwet, die teks in die ander landstaal en nietigheid van handelinge verrig in stryd met wetsbepalings, is grootliks uitgebrei, terwyl die reël *cessante ratione legis cessat ipsa lex* bygevoeg is. Besliste sake tot en met Junie 1983 is bygewerk, asook die Interpretasiewet van 1957.

By nadere beskouing word die aanvanklike optimisme in die kiem gesmoor. In wese is die tweede uitgawe 'n "opgekikkerde" weergawe van die eerste, met die gevolg dat die nuwe uitgawe steeds mank gaan aan sy voorganger se gebreke.

Die werk is geskoei op die lees van die Amerikaanse "casebooks." Waar uitleg van wette in Suid-Afrika op voorgraadse vlak aangebied word, is ek persoonlik nog nie daarvan oortuig dat die sogenaamde "casebook method" noodwendig 'n suksesvolle metode vir die betrokke kursus bied nie. Myns insiens bied die werk nie 'n genoegsame formeelteoretiese grondslag ten opsigte van die reëls van wetsuitleg nie. Voort-

spruitend hieruit kom dit voor dat die outeur passasies uit besliste sake aanhaal wat òf geen betrekking het op die reël onder bespreking nie òf glad nie as gesag daarvoor dien nie. 'n Sprekende voorbeeld hiervan is die vermoede dat 'n wet nie in stryd met 'n reël van die volkereg uitgelê sal word nie (187–200). Nie een van die aanhalings uit die hofbeslissings onderskryf die vermoede nie. Trouens, soos Booysen (*Volkereg* 1980 326–328) aantoon, is daar geen definitiewe gesag in die Suid-Afrikaanse reg dat die betrokke vermoede deel van ons reg is nie.

'n Hinderlike aspek van die werk is die feit dat reëls soos die *eiusdem generis* en *contemporanea expositio* as sogenaamde "maxims" behandel word. Hoekom die reëls nie onder afwyking van letterlike uitleg of hulpmiddels by uitleg behandel word nie, bly vir my 'n raaisel. Dit skep slegs onnodige verwarring.

Verder skitter 'n aantal belangrike beslissings in hulle afwesigheid. Die reël dat 'n betekenis aan elke woord geheg moet word, kan nie sinvol bespreek word sonder verwysing na *Keyter v Minister of Agriculture* 1908 NLR 522 of *R v Herman* 1937 AD 168 nie. Die misstandsreël word afgehandel sonder verwysing na *S v Conifer (Pty) Ltd* 1974 1 SA 651 (A) waar die hof die betrokke reël bondig dog helder toegepas het. Indien uitlegreëls aan die hand van hofbeslissings verduidelik word, volg dit tog dat die sprekendste voorbeelde uit die vonnisverslae daarvoor aangewend moet word. Die outeur maak ook ruimskoots gebruik van Rhodesiese en Zimbabwiese gewysdes sonder om aan te toon dat sulke beslissings slegs oorredingskrag in die Suid-Afrikaanse howe het.

Die outeur volhard steeds om 'n volle hoofstuk (38–47) te wy aan sogenaamde "interpretasie deur die parlement." Die hele kwessie rondom die hoë hof van die parlement is darem al finaal begrawe, terwyl die Interpretasiewet en woordbepalingsartikels hoogstens hulpmiddels is by die howe se interpretasiefunksie. Binne die raamwerk van skeiding van magte is die funksie van die wetgewer tog om die wette te maak, en nie om dit uit te lê nie!

Die lys van aanbevole leeswerk op 243 is te kort en niksseggend om enigsins van waarde te wees vir studente.

Ten spyte van al die kritiek, is daar tog 'n paar pluspunte. Die sleutelbeslissing van *S v Marwane* 1982 3 SA 717 (A) is ingesluit, en gesien in die lig van die gebrek in Suid-Afrika aan besprekings van die uitleg van grondwette, is dit verblydend om tog êrens in 'n handboek verwysings na "konstitusionele interpretasie" te vind.

Die werk verskyn in 'n handige formaat en is maklik om te gebruik.

Alhoewel die werk heelwat gebreke toon, wil ek dit tog voorwaardelik aanbeveel, veral as aanvulling tot die vyfde uitgawe van Steyn se *Uitleg van Wette*, wat ook nie sonder gebreke is nie. Studente en praktisyns sal die werk nuttig vind, mits dit met 'n mate van omsigtigheid benader word.

CJ BOTHA
Universiteit van Suid-Afrika

ACTA IURIDICA 1983: FAMILY LAW IN THE LAST TWO DECADES OF THE TWENTIETH CENTURY

Gepubliseer onder beskerming van die Fakulteit Regsgeleerdheid, Universiteit van Kaapstad

Juta Kaapstad, Wetton, Johannesburg 1984; 256 bladsye

Prys R35,00 (sagteband)

Die doel van hierdie resensie is bloot die bekendstelling van hierdie werk. Dit is nie in hierdie bespreking die bedoeling om enigsins die verskillende individuele bydraes te beoordeel of om die meriete van elke bydrae te bespreek nie.

In die voorwoord kondig die redaksie aan dat van 1983 af, elke uitgawe van die *Acta Iuridica* aan 'n bepaalde tema gewy gaan word. Daardeur hoop hulle om die leemtes in die Suid-Afrikaanse regsliteratuur aan te vul en om verskillende standpunte oor 'n enkele aangeleentheid in een bundel saam te voeg.

Die tema van hierdie uitgawe van die *Acta Iuridica* is die familiereg. Die familiereg is gekies hoofsaaklik as gevolg van die fundamentele veranderinge wat die Wet op Egskeiding van 1979 teweeggebring het en die huidige voorstelle ter hersiening van die huweliksgoedereg.

Hierdie uitgawe bestaan uit elf artikels wat handel oor verskillende uiteenlopende aspekte van die familiereg. Aangesien die publikasie eintlik 'n uitgawe van 'n tydskrif is, word in die laaste gedeelte ook boekbesprekings aangetref (213 e v).

Die redaksie het 'n algemene raamwerk gestel waarvolgens die outeurs hulle artikels moes voorberei. Daar is egter geen beperkings geplaas op die styl en inhoud van die bydraes of die benaderings tot die verskillende onderwerpe nie. Onderliggend aan enige statutêre verandering van die reg, is die sosiale en ekonomiese tendense wat 'n diepgaande invloed (in hierdie geval op familieverhoudings) uitoefen. Van die belangrikste tendense is in hierdie algemene raamwerk vervat en word volledig in die voorwoord uiteengesit.

Die eerste bydrae tot hierdie werk is gelewer deur HR Hahlo van die Universiteit van Toronto en is getitel "Recent Trends in Family Law: A Global Survey." Hierin bespreek die skrywer die gronde vir egskeiding soos dit in verskeie lande van toepassing is (2), onderhoud na egskeiding (4), die posisie van die langslewende gade wat onterf is (8) en die verdeling van bates in geval van egskeiding of dood (8). Op 14 volg 'n kort bespreking van die *de facto*-huwelik en die hedendaagse neiging om dit 'n erkende regsinstelling te maak. Daarna word die regsposisie van kinders bespreek (15). Laastens wys die skrywer (ongelukkig net kortliks) op die

baie nuwe regsvrae wat ontstaan het vanweë die ontwikkeling van nuwe mediese tegnieke, onder andere surrogaat-moederskap, kloning en die proefbuisbaba.

Die tweede artikel, "The Development of the Canon Law of Marriage," is geskryf deur J Hofman van die Universiteit van Kaapstad. Die ontwikkeling van die kanonieke reg met betrekking tot die huwelik en die hedendaagse rol van die kerk en die staat wat die huwelik betref, word breedvoerig van 23 af bespreek.

Die derde artikel is gelewer deur AH Barnard van die Universiteit van Suid-Afrika onder die opskrif "An evaluation of the Divorce Act, 70 of 1979." Die skrywer gee 'n volledige uiteensetting van die nuwe Wet op Egskeiding en die toepassing van die wet, en kom tot die gevolgtrekking dat die oogmerk van die wetgewer met die uitvaardiging van hierdie wet nie ten volle bereik is nie (39 e v). Hy bespreek ook 'n aantal voorgestelde wysigings aan hierdie wet wat noodsaaklik is om die ware doelwit van die wetgewer te bereik (45 e v).

Die vierde artikel is gelewer deur AH van Wyk van die Universiteit van Stellenbosch en is getitel "Matrimonial Property Systems in Comparative Perspective." In hierdie artikel bespreek die skrywer die ontwikkeling van die verskillende huweliksgoederesisteme in die belangrikste Europese regstelsels (54) en daarna die invloed wat hierdie Europese regstelsels gedurende die kolonisasieperiode op lande buite Europa uitgeoefen het (59). Verder word die voorgestelde Suid-Afrikaanse wetgewing bespreek (62 e v).

June Sinclair van die Universiteit van die Witwatersrand het die vyfde artikel geskryf onder die opskrif "Marriage: Is It Still a Commitment for Life Entailing a Lifelong Duty of Support?" In hierdie artikel word die volgende twee vrae behandel: eerstens, die vraag of die huwelik neerkom op 'n lewenslange verbintenis (75) waarop sy dan tot die gevolgtrekking kom dat die huwelik nie as 'n lewenslange verbintenis wat tot permanente regte en verpligtinge aanleiding gee, beskou kan word nie (87); en tweedens, die vraag of die aard van die huwelik verander het of besig is om te verander van 'n ondersteunende instelling (vir vroue) tot 'n vennootskap van gelykes wat met 'n egskeiding beëindig word (79). Op 87 sê die skryfster met betrekking tot die tweede vraag dat die praktiese implikasies van die aanvaarding van so 'n benadering nie geïgnoreer kan word nie. Sy kom tot die gevolgtrekking dat private onderhoudsverpligtinge nie afgeskaf moet word nie omdat dit net 'n ekstra las op die staat kan plaas.

Die sesde artikel is bygedra deur PJJ Olivier van die Bloemfonteinse Balie en die titel daarvan is "Minority and Parental Power." Die volgende aspekte met betrekking tot minderjarigheid word bespreek: die verlaging van die ouderdom waarop 'n persoon meerderjarig word (97); stilswyende emansipasie (98); die Wet op die Meerderjarigheidsouderdom 57 van 1972 (99); en 'n minderjarige wat 'n wettige huwelik sluit (100). Wat ouerlike gesag betref, word die volgende bespreek: die natuurlike ouer se reg van beheer en toesig oor sy kind (102); die reg om te bepaal met wie die kind mag assosieer (102); kindermishandeling (104); en

ouerlike administrasie van die kind se eiendom (105).

Die sewende artikel is geskryf deur E Spiro van die Kaapstadse Balie en is getitel "Custody and Guardianship of Children *stante matrimonio* and on Dissolution of Marriage." Die posisie van die kind ten opsigte van beheer en toesig asook voogdy ten tyde van die bestaan van die huwelik (114) en in geval van egskeiding (116) word breedvoerig in hierdie artikel behandel.

Die agste artikel, getitel "Rape in the Marriage – Conjugal Right or Criminal Wrong?" is bygedra deur F Kaganas en C Murray van die Universiteit van die Witwatersrand. Die feit dat niemand nog in Suid-Afrika van verkragting binne die huwelik aangekla is nie, dui op die algemene aanvaarding van die uitsondering ten aansien van verkragting binne die huwelik in ons reg (125). Na die bespreking van onder andere die ontstaan van hierdie uitsondering (126), die moderne Westerse siening van die huwelik (127) en die posisie rakende hierdie uitsondering in ander lande (130), kom die skryfsters tot die gevolgtrekking dat hierdie uitsondering 'n argaïese simbool van die onderdrukking van die vrou is.

Die publikasie bevat benewens bogenoemde artikels ook die volgende wat verband hou met, maar nie beperk is tot, die inheemse reg nie: "The Dualism of Marriage Laws in Africa" deur TW Bennett en NS Peart van die Universiteit van Kaapstad (145) en "Roman-Dutch Family Law for Africans: The Black Divorce Court in Action" deur SB Burman van die Centre for Socio-Legal Studies Wolfson College, Oxford (171).

Die laaste bydrae is uit die pen van I Schäfer van die Universiteit Rhodes en dit handel oor "Family Courts – Reconsideration Invited." In hierdie artikel word familiehowe nader bekyk (191).

Hierdie publikasie sal ons jaarliks laat uitsien na gerieflik gebundelde, nuttige en waardevolle bydraes oor aktuele regsaangeleenthede.

Ten slotte moet beklemtoon word dat 'n versamelwerk van hierdie aard eenvoudig 'n inhoudsregister moet hê. Dit ontbreek ongelukkig. 'n Inhoudsregister sou grootliks bygedra het tot die gebruikswaarde van die werk.

Samevattend sou ek hierdie boek beskryf as 'n nuttige en verdienstelike toevoeging tot ons regsliteratuur.

RITA LEMMER
Universiteit van Suid-Afrika

THE LAW OF PROPERTY

deur H SILBERBERG en J SCHOEMAN

Butterworth Durban – Pretoria 1983; xxiii en 575 bl

Prys R55,00 + AVB (hardeband) R49,00 + AVB (sagteband)

Hierdie publikasie is 'n algehele verwerking van Silberberg se eerste uitgawe oor die sakereg deur Schoeman.

In sy voorwoord stel Schoeman

hom ten doel om in die tweede uitgawe van die boek die beginsels van die Suid-Afrikaanse sakereg op so 'n wyse weer te gee dat die sterk Romeins-Hollandse basis daarvan na vore kom. Tegelykertyd wil hy die boek vir die praktisyn ook meer bruikbaar maak. Hierin slaag hy.

Dit verbaas dus nie dat ten einde 'n wetenskaplike uitgangspunt te neem, die historiese ontwikkeling by te werk en 'n meer logiese uiteensetting van die vakgebied te gee, hy genoodsaak is om groot dele van die werk uit te brei, te wysig, te herskryf of te herrangskik nie.

Hoofstuk II ("The legal concept of a thing") en hoofstuk IV ("Real rights") skryf hy in die geheel oor. Hy verwys nie alleen na Joubert " 'n Realistiese Benadering van die Subjektiewe Reg" 1958 *THRHR* 98, Van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes* (1959) en *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 378 (T) nie, maar verduidelik ook die begrippe "saak" en "saaklike regte" aan die hand van die leerstuk van die subjektiewe regte. Die waarde hiervan vir studente kan nie genoeg beklemtoon word nie.

In die eerste uitgawe van die werk is nie veel aandag gegee die historiese ontwikkeling nie. Hierdie gebrek word in die tweede uitgawe aangevul. Dit is opmerklik dat die skrywer moeite doen om die historiese ontwikkeling telkens by te werk. Veral hoofstukke III, VII, VIII, X, XII en XVII is sprekend hiervan.

Die hoofstukke in die boek is hergesistematiseer en vorm nou 'n logiese verband. Eerstens word die betekenis en omvang van die sakereg bespreek, daarna die teoretiese basis van die sakereg; die verkryging van saaklike regte (wat oa 'n nuwe hoofstuk oor grondregistrasie insluit); besit; eiendomsreg; oorspronklike en afgeleide wyses van eiendomsverkryging; beskerming van eiendomsreg; mede-eiendomsreg; waterreg; deeltitels; beperkte saaklike regte en ter afsluiting 'n interessante identifisering en bespreking van sommige van die werklike probleme in die sakereg.

'n Paar hoofstukke kan gerus uitgelig word. Die bespreking van die leerstuk van die subjektiewe regte in hoofstukke II en IV voorsien die tweede uitgawe van 'n suiwer teoretiese uitgangspunt wat onontbeerlik is by 'n wetenskaplike werk. Studente wat die eerste maal met die vakwetenskap *sakereg* te doen kry, sal aan die hand van die leerstuk van die subjektiewe regte begrippe en beginsels van die sakereg waarskynlik beter verstaan. Die nuwe hoofstuk oor grondregistrasie (hoofstuk VII) gee 'n kernagtige samevatting van die ontwikkeling van die Suid-Afrikaanse grondregistrasiestelsel. Die interessante vraag of Suid-Afrika 'n abstrakte of kousale stelsel van eiendomsoordrag van grond het, word hierin behandel.

Sy bespreking van *inaedificatio* as een van die oorspronklike wyses van eiendomsverkryging (hoofstukX) is aansienlik uitgebrei. Hy behandel 'n aantal sake oor die maatstawwe wat gebruik word om vas te stel of 'n aanhegting volgens die stelreël *superficies solo cedit* onroerend geword het, en wys daarop dat die howe die klem op die bedoeling van die eienaar van die aangehegte saak laat val. Die moontlike gevaar van 'n oorbeklemtoning van

hierdie bedoeling-maatstaf word kortliks bespreek. Die behandeling sou vir sowel die student as regspraktisyn van meer nut gewees het as hy hierdie kwessie verder ondersoek het. Hy wys immers self daarop dat daar twyfel bestaan of die gemeenregtelike gesag, waarop die howe steun, dat die bedoeling van die eienaar van die aangehegte saak deurslaggewend is, voldoende is. Van der Merwe (*Sakereg* (1979) 168) wys ook op die verdere probleem dat "deur die bedoeling te beklemtoon . . . 'n oorspronklike wyse van eiendomsverkryging, naamlik *inaedificatio*, verwar [word] met 'n afgeleide wyse van eiendomsverkryging, naamlik *traditio* of lewering." By *traditio* gaan eiendom slegs ooreenkomstig die bedoeling van die vorige eienaar oor. Eiendomsverwisseling by *accessio* vind egter deur regswerking plaas (Van der Merwe 168).

Die werk is tegnies netjies versorg. Dit behoort 'n nuttige naslaanwerk vir sowel die student as praktisyn te wees. Veral die saakregister wat 25 bladsye beslaan en al die belangrikste vonnisse tot die einde van 1982 bevat, sal baie nuttig te pas kom. Die tweede uitgawe voorsien in die behoefte vir 'n goeie Engelse handboek oor die Suid-Afrikaanse sakereg.

M KLOPPER
Universiteit van Suid-Afrika

UNIVERSELE OPVOLGING IN DIE SUID-AFRIKAANSE ERFREG

deur FJ VAN ZYL

Annale van die Universiteit van Stellenbosch 1984; xii en 309 bl

Prys R12,00 + AVB (sagteband)

Hierdie werk is die publikasie van die skrywer se proefskrif. Hy behandel fundamentele vrae oor die erfreg en boedelbereddering en die boek kom op 'n baie geleë tyd siende dat die Suid-Afrikaanse Regskommissie tans besig is met 'n ondersoek na die erfreg in Suid-Afrika.

Na 'n deeglike ontleding van die gemeenregtelike gesag, die Suid-Afrikaanse wettereg en gewysdes van ons howe, kom die skrywer tot die gevolgtrekking dat 'n erfgenaam nie meer in die moderne Suid-Afrikaanse erfreg universeel in die nalatenskap van 'n oorledene opvolg nie. Hy kom verder tot die slotsom dat die persone in beheer van 'n bestorwe boedel, dit is die *interim* kurator (indien daar een is), die eksekuteur of eksekuteurs, die meester en sy assistente en die staat wat deur middel van die howe optree, 'n bestuursliggaam vorm wat regspersoonlikheid het. Hierdie bestuursliggaam is dan die universele opvolger van die oorledene. By die erflater se dood volg hierdie bestuursliggaam *ipso iure* in die oorledene se nalatenskap op. Die bestuursliggaam se taak is dan om die boedel te beredder en die restant van

die bates aan die bevoordeeldes oor te dra.

Die skrywer gee voldoende rekenskap van sy standpunte oor die subjektiewe reg en die regspersoon om die konklusie waartoe hy kom, te motiveer, maar nogtans sou daar verskil van mening kan bestaan oor die gevolgtrekking dat 'n bestuursliggaam met regspersoonlikheid by die erflater se dood ontstaan, wat in die oorledene se nalatenskap opvolg. Maar selfs al sou daar meningsverskil bestaan, sou dit nie afbreuk doen aan die groot nut van die positiefregtelike navorsing en die rykdom van historiese gegewens wat die werk bevat nie. Studente en regsvormers kan met groot vrug daarvan gebruik maak en daarom was dit 'n uitstekende idee om die proefskrif in sy geheel te publiseer.

DSP CRONJÉ
Universiteit van Suid-Afrika

All things considered, all persons ought to follow what is right, and not what is established. (Per Aristoteles.)

BRIEWE

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Geagte heer

In my bespreking van die vyfde uitgawe van Gibson en Comrie se *South African Mercantile and Company Law* (sien bladsy 250 van die Mei-uitgawe van u tydskrif) het ek die stelling gemaak dat die vyfde uitgawe geen register bevat nie. Dit was inderdaad die geval met die eksemplaar wat aan my beskikbaar gestel is, hoewel die inhoudsopgawe wel 'n verwysing na die register bevat het. Die uitgewers het my intussen meegedeel dat daar in-hierdie verband 'n fout ingesluip het by die bindwerk van die resensiekopie. In alle billikheid ag ek dit my plig om hierdie inligting, wat eers later tot my kennis gekom het, onder die aandag van die lesers van my bespreking te bring.

Die uwe

PROFESSOR AN OELOFSE

Die onderskeid tussen borgtog en ander vorme van persoonlike sekerheidstelling

GF Lubbe
BA LLB LLM
Professor in die Privaatreg aan die Universiteit van Stellenbosch

SUMMARY

The Distinction between Suretyship and Other Forms of Personal Security

This contribution examines various contractual arrangements whereby a third party may intercede for a debtor with a view to the greater security of the latter's creditor. A basic distinction is drawn between those arrangements whereby a debtor is replaced by a more creditworthy outsider and those which result in the outsider assuming a liability cumulative to that of the debtor. In regard to the latter, a distinction is drawn between suretyship, a contractual arrangement whereby the surety assumes a secondary liability which is said to be accessory to that of the principal debtor and the undertaking by the intercessor of a primary liability as co-principal debtor with the party in need of accommodation. This distinction is difficult to draw in practice, but it is argued that the surety is one who intercedes to protect the creditor merely against the risk of loss flowing from breach of contract by the principal debtor. This is achieved by the surety undertaking a conditional liability which renders his performance exigible only in the event of a breach of contract by the principal debtor. Circumstances which preclude a breach of contract by the principal debtor, for example where the principal obligation is void *ab initio* or extinguished subsequent to its creation will, therefore, result in a failure of the condition for the surety's liability and his release. The so-called accessory nature of suretyship is, therefore, not of a mystical origin, but a consequence of the intention of the parties, namely that the surety assumes the risk to the creditor of loss resulting from a breach of contract by the principal debtor, and nothing more.

One who assumes a joint and several liability as co-principal debtor with another in order to provide security for a creditor of the latter, stands on a different footing. His obligation is a primary one and his liability does not, therefore, depend on a breach of contract by his co-debtor. It is argued, furthermore, that while the liability of the co-principal debtor liable *in solidum* is, on account of the theoretical nature of the solidary relationship, not wholly independent of that of his compatriots, it is not as closely linked as is the case with the liability of the surety and his co-principal debtor. There might well be circumstances in which a co-principal debtor might remain liable despite the falling away of the liability of his fellows. Assumption of liability *singuli in solidum* in order to secure the position of a creditor entails, therefore, the assumption of risks beyond that borne by the true surety.

If regard is had to the performance undertaken by the surety, suretyship might be seen as an instance of the contract of guarantee or indemnity. In view of its conditional nature, however, suretyship is a guarantee of a restricted nature. It serves to safeguard the creditor merely against the risk of breach of contract and the loss that may arise from it. While there is clearly nothing that prevents a third party from indemnifying a creditor against all risks of loss that may arise from his dealings with a debtor, such an indemnity will only amount to a principal obligation distinguishable from suretyship if it is clear that the guarantor undertakes liability even for

losses arising from the extinction or non-existence of the supposed obligation between the creditor and debtor.

INLEIDING

Persoonlike sekerheidstelling, in die omvattendste sin van die woord, behels dat 'n regsubjek homself deur middel van 'n kontrak teenoor iemand verbind ter finansiële akkommodasie van 'n derde, die skuldenaar van die persoon teenoor wie die aanspreeklikheid opgeneem word. Dit gaan dus om 'n handeling *ob maiorem securitatem creditoris*, maar dan ten behoewe van 'n ander se skuldeiser. Hierdie resultaat kan op verskillende maniere bewerkstellig word. Na aanleiding van die leerstellings rondom die begrip *intercessio*,[1] kan onderskei word tussen gevalle waarin die skuldeiser se sekuriteitsbehoefte bevredig word deurdat sy skuldenaar vervang word deur 'n meer kredietwaardige persoon,[2] en gevalle waarin 'n derde 'n aanspreeklikheid opneem wat nie dié van die skuldenaar vervang nie, maar kumulatief daartoe staan.[3] Persoonlike sekerheidstelling deur die opname van 'n kumulatiewe aanspreeklikheid kan op sigself weer verskillende vorme aanneem. In hoofsaak kan onderskei word tussen situasies waar die sekerheidsteller hom as borg teenoor die hoofskuldenaar se skuldeiser verbind en situasies waar hy, ter versekering van die skuldeiser, hom selfstandig as hoofskuldenaar verbind.[4] Die onderskeid tussen die twee vorme van kumulatiewe persoonlike sekerheidstelling is belangrik. Afgesien daarvan dat formaliteite van regsweë net ten opsigte van borgkontrakte voorgeskryf word,[5] mag

1 In die Romeinse en Romeins-Hollandse reg, en in die Suid-Afrikaanse reg tot en met die inwerkingtrede van die *Borgtogwysigingswet* 57 van 1971, dui die begrip *intercessio* op 'n reeks regshandelinge waardeur 'n persoon by 'n ander se verbintenis betrek kan word ter akkommodasie van die skuldenaar en versekering van die skuldeiser en waartoe vrouens in die algemeen nie toegang gehad het nie. Alhoewel die begrip vandag enigsins haweloos is, bied die leerstellings in hierdie verband tog 'n oorsig van die verskillende maniere waarop oa persoonlike sekerheidstelling bewerkstellig kan word. Sien in die algemeen aangaande *intercessio*: Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) § 323; Berger *Encyclopedic Dictionary of Roman Law* (1953) 506 sv *Intercessio*, Wessels en Roberts *Wessel's Law of Contract in South Africa* (1951) 2 §§ 3778–3783; Forsyth *Caney's Law of Suretyship in South Africa* (1982) 29–30; Van Warmelo "*Senatus Consultum Velleianum, Authentica si qua Mulier*" 1953 *THRHR* 94; Nienaber 1966 *Annual Survey* 122. Vgl wat die regspraak betref: *Schoeman v Moller* 1951 1 SA 456(O); *African Guarantee and Indemnity Corporation v Rabinowitz* 1934 WLD 151; *Estate Carstens v Van der Westhuizen* 1934 CPD 191; *Standard Building Society v Kellerman* 1930 TPD 796; *Zeederberg v Union Bank* (1885) 3 SC 290.

2 So 'n sg private *intercessio* behels dat die *intercessor* in die plek tree van die oorspronklike skuldenaar deur middel van 'n *novatio*. Die noodsaaklikheid van 'n *novatio* kan vermy word deurdat die voornemende skuldeiser van huis uit met die *intercessor* kontrakteer en dan teenoor die geakkommodeerde presteer op grond van die *intercessor* se onderneming om hom te vergoed. Vgl Jörs, Kunkel en Wenger *Römisches Recht* (1949) § 133; Wessels en Roberts aw §§ 3780–3783.

3 Sien die bewysplase waarna in vn 2 verwys is.

4 'n Onderskeid wat duidelik na vore kom in *Dorfman v Perring* 1922 EDL 137; *Schoeman v Moller* 1951 1 SA 456(O) 473; *Blaikey-Johnstone v Holliman* 1971 4 SA 108(D) 116.

5 Vgl Hahlo en Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 706 mbt die implikasies hiervan.

daar besondere reëls wees — veral by borgtog — wat nie na ander, funksioneel verwante regsfigure uit te brei is nie.[6] Verskillende faktore bemoeilik die maak van bogenoemde onderskeid in die praktyk. Enersyds blyk dit dat sekere gebruike in verband met borgtog tot gevolg het dat die wesenskenmerke van hierdie figuur verdoesel word. Andersyds weer is daar in die regspraak selde duidelikheid oor die basis waarop iemand as hoofskuldenaar kan intree ter versekering van 'n ander se skuldeiser. Die feit dat die partyebedoeling by transaksies van hierdie aard dikwels ook nie volkome en helder uitgedruk word nie, dra niks by tot duidelikheid nie.

Die oogmerk met hierdie bydrae is om die beginselonderskeid tussen die verskillende vorme van persoonlike sekerheidstelling deur die opname van 'n kumulatiewe aanspreeklikheid toe te lig. Eerstens sal aandag aan borgtog gegee word en daarna sal, by wyse van kontras, gelet word op sekerheidstelling deur die opname van 'n aanspreeklikheid as hoofskuldenaar.

BORGTOG

Borgtog, die mees algemene vorm van persoonlike sekerheidstelling, is 'n kontrak tussen 'n borg en 'n skuldeiser ingevolge waarvan eersgenoemde daarvoor instaan dat die hoofskuldenaar sy verpligting teenoor die skuldeiser sal nakom en onderneem om self teenoor laasgenoemde te presteer indien die hoofskuldenaar dit nie doen nie.[7] Begripsmatig beskou, vertoon die borgtogfiguur twee verbintenisse, te wete die hoofskuld tussen die hoofskuldenaar en skuldeiser en die borgskuld tussen laasgenoemde en die borg.[8] Kenmerkend is verder die besondere verhouding tussen hierdie verbintenisse. Daar word naamlik gesê dat die borgskuld aksessoor staan tot die hoofskuld, waarmee bedoel word dat die borgskuld nie 'n selfstandige bestaan voer nie, maar 'n geldige hoofskuld veronderstel en die lotgevalle daarvan deel.[9] Hierbenewens wil dit voorkom of die borg se aanspreeklikheid 'n verdere wesenlike kenmerk het, naamlik dat dit van 'n sekondêre aard is. Dit beteken dat die borg alleenlik aangespreek kan word indien daar sprake is van kontrakbreuk aan die kant van die hoofskuldenaar.

6 Dit is veral die geval met die sg *beneficia* van die borg. Sien hieroor De Wet en Van Wyk *Kontraktereg en Handelsreg* (1978) 347 ev; Wessels en Roberts aw §§ 4045–4153; Forsyth aw 109–136.

7 *Corrans v Transvaal Government and Coull's Trustee* 1909 TS 605 612; *Fitzgerald v Argus Printing and Publishing Co Ltd* (1907) 3 Buch 152; *Versveld and Co v Southern Timber (Pty) Ltd* 1935 2 PH A 38; *Orkin Lingerie Co (Pty) Ltd v Melamed and Hurwitz* 1963 1 SA 324(W); *Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Company Ltd* 1965 2 SA 597(A); De Wet en Van Wyk aw 344; Forsyth aw 27–29.

8 *Gerber v Wolson* 1955 1 SA 158(A) 166; Fourie "*Die Aanspreeklikheid van die Borg en Hoofskuldenaar*" 1978 *THRHR* 307.

9 Sien in die algemeen De Wet en Van Wyk aw 345 349–50; Wessels en Roberts aw § 3952; Forsyth aw 27–29; *Corrans v Transvaal Government and Coull's Trustee* hierbo; *Fitzgerald v Argus Printing and Publishing Co Ltd* hierbo 159.

In hierdie sin is die borg se aanspreeklikheid dan inderdaad van 'n voorwaardelike aard.[10] Hierdie punt, wat nie altyd goed ingesien word nie,[11] is inderdaad die sleutel tot 'n begrip van die aard van borgtog. Die voorwaardelike aard van die borg se onderneming bring mee dat hy teenoor die skuldeiser alleen maar instaan vir die risiko van kontrakbreuk deur die hoofskuldenaar. Verliese wat die skuldeiser op ander gronde uit die transaksie met die hoofskuldenaar mag oploop, kan nie op die borg afgewentel word nie.[12] Inderdaad skyn dit of die sogenaamde aksessore aard van die borgskuld te herlei is tot die partyebedoeling met die kontrak wat juridies 'n neerslag vind deur middel van die leerstuk van die ontbreking van voorwaardes.[13] Faktore wat meebring dat daar geen sprake kan wees van kontrakbreuk deur die skuldenaar nie, byvoorbeeld omdat daar geen geldige hoofskuld ontstaan het nie, of die hoofskuld, op watter manier ook al, uitgewis is, kom naamlik neer op 'n ontbreking van die voorwaarde vir die borg se aanspreeklikheid en 'n gevolglike verval van die borgskuld.[14]

Hierdie kenmerke van borgstelling word in die praktyk enigsins verdoesel deurdat geldskieters in die reël daarop aandring dat sekerheidstellers afstand doen van die voorregte van uitskudding en skuldsplitsing. Sodanige afstanddoening, wat ook stilswyend kan geskied deurdat sekerheidstellers aanspreeklikheid as "borge en medehoofskuldenaars" opneem,[15] het tot gevolg dat 'n sekerheidsteller vir die geheel van die prestasie aangespreek kan word sonder

10 *Inglis v Durban Navigation Collieries Ltd* (1908) NLR 436 446; *Director of Public Works v Lewis* (1908) ORC 14; *Union Government v Van der Merwe* 1921 TPD 318 321; *Parker Wood and Co Ltd v Lewis* 1925 NPD 277; *Orkin Lingerie Co (Pty) Ltd v Melamed and Hurwitz* hierbo; *Western Bank v Wood* 1969 4 SA 131(D). Vgl Forsyth aw 30 79. In gevalle waar die *beneficium excussionis* beskikbaar is vir die borg en hy hom daarop beroep, is uitskudding van die hoofskuldenaar natuurlik 'n verdere voorvereiste vir 'n ontvanklike eis teen die borg. Vgl Wessels en Roberts aw §§ 4029 en 4045.

11 Vgl bv Wessels en Roberts aw §§ 3784 met die opmerkings in §§ 3952 en 4029.

12 Vgl *ibid.*

13 Sien in hierdie verband De Wet en Van Wyk aw 137–138.

14 Die sg aksessoriteitsbeginsel is 'n ietwat newelagtige begrip en die implikasies van die byna mistieke verband wat daar dan sou bestaan tussen die borgskuld en die hoofskuld is nie volkome duidelik nie. Sien egter De Wet en Van Wyk aw 345 349–350; Wessels en Roberts aw § 3952. Hierdie gevolge kan verklaar word aan die hand van die konstruksie van die borgverbintenis wat in die teks voorgestaan word. Die sg verwere *in rem* van die hoofskuldenaar, waarop die borg hom ook ingevolge die aksessoriteitsbeginsel kan beroep, dui immers juis op die bestaan van omstandighede wat die kontraktuele aanspreeklikheid van die hoofskuldenaar uitsluit, aanvegbaar maak of ten minste kontrakbreuk deur hom uitsluit. Verwere *in personam* van die hoofskuldenaar, waarop die borg hom nie kan beroep nie, hou verband met persoonlike omstandighede van die skuldenaar wat van so 'n aard is dat alhoewel dit die hoofskuldenaar vrywaar van 'n proses deur die skuldeiser, daar steeds sprake kan wees van kontrakbreuk deur die hoofskuldenaar en dus vervulling van die voorwaarde vir die borg se aanspreeklikheid. Sien in die algemeen in verband met die onderskeid tussen verwere *in rem* en *in personam*: *Wortlington v Wilson* 1918 TPD 104; *Ideal Finance Corporation v Coetzer* 1970 3 SA 1(A); *Linden Duplex (Pty) Ltd v Harrowsmith* 1978 1 SA 371(W); Wessels en Roberts aw § 3969 ev en veral Forsyth aw 163–164; Scott en Grové *Suid-Afrikaanse Handelsreg* 2 (red Van Jaarsveld) (1983) 178–179.

15 *Mouton v Die Mynwerkersunie* 1977 1 SA 119(A) 123; *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 1 SA 463(A); De Wet en Van Wyk aw 347–348.

dat die skuldeiser eers iets van 'n ander skuldenaar moet probeer verhaal.[16] Op die oog af mag hierdie situasie lyk na 'n solidêre skuldverhouding, maar solank daar maar sprake is van 'n identifiseerbare skuldenaar wie se kontrakbreuk 'n vereiste is vir die summiere verhaal teen die "borge en mede-hoofskuldenaars," kan laasgenoemde steeds as borge, wat sekondêr en aksessoor aanspreeklik is, beskou word.[17]

SEKERHEIDSTELLING EN AANSPREEKLIKHEID AS HOOFSKULDENAAR

Persoonlike sekerheidstelling deur die opname van 'n aanspreeklikheid kumulatief tot dié van die skuldenaar hoef in die Suid-Afrikaanse reg nie noodwendig by wyse van borgtog te geskied nie. Die moontlikheid dat iemand met hierdie oogmerk selfstandig aanspreeklikheid as hoofskuldenaar kan opneem, is reeds meermale in die regspraak bevestig. Die terminologie waarmee na so 'n skuldopname verwys word, is nie altyd konsekwent nie. Soms word gepraat van die opname deur die skuldenaar van 'n primêre aanspreeklikheid[18] of die opname van 'n aanspreeklikheid as prinsipaal[19] of ingevolge 'n "out and out undertaking."[20] Ander formulerings verwys na 'n "absolute undertaking to pay in a certain event,"[21] 'n "independent promise to pay"[22] of 'n "contract of original liability,"[23] alles in teenstelling met sekerheidstelling deur middel van borgtog. Hierbenewens word die begrip *guarantee* ook in 'n besondere wye sin gebruik as duidend op 'n nie-aksessore aanspreeklikheid ten opsigte van die verbintenis van 'n ander.[24] De Wet en Van Wyk kontrasteer eweneens, juis in die konteks van

16 *Fitzgerald v Argus Printing and Publishing Co Ltd* (1907) 3 Buch 152; De Wet en Van Wyk aw 347.

17 Sien veral *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* hierbo; Fourie (1978) *THRHR* 307 asook Forsyth aw 46–48. Alles hang egter steeds af van die bedoeling van die partye. Sien bv *Trans-Drankensberg Bank Ltd v The Master* 1962 4 SA 417(N), waar 'n handelaar homself "*in solidum*" as "surety for and co-principal debtor" verbind het teenoor 'n verdiskonteringsbank tov die vorderings teen klante wat aan die bank oorgedra is. Die handelaar word tereg as 'n solidêr aanspreeklike behandel, onder meer omdat die ooreenkoms in die geheel dit duidelik stel dat die skuldeiser na keuse direk van die handelaar prestasie kan verlang en lg in bepaalde gevalle selfs aanspreeklik sou bly nadat die klant sy aanspreeklikheid regmatiglik beëindig het.

18 Vgl *Hubbard v Rogers* 1915 WLD 39; *Versveld and Co v Southern Timber (Pty) Ltd* 1935 2 PH A 38; *Edgecombe v Maunsell* 1911 CPD 521.

19 *Renou v Walcott* (1909) 6 HCG 246.

20 *Blom v Auret* (1907) 17 CTR 107; (1907) 24 SC 48.

21 *Schoeman v Moller* 1951 1 SA 456(O); *Fitzgerald v Argus Printing and Publishing Co Ltd* (1907) EDC 29 (Vgl (1907) 3 Buch 152).

22 *Cazalet v Johnson* 1914 TPD 142.

23 *Dorfman v Perring* 1922 EDL 137.

24 *Shaw v Kirby* 1924 GWLD 33; *Walker Fruit Farms Ltd v Sumner* 1930 TPD 394; *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372; *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil SA Ltd* 1973 3 SA 263(D); *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 1 SA 641(A) 646; *List* v *Jungers* 1979 3 SA 106(A). Vgl Forsyth aw 27 vn 16.

sekerheidstelling, die "selfskuldenaar" ingevolge 'n "ondubbelsinnige onderneming om te betaal" met die figuur van die borg, sonder om veel mee te deel aangaande die aard van sy aanspreeklikheid.[25]

Alhoewel daar soms 'n uniforme basis vir hierdie vorm van sekerheidstelling gepostuleer word,[26] skyn dit 'n ongegronde uitgangspunt te wees. In enkele beslissings dui die feite byvoorbeeld op wat vroeër dae as 'n private *intercessio* bestempel is, met ander woorde dat 'n kredietwaardige persoon hom as kontraksparty verbind teenoor die skuldeiser, alhoewel laasgenoemde sy prestasie aan 'n ander lewer.[27] In ander gevalle skyn dit weer of die persoon wat 'n onderneming gee om die skuld van 'n ander te betaal bloot 'n *assignatus* is, met ander woorde iemand wat eintlik as lasnemer van die skuldenaar eensydiglik teenoor die skuldeiser te kenne gee dat betaling deur hom ten behoewe van die skuldenaar bewerkstellig sal word.[28] Alhoewel daar in die geval van 'n *assignatio* streng gesproke geen *vinculum iuris* tussen die *assignatus* en die skuldeiser is nie,[29] dien die tussenkoms van 'n kapitaalkragtige party as 'n voldoeningsmeganisme tog prakties gesproke ter beveiliging van die skuldeiser. Dit is veral so waar die voorvereistes vir betaling deur die *assignatus* presies uitgespel word en losgemaak word van die substantiewe aspekte van die verhouding tussen die skuldenaar en skuldeiser.[30]

Afgesien van bogenoemde moontlikhede, erken die regspraak ook dat 'n derde homself deur middel van 'n kontrak met 'n ander se skuldeiser, onvoorwaardelik kan verbind tot dieselfde prestasie as dié waartoe die skuldenaar verplig staan.[31] In hierdie tipe geval sal daar 'n verdere *vinculum iuris*, gerig op dieselfde prestasie as dié waartoe die ander skuldenaar verplig staan tot stand kom en wel, in die afwesigheid van 'n bedoeling om te noveer, kumulatief tot die oorspronklike verbintenis.[32] Hierdie toedrag van sake stem ooreen met die huidig gangbare konstruksie van die solidêre skuldverhouding[33] en kom dan daarop neer dat

25 aw 345 vn 11.

26 Vgl *Hubbard v Rogers* hierbo; *Schoeman v Moller* hierbo.

27 Sien bv *Blom v Auret* hierbo; *Renou v Walcott* hierbo; *Versveld and Co v Southern Timber (Pty) Ltd* hierbo en vgl vn 2.

28 Vgl *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* hierbo.

29 Vgl Lee *An Introduction to Roman Dutch Law* (1953) 246 vn 2 273 en die gesag daar aangehaal.

30 Vgl die opmerkings in *SA Warehousing Services (Pty) Ltd* v *South British Insurance Co Ltd* 1971 3 SA 10(A) 17–18.

31 Vgl *Blaikey-Johnstone v Holliman* 1971 4 SA 108(D) 116, waar verklaar word: "A person may undertake the debt of another in such a way as to amount to an unconditional promise to pay giving rise to an original liability."

32 Sien, benewens *Blaikey-Johnstone v Holliman* hierbo, ook: *Brenner v Hart* 1913 TPD 607; *Huneberg v Watson's Estate* 1916 AD 116; *Hills v Stanley* 1930 NPD 268; *Williams v Kirk* 1932 CPD 159; *Schoeman v Moller* 1951 1 SA 456(O); *Froman v Robertson* 1971 1 SA 115(A); *South Africa Warehousing Services (Pty) Ltd v South British Insurance Co Ltd* hierbo; *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil SA Ltd* 1973 3 SA 263(D). Die beslissings in *Edgecombe v Maunsell* 1911 CPD 521; *Cazalet v Johnson* 1914 TPD 142 en *List v Jungers* 1979 3 SA 106(A) neig miskien ook in hierdie rigting, maar is nie volkome duidelik nie.

33 Vgl De Wet en Van Wyk aw 120.

hierdie vorm van medeskuld vir doeleindes van persoonlike sekerheidstelling aangewend kan word.[34] Akademiese kritiek teen die vestiging van 'n solidêre skuldverhouding op hierdie manier[35] kom nie oortuigend voor nie en is in ieder geval deur die regspraak verwerp.[36]

In beginsel is die onderskeid tussen sekerheidstelling deur middel van die opname van 'n solidêre aanspreeklikheid en borgstelling duidelik. In die geval van die solidêre verhouding is daar geen onderskeid te maak tussen 'n hoofskuldenaar wat primêr aanspreeklik is en diegene wat sekondêr aanspreeklik is, dit wil sê slegs as die hoofskuldenaar kontrakbreuk pleeg nie.[37] Hierbenewens is daar by die solidêre verhouding geen sprake van aksessoriteit soos by die borgverhouding nie. Die feit dat daar by solidêre medeskuld meerdere verbintenisse bestaan gerig op dieselfde, eenmalig verhaalbare prestasie, bring weliswaar mee dat die medeskuldenaars nie volkome onafhanklik van mekaar staan nie. Voldoening en skulduitwissende faktore wat daaraan gelyk staan sal al die solidêre medeskuldenaars bevry, maar ander vorme van skulduitwissing mag, in bepaalde gevalle, slegs sommige medeskuldenaars bevry.[38] By borgtog deel die borgskuld die lotgevalle van die hoofskuld ten volle as gevolg van die beginsel van aksessoriteit.[39]

In enkele beslissings word, afgesien van die solidêre skuldverhouding wat *ob maiorem securitatem creditoris* aangegaan word, 'n verdere moontlikheid van sekerheidstelling deur middel van kumulatiewe aanspreeklikheid as hoofskuldenaar voorsien.[40] In *Hubbard v Rodgers*[41] was 'n dokument ter sprake waarin die verweerder teenoor die eiser gewaarborg het dat sekere tjeks getrek deur 'n ander gehonoreer sou word. Daar is verder ook onderneem om, ingeval dit nie gebeur nie, die skuld op aanvraag te betaal. Toe die verweerder aangespreek word, word 'n beroep gedoen op die voorreg van uitskudding. Die hof spreek die mening uit dat daar ruimte was vir 'n bevinding dat afstand gedoen is van die *beneficia*, maar beslis tog dat dit nie 'n geval van borgstelling was nie. Die verweerder se verpligting was 'n *primary obligation*, naamlik

> "an unqualified obligation in the event of the cheques being dishonoured to pay on an ascertainable date, namely, on demand."[42]

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34 Sien *Williams v Kirk* hierbo 161–162; *Schoeman v Moller* hierbo 472; *Dorfman v Perring* hierbo 139; *Froman v Robertson* hierbo 122; *Trans-Drakensberg Bank Ltd v The Master* hierbo 422.

35 Vgl De Wet en Van Wyk aw 119 vn 13.

36 Sien die beslissings in vn 34 en vgl *Smit v Rondalia Versekeringskorporasie van Suid Afrika Bpk* 1964 3 SA 338(A) en *Adams v South Africa Motor Industry Employers Association* 1981 3 SA 1189(A), waar die appèlhof beslis het dat 'n skulderkenning tov 'n eie skuld 'n verdere verbintenis, gerig op dieselfde prestasie, in die lewe kan roep.

37 Sien *Schoeman v Moller* hierbo 467; *Trans-Drakensberg Bank Ltd v The Master* hierbo 422. Juis om hierdie rede was die meerderheid van die hof in *Gerber v Wolson* 1955 3 SA 158(A) dan ook van mening dat die verhouding wat daar ter sprake was, van 'n solidêre aard was.

38 *Schoeman v Moller* hierbo; *Trans-Drakensberg Bank Ltd v The Master* hierbo 422.

39 De Wet en Van Wyk aw 349.

40 Sien veral *Dorfman v Perring* hierbo 139 oor hierdie teenstelling. Vgl Forsyth aw 29.

41 1915 WLD 39.

42 41.

Blom v Auret[43] en *Edgecombe v Maunsell*[44] word as gesag aangehaal. Eersgenoemde beslissing was waarskynlik 'n geval van 'n *private intercessio*,[45] en is hier dus ontoepaslik. In die *Edgecombe*-saak was daar eweneens 'n onderneming, kumulatief tot die van 'n skuldenaar, om enige uitstaande balans van laasgenoemde se skuld op 'n bepaalde datum te delg. Die hof beskou die sekerheidsteller as 'n hoofskuldenaar en nie 'n borg nie. Vir sover *Hubbard* en *Edgecombe* meerdere skuldenaars ten opsigte van dieselfde prestasies veronderstel, lyk die situasie na voorbeelde van solidêre aanspreeklikheid soos hierbo bespreek, te meer daar dit goed moontlik is dat sommige solidêre skuldenaars hulself voorwaardelik en andere hulself onvoorwaardelik verbind.[46] Die feit dat die voorwaarde in hierdie sake telkens verwys na wanbetaling deur 'n ander medeskuldenaar, skep egter probleme. Hierdeur word die een se aanspreeklikheid ondergeskik gestel aan dié van die ander, wat strydig voorkom met die kenmerk van die solidêre verhouding dat al die medeskuldenaars in die eerste linie van aanspreeklikheid staan.

Ook om 'n ander rede sluit die toevoeging van 'n voorwaarde met voormelde strekking die totstandkoming van 'n solidêre verhouding in hierdie situasies uit. Die leerstuk van die ontbreking van voorwaardes bring mee dat enige faktor wat die aanspreeklikheid van die primêre skuldenaar raak, tot gevolg sal hê dat die verbintenis van die sekerheidsteller verval omdat kontrakbreuk deur eersgenoemde dan nie meer moontlik sal wees nie.[47] Deur die aanspreeklikheid van die sekerheidsteller te koppel aan kontrakbreuk deur die ander skuldenaar word daar gevolglik 'n nouer koppeling tussen die verbintenisse bewerkstellig as in die geval van solidêre aanspreeklikheid. *Dorfman v Perring*[48] kontrasteer dan ook die situasie "[w]here a person makes himself equally liable for the debt" met die geval "in which he undertakes upon one or more conditions to pay the debt." Klaarblyklik is aangevoel dat 'n voorwaarde dat die sekerheidsteller slegs aanspreeklik sal wees as die ander party kontrakbreuk pleeg, strydig is met die aard van solidêre medeskuld. Die vraag is egter of die regters in hierdie beslissings korrek is in hul siening dat daar, ten spyte van hierdie gevolgtrekking, steeds gesê kan word dat die sekerheidsteller 'n hoofskuldenaar van die een of ander aard is. Soos reeds gesê, word die aanspreeklikheid van die sekerheidsteller sekondêr as gevolg van die toevoeging van die voorwaarde, en lyk die situasie in hierdie opsig dan na borgtog. Meer nog: die voorwaarde is presies dieselfde as dié waarvan die borg se aanspreeklikheid afhang. Uit die analise van die effek van die ontbreking van hierdie voorwaarde hierbo, blyk dit dan dat die verhouding tussen die aanspreeklikheid van die sekerheidsteller en dié van die ander party eintlik maar dieselfde is as dié wat aan die borgverhouding toegeskryf word op grond van die aksessoriteitsbeginsel. Die standpunt van De Wet en

43 (1907) 24 SC 48.
44 1911 CPD 521.
45 Sien vn 27.
46 Vgl De Wet en Van Wyk aw 124.
47 Vgl die bespreking hierbo.
48 Hierbo 139.

Van Wyk[49] dat die beslissings soos *Dorfman v Perring* en *Hubbard v Rogers* bedenklik is en eintlik maar gevalle van borgstelling was, is gevolglik korrek.

GARANSIE EN SEKERHEIDSTELLING

Daar bestaan 'n tendens om beslissings soos *Dorfman v Perring*[50] voor te stel as voorbeelde van die garansie-kontrak ten einde die siening dat dit daar om sekerheidstelling deur die opname van aanspreeklikheid as hoofskuldenaar gaan, te onderskraag.[51] Die garansiekontrak (*contract of indemnity*) is inderdaad 'n geval van selfstandige aanspreeklikheid waardeur die garant as hoofskuldenaar onderneem om sy skuldeiser skadeloos te stel teen die gevolge van die een of ander toekomstige gebeurtenis, waarvan die nie-intrede deur hom gewaarborg word.[52] Die onderskeid tussen borgtog en garansie is problematies. De Wet en Van Wyk trag om die streep te trek deur garansie te beperk tot gevalle

> "waarby iemand iets anders as die betaling van 'n skuld deur 'n ander persoon waarborg."[53]

Vir sover hierdie skrywers te kenne gee dat garansie nooit 'n sekerheidstellingsfunksie kan hê nie, skyn hul standpunt arbitrêr te wees en word dit dan ook nie deur ander skrywers gesteun nie.[54] Daar moet egter onthou word dat garansie 'n toepassing het buite die gebied van sekerheidstelling en dat hierdie kontrak dus hoegenaamd nie die bestaan van 'n ander skuld veronderstel nie. Wesenskenmerk van die garant se aanspreeklikheid is dan dat dit 'n primêre aanspreeklikheid is, wat nie aksessoor tot enige ander verbintenis staan nie, selfs nie eers waar die garansie ten opsigte van 'n ander kontrak gegee word nie.[55] 'n Onderneming tot skadeloosstelling ten opsigte van die kontrak van 'n ander sal dus slegs neerkom op garansie as die garant nie net 'n waarborg verskaf teen die gevolge van kontrakbreuk nie, maar ook instaan vir die gevolge vir die skuldeiser indien dit sou blyk dat daar hoegenaamd geen geldige verpligting bestaan tussen die skuldeiser en sy teenparty nie. Die koppeling van 'n sogenaamde "garant" se aanspreeklikheid aan spesifiek kontrakbreuk deur die ander party, is dus inderdaad strydig met die wese van garansie. *Via* die leerstuk van

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49 aw 345 vn 11.

50 Hierbo.

51 Sien bv Hahlo en Kahn aw 705.

52 Sien in hierdie verband: *Voet* 46 1 3; *Acutt v Bennett* (1906) 27 NLR 717; *Imperial Cold Storage and Supply Co Ltd v Julius Weil and Co* 1912 AD 747; *Northern Assurance Co Ltd v Delbrook-Jones* 1966 3 SA 176(T) (nie baie oortuigend nie); *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 1 SA 641(A); *Jonnes v Anglo-African Shipping Co (1936) Ltd* 1972 2 SA 827(A); *Union and South West Africa Insurance Co Ltd v Hull* 1972 4 SA 481(D); Wessels en Roberts aw § 3794; De Wet en Van Wyk aw 344; Cilliers "*Waarborg en Garansie in die Suid-Afrikaanse Kontraktereg*" 1962 *THRHR* 244; Nienaber 1966 *Annual Survey* 122; Forsyth aw 27 vn 16 en veral 29–30; Pretorius 1982 *THRHR* 73.

53 aw 344. Vgl Cilliers 1962 *THRHR* 244.

54 Sien die werke van Forsyth, Wessels en Roberts en Hahlo en Kahn op die plekke waarna in vn 52 verwys is.

55 *Imperial Cold Storage and Supply Co Ltd v Julius Weil and Co* hierbo 750; Wessels en Roberts aw § 3794; Forsyth aw 30.

ontbreking van voorwaardes en aksessoriteit eindig die analise in sodanige gevalle maar weer eens by borgtog. In hierdie beperkte sin skyn die voormelde toets van De Wet en Van Wyk ten opsigte van die onderskeid tussen garansie en borgtog aanvaarbaar te wees. Aangesien dit nie duidelik is dat die partye in *Dorfman v Perring* so 'n algemene aanspreeklikheid in die vooruitsig gestel het nie, is hierdie gepoogde verduideliking van die beslissing eweneens onaanvaarbaar.

SAMEVATTING

Uit die voorafgaande blyk dit dat borgtog en garansie nie onverwant is nie. Borgtog kan inderdaad beskou word as 'n verskyningsvorm van garansie in die wye sin van die woord.[56] Laasgenoemde kontrakvorm kan ten opsigte van 'n transaksie tussen ander regsubjekte aangegaan word, maar dan alleenlik op die basis dat die een party in die algemeen gevrywaar word teen verliese wat hy mag ly uit die handeling met die geakkommodeerde. By borgtog daarenteen neem die borg bloot die risiko van kontrakbreuk deur die hoofskuldenaar op. Ten gevolge hiervan en van die leerstuk van die ontbreking van die voorwaarde word so 'n noue skakeling tussen die borgverbintenis en die hoofverbintenis bewerkstellig dat die borg se aanspreeklikheid as sekondêr en aksessoor bestempel word, welke kenmerke ontbreek by garansie in die algemene sin van die woord. Hierdie eienskappe onderskei ook die borg van iemand wat, ter versekering van die posisie van 'n ander se skuldeiser, homself verbind teenoor die skuldeiser tot dieselfde prestasie, en wel sonder om kontrakbreuk deur die ander skuldenaar as voorwaarde vir sy aanspreeklikheid te stel. So 'n solidêre skuldenaar se aanspreeklikheid hang saam met dié van die ander skuldenaar(s), maar nie op dieselfde wyse as die aanspreeklikheid van die borg en sy hoofskuldenaar nie.[57]

By die toepassing van hierdie beginselonderskeid moet as uitgangspunt geneem word dat die bedoeling van die partye in beginsel deurslaggewend behoort te wees by vasstelling van die regsaard van die transaksie.[58] Vir sover daar nie sprake is van 'n simulasie nie, moet die bedoeling juis gesoek word in die wilsverklarings van die partye wat die kontrak daarstel. Dit skyn dan ook of die wyse waarop die onderneming van die sekerheidsteller tot uiting kom, 'n riglyn bied vir die klassifisering van die betrokke transaksie. Sou daar sprake wees van 'n onderneming aan die kant van die sekerheidsteller dat 'n ander sal presteer, gerugsteun deur 'n aanvaarding van aanspreeklikheid indien dit nie gebeur nie, word die transaksie gewoonlik as een van borgtog beskou, mits die wesenskenmerke van borgtog teenwoordig is. Aanspreeklikheid van die hoofskuldenaar daarenteen, kom ter sprake waar daar sonder meer vir die sekerheidsteller die

56 Wessels en Roberts aw § 3795.
57 Sien die bespreking hierbo.
58 Vgl *Dorfman v Perring* 1922 EDL 137 en in die algemeen *List v Jungers* 1979 3 SA 106(A) oor die uitlegproses in hierdie konteks. 'n Nuttige bespreking is ook te vinde by Forsyth aw 64–67.

verpligting geskep word om te presteer.[59] In aansluiting hierby word in *Orkin Lingerie Co Ltd v Melamed and Hurwitz*[60] geleer dat dit relevant is om te vra of die verpligting wat die skuldeiser verseker wil sien, vanuit die oogpunt van die skuldenaars beskou, dié is van die persoon ten behoewe van wie die sekerheidsteller toetree, dan wel van beide die sekerheidsteller en die persoon wat hy deur sy toetrede akkommodeer. Is eersgenoemde die geval, is die situasie een van borgtog, andersins is dit een van solidêre medeaanspreeklikheid as hoofskuldenaar.

59 Sien in die algemeen oor hierdie riglyne: *Corrans and Another v Transvaal Government and Coull's Trustee* 1909 TS 605; *Fitzgerald v Argus Printing and Publishing Co Ltd* (1907) 3 Buch 152; *Versveld v Southern Timber (Pty) ltd* 1935 2 PH A 38; *Cazalet v Johnson* 1914 TPD 142 145; *Hermes Ship Chandlers (Pty) Ltd v Caltex Oil South Africa Ltd* 1973 3 SA 263(D); *List v Jungers* hierbo.

60 1963 1 SA 324(W).

Die inwerkingtreding en herroeping van wette

Lourens M du Plessis
B Jur et Comm BPhil LLD
Professor in en Hoof van die Departement Regsfilosofie PU vir CHO

SUMMARY

The Promulgation and Revocation of Statutes

This article deals with the rules applicable to the promulgation and revocation of statutes. Though the general rules in this regard seem to be clear and simple, ulterior factors may serve to complicate their application in certain circumstances. By systematizing the most important rules, an attempt is made to deal also with these more difficult and less obvious issues.

The rules of promulgation are examined with the general rule as starting point, then the exceptions to this rule are discussed, and lastly attention is given to the rules applicable to the exercise of powers prior to the commencement of empowering statutes.

The discussion of the rules of revocation commences with an investigation of the question whether statutes can be abrogated by disuse. Next express and implied revocation and the relationship between revoked and revocating statutes are dealt with, and the article is then concluded with a discussion of the material consequences of revocation as provided for by section 12(2) of the Interpretation Act 33 of 1957.

1 INLEIDEND

Dit wil soms voorkom asof Suid-Afrikaanse juriste – en veral regsakademici – wetgewing as regsbron al te geredelik en al te gelate as 'n soort noodsaaklike euwel bejeën wat, soos die armes, nou maar eenmaal met ons is. Statutereg, so word geredeneer, is immers nie dié primêre bron van ons reg nie en daarom, in vergelyking met byvoorbeeld die gemenereg, 'n nie al te vrugbare terrein vir navorsing en regswetenskaplike besinning nie.

Die vraag presies hoe 'n primêre funksie statutereg as regsbron vervul, wil ek geensins probeer beredeneer nie. Dat statutereg in die moderne staat egter 'n onontbeerlike (en soms selfs oorbenutte) regeer- en reguleringsinstrument is, wil ek sonder vrees vir teenspraak beweer. Daarom is dit noodsaaklik dat daar voortdurend aan die verskillende fasette van die werking van wetgewing deurtastende aandag gewy moet word. Twee redelik verwaarloosde fasette van hierdie werking betref die begin en die einde, die "geboorte" en die "afsterwe" van wette. In 'n sekere sin is dit 'n eenvoudige saak: die primêre regsreëls wat in hierdie verband geld, kan miskien in 'n paragraaf of twee opgesom word. Soos met enige regskwessie is hier egter ook heelparty versteekte voetangeltjies ter

sake wat die toepassing van die eenvoudige, primêre reëls soms erg kan kompliseer.

Die onpretensieuse oogmerke met hierdie artikel is dus om

i die primêre reëls vir die inwerkingtreding en herroeping van wette samevattend te sistematiseer en

ii in hierdie proses enkele van die versteekte voetangels aan die kaak te stel.

2 INWERKINGTREDING

2 1 Die Algemene Reël

Wanneer 'n mens oor die inwerkingtreding van 'n wet praat, praat jy primêr oor die promulgasie – die van-krag-wording – van so 'n wet. Die *promulgasie* van 'n wet moet duidelik van sy *aanname* onderskei word. Aanname is die versamelnaam vir die wetgewende prosesse wat betrokke is by die verkryging van die formele instemming van wetgewende liggame vir die inhoud van die voorgestelde wet. Promulgasie of inwerkingtreding, daarenteen, is die proses(se) waardeur so 'n wet tot *de facto* en *de iure*-gelding gebring word.[1] Die gebiedende bepalings van artikel 13 van die Interpretasiewet[2] – wat ook die staat bind[3] – geld hier as primêre reëls.

Artikel 13 het betrekking op alle *wette*, dus proklamasies, ordonnansies, wette van die parlement of ander maatreëls wat die krag van wet het.[4] Gedelegeerde of ondergeskikte wetgewing word met ander woorde ingesluit – 'n gevolgtrekking wat bevestig word deur die artikel-16-vereiste dat verorderinge, regulasies, reëls of voorskrifte wat volgens wet deur bepaalde gedelegeerde wetgewers uitgevaardig word in die *Staatskoerant* gepubliseer moet word.

Artikel 13(1) herbevestig die gemeenregtelike reëling[5] dat 'n wet op die dag van sy publikasie in die *Staatskoerant* in werking tree tensy die wet self voorskrifte oor 'n ander dag vir sy inwerkingtreding bevat. Die "dag" waarna verwys word, begin onmiddellik ná afloop van die vorige dag, dit wil sê, om presies te wees, onmiddellik ná 0h00.[6] "*Staatskoerant*" beteken die staatskoerant van die RSA of, in die geval van provinsiale wetgewing, die *Offisiële Koerant* van 'n betrokke provinsie of, in die geval van voor-Unie wetgewing, die staatskoerant van die kolonie waarin die wet van krag was.[7]

Die voormelde reël word oor die algemeen gesproke letterlik geïnterpreteer[8] ten einde so doeltreffend moontlik aan die onderliggende *ratio* vir sy bestaan gevolg te gee, en dit is naamlik dat die inhoud van die wet aan die wetsonderdane

1 Hahlo en Kahn *The South African Legal System and its Background* (1973) 157.
2 33 van 1957.
3 a 24.
4 a 2.
5 *S v Manelis* 1965 1 SA 748 (A); Steyn *Die Uitleg van Wette* (1981) 180.
6 a 13(2).
7 a 2.
8 Sien bv *R v Zuma* 1952 3 SA 461 (N).

bekendgestel behoort te word alvorens van hulle verwag kan word om dit te eerbiedig. Aan hierdie *ratio* word egter nie altyd op 'n al te strakke wyse gevolg gegee nie. "Dag van publikasie" beteken byvoorbeeld die dag waarop die *Staatskoerant* formeel in die nasionale of provinsiale hoofstad verskyn en nie die dag waarop dit alle betrokkenes – insluitend wetsonderdane in afgeleë gebiede – bereik nie.[9]

2 2 Uitsonderings op die Algemene Reël

Op die hierbo gestelde algemene reël bestaan daar twee uitsonderings, die eerste waarvan in beginsel deur artikel 13(1) self voorsien word:

i Die wet soos gepubliseer in die *Staatskoerant* kan self 'n ander datum vir sy algehele of gedeeltelike inwerkingtreding voorskryf, deurdat dit

a deur middel van 'n vertragingsklousule vir sy eie latere inwerkingtreding voorsiening maak; *of*

b 'n bepaling bevat wat die staatspresident magtig om by proklamasie 'n latere datum vir sy inwerkingtreding te bepaal; *of*

c deur middel van 'n vervroegingsklousule vir sy eie terugwerkendheid voorsiening maak.[10]

In geval (b) hierbo kan die wet en die proklamasie wat vir sy inwerkingtreding voorsiening maak gelyktydig in die (-selfde) *Staatskoerant* gepubliseer word, in welke geval die wet behoorlik gepromulgeer is.[11]

'n Nie-inwerkinggetrede wet word nie sonder meer in werking gestel deurdat bepalings daarvan deur verwysing by 'n ander reeds inwerkinggetrede wet ingelyf word nie.[12] Die nie-inwerkinggetrede wet kan egter self bepaalde vorme van promulgasie deur inlywing uitdruklik en geldiglik magtig.[13] Dit spreek eweneens vanself dat bepalings van 'n reeds inwerkinggetrede wet wat deur verwysing by 'n inwerkinggetrede wet ingelyf word, nie deur (of saam met) die laasgenoemde wet geherpromulgeer (hoef te) word nie.[14]

ii "Indien die Staatspresident oortuig is dat die publikasie van die Staatskoerant nie bewerkstellig kan word nie of waarskynlik ernstig vertraag sal word as gevolg van omstandighede buite die beheer van die Staatsdrukker," kan hy, ingevolge artikel 16A(1) van die Interpretasiewet, by proklamasie afgekondig op 'n wyse en geldig vir 'n tydperk deur hom bepaal, 'n alternatiewe prosedure vir wetspromulgasie deur buitengewone metodes van publikasie (wat hy onder die omstandighede mag goedvind) voorskryf. Die dag waarop wette dan

9 *Q v Jizwa* 11 SC 387 393.
10 Sien oor die algemeen Hahlo en Kahn *op cit* 169–170.
11 *R v Hoosen* 1950 3 SA 4 (T).
12 *R v Gluck* 1923 AD 149 151; *Ismail Amod v Pietersburg Municipality* 1904 TS 321.
13 Sien Steyn *op cit* 182 vn 200 vir voorbeelde hiervan.
14 *R v Gluck supra* 151.

in werking sal tree, word aan die hand van die alternatiewe prosedure bepaal.[15] Die staatspresident kan 'n artikel-16A(1)-proklamasie te enigertyd wysig of intrek.[16] Wette wat ingevolge die alternatiewe prosedure gepromulgeer is, moet, sodra die *Staatskoerant* weer normaalweg verskyn en indien hulle ten tyde van sodanige verskyning nog van krag is, vir algemene inligting in die *Staatskoerant* gepubliseer word.[17] Sodanige *de facto* herpublikasie is egter geen *de iure* herpromulgasie nie: die wette wat ingevolge die alternatiewe prosedure gepromulgeer is, geld op grond van hulle oorspronklike aldus verkreë geldingskrag.[18]

2 3 Uitoefening van Bevoegdhede

Kan bevoegdhede deur 'n wet verleen in die tydsverloop tussen sy aanname en sy promulgasie regsgeldiglik uitgeoefen word? Artikel 14 beantwoord hierdie vraag bevestigend *slegs vir sover* die uitoefening van sodanige bevoegdhede vir die inwerkstelling van die wet nodig is, en die kwalifiserende "slegs" word vry letterlik geïnterpreteer.[19] Die soort bevoegdhede ter sprake word enigermate beperkend en gespesifiseerd in artikel 14(a)–(d) omlyn, maar artikel 14(e) bevat 'n algemene magtiging ingevolge waarvan, (steeds) ter wille van en met die oog op die inwerkstelling van 'n wet, enige (ander) handeling verrig of enigiets anders gedoen kan word. So byvoorbeeld kan 'n provinsiale administrateur ingevolge hierdie algemene magtiging self 'n datum vir die inwerkingtreding van 'n provinsiale ordonnansie bepaal indien sodanige datum nie reeds op enige ander wyse bepaal of voorsien is nie.[20]

3 HERROEPING

3 1 Kan 'n Wet in Onbruik Verval?

Die oorgrote meerderheid Suid-Afrikaanse wette "are of potentially perpetual existence."[21] Dit beteken dat, as 'n algemene reël, wette nie deur gewoonte afgeskaf kan word nie. Hierdie reël is in ooreenstemming met die Engelsregtelike reëling waardeur die leerstuk en praktyk van parlementêre (wetgewende) soewereiniteit tot uitdrukking gebring word. Dit word ook in artikel 107 van die Grondwet van die Republiek van Suid-Afrika[22] – en sy voorganger, artikel 135 van die Zuid-Afrika Wet[23] – bevestig deur die bepaling dat alle statutereg wat

15 a 16A(2).
16 a 16A(3).
17 a 16A(4).
18 a 16A(5).
19 Vgl bv *S v Manelis supra* met *Cresto Machines (Edms) Bpk v Afdeling Speuroffisier Noord-Transvaal* 1972 1 SA 376 (A). Sien ook *R v Magana* 1961 1 SA 654 (T) 656; Wiechers *Administratiefreg* (1973) 166.
20 *S v Manelis supra.*
21 Hahlo en Kahn *op cit* 172.
22 32 van 1961.
23 (9 Edw vii c 9).

onmiddellik voor die inwerkingtreding van die wet van krag was, van krag sal bly totdat dit deur bevoegde gesag herroep word.

Wetgewing wat voor 1806 aan die Kaap gegeld het, word egter as deel van die gemenereg beskou en kan daarom deur gewoonte afgeskaf word.[24] Die algemene reël dat 'n bevoegde gesag wette moet herroep, geld in beginsel steeds ten aansien van voor-Unie wetgewing, dit wil sê wette wat tussen 1806 en 1910 in die destydse kolonies en republieke aangeneem is. Tot en met 1 Junie 1979 het die Suid-Afrikaanse parlement verskeie wette aangeneem waardeur sekere voor-Unie wetgewing gespesifiseerd en gekonsolideerd herroep is.[25] Die metode wat gevolg is, is dat die herroepende wette elk 'n algemene bepaling bevat het waardeur sekere in bylaes vermelde voor-Unie wetgewing herroep is. Artikel 1 van die Hersieningswet op die Voor-Unie Wette[26] wat op 1 Junie 1979 in werking getree het, volg 'n omgekeerde prosedure wat daarop neerkom dat slegs die in die bylae tot die wet vermelde voor-Unie wette hulle geldingskrag (in die mate waarin dit in die bylae gespesifiseer word) behou. Die wet dien dus meteen as 'n soort konkordansie van al die tans nog geldende voor-Unie statutereg.

Met die stellings dat (i) statutereg uit die voor-1806 periode in onbruik kan verval en (ii) alle voor-Unie statutereg in die Hersieningswet op die Voor-Unie Wette vermeld tans nog geldende statutereg is wat alleen deur 'n bevoegde gesag herroep kan word, is die volledige prentjie nog nie geskilder nie. Daar is naamlik 'n sekere kategorie voor-Unie statutereg wat in beginsel wel vatbaar is of, liewer, was vir afskaffing deur gewoonte, te wete alle Transvaalse en Vrystaatse wette wat voor die Britse anneksasie van hierdie gebiede in 1900 aangeneem en teen 31 Mei 1910 (die datum van inwerkingtreding van die Zuid-Afrika Wet) alreeds aldus afgeskaf was.[27] Hierdie kategorie wette is aangeneem onder die gelding van die Romeins-Hollandse regsreëling dat statutereg wel deur gewoonte afgeskaf kan word. Die *ratio* onderliggend aan die Romeins-Hollandse reël is dat die finale wetgewende gesag in die staat by die volk (en nie die parlement nie) berus, dat die volk bygevolg (regsgeldiglik) 'n regsafskaffende houding teenoor wette van 'n wetgewer kan inneem en dat aan die wetsafskaffende gewoontereg wat aldus ontstaan, gevolg gegee moet word. Indien enige aldus afgeskafde Transvaalse of Vrystaatse wet tans nog in die bylae tot die Hersieningswet vermeld word, kan 'n mens argumenteer dat daardie wet teen 31 Mei 1910 reeds deur gewoonte afgeskaf was en dus nie meer deel van ons reg vorm nie. Aan die ander kant kan 'n mens egter ook argumenteer dat, selfs al sou so 'n wet teen 31 Mei 1910 afgeskaf gewees het, dit *via* die Hersieningswet heraangeneem en – gepromulgeer is en dus op 1 Junie 1979 weer in werking getree het.

Hoe interessant ook al die regskwessie wat hier ter sprake is, is my indruk dat hierdie probleem egter nie maklik in die praktyk sal opduik of hoef op te

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24 *R v Detody* 1926 AD 198; *Muller v Grobbelaar* 1946 OPD 272 276; *R v Patz* 1946 AD 845.

25 Sien bv Wette 25 van 1934, 33 van 1936, 32 van 1939, 78 van 1967, 44 van 1968, 42 van 1970, 36 van 1976 en 43 van 1977.

26 24 van 1979.

27 Vir 'n verdienstelike uiteensetting sien Hahlo en Kahn *The Union of South Africa: the Development of its Laws and Constitution* (1960) 39–40.

duik nie en dat dit in hierdie stadium, 72 plus jaar ná 31 Mei 1910, in ieder geval moeilik sal wees om te bepaal welke van die in die bylae tot die Hersieningswet vermelde Transvaalse en Vrystaatse wette van voor 1900 (daar is altesaam slegs vyf van hulle) op 31 Mei 1910 deur gewoonte afgeskaf was.

3 2 Uitdruklike en Stilswyende Herroeping

Die oorgrote meerderheid Suid-Afrikaanse wette word by uitdruklike of stilswyende wetsduiding herroep. Uitdruklike herroeping lewer nie noemenswaardige probleme nie. Wet X ('n latere wet) bevat gewoon die stelling dat wet Y ('n vroeëre wet) herroep word of so nie word 'n lys van wette wat deur X herroep word (en waarby Y ingesluit is) in 'n bylae tot X vermeld. 'n Bowe geskikte wetgewer kan op hierdie wyse ook wetgewing van 'n ondergeskikte wetgewer direk herroep – wat selde gebeur – of selfs indirek herroep deur 'n wet in stryd met bestaande ondergeskikte wetgewing aan te neem en te promulgeer. Vir die doeleindes van die pas gemelde vorm van herroeping word provinsiale rade – ofskoon hulle volgens die aard van hulle wetgewende bevoegdheid vir die meeste doeleindes geag word sogenaamd oorspronklike wetgewers te wees[28] – as ondergeskikte wetgewers beskou.[29]

Wat herroeping by implikasie betref, geld die reël dat indien die bepalings van (die latere) wet X duidelik in stryd met die bepalings van (die vroeëre) wet Y is, X Y herroep in die mate wat en met betrekking tot die aangeleenthede waaroor sodanige strydigheid bestaan:[30] *lex posterior priori derogat*, lui die stelreël wat, in die lig van die uitlegvermoede dat die wetgewer nie die bestaande reg meer as wat nodig is, wil wysig nie, met groot omsigtigheid toegepas word.[31] 'n Verdere konsekwensie van die omsigtige toepassing van die pas gemelde stelreël is die kwalifiserende reël dat indien X 'n onderwerp in algemene terme behandel terwyl Y dit in spesifieke terme doen, dan doen die algemene gelding van X geen (herroepende) afbreuk aan die spesifieke gelding van Y nie (*generalia specialibus non derogant*),[32] behalwe vir sover dit sou blyk dat X daarop gemik is om die onderwerp(e) wat dit behandel, uitputtend of volledig te reël.[33]

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28 Sien bv *Middelburg Municipality v Gertzen* 1914 AD 544 550; *Johannesburg Consolidated Investment Co v Marshall's Township Syndicate* 1917 AD 662 666; *S v Le Grange* 1962 3 SA 498 (A) 504–505.

29 Op grond van die voorbehoudsbepaling tot a 85 van die *Grondwet*.

30 *Chotabhai v Union Government* 1911 AD 13; *New Modderfontein GM Co v Transvaalse Provincial Administration* 1919 AD 367 397; *Principal Immigration Officer v Bhula* 1931 AD 323 335; *R v Sutherland* 1961 2 SA 806(A) 815.

31 *Ex parte Minister of Justice: In re R v Jekela* 1938 AD 370 377; *Principal Immigration Officer v Bhula supra* 345; *Minister of The Interior v Estate Roos* 1956 2 SA 266(A) 271; *Tlelima v Sebokeng Management Board* 1967 1 SA 603 (T) 605–606; *Amalgamated Packaging Industries Ltd v Hutt* 1975 4 SA 943 (A) 949.

32 *S v Van Wyk* 1969 1 SA 37 (K) 40; *S v ffrench-Beytagh (1)* 1971 4 SA 333 (T) 336–337; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A) 603; *S v Hattingh* 1978 2 SA 826(A) 829; *S v Senye* 1978 3 SA 59 (T) 61–62.

33 *New Modderfontein GM Co v Transvaal Provincial Administration supra* 397; *S v Mseleku* 1968 2 SA 704(N); *S v Senye supra* 61–62.

'n Wet kan ten slotte ook sy eie algehele of gedeeltelike herroeping voorskryf deur uitdruklik sy eie geldingsduur te beperk (soos byvoorbeeld die geval met artikel 17 van die Algemene Regswysigingswet 37 van 1963 was), maar hierdie herroepingsmetode word heel selde gebruik.

3 3 Die Verhouding tussen Herroepende en Herroepte Wette

Artikel 11 van die Interpretasiewet betaal dat indien wet X wet Y of bepalings daarvan herroep, Y van krag bly totdat X (soos in paragraaf 2 hierbo beskryf) in werking tree. Herroeping sluit hier – net soos in die geval van artikel 12(2) – waarskynlik uitdruklike sowel as stilswyende herroeping in.[34] Indien by wet Y bepalings van 'n nie-herroepte wet Z deur verwysings ingelyf is, herroep wet X egter nie outomaties die aldus ingelyfde bepalings van wet Z nie.[35]

Waar X Y slegs gedeeltelik herroep, moet die oorblywende bepalings van Y nie as losstaande van die herroepte bepalings uitgelê word nie: die herroepte bepalings "bly van krag" vir sover hulle vir interpretasiedoeleindes op die betekenis van die oorblywende bepalings lig kan werp.[36]

Indien wet X enige bepalings van wet Y (sê byvoorbeeld artikel y) herroep en met of sonder wysigings herverorden, word verwysings in enige ander wet (sê byvoorbeeld artikel q van wet Q) na artikel y, as verwysings na die tersaaklike bepalings van wet X (sê byvoorbeeld artikel x) uitgelê.[37] "Verwysing" en "inlywing deur verwysing" moet in hierdie verband egter duidelik van mekaar onderskei word. As artikel q byvoorbeeld die bepalings van artikel y deur verwysing inlyf, wysig of herverorden artikel x nie artikel q sonder meer nie, sodat die artikel q-verwysings na artikel y steeds as verwysings na die oorspronklike artikel y uitgelê moet word.[38]

Wanneer daar ná die wysiging van artikel y onsekerheid oor die uitleg van artikel x ontstaan, kan vir die doeleindes van 'n korrekte uitleg van artikel x die bepalings en bewoording van die oorspronklike artikel y in aanmerking geneem word.[39]

3 4 Die Materiële Gevolge van Herroeping

Onder hierdie hoof het ek hoofsaaklik die bepalings van artikel 12(2) van die Interpretasiewet in gedagte, veral vir sover hulle aangeleenthede in verband met die regte en verpligtinge van die wetsonderdane sowel as die status en gelding

34 Sien vn 41 *infra*.
35 *Solicitor-General v Malgas* 1918 AD 491; *R v Patel* 1952 3 SA 463 (N); *Ruby's Cash Store (Pty) Ltd v Estate Marks* 1961 2 SA 118(T) 124.
36 *Morake v Dubedube* 1928 TPD 632; *D v Minister of Interior* 1960 4 SA 905 (T) 908; *Ex parte Glavonic* 1967 4 SA 141 (N) 142.
37 Interpretasiewet a 12(1). Sien ook *South African Master Dental Technicians Association v Dental Association of South Africa* 1970 3 SA 733 (A).
38 Die reël in *Solicitor-General v Malgas supra* word maar toegepas. Sien ook Steyn *op cit* 176.
39 *R v Von Zell* (2) 1953 4 SA 552(A) 558; *Casely v Minister of Defence* 1973 1 SA 630 (A).

van regsreëls reël. Artikel 12(2) handel slegs oor die herroeping – nie ook oor die wysiging of herverordering nie – van *wet Y* deur *wet X*, en die geval waar Y vir sy eie totnietgaan voorsiening maak, is dus eweneens uitgesluit.[40]

Herroeping sluit in hierdie geval uitdruklike sowel as stilswyende herroeping in: "[T]he repeal of a law . . . is . . . a matter of substance and not of form."[41]

Die spesifieke bepalings van artikel 12(2), onderworpe aan 'n "tensy 'n ander bedoeling blyk" -voorbehoud, is die volgende:

i Ingevolge artikel 12(2)(a) laat 'n herroeping niks herleef wat by sy van-kragwording nie van krag is of nie bestaan nie, selfs al het daardie iets voorheen bestaan. "Niks" sluit voorheen herroepte wetsbepalings[42] of vernietigde kontrakte[43] in, maar dit is onseker of voorskrifte van die gemenereg (wat voorheen deur die herroepte wet Y gewysig is) ook ingesluit is.[44]

ii Wet X (as herroepende wet) raak nie die vroeëre werking van (die herroepte) wet Y of enigiets wat behoorlik kragtens wet Y gedoen is nie (artikel 12(2)(b)). Dit geld egter nie ten opsigte van ondergeskikte wetgewing wat ingevolge wet Y uitgevaardig is nie,[45] want sodanige wetgewing word as 'n reël outomaties deur wet X opgehef indien dit nie deur ooreenstemmende[46] of wesenlik ooreenstemmende (soortgelyke) maatreëls vervang word nie. In gevalle van wesenlike ooreenstemming word 'n vervanging as 'n wysiging beskou.[47]

iii Luidens artikel 12(2)(c)[48] raak wet X nie "enige reg, voorreg, verpligting of aanspreeklikheid" wat ingevolge wet Y "verkry is of ontstaan of opgeloop het nie." In *Browne v Incorporated Law Society of Natal*[49] is die toepassing van hierdie reël aan die nakoming van drie vereistes onderhewig gestel:

a X moet Y inderdaad herroep.

b X moet nie uitdruklik beoog om regte weg te neem of daarop inbreuk te maak nie.[50]

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40 *R v Madikwa* 1961 2 SA 245(N) 247–248.

41 *R v Sutherland supra* 814–815. Sien ook *Bell v Voorsitter van die Rasseklassifikasieraad* 1968 2 SA 678(A) 683; *Pinkey v Race Classification Board* 1968 4 SA 628(A) 636; *Venter v Venter* 1970 3 SA 257(A) 263.

42 *R v Maluma* 1949 3 SA 856 (T) 858.

43 *Pietermaritzburg, Corporation v Union Government* 1935 NPD 36.

44 Steyn *op cit* 176–177.

45 *R v Madine* 1961 3 SA 29(A) 30.

46 *Oranjeville Dorpsbestuur v Gulliver* 1970 1 SA 544(O) 556. "Ooreenstemmend" beteken "soortgelyk" of "analoog aan."

47 *CIR v Galena Oil* 1931 TPD 123.

48 Soos toegepas in *Pinkey v Race Classification Board supra* 635 ev; *Popotlall Kara (Pty) Ltd v Essay* 1969 3 SA 593 (D) 595 ev; *Essop v Sekretaris van Binnelandse Sake* 1969 4 SA 243 (K); *Oranjeville Dorpsbestuur v Gulliver supra* 557 en *Munisipaliteit van Roodepoort v Kock* 1979 2 SA 749 (T).

49 1968 3 SA 535 (N) 537 ev.

50 Sien ook *Bartman v Dempers* 1952 2 SA 577 (A) 580; *Rustenburg Platinum Mines Ltd v Motletlegi* 1954 2 SA 597 (T); *Ex parte East* 1974 2 SA 197(K) 198. Sien hier teenoor *Ex parte De Wit* 1959 4 SA 731 (K) 733 ev asook *Barker v Chadwick* 1974 1 SA 461 (D) 467 ev.

c Die tersaaklike regte moet inderdaad gevestigde regte wees en moet verkry gewees het of opgeloop het voor die tydstip waarop X Y herroep.[51]

Vereiste (c) word verder in tweërlei opsigte gekwalifiseer:

aa Die verkryging van regte voorveronderstel die aanwending van individuele inspanning. Opgeloopte regte, aan die ander kant, is die latente aansprake van regsubjekte om voordeel uit 'n wet te trek. Verkreë regte en opgeloopte regte moet dus van mekaar onderskei word.[52]

bb Handelinge ter verkryging van regte moet van handelinge gemik op die handhawing van regte onderskei word: eersgenoemde is 'n voorvereiste vir laasgenoemde maar die omgekeerde is nie waar nie.[53]

iv Artikel 12(2)(d) bepaal dat wet X nie "enige boete, verbeurdverklaring of straf opgeloop ten opsigte van enige misdryf" ingevolge wet Y gepleeg, raak nie. Dit wil voorkom asof hierdie bepaling veral wat publiekregtelike sanksies betref, van die gemenereg afwyk, want normaalweg word aanvaar dat 'n wet (*in casu* X) van terugwerkende krag is indien en vir sover dit die onderdane bevoordeel.[54] Daarom word die bepalings van artikel 12(2)(d) met omsigtigheid toegepas.[55] So is byvoorbeeld in *R v Loots*[56] verklaar dat bloots-telling aan straf slegs by skuldigbevinding ontstaan, en in *S v Thebe*[57] het die hof geweier om misdrywe ingevolge wet Y gepleeg vir die doeleindes van 'n verswarende straf deur wet X voorsien, in aanmerking te neem. Aan die ander kant is daar egter ook gevalle waar die bepalings van artikel 12(2)(d) toegepas is ten einde aanspreeklikheid vir vervolging sowel as strafbaarheid ingevolge wet Y opgeloop, intak te hou.[58]

v Wet X raak nie "enige ondersoek, regsgeding of regsmiddel ten opsigte van" enige reg of verpligting in (i)–(iv) hierbo genoem nie (artikel 12(2)(e)). Sodanige ondersoeke, regsgedinge ensorvoorts kan dus voortgesit word asof wet X nie aangeneem is nie.[59] Hierdie reëling is in 'n sekere sin weer eens 'n uitsondering op die gemenereg waarkragtens wette wat oor prosedure en bewyslewering handel, "terugwerkende krag" verkry in dié sin dat die nuwe prosedure ook op aangeleenthede wat voor die inwerkingtreding van X ontstaan het, toegepas word.[60] Gestel byvoorbeeld 'n misdaad is voor die inwerkingtreding van X gepleeg en X skryf 'n nuwe strafprosedure voor, dan

51 Vir die a 12(2)(c)-betekenis van "regte" sien *Garydale Estate and Invesment Co (Pty) Ltd v Johannesburg Western Rent Board* 1958 1 SA 466 (T) en *Ex parte East supra* 198.
52 *Mahomed v Union Government* 1911 AD 1 11.
53 *Dys v Dys* 1979 3 SA 1170(O).
54 Steyn *op cit* 179.
55 Sien bv *S v Williams* 1979 3 SA 1270(K).
56 1951 2 SA 132(T).
57 1979 3 SA 1181(O).
58 *R v Sutherland supra* 815 en *S v Khosa* 1972 1 SA 557 (O) 558.
59 Hierdie bepalings is oa in *Bartman v Dempers supra* 580; *Moodley v Community Development Board* 1968 4 SA 615 (D); *Pinkey v Race Classification Board supra* en *S v Erasmus* 1978 3 SA 279(T) toegepas.
60 Steyn *op cit* 90–94.

word daardie misdaad volgens die in X voorgeskrewe prosedure bereg. 'n Mens moet dus verwag dat die artikel-12(2)(e)-reëling met omsigtigheid toegepas sal word. Die gewysdes in hierdie verband gee egter geen besondere blyke van sodanige omsigtigheid nie. Aan die ander kant kan 'n mens argumenteer dat artikel 12(2)(e) slegs op prosedures wat reeds voor die inwerkingtreding van X *'n aanvang geneem het* van toepassing is, in welke geval dit die gemeenregtelike reëling onveranderd laat en die rede vir omsigtige toepassing dus verval. Dit, meen ek, is die korrekte interpretasie van hierdie bepaling.

4 SLOTSOM

Uit die voorgaande uiteensetting blyk dit duidelik dat, selfs al sou die algemene reëls van toepassing op die inwerkingtreding en herroeping van wette moontlik as voor-die-hand-liggendhede kon kwalifiseer, daar 'n verskeidendheid faktore bestaan wat hulle toepassing onder bepaalde omstandighede erg kompliseer. Dit spreek vanself dat die juris vir hierdie "vangplekke" deeglik op sy hoede behoort te wees.

The law must be kept as a garden with frequent digging, weeding and turning.
(Per *Lord Keeper North.*)

Die Opsie en Boedelbeplanning – Onkruid of Towerformule?

JSA Fourie
BA LLD
Professor in die Handelsreg aan die Universiteit van Stellenbosch

SUMMARY

The Option and Estate Planning – Monstrosity or Magic Forumla?

According to proponents of the option scheme it can achieve the objective of pegging the growth of assets which are made subject to the option. Thus it is argued that the scheme is a viable one and an important estate-planning tool. According to the writer this argument is untenable. The option cannot be construed as a debt due by the deceased. The only debt due is the duty of the offeror to keep the option open for a specified period. Where the option is exercised only after the death of the offeror, then at death there would be no existing right to the purchase price which in turn would constitute part of the dutiable estate. This is so notwithstanding the fact that once the offeree accepts the option the estate will be obliged to sell the property and will acquire the right to the purchase price which has been agreed upon in terms of the option contract. The view that the purchase price of the property becomes the only asset as far as estate duty calculations are concerned, is fallacious. The exercise of an option, *inter vivos* as well as *post mortem*, in an attempt to allow the effluxion of time and attendant inflation to operate in favour of the estate planner and his beneficiaries, will not necessarily be a profitable venture.

'n Slim metode wat soms voorgestel word om boedelbelasting te bespaar, is die gebruik van 'n opsie wat *inter vivos* tussen 'n beplanner en sy begunstigde aangegaan word. Byvoorbeeld, 'n boer gee 'n opsie teen huidige landbankwaarde aan sy seun om sy plaas (waarvan die waarde besig is om vinnig toe te neem) te koop. Ingevolge die ooreenkoms sal die opsie uitoefenbaar wees binne drie maande na die dood van die opsiegewer. Wanneer die opsie later uitgeoefen word, is daar dikwels 'n aansienlike verskil tussen die opsieprys wat toentertyd beding is en die werklike waarde van die eiendom by uitoefening van die opsie.

Met verwysing na onder andere regspraak kom Davis[1] tot die gevolgtrekking dat so 'n skema regtens gefundeerd is:

> "According to section 4(b) of the Estate Duty Act, all debts due by the deceased to persons ordinarily resident within the Republic, which it is proved to the satisfaction of the secretary of inland revenue have been discharged from the property included in the estate, are to be included as a deduction from the total value of all dutiable property for estate duty purposes. If the deceased died prior to the option being exercised by the

1 "The Option Scheme and Estate Planning" 1980 *THRHR* 303.

option holder, the property to which an option was attached clearly forms part of the property of the estate and the estate would be liable for estate duty thereon (s 2(1)). Assuming, however, that section 4(b) applies, i e the option is construed as being a debt due by the deceased which may be deducted for estate duty purposes, then the value of property at death, which would otherwise form part of the deceased's dutiable estate, will be off-set for estate duty purposes by a deduction which will obviously also amount to the value of such property. As such, estate duty will only be paid on the purchase price of the property, or the estate's right thereto if this is not paid at the date of the estate holder's death. Thus it is argued that the scheme is a viable one which can achieve the advantages set out above and particularly the objective of pegging the growth of assets which are made subject to an option."

Skematies kan Davis se argument soos volg voorgestel word:

	BATES	LASTE	
Landbankwaarde by oorledene se dood	R200 000	R200 000	(Verpligting om te lewer)
Koopprys	R 80 000		
	R280 000	R200 000	

Boedelbelasting is dus betaalbaar op R80 000 en gevolglik is daar belasting bespaar op R120 000.

Die doel met hierdie ondersoek is om te bepaal of bogemelde opvatting korrek is. Om dit te bepaal, sal die bepalings van artikel 4(b) van die Boedelbelastingwet[2] in besonderhede ontleed word met spesifieke verwysing na die vraag of 'n opsie 'n *debt due* is wat kwalifiseer as 'n aftrekking.

Ingevolge die gemelde artikel word 'n aftrekking toegelaat ten opsigte van

> "alle skulde wat deur die oorledene verskulidg is aan persone wat hulle gewone verblyfplek in die Republiek het en wat tot bevrediging van die Sekretaris bewys word, gedelg te gewees het uit eiendom in die boedel ingesluit."

Die Engelse teks van die Boedelbelastingwet is deur die goewerneur-generaal geteken en bepaal dat die netto waarde van 'n boedel bepaal word deur sekere kortings af te trek van die totale waarde van alle eiendom wat in die boedel ingesluit is, onder andere

> "all debts due by the deceased to persons ordinarily resident within the Republic which it is proved to the satisfaction of the Commissioner have been discharged from property included in the estate."

Die vraag ontstaan wat presies bedoel word met die woorde *debts due* soos dit deur die wetgewer hierbo gebruik word. Beteken *debts due* "skulde verskuldig" of "skulde verskuldig en opeisbaar"? Die Afrikaanse teks verwys na "skulde verskuldig" en die probleem is dus of laasgenoemde uitleg korrek is. Artikel 65 van die Grondwet bepaal dat in die geval van verskil[3] tussen die twee eksemplare van die wet, die ondertekende eksemplaar die deurslag gee. Steyn[4] wys daarop dat waar die twee tekste, wat die betrokke bewoording betref, onversoenbaar teenstrydig is, daar slegs aan die ondertekende teks gevolg gegee word. In die

2 45 van 1955.
3 Volgens Steyn *Die Uitleg van Wette* (1981) 145 beteken "verskil" 'n onversoenbare teenstrydigheid.
4 aw 148.

onderhawige geval is dit duidelik dat ons hier met 'n dubbelsinnigheid te doen het en nie met 'n onversoenbare teenstrydigheid nie. In so 'n geval kan die nie-ondertekende teks die deurslag gee. So byvoorbeeld word in *Peter v Peter*[5] verklaar:

> "[A] reference to the other text is permissible wherever the text under consideration is ambiguous. The legislature obviously intends both versions to have exactly the same meaning, and that intention is carried out if the ambiguity in one text is resolved by reference to the unambiguous word in the other text."

In 'n onlangse beslissing van die appèlhof word hierdie benadering weer onderstreep:

> "[T]hat what is common to both versions should be regarded as conveying the legislature's intention."[6]

Die opvatting dat *debt due* slegs "skuld verskuldig" kan beteken, word gesteun deur die *contra fiscum*-reël wat bepaal dat die uitleg wat teen die *fiscus* gaan by belastingwette gevolg moet word.[7] Indien die skuld verskuldig en opeisbaar moet wees, sal dit beteken dat

> "all debts owing by the deceased which have not yet fallen due for payment at his death would be excluded (for example mortgage bonds, credit accounts with the grocer, butcher, baker and candlestick maker) and the net value of the dutiable estate would be artificially inflated according to whether the deceased died before or after his debts became payable."[8]

Hierdie siening dat 'n skuld slegs verskuldig hoef te wees en nie verskuldig en opeisbaar nie, word klaarblyklik gesteun in die beslissing in *Myer v CIR*:[9]

> "The fact that the debt is not due and payable at the moment of death is irrelevant as long as the debt when due was not one incurred by the executor in the liquidation and administration of the estate but arose because of some action taken or obligation assumed by the deceased."

In *Estate Robottom v CIR*[10] weier die hof egter om 'n voorwaardelike verpligting aangegaan deur die oorledene gedurende sy leeftyd as 'n skuld verskuldig deur die oorledene te erken. Hierdie beslissing is dikwels gekritiseer.[11] Alhoewel die hof nie bewustelik op die vraag ingegaan het wat *debts due* beteken nie, wil dit voorkom of die hof tot 'n verkeerde beslissing gekom het, onder andere omdat die beslissing daarop neerkom dat *debts due* "verskuldig en opeisbaar" beteken. Indien dit slegs "verskuldig" kan beteken, moet 'n voorwaardelike skuld aangegaan deur die oorledene, selfs waar die voorwaarde nog nie vervul is nie, wel ingesluit word as 'n skuld verskuldig deur die oorledene.

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5 1959 2 SA 347(A) 350.
6 *S v Moroney* 1978 4 SA 389(A) 408. Vir meer besonderhede oor verskille tussen die Afrikaanse en Engelse teks, vgl Hahlo en Kahn *The South African Legal System and its Background* (1968) 193.
7 Vgl Steyn aw 115; Dison "The *Contra Fiscum* Rule in Theory and Practice" 1976 *SALJ* 159–199; Van Niekerk "Geld die Gewone Reëls van Uitleg by Belastingwette?" 1971 *THRHR* 137–146.
8 Meyerowitz "Estate Duty Deductions: Debts Due by the Deceased" 1976 *The Taxpayer* 185.
9 1965 4 SA 342(T).
10 1961 1 SA 33(K).
11 Vgl Molteno 1967 *Acta Juridica* 220; Meyerowitz aw 187; Davis 1980 *THRHR* 303.

Soos Meyerowitz[12] tereg aantoon, bestaan daar geen probleem in die hantering van 'n voorwaardelike skuld as 'n "skuld verskuldig" nie, solank die gebeurlikheid plaasvind voordat boedelbelasting aangeslaan word. Indien dit nie voor daardie tydstip sou plaasvind nie, sou 'n praktiese probleem ontstaan vir sover die Boedelbelastingwet nie voorsiening vir 'n terugbetaling van belasting maak nie. Meyerowitz stel 'n moontlike oplossing voor, naamlik dat met die sekretaris gereël word dat die aanslag gemaak word sonder om die voorwaardelike aanspreeklikheid in ag te neem, met dien verstande dat die aanslag heropen word om die voorwaardelike skuld in berekening te bring wanneer dit uiteindelik opeisbaar word.

Dit is verder belangrik om daarop te let dat om ingevolge artikel 4(b) 'n skuld verskuldig te wees, die skuld uit eiendom in die boedel van die oorledene gedelg moes gewees het. By noodwendige implikasie beteken dit dat indien hierdie vereiste in die streng sin van die woord vertolk en toegepas word, daar bewys sal moet word dat die skuld deur die oorledene gedelg is (a) vóór die tydstip van die aanslag en (b) uit eiendom wat in die boedel ingesluit is. Dit is duidelik dat 'n testateur sy boedel die voordeel van die artikel-4(b)-aftrekking kan ontneem deur 'n voorwaarde of lasbepaling in sy testament te voeg dat sekere van sy skulde deur sy erfgename aanvaar en betaal moet word. Meyerowitz[13] kritiseer hierdie bepaling in die wet: dit is onwenslik dat betaling of nie-betaling van boedelbelasting van die metode van betaling van die boedel se verpligtinge afhanklik gemaak word. In die praktyk word hierdie vereiste egter nie streng toegepas nie, aangesien die verskillende maniere waarvolgens skulde betaal word tot gevolg sou hê dat meer boedelbelasting betaalbaar sou wees omdat nie alle skulde regtens verskuldig aftrekbaar is nie:

> "The return required under the Estate Duty Act usually accompanies the account and assessments are issued without enquiry as to whether the debts have been discharged or out of what property the debts have been discharged."[14]

Die vraag kan gestel word of die wet nie gewysig behoort te word om die *de iure* posisie met die *de facto* posisie in lyn te bring nie.

Ingevolge die Boedelbelastingwet[15] bestaan die boedel van 'n "persoon" (dit kan net die oorledene beteken) uit al die eiendom van daardie persoon op die datum van sy dood en uit alle eiendom wat ooreenkomstig die wet geag word eiendom van daardie persoon op bedoelde datum te wees. Dit wetgewer omskryf "eiendom" verder as enige reg op goed, hetsy roerend of onroerend, insluitende beperkte regte wat die oorledene onmiddellik voor sy dood gehad het. Die rede vir laasgenoemde insluiting deur die wetgewer is duidelik. Aangesien sodanige regte op datum van dood van die oorledene nie meer bestaan nie, wil hy verseker dat sodanige eiendom wel ingesuit word as eiendom. Hierdie werkswyse van die wetgewer regverdig die noodwendige afleiding dat "datum van dood" en

12 aw 188.
13 *ibid.*
14 Meyerowitz *loc cit.*
15 a 3(1).

"onmiddellik voor dood" twee verskillende momente moet wees, anders sou dit nie vir die wetgewer nodig gewees het om sodanige regte spesifiek in te sluit nie — die insluiting is immers nie *ex abundanti cautela* nie.

Aangesien die begrip "eiendom" regte insluit wat die oorledene onmiddellik voor sy dood gehad het, moet die begrip "eiendom op die datum van sy dood" noodwendig eiendom insluit wat hy op die datum van dood verkry het.[16] Dit is ook belangrik om daarop te let dat "datum van dood" 'n langer tydsbegrip daarstel as "moment van dood." Laasgenoemde is 'n spesifieke moment, terwyl eersgenoemde slaan op 'n bepaalde dag of datum.

Die vraag ontstaan of bogemelde opvatting dat "eiendom op die datum van dood" beteken regte op eiendom onmiddellik voor dood en regte wat ontstaan het op datum van dood, korrek is indien 'n mens gaan kyk na die bepalings van die wet wat handel oor eiendom wat geag word eiendom van die oorledene te wees. Ook hier is dit duidelik dat in alle gevalle waar eiendom deur die wetgewer geag word eiendom van die oorledene te wees, dit hoegenaamd nie die eiendom van die oorledene is op die datum van dood soos hierbo uiteengesit nie.

Indien bogemelde opvattings korrek is, moet vervolgens uitgemaak word wat bedoel word met die woorde "skulde verskuldig deur die oorledene" in artikel 4(b). Die woord "oorledene" is hier van deurslaggewende belang. Die woorde "skulde verskuldig deur die oorledene" kan beteken:

a skulde verskuldig deur die oorledene onmiddellik voor sy dood en/of

b skulde verskuldig deur die oorledene op die moment van sy dood en/of

c skulde verskuldig deur die oorledene op die datum van dood en/of

d skulde verskuldig deur die oorledene na die datum van dood.

Die probleem by die uitleg van bogenoemde woorde is dat die wetgewer by die omskrywing van "boedel" eiendom insluit met verwysing na 'n bepaalde tydsduur, naamlik "op die datum van dood." Geen sodanige aanwysing word egter deur die wetgewer in artikel 4(b) gegee nie. Volgens algmene beginsels sou mens kon redeneer dat slegs skulde wat bestaan het op die datum van die dood van die oorledene, afgetrek kan word, aangesien dit die maatstaf was by die vasstelling van die boedel van die oorledene. "Skulde van die oorledene" sou dan beteken dat situasies a en b kwalifiseer, dit wil sê skulde verskuldig deur die oorledene onmiddellik voor sy dood en skulde wat ontstaan het op die moment van sy dood. Aangesien datum van dood die wyer begrip is, sal dit noodwendig skulde verskuldig op die moment van dood moet insluit. Laasgenoemde afleiding klink billik, veral indien 'n mens in gedagte hou dat die wetgewer spesifiek verwys na skulde van die "oorledene." 'n Mens is immers eers oorlede op die moment van dood. Derhalwe word aangevoer dat die sinsnede "skulde verskuldig deur die oorledene" minstens beteken "skulde verskuldig deur die oorledene op die moment van dood" en hoogstens kan beteken "skulde verskuldig deur die oorledene op die datum van dood."

16 Vgl Honoré *South African Law of Trusts* (1976) 329 wat dieselfde mening huldig, maar datum van dood verwar met "moment of death."

Teen die agtergrond van hierdie algemene bespreking van artikel 4(b) word die opsie vervolgens bespreek. Dit is duidelik dat eiendom wat onderwerp is aan 'n opsie wat nog nie uitgeoefen is op die datum van dood van die opsiegewer nie, eiendom in sy boedel is.[17] Waar die opsie na sy dood uitgeoefen word, sal die eiendom verkoop word ingevolge daardie opsie en sal dit nie eiendom wees wat van die hand gesit is deur 'n *bona fide*-koop en verkoop in die loop van die likwidasie van die boedel van die opsiegewer nie. Gevolglik word dit nie ingevolge artikel 5(1)(a) waardeer nie en die bedrag waarteen dit gerealiseer of verkoop is, sal nie die waarde daarvan in die boedel wees nie. Die waarde sal dus vasgestel moet word soos bepaal in artikel 5(1)(*g*), dit wil sê die billike markwaarde (landbankwaarde) op die datum van dood van die oorledene.

In ons reg word die opsie as 'n geldige kontrak beskou,[18] maar dat dit geen koopkontrak is nie, word algemeen erken.[19] Dit word ontleed as 'n eiesoortige kontrak, naamlik 'n aanbod om te verkoop met 'n ooreenkoms om die aanbod vir 'n termyn staande te hou.[20] Dit is ook geen voorwaardelike kontrak nie en die uitoefening van die opsie is nie die vervulling van 'n voorwaarde wat die koper betref nie.[21] Davis[22] verklaar met verwysing na die opsie:

> "Once the offeree accepts the option the estate is obliged to sell the property in question and acquires the right to the purchase price which has been agreed upon in terms of the contract of option. There would, as long as Robottom's case is overruled, seem to be no authority which would prevent the option being regarded as a debt due within the terms of section 4(b) and therefore the purchase price of the property becomes the only asset as far as estate duty calculations are concerned."

Indien die skrywer met die woorde "accepts the option" bedoel dat die opsie uitgeoefen word, kan daar met die eerste sin van hierdie aanhaling nie fout gevind word nie. 'n Onherroeplike aanbod, voortvloeiende uit 'n *pactum de contrahendo*, verval nie by die dood van die aanbieder nie want die verbintenis wat daaruit voortvloei is soos enige ander verbintenis uit ooreenkoms 'n las in die erflater se boedel.[23] Die opsiehouer kan die opsie uitoefen en die boedel (eksekuteur) sal verplig wees om oordrag te gee. Die juistheid van die tweede sin is egter onder verdenking. Hierbo is alreeds daarop gewys dat die datum van dood die deurslaggewende moment is vir die beoordeling van die vraag of die oorledene 'n skuld het wat as 'n verpligting van sy boedelbates afgetrek kan word. Op die datum van dood van die oorledene het daar slegs 'n verpligting op die eksekuteur oorgegaan om die opsie vir 'n bepaalde termyn oop te hou. Op gemelde datum was daar geen koopkontrak nie en gevolglik geen verpligting om te lewer en 'n dienooreenkomstige reg op betaling van die koopsom nie. Die effek van die uitoefening van die opsie is dat 'n koopkontrak tot stand kom op

17 a 3(2) van die Boedelbelastingwet.
18 *Hersch v Nel* 1948 3 SA 686(A).
19 Vgl De Wet en Yeats *Kontraktereg en Handelsreg* (1978) 281; *Van Niekerk v Smith* 1952 3 SA 17(T).
20 *Hersch v Nel* hierbo.
21 Vgl *Venter v Birchholtz* 1972 1 SA 276(A).
22 1980 *THRHR* 308.
23 De Wet en Yeats aw 31; Mostert, Joubert en Viljoen *Die Koopkontrak* (1972) 273.

daardie moment, welke moment plaasvind *na* die datum van dood van die oorledene. Die eksekuteur van die boedel van die oorledene sal dan verplig wees om die betrokke bate te lewer. Indien 'n opsie, soos uiteengesit in *Hersch v Nel*,[24] 'n ooreenkoms is om te verkoop indien die opsiegewer sy reg om te koop uitoefen, dan spruit die koopkontrak uit 'n verpligting van die opsiegewer om te verkoop voort, en dan is die daaruitvolgende verpligting van die eksekuteur om die bate te lewer teen betaling van die koopsom nie 'n verpligting wat deur die eksekuteur opgeloop is nie, maar vloei dit voort uit 'n verpligting opgedoen deur die oorledene gedurende sy leeftyd.

Davis se basiese fout is egter dat hy die leweringsverpligting van die eksekuteur, selfs al sou dit voortspruit uit 'n handeling deur die oorledene gedurende sy leeftyd, beskou as 'n skuld van die oorledene *op die datum van dood*. Dit is te wyte aan 'n verkeerde siening van basiese kontrakteregbeginsels van toepassing op die opsie. Op die datum van dood van die oorledene (en dit is die deurslaggewende moment vir doeleindes van artikel 4(b)) het daar slegs 'n verpligting op die boedel oorgegaan om die opsie oop te hou. Op gemelede datum was daar geen verpligting op die boedel om die betrokke bate oor te dra en 'n dienooreenkomstige reg om betaling teen lewering te eis nie. So 'n reg en verpligting kan eers ontstaan *na* die datum van dood van die oorledene, wanneer die opsienemer sy opsie uitoefen. Davis is duidelik besig om te dwaal deurdat hy die leweringshandeling en die verpligting om die opsie oop te hou nie van mekaar onderskei nie. Dit blyk uit Davis se gevolgtrekking waar hy verklaar:

> "As such, estate duty will only be paid on the purchase price of the property, *or the estate's right thereto if this is not paid at the date of the estate holder's death.*"[25]

Dit is tog onmoontlik om 'n reg vir die boedel van die opsiegewer te konstrueer vir betaling van die koopprys voordat die opsie deur die opsienemer uitgeoefen is. In die betrokke voorbeeld wat hy gebruik, is die opsie eers uitoefenbaar binne drie maande *na* die dood van die opsiegewer. Hoe verward hy is, blyk ook duidelik uit Davis se bespreking van die vraag of die sekretaris nie geregtig sal wees om die verskil tussen die waarde van die eiendom en die kontrakprys as 'n skenking te beskou nie. So byvoorbeeld verklaar hy:[26]

> "However, as Molteno argued, the adequacies of the consideration must be ascertained as at the date of the disposition whereby the purchaser becomes entitled to receive the property. The disposition, it is submitted, means the legal manner in which the purchaser acquired a right to the property as the act refers to dispositions whereby any person becomes entitled to receive or acquire any property. *The time for assessing the adequacy of the consideration is at the time of the conclusion of the contract, in this case the contract of option.* As has been submitted above, *the option agreement gives the option holder a legal right to purchase the property which is subject to the option and it is therefore at the date of the conclusion of the option agreement that the adequacy of the purchase price must be assessed. Clearly, therefore, as long as the option price is adequate and realistic as at the time the contract of option was concluded,*[27] the secretary would not be able to invoke the remedy provided by section 3(3)(c) read together with section 3(4)(a) as described above."

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24 hierbo bespreek.
25 my kursivering.
26 1980 *THRHR* 310.
27 my kursivering.

Uit die gekursieveerde gedeeltes is dit duidelik dat Davis die verpligting van die opsiegewer om die opsie oop te hou verwar met die moontlike latere verpligting, *na* die datum van dood van die opsiegewer, om die saak te lewer na uitoefening van die opsie deur die opsienemer. Hy is besig om die kar voor die perde te span. Die reg om lewering te eis teenoor die boedel van die oorledene vloei immers voort uit die koopkontrak wat na die dood van die opsiegewer tot stand gekom het en nie bloot uit die opsie wat *inter vivos* tussen die partye tot stand gekom het nie. Indien die opsie volgens ons appèlhof nie 'n voorwaardelike kontrak is nie, kan dit nog minder 'n voldonge kontrak daarstel.

In die tweede plek is dit ook verkeerd om te beweer dat die bepalende moment of 'n mens in die geval van 'n opsie met 'n skenking te doen het al dan nie, die datum van die opsieooreenkoms is. Volgens Davis se benadering beteken dit dat indien my huis se huidige markwaarde R100 000 is en ek vandag 'n opsie aan hom verleen teen gemelde bedrag vir 'n onbepaalde termyn, uitoefenbaar voor my dood, en hy my huis tien jaar later sou koop deur uitoefening van die opsie, daar geen belasting op geskenke betaalbaar sal wees indien die huis dan R250 000 werd sal wees nie. Die vraag of daar enige belasting op geskenke betaalbaar is, ontstaan tog nie by die verlening van die opsie nie maar by sy uitoefening, met ander woorde by die koopkontrak. Eers dan sou 'n mens in 'n posisie wees om die teenprestasies, naamlik die reg om betaling te eis en die verpligting om te lewer (die waarde van die bate) teenoor mekaar op te weeg.

Samevattend kan dus verklaar word dat by die beoordeling van die vraag of 'n skuld ingevolge artikel 4(b) aftrekbaar is, daar aan sekere vereistes[28] voldoen moet word:

a die skuld moet verskuldig wees, maar hoef nie opeisbaar te wees nie;

b die skuld kan voorwaardelik wees;

c dit moet 'n skuld van die oorledene wees;

d die skuld moes bestaan het op die datum van dood van die oorledene.

Indien hierdie vereiste op die opsie toegepas word, vind ons dat vereiste b buite rekening gelaat kan word omdat die opsie nie 'n voorwaardelike verpligting daarstel nie.[29] Aangesien daar geen verpligting op die oorledene gerus het om op die datum van dood eiendom te lewer nie, is dit nie 'n skuld verskuldig ingevolge artikel 4(b) nie. Hieruit volg dit logies dat die koopprys van die eiendom nie regtens op die datum van dood 'n bate in sy boedel kan wees nie, net so min as wat die latere verpligting van die eksekuteur om die eiendom te lewer 'n skuld van die oorledene op die datum van dood kan wees.

Die verpligting van die opsiegewer om die opsie oop te hou, welke verpligting op sy boedel oorgegaan het, voldoen wel aan die vereistes (met uitsondering van vereiste b hierbo gestel). Dit was 'n skuld verskuldig deur die oorledene op

28 Hierdie is nie 'n volledige lys van vereistes wat nagekom moet word ingevolge a 4(b) nie. Die ander is egter nie hier ter sake nie.

29 Vgl *Venter v Birchholtz* hierbo.

die datum van dood en is gevolglik aftrekbaar ingevolge artikel 4(b). Uit 'n praktiese oogpunt is dit duidelik dat dit dikwels moeilik sal wees om die verpligting om die opsie oop te hou as 'n skuld verskuldig wat nou aftrekbaar is, te kwantifiseer. 'n Bespreking van die metode van kwantifisering val egter buite die bestek van hierdie onderwerp, want dit is geen regsprobleem nie.

Uit bogenoemde bespreking blyk dit duidelik dat die gebruik van 'n opsie nie 'n towerformule daarstel om betaling van minder boedelbelasting te bewerkstellig nie. Gestel X het op 1 Julie 1975 'n opsie aan sy seun gegee om sy plaas (Landbankwaarde R80 000) drie maande na sy dood te koop vir R80 000. Hy sterf op 1 Julie 1982. Op datum van dood is die plaas R200 000 werd en sy seun oefen binne die ooreengekome termyn die opsie uit. Indien die verpligting om die opsie oop te hou om welke rede ook al nie gekwantifiseer kan word nie (met ander woorde daar kan geen aftrekking ingevolge artikel 4(b) plaasvind nie), sal die boedel van die oorledene verplig wees om op die volle waarde van die eiendom boedelbelasting te betaal aangesien dit deel van die boedel van die oorledene uitgemaak het.

Die interessante vraag wat vervolgens opduik, is of belasting op geskenke nou betaalbaar sal wees omdat die opsienemer 'n bate van R200 000 ontvang het teen betaling van 'n koopsom van slegs R80 000. Artikel 58 van die Inkomstebelastingwet[30] bepaal dat waar daar oor eiendom beskik is teen 'n vergoeding wat volgens die kommissaris se oordeel nie voldoende vergoeding is nie, dit geag word dat daar ingevolge 'n skenking oor die betrokke eiendom beskik is: met dien verstande dat by die vasstelling van die waarde van sodanige eiendom 'n vermindering gemaak word van 'n bedrag gelyk aan die waarde van bedoelde vergoeding.

Met die eerste oogopslag wil voorkom of gemelde artikel wel van toepassing is, aangesien ons hier duidelik met 'n beskikking (die koopkontrak) teen onvoldoende vergoeding te doen het. Die probleem is egter wie nou as die skenker beskou moet word. Dit is egter onnodig om op hierdie vraag in te gaan, aangesien dit by nadere ondersoek tog blyk dat artikel 58 nie van toepassing is nie omdat ons in boedelbelastingkonteks nie hier met 'n skenking te doen het nie. Die oplossing van bogenoemde probleem lê opgesluit in die besondere wisselwerking tussen die voorskrifte van die Boedelbelastingwet en dié gedeelte van die Inkomstebelastingwet wat oor skenkings handel.

Ingevolge die Boedelbelastingwet[31] word eiendom geskenk ingevolge 'n *donatio inter vivos* geag deel te vorm van die boedel van die oorledene. Die *ratio* vir hierdie bepaling is om te voorkom dat 'n persoon sy boedel deur middel van skenkings verklein en sodoende betaling van boedelbelasting vermy. Voorts bepaal die gemelde wet[32] dat by die toepassing van die voorskrifte wat oor *donationes inter vivos* handel, 'n beskikking waarvolgens iemand geregtig word

30 58 van 1962.
31 a 3(3)(c).
32 a 3(4)(a).

om eiendom teen 'n vergoeding te ontvang of te verkry wat, na oordeel van die kommissaris, nie voldoende vergoeding vir daardie eiendom is nie, geag word 'n skenking te wees in die mate wat die billike markwaarde van die eiendom, bedoelde vergoeding te bowe gaan.[33]

Op sy beurt bepaal die Inkomstebelastingwet[34] weer dat waar 'n persoon 'n beskikking teen onvoldoende vergoeding sou maak, die skenker vir belasting op geskenke aanspreeklik is. Waar 'n persoon dus 'n plaas wat R200 000 werd is vir R80 000 verkoop, sal hy ingvolge die Inkomstebelastingwet, afhangende van die kommissaris se oordeel, belasting op geskenke op die verskil, naamlik R120 000, moet betaal. Wanneer die skenker dan later te sterwe kom, word gemelde bedrag as gevolg van bogenoemde bepalings van die Boedelbelastingwet geag deel van sy boedel te wees. In effek sou dit beteken dat 'n skenker nou eintlik dubbele belasting sou moes betaal, naamlik boedelbelasting sowel as belasting op geskenke. Gelukkig bepaal artikel 16(b) van die Boedelbelastingwet egter dat enige belasting op geskenke wat betaal is ten opsigte van eiendom wat geag word eiendom van die oorledene te wees, afgetrek word van enige boedelbelasting wat betaalbaar is. Prakties gesproke is betaling van sodanige belasting op geskenke dus eintlik 'n vooruitbetaling van boedelbelasting en word daar gevolglik nie dubbele belasting betaal nie.

Indien hierdie wisselwerking van genoemde twee wette in gedagte gehou word, bied dit 'n oplossing vir die vraag of belasting op geskenke in bogenoemde voorbeeld betaalbaar sal wees op die verskil tussen die markwaarde en die koopprys, naamlik R120 000. Soos hierbo aangetoon, vorm die markwaarde deel van die boedel van die oorledene as gevolg van die feit dat hy op datum van dood eienaar was en is daar geen bedrag wat as 'n skuld verskuldig deur die oorledene afgetrek kan word as gevolg van die opsie nie (indien veronderstel word dat die verpligting om die opsie oop te hou nie gekwantifiseer word of kan word nie). Omdat die oorledene gedurende sy leeftyd geen skenking gemaak het nie (daar was nog geen koopkontrak nie), is sy boedel nie verklein nie en gevolglik kan artikel 58 van die Inkomstebelastingwet nie van toepassing wees nie. Indien gemelde artikel wel van toepassing sou wees, sou dit beteken dat boedelbelasting betaalbaar sou wees op die volle waarde van die eiendom plus belasting op geskenke op die verskil tussen die markprys en die koopprys – in effek dus dubbele belasting, en dit is immers nie die bedoeling van die wetgewer nie.

SLOTSOM

Uit bogenoemde bespreking blyk dit duidelik dat die gebruik van 'n opsie om 'n besparing van boedelbelasting te bewerkstellig, ernstig bevraagteken moet word. Dit blyk inderdaad geen towerformule te wees soos Davis voorstel nie. Alhoewel dit nie sal lei tot 'n betaling van meer belasting as wat andersins die

33 Vgl die soortgelyke voorskrif van a 58 van die Inkomstebelastingwet.
34 a 54 e v.

geval sou wees nie, sal dit in alle gevalle die bereddering van die boedel vertraag. Myns insiens sou die gebruikmaking van 'n opsie uitoefenbaar na die dood van die opsiegewer as boedelbeplanningstegniek slegs in twee gevalle gebruik kan word:

a Indien die opsienemer die opsie uitoefen *en* die verpligting om die opsie oop te hou gekwantifiseer kan word as 'n skuld van die oorledene ingevolge artikel 4(b) van die Boedelbelastingwet;

b Indien die opsienemer nie die opsie uitgeoefen het na die dood van die opsiegewer nie, maar die verpligting om die opsie oop te hou gekwantifiseer kan word as 'n skuld van die oorledene kragtens die gemelde artikel.

In beide boegenoemde voorbeelde sou dit die skulde van die oorledene verhoog, wat noodwendig moet lei tot 'n besparing van boedelbelasting. Hierdie besparing word egter nêrens deur Davis aangetoon nie, aangesien hy slegs die leweringsverpligting van die boedel verkeerdelik as 'n skuld van die oorledene konstrueer. In die tweede voorbeeld hierbo spreek dit vanself dat die partye te goeder trou moet handel, anders kan dit as 'n gesimuleerde regshandeling beskou word.

Ten slotte moet die vraag gestel word of die opsie enige belasting kan bespaar waar dit uitgeoefen word voor die dood van die oorledene (opsiegewer) en daar 'n verskil is tussen die koopprys en die markwaarde. Twee situasies kan hier onderskei word:

a Waar 'n oordrag van die grond nie plaasgevind het voor die dood van die oorledene nie, vorm die betrokke eiendom deel van die boedel van die oorledene op datum van dood. Aangesien die opsie *inter vivos* uitgeoefen is, het daar 'n koopkontrak tot stand gekom. Die opsienemer (koper) het 'n vordering vir lewering teen die boedel, wat ingevolge artikel 4(b) 'n skuld verskuldig is deur die oorledene. Daarteenoor sal die vorderingsreg van die oorledene soos verteenwoordig deur die koopsom, eiendom in die oorledene se boedel wees. Waar die billike markwaarde van die eiendom op die datum toe die koopkontrak gesluit is, vasgestel ooreenkomstig die bepalings van artikel 62 van die Inkomstebelastingwet, die opsieprys oorskry, is daardie oorskot eiendom wat geag word eiendom te wees wat deur die opsiegewer geskenk is ingevolge 'n *donatio inter vivos*.[35] Belasting op geskenke sal dus betaalbaar wees deur die verkoper of sy boedel, welke belasting egter afgetrek kan word van die boedelbelasting betaalbaar op die belasbare bedrag van die boedel van die oorledene.

b Waar oordrag alreeds plaasgevind het, sal slegs die koopsom deel vorm van die boedel van die oorledene. Indien die billike markwaarde van die eiendom op die datum toe die koopkontrak gesluit is, vasgestel ooreenkomstig die bepalings van artikel 62 van die Inkomstebelastingwet, die opsieprys oorskry, is daardie oorskot eiendom wat geag word eiendom te wees wat deur die opsiegewer geskenk is ingevolge 'n *donatio inter vivos*.

35 a 3(3)(c) en 3(4)(a) saamgelees met a 5(1)(g).

In beide voorbeelde hierbo gebruik word geen belasting bespaar nie.

In die lig van al hierdie oorwegings wil dit gevolglik voorkom of die uitoefening van 'n opsie, sowel *inter vivos* as *post mortem*, in 'n poging om tydsverloop en gepaardgaande inflasie tot die beplanner en sy begunstigdes se voordeel te gebruik, nie noodwendig 'n lonende onderneming sal wees nie.

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Subordinate legislation and unreasonableness: the application of *Kruse v Johnson* (1898 2 QB 91) by the South African courts

C M Plasket
BA LLB
Lecturer, Department of Mercantile Law, Rhodes University
P L Firman
BComm LLB
Attorney

OPSOMMING

Ondergeskikte Wetgewing en Onredelikheid: die Toepassing van *Kruse v Johnson (1898 2 QB 91)* deur die Suid-Afrikaanse Howe

Die toets wat toegepas moet word om die redelikheid van ondergeskikte gedelegeerde wetgewing te bepaal, is dié wat Lord Russel CJ in *Kruse v Johnson* (1898 2 QB 91 99) gestel het. Hierdie saak het sekerheid gebring op hierdie gebied van die reg vir sover dit vier beginsels om vir redelikheid te toets, gestel het. Daar word in die Suid-Afrikaanse reg algemeen aanvaar dat die redelikheidsvraag nie bloot 'n probleem by wetsuitleg is nie. Ondergeskikte wetgewing moet noukeurig nagegaan word. As dit onredelik in sy toepassing is, vir sover dit "partial and unequal" of 'n "gratuitous interference with rights," of "manifestly unjust" of "*mala fide*" is, sal dit *ultra vires* wees. Slegs die wetlike bevoegheid om onredelik op te tree, kan dit dan red. Redelikheid moet bepaal word wanneer die geldigheid van die wetgewing bevraagteken word.

Kruse v Johnson het gehandel oor 'n verordening uitgevaardig deur 'n plaaslike raad (*county council*), maar Suid/Afrikaanse howe aanvaar dat die beginsel vir alle vorme van ondergeskikte wetgewing geld, selfs al is dit deur die parlement goedgekeur voordat dit van krag word. In die geval waar prossesuele beskermings verleen word, sal die hof 'n "goedgunstiger" uitleg aan die onderskikte wetgewing gee. Daar is al betoog dat daar geen behoefte aan so 'n goedgunstige uitlegbeginsel bestaan nie (1959 *SALJ* 39). Die uitlegbeginsel wat die howe toepas, is die letterlike benadering waarin die woorde van die verordening 'n sinvolle betekenis gegee word. As die verordening egter nie die toets wat deur die reëls van wetsuitleg gestel word deurstaan nie, sal geen mate van goedgunstigheid dit red nie.

Die parlement het die bevoegdheid om die wette te maak wat dit goedvind, maar indien die wetgewer die bevoegdheid om onredelik op te tree, wil delegeer, moet dit ingevolge *Kruse v Johnson* spesifiek gedoen word. Met ander woorde, hierdie bevoegdheid moet òf uitdruklik òf by noodwendige implikasie verleen word. Ons howe het tot die beslissing in *Minister of the Interior v Lockhat* (1961 2 SA 587 (A)) hierdie benadering gevolg om te bepaal of hulle jurisdiksie uitgesluit is.In hierdie saak het appèlregter Holmes beslis dat alhoewel die bevoegdheid om onredelik op te tree nie deur die wet verleen is nie, dit duidelik afgelei kan word omdat die parlement moes voorsien het dat die verpligte verskuiwing van die bevolking in gevolge die Groepsgebiedewet "partial and unequal" sou wees.

Dié beslissing (gevolg in *S v Adams, S v Werner* 1981 1 SA 187 (A)) is al skerp gekritiseer. Hierdie jammerlike afwyking van *Kruse v Johnson* het tot gevolg gehad dat die *Kruse*-saak nie meer 'n "mini bill of rights of the common law" is nie. Verder is dit 'n afwyking van wat in *Dadoo Ltd v Krugerdorp Municipal Council* (1920 AD 530) 'n "wholesome rule of our law" genoem is, naamlik dat wanneer die basiese regte van die individu ter sprake is, wetgewing wat die strekking het om daardie regte in te kort, beperkend uitgelê moet word.

INTRODUCTION

No court of law has the power to review an act of parliament which has been duly passed,[1] and provincial ordinances are almost as immune from judicial scrutiny.[2] Subordinate delegated legislation, however, is subject to judicial review unless this common-law power is excluded by statute. The courts have evolved rules by which subordinate legislation may be tested and struck down on the grounds of vagueness or uncertainty[3] and unreasonableness.[4] The importance of these powers lies in the fact that the vast majority of legislation passed *per annum* falls into the category of subordinate delegated legislation.[5]

Subordinate delegated legislation must be distinguished at the outset from so-called administrative acts. The distinction often tends to be vague and is sometimes ignored,[6] but is, it is submitted, of primary importance. Evans says that a legislative act is general while an administrative act is particular:

> "[A] legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined but it includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice."[7]

The significance of the distinction lies in the fact that different tests are applied to legislative and administrative acts when their reasonableness is at issue. Stratford JA set out the test for the latter in *Union Government v Union Steel Corporation*[8] as follows:

> "[E]mphasis is always laid upon the necessity of unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of *mala fides* or ulterior motive' or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter."[9]

The test for reviewing the reasonableness of subordinate legislation was set out by Lord Russell CJ in *Kruse v Johnson*[10] in the following terms:

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1 *S v Tuhadeleni* 1967 4 SA 511 (T) 520.
2 *Brown v Cape Divisional Council* 1979 1 SA 589 (A) 602.
3 *S v Meer* 1981 1 SA 739 (N).
4 *Kruse v Johnson* 1898 2 QB 91.
5 Wade *Administrative Law* (5th ed) 733 points out: "There is no more characteristic administrative activity than legislation. Measured merely by volume, more legislation is produced by the executive government than by the legislation."
6 An example is *S v Meer* 1981 4 SA 614 (A).
7 Evans *De Smith's Judicial Review of Administrative Actions* (4th ed) 71.
8 1928 AD 220.
9 237. See too *National Transport Commission v Chetty's Motor Transport* 1972 3 SA 726 (A) 735 where Holmes JA tightened the test still further.
10 *supra.*

> "But unreasonable in what sense? If for instance they (the by-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' "[11]

This *dictum* is of considerable importance, not least in South Africa, where much of the discriminatory legislation is implemented through proclamations and regulations and so falls within the scope of *Kruse v Johnson*.[12] To label the four legs of Lord Russell's test a 'mini bill of rights of the common law' would not be to exaggerate the potency of *Kruse*.

THE HISTORICAL DEVELOPMENT OF *ULTRA VIRES* AND THE TEST APPLIED IN SOUTH AFRICA

The essence of the *ultra vires* doctrine has been stated as follows:

> "The *ultra vires* doctrine is based upon an axiom that a person or body which owes its legal existence to and derives its powers from a statute or an agreement or the common law can do no valid act unless thereto authorized by the statute or other source of its powers. Furthermore any limitations upon the exercise of power which are prescribed by the statute must be observed."[13]

This means, of course, that no valid administrative act can be performed without statutory or prerogative authority. In the light of the above it is not surprising that Wade describes the *ultra vires* doctrine as "the central principle of administrative law."[14]

The doctrine was evolved in Britain in order to control excesses of legal authority by independent statutory bodies, but was extended until it brought within its scope acts of the state and its servants.[15] This meant that the English courts could effectively keep subordinate legislation within the ambit intended by the dictates of justice. A problem arose as to the exact bounds of the doctrine: how far should the courts go in interfering with the rights of bodies over which they exercise control in the form of judicial review? Watermeyer CJ described the position thus:

> "The limits of the right of a corporation to make by-laws were thus uncertain and it became necessary for the courts to define them. In doing so, because the powers of corporations were limited to the accomplishment of certain purposes, it was inevitable that reasonableness in relation to the purposes for which the corporation existed or to the authorized purposes should come to be regarded as one of the requirements for the validity of a by-law."[16]

The term 'unreasonableness' was already in use by the English courts prior to *Kruse v Johnson* as a measure of the authority of a law-making body.[17] The

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11 99.
12 *supra*.
13 Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 89.
14 *Op cit* 38.
15 Evans *op cit* 94–95.
16 *Sinovich v Hercules Municipal Council* 1946 AD 783 788.
17 *Slattery v Naylor* [1888] 13 AC 446 452.

problem, however, was not so much in the usage of the word but rather in its definition. This point was crisply stated by Watermeyer CJ:

> "But reasonableness is not an abstract independent quality which can be measured by a fixed standard."[18]

The court in *Kruse v Johnson* sought to introduce certainty into the elastic definitions which were resulting in by-laws being declared unreasonable on somewhat unsubstantial grounds.[19] The courts now have certain established principles by which they can measure unreasonableness, namely the four "legs" enunciated by Lord Russell. The test in *Kruse* has been accepted in a great number of South African cases and is the basis for reviewing subordinate legislation.[20] However, the test applied by Schreiner JA, in a dissenting judgment, in *Sinovich v Hercules Municipal Council*[21] is perhaps more precise. The judge of appeal divided the inquiry into two parts to preserve and clarify the distinction between unreasonableness and excess of power. He stated the test as follows:

> "In investigating an issue of unreasonableness one would, on this view ask oneself at the outset whether in the light of the proved facts the by-law is unreasonable in the sense of being manifestly unjust or highly oppressive, and then, if this question were answered in the affirmative, one would consider in the next place how far such 'unreasonableness' could be said to be authorised by the enabling provision."[22]

This approach would, Schreiner JA held, avoid the error of treating the question merely as one of interpretation. He also drew a distinction between reviewing subordinate legislation and discretionary decisions of public officers, saying that because the former has a wider effect the courts have wider powers to invalidate such an act.

The judgments of the majority (Watermeyer CJ, Tindall JA and Feetham AJA) treated the by-law strictly in terms of the enabling provision. They held that because the ordinance appeared to give the respondent power to pass the by-law it was valid. They drew a distinction between general and specific powers.[23] Because the enabling provision granted specific powers to the municipal council in that it prescribed the contents of the by-laws, they were able to distinguish

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18 *Sinovich v Hercules Municipal Council supra* 788.

19 789.

20 See, e g, *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 173 where Stratford ACJ said: "When therefore the question of the unreasonableness of a by-law arises it is the function of this Court to decide the matter on the facts of the case, and it is now accepted that Lord Russell's test is the one to be applied."

21 *supra.*

22 802. Also see *R v Hildick Smith* 1924 TPD 69 75. Tindall J stated the test as follows: "The question whether a regulation is reasonable is only a branch of the question whether it is *ultra vires.* In *Struben v Minister of Agriculture* 1910 TS 903 905 Mason J stated that the first question to decide was whether there was power to make the regulation at all and the second question whether the regulation itself was so unreasonable as to be *ultra vires.*"

23 791. The reasoning applied follows that of Roos JA in *Feinstein v Baleta* 1930 AD 319. The judge of appeal said: "It is, however, said that the by-law is unreasonable. This, as the cases show, is another way of saying that, though in terms this law falls within the power, yet it has exceeded the implied limitation in the exercise of that power. We see no implied limitation to the power given other than the discretion, honestly exercised, of the municipality. A by-law cannot be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges" (325).

Kruse and apply the stricter test of the *Union Steel*[24] case. Watermeyer CJ, for example, stated the test as follows:

> "In such a case the legislature granted to municipal councils a discretion whether or not to adopt the particular by-law in question. That discretion must be exercised for the benefit of the inhabitants as a whole and in the prescribed manner, but when it has been properly exercised a Court of law cannot interfere."[25]

He went on to add that, in cases where the discretion was not exercised when it should have been, where bad faith or an ulterior motive was present, the court could review on grounds of unreasonableness.[26] He said that these were the only grounds on which the appellant could rely.

Schreiner JA's test for *ultra vires* is, it is submitted, more in line with *Kruse* and with South African judicial interpretation of Lord Russell's test. The distinction between the authority to make the by-law or regulation and the reasonableness of the end result is a very important one and has been recognised and applied in our courts.[27] The approach of the majority is, it is submitted, too formalistic, and ignores the necessity of testing the by-law by its application. The real issue, as Centlivres JA said in *R v Abdurahman*,[28] is not whether the by law is *intra* or *ultra vires* but whether its application results in partial and unequal treatment or any other type of unreasonable result.[29]

In *R v Hildick Smith*[30] regulation 179 of the Mines Works and Machinery Regulations was held to be invalid. It purported to reserve certain jobs on mines and works in the Transvaal and Orange Free State for Whites at the expense of competent Black or Coloured workers. The enabling provisions of Act 12 of 1911 were wide, it being skeleton legislation to be filled in by the governor-general. Notwithstanding this fact Tindall J held:

> "In testing the authority of the Governor-General under a power to make regulations I know of no ground for applying a principle more liberal than that laid down in *Kruse v Johnson*. If a regulation is unequal in its operation between different classes it can only be justified by powers conferred by the enabling statute."[31]

In concurring with Tindall J, Krause J added that:

> "Such restrictions of the right of the citizen to so employ skilled and competent coloured persons or of such persons to be so employed, could never have been contemplated by the Legislature and are unreasonable and even capricious and arbitrary."[32]

THE SCOPE AND INTERPRETATION

In dealing with the basis of judicial control of administrative legislation, Wade says:

> "In requiring statutory powers to be exercised reasonably, in good faith, and on correct grounds, the courts are still working within the bounds of the familiar principle of *ultra*

24 *supra*.
25 791–792.
26 792.
27 *R v Abdurahman* 1950 3 SA 136 (A) 143–144.
28 *supra*.
29 146G–H.
30 *supra*.
31 76.
32 90.

> *vires*. The analysis involves no difficulty or mystique. Offending acts are condemned simply for the reason that they are unauthorized. The court assumes that Parliament cannot have intended to authorize unreasonable action, which is therefore *ultra vires* and void."[33]

In *Kruse v Johnson* the validity of a by-law made by a county council was under consideration. The principles applied in that case have been extended to cover all forms of subordinate legislation where the jurisdiction of the court has not been excluded.[34] So in *R v Hildick Smith*[35] it was contended by the crown that the rule in *Kruse* did not apply because the regulation was not municipal legislation. Tindall J held that the rule in *Kruse* derived from a wider principle to the effect that powers entrusted to judicial or administrative officials of the state must be exercised without discrimination whether on the grounds of race, religion, social status or other characteristics.[36]

In *Minister of Posts and Telegraphs v Rasool*,[37] De Villiers JA was faced with the problem of whether the principles of *Kruse* could be extended to a proclamation issued by the postmaster-general under statutory authority.[38] The judge of appeal ruled:

> "The underlying principle in each case is that the Legislature cannot have intended to give authority to make unreasonable rules, whether in the form of by-laws or 'instructions.' "[39]

To this he added:

> "It may be that in the case of instructions issued *mero motu* by a public officer, the court will more carefully scrutinize and more rigorously apply the tests of what is 'unreasonable', than is the case of by-laws (for example of a municipality) which are subjected to many preliminary safeguarding provisions before they can be promulgated. The principles must however be the same."[40]

In *R v Carelse*[41] Davis J expressed no doubt that the *Kruse* principle applied to a regulation which purported to segregate beaches. This finding was made despite the fact that the regulation had received the approval of both houses of parliament prior to promulgation by the governor-general. This procedural safe-guard did not immunise the regulation against judicial scrutiny. Despite parliamentary approval it remained subordinate legislation, and could not be granted the protection granted only to statutes.[42] Centlivres JA expressed a similar view in *R v Abdurahman*[43] where a regulation purported to segregate railway carriages.

The courts, as a rule, show caution in interpreting subordinate legislation. Lord Russell CJ outlined the approach in the following terms:

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33 *op cit* 348
34 Wade *op cit* 753.
35 *supra*.
36 76.
37 *supra*.
38 Act 10 of 1911.
39 180.
40 *ibid*.
41 1943 CPD 242.
42 248.
43 *supra* 150A–B.

> "They [the by-laws] ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who administer them that they will be reasonably administered. This involves the introduction of no new canon of construction."[44]

The chief justice based this statement of the law on two grounds: that the body making the by-law was representative and clothed with ample authority and that the body, being local, would be better equipped to know the needs of the area than a judge. The fact that a by-law must go through a number of safeguarding procedures also appears to be of importance.[45] In *R v Carelse*,[46] after stating that instructions issued by the postmaster-general are not subject to safeguards (referring to *Rasool*'s case) Davis J went on to say that a court in pronouncing on the validity of such an instrument must

> "bear that fact in mind and be the more careful in its scrutiny and less 'benevolent' in its interpretation."[47]

Referring to the benevolent interpretation theory, Schreiner J said in *Amoils v Johannesburg City Council*:[48]

> "It seems to me that the quotations from the judgments of Lord Russell and Curlewis CJ are to be explained on the basis that the learned Judges were seeking to express the somewhat difficult conception of 'benevolent' interpretation and were, in effect, saying that a by-law should not, if reasonably possible, be construed to cover far fetched or extravagant cases the inclusion of which within the ambit of the by-law would render it invalid."[49]

Nolte points out that a justification of the "benevolent" interpretation principle is the representative character of the decision-making body.[50] However, in a large number of cases bodies making subordinate legislation in South Africa are not representative at all. He submits, first, that the existence of safeguards against unreasonable by-laws would be a better justification, and secondly, that there is no need for a "benevolent" interpretation principle at all because other well-established principles can provide sufficiently for the scrutiny of local laws. He submits further that the real principle applied is a literal approach in which a sensible meaning is given to the words of the by-law. Its application to local conditions is then examined objectively, and if it is clear that a reasonable person could not have applied such a by-law to the case, the by-law will be held to be invalid. He adds that

> "if a by-law fails to pass the test of established rules of interpretation no amount of benevolence will save it."[51]

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44 *Kruse v Johnson supra.*
45 *Minister of Posts and Telegraphs v Rasool supra* 180.
46 *supra.*
47 250.
48 1943 TPD 386.
49 390.
50 1959 *SALJ* 39.
51 *op cit* 44.

THE APPLICATION: CONSTRUCTION OR EFFECT?

In applying the *Kruse* principle, the situation may arise where legislation which is reasonable in construction may be unreasonable in effect. Furthermore, changing circumstances may result in subordinate legislation which was once reasonable becoming unreasonable.

In *George v Pretoria Municipality*[52] the court took the view that the subordinate legislation in question should be interpreted at its face value. This means that the reasonableness is to be judged on the interpretation of the enactment rather than by its effect in practice. It is submitted that this approach cannot be supported. First of all, it is not in accordance with *Kruse v Johnson,* and secondly it is out of step with other cases in point. In *Sinovich v Hercules Municipal Council*,[53] Watermeyer CJ said that reasonableness is a relative term, and that a by-law can be reasonable only in relation to circumstances.[54] Similarly, in *R v Hildick Smith*,[55] Tindall J succinctly stated the principle as follows:

> "But in my opinion Regulation 179 must be tested by its effect and that undoubtedly, as above stated, is to discriminate against a large section of the population on the ground of colour."[56]

In *R v Carelse*[57] Davis J raised the valid point that in *Kruse* Lord Russell spoke of by-laws being "partial and unequal in their operation."[58] In *R v Abdurahman*,[59] the court had before it a regulation that was *prima facie* reasonable. The appellant had been convicted in the Cape provincial division on a charge of inciting people to commit an offence in that he encouraged a number of people to enter railway carriages reserved for Whites in terms of a regulation. The court held (per Centlivres JA) that the regulation to a certain extent aimed at, and was capable of, impartiality and equality, but that in its application it was in fact partial and unequal.[60]

On the other hand, in *Amoils v Johannesburg City Council,*[61] Schreiner J said of the generally reasonable application of a by-law which was framed in unreasonable terms:

> "For a by-law that would be grossly unreasonable if applied in some cases covered by its language is also grossly unreasonable as a whole and cannot be saved by the fact that it could be reasonably applied to many or even the great majority of cases."[62]

In *S v Adams, S v Werner*,[63] counsel for Werner submitted that the validity of a proclamation[64] under the Group Areas Act[65] should be tested by its application.

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52 1916 TPD 501.
53 *supra.*
54 788.
55 *supra.*
56 76.
57 *supra.*
58 252.
59 *supra.*
60 144A and 144H–145A.
61 *supra.*
62 390.
63 1981 1 SA 187 (A).
64 Proc 83 of 1962.
65 Act 36 of 1966.

Rumpff CJ pointed out that two situations may arise; first, an instrument of subordinate legislation may be framed in unreasonable terms; secondly, its wording may be reasonable but its application unreasonable.[66] In the first situation the chief justice held that the normal rules of statutory interpretation would apply to decide its validity. With regard to the second situation he said:

> "Die ongeldigheid in so 'n geval hang af van beweerde feite en dit sou kon gesê word dat die bewyslas op die beskuldigde rus om met oorwig van waarskynlikhede te bewys dat die feite 'n onredelike toepassing aantoon."[67]

In the result, it is submitted that generally the reasonableness of subordinate legislation must be tested by its application,[68] but where it is framed in unreasonable terms and applied reasonably, the rules of statutory interpretation will operate. In this case, despite reasonable application, the subordinate legislation will be *ultra vires* none the less.

It is evident that in most cases (especially in the so-called discrimination cases) absolute equality or impartiality is almost impossible to achieve. When, therefore, does the inequality or partiality of a subordinate enactment warrant its being held *ultra vires*? In *R v Carelse*[69] Davis J approached the problem in the following manner:

> "In my opinion, to entitle a court to interfere with a regulation or by-law, involving a discrimination between White and Coloured, on the ground of unreasonableness, it must be one as to which it is shown that the discrimination is coupled with an inequality of treatment which is in all the circumstances manifestly unjust or oppressive."[70]

However, in *R v Abdurahman*,[71] Centlivres JA, bearing in mind the duty of the court to "hold the scales evenly between different classes of the community," held that a practice must be declared invalid if, in the absence of an act of parliament which authorises such discrimination, it results in partial or unequal treatment to a substantial degree.[72] In other words, mere technical inequality *per se* is insufficient to invalidate subordinate legislation on the ground of unreasonableness.[73]

EXCLUSION OF THE COURT'S JURISDICTION

Parliament, being sovereign, is free to do with its power what it pleases. Thus, in delegating its power, it can authorise the making of subordinate legislation, which would otherwise be unreasonable in the *Kruse v Johnson* sense. The effect

66 222F–G.
67 222G.
68 Counsel in *Adams and Werner* argued that, because reasonableness is determined by the application, as a matter of logic it must be determined at the time the validity is questioned. It is submitted that this approach is correct, practical and equitable but it has one drawback. In the case of a by-law framed in reasonable terms its validity may fluctuate due to changing circumstances. Unfortunately the court left this submission unanswered but it can be argued that it accepted it by implication.
69 *supra*.
70 253.
71 *supra*.
72 145B–C.
73 For a contrary view see the dissenting judgment of Gardiner AJA in *Minister of Posts and Telegraphs v Rasool supra* and the cases cited therein.

of such authorisation is to exclude the jurisdiction of the courts in this regard and so prevent the application of the *Kruse* test. Therefore the question whether the enabling act has conferred on the subordinate body power to enact unreasonably is of considerable importance.

Originally the law-making powers of the "corporations" were broadly and vaguely defined.[74] This meant that the courts could have taken the view that, since the by-law fell within the potentially wide area defined by the enabling act, the enabling authority must have foreseen that it might be unreasonable in its operation. In other words, the wide wording could be interpreted to mean that the enabling authority foresaw the by-law's being unreasonable in effect and hence must have impliedly given the power for its operation to be unreasonable.

The courts, however, tended to take the view that the power to enact unreasonably could not be inferred from looking at what the enabling authority intended.[75] Any limitation of their jurisdiction had to be clearly stated. It is submitted that this approach was a correct interpretation of the *Kruse dictum*[76] which aimed at crystallising a formula by which unreasonableness could be measured, and which was aimed at extending rather than limiting a court's jurisdiction. This may be said because the courts look at the formula and not at the intention of parliament (or other enabling authority) in deciding whether the enactment was unreasonable or not. Lord Russell put the issue as follows:

> "But it is in this sense (the context of the formula), and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded."[77]

The South African courts tended to take a similar line. The approach adopted is perhaps best summed up by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council*:[78]

> "It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights."[79]

The earlier South African cases which followed *Kruse* tended to require express authorisation to act unreasonably[80] but as a matter of logic the courts had to allow unreasonable subordinate legislation if the unreasonableness was sanctioned by necessary implication.[81] It is submitted that what was intended by necessary implication was power to act unreasonably which was evident from the wording of the statute. In *Minister of Posts and Telegraphs v Rasool*[82] Stratford ACJ said that the power to discriminate must be specifically given.[83] In *R v Abdurahman*,[84] Centlivres JA, in dealing with this *dictum*, stated:

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74 *Sinovich v Hercules Municipal Council supra* 803.
75 801.
76 *Minister of Posts and Telegraphs v Rasool supra* 173.
77 *supra* 100.
78 1920 AD 530.
79 552.
80 *Moses v Boksburg Municipality* 1912 TPD 659 661–662; *Williams and Adendorff v Johannesburg Municipality* 1915 TPD 106 126.
81 *R v Hildick-Smith supra* 69 77.
82 *supra* 167.
83 173.
84 *supra.*

> "I take it that such power can be specifically given either in express terms or by necessary implication."[85]

In applying a strict approach to power to act unreasonably, sanctioned by necessary implication, Van den Heever JA made it clear in *Bindura Town Management Board v Desai and Company*[86] that this power should not be "readily inferred." The Judge of Appeal went on to add that

> "unless the contrary appears it is to be presumed that the Legislature intended such powers to be exercised impartially and without discriminating incidence upon any particular class of the community."[87]

The decision of the appellate division in *Minister of the Interior v Lockhat*[88] marked a distinct change in emphasis with respect to enabling authority. The case involved a proclamation issued in terms of the Group Areas Act[89] affecting the respondents who were members of the Indian population group. The validity of Proclamation 152 of 1958 was attacked on a number of grounds, the most important being that the governor-general-in-council had not been given power to issue proclamations under the act which were unreasonable in effect. The court readily held that the proclamation was partial and unequal in effect and hence unreasonable.[90] In deciding whether the power to issue an unreasonable proclamation had been given Holmes JA held:

> "No such power is expressly given in the Group Areas Act; but it seems to me clearly implied. The Group Areas Act represents a colossal social experiment and a long term policy... Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future substantial inequalities."[91]

This *dictum* stands in stark contrast to the decision of the court *a quo* (per Henochsberg J) in *Lockhat v Minister of the Interior*.[92] It is submitted that the judge dealt correctly with *Kruse v Johnson* and subsequent case law when he stated:

> "Authority to do unreasonable things can be specifically given either in express terms or by necessary implication. I can find no such express terms in the Group Areas Act nor can I find anything which by necessary implication authorises discrimination coupled with partiality and inequality in treatment to a substantial degree."[93]

The real issue in *Lockhat's* case was whether the act gave the governor-general the power to enact unreasonably, not the foresight of the parliamentary draughtsmen with regard to the "foreseeable future." If parliament had foreseen the impartiality and inequality that proclamations under the Group Areas Act would cause, that is all the more reason to expect the act expressly to authorise such unreasonable effects.

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85 149B–C.
86 1953 1 SA 358 (A).
87 364A–B.
88 1961 2 SA 587 (A).
89 Act 77 of 1957.
90 602C.
91 602D–E.
92 1960 3 SA 765 (N).
93 786D–F.

The issue came before the appellate division again in *S v Adams; S v Werner.*[94] This case involved a member of the Indian population group and one of the Coloured group who were prosecuted for a breach of the Group Areas Act[95] in that they lived in suburbs designated as White group areas. The defence of necessity failed and Werner argued in addition that the proclamation in question[96] was *ultra vires* because of unreasonableness. The court held that the proclamation was indeed unreasonable,[97] but followed the *Lockhat* decision. Rumpff CJ held that since the legislature clearly foresaw the unreasonable effect of proclamations issued in terms of the act, the state president had been given the power to issue such proclamations. In short, the chief justice found, as in *Lockhat's* case, that the establishment of unreasonable group areas was impliedly authorised by the act. Van der Vyver criticises this finding. He says:

> "The implied provisions in statutory law do not stem from the legislature's presumed prophecies of future eventualities, but are a matter of logical inevitability emanating from the express provisions of the Act in question. The words used by the legislature may, on the one hand, express the meaning of the enactment in so many words. On the other hand, the express intention of the legislature may in some cases become entirely meaningless unless one assumes that the words used by the legislature include a certain complementary provision. In such cases the complementary provision may be regarded as an implied term of the enactment."[98]

CONCLUSION

It is submitted that on a correct application of the principles enumerated in *Kruse*, the test for unreasonableness of subordinate legislation is very simple. The crux of the test was stated by Centlivres JA as follows:

> "The crisp question in the present case is (1) whether regulation 20 or the application thereof is partial or unequal as between different classes and, if so (2) whether Act 22 of 1916 authorises such partiality or inequality."[99]

The first part of this formulation presents few problems. It should be remembered that the four "legs" of *Kruse* by which unreasonableness can be tested are not an exhaustive list.[100] Steyn has suggested two more grounds which, in terms of *Kruse*, would render subordinate legislation *ultra vires* on the ground of unreasonableness. He says:

> " 'n Besluit kan *by* ook onredelik wees in bedoelde sin omdat hy geheel en al *willekeurig* of *absurd*, of op 'n *onmoontlikheid* gerig is."[101]

The second part of the inquiry (ie authorisation to act unreasonably) has been diluted by the South African courts in the cases of *Lockhat*[102] and *Adams and*

94 *supra.*
95 Act 36 of 1966.
96 Proc 83 of 1962.
97 224E.
98 1981 *SALJ* 135 147.
99 *R v Abdurahman supra* 143H.
100 *Minister of Posts and Telegraphs v Rasool supra* 180.
101 Steyn *Uitleg van Wette* (1981) 242.
102 *supra.*

Werner.[103] This unfortunate deviation from *Kruse v Johnson* and the South African case law prior to 1961 has had the effect of emasculating *Kruse* as a "mini bill of rights of the common law." Furthermore, the above two decisions are a striking departure from the rule stated by Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council*,[104] that where the elementary rights of individuals are at issue, a strict interpretation should be placed on statutory enactments which purport to interfere with those rights.[105]

103 *supra.*
104 *supra.*
105 552. We would like to express our gratitude to professor Lawrence Baxter for his help and encouragement in the writing of this article.

It is this desire for consistency that is at the bottom of that respect for precedent which is so marked a feature of English law. (Per *Robson* in Justice and Administration Law 192.)

AANTEKENINGE

NOG EENS *NAIDOO V MOODLEY* – 'N REPLIEK

1 Inleiding

1 1 Die beslissing van regter Eloff in *Naidoo v Moodley* 1982 4 SA 82 (T) beslaan maar een en 'n halwe bladsye in die hofverslae, maar dit bied klaarblyklik genoeg stof tot nadenke om 'n groter volume van kommentaar te inspireer. Tot dusver is daar reeds twee besprekings van die beslissing gepubliseer, naamlik dié van skrywer hiervan (1983 *THRHR* 237–240), en dié van De Waal (1984 *THRHR* 115–118). Hoewel albei hierdie skrywers hulle instemming met sowel die gees as die resultaat van regter Eloff se uitspraak betuig (1983 *THRHR* 237 239; 1984 *THRHR* 115), getuig die uiteenlopende interpretasies wat die onderskeie skrywers aan die beslissing heg, van 'n grondliggende verskil in uitgangspunt met betrekking tot die mandament van spolie. 'n Debat oor die verskillende uitgangspunte kan verdere ontwikkeling van hierdie interessante regsfiguur net tot voordeel strek.

1 2 'n Aspek van die *Naidoo*-beslissing waaroor albei skrywers dit eens is, verdien ook hier vemelding aangesien die verskillende uitgangspunte wat hieronder ontleed sal word, ook die interpretasie van hierdie op die oog af eenvoudige punt beïnvloed. Dit handel naamlik oor die toepassing van die mandament van spolie op gevalle soos hierdie, waar nie die besit van 'n *saak* as sodanig gespolieer is nie, maar wel die sogenaamde besit van 'n *reg* of die sogenaamde *quasi*-besit van 'n *reg*. Deur die beslissing in die *Naidoo*-saak oor die boeg van spoliasie van applikant se *gebruik* van die elektrisiteit (as inherente element van sy okkupasie van die perseel) te gooi, het regter Eloff die feite in hierdie saak, heeltemal tereg, met die feite in 'n hele tradisie van vorige beslissings op een lyn gestel (sien veral *Nino Bonino v De Lange* 1906 TS 120; *Nienaber v Stuckey* 1946 AD 1049; *Sebastian v Malelane Irrigation Board* 1950 2 SA 690 (T); *Van Rooyen v Burger* 1960 4 SA 356 (O); *Rooibokoord Sitrus v Louw's Creek Sitrus Koöperatiewe Maatskappy* 1964 3 SA 601 (T); *Jansen v Madden* 1968 1 SA 81 (GW); *Van Wyk v Kleynhans* 1969 1 SA 221 (GW); *Beukes v Crous* 1975 4 SA 215 (NK)). In al hierdie beslissings het dit nie soseer oor die spoliasie van besit van 'n saak as sodanig gehandel nie, as oor die spoliasie van sogenaamde besit van 'n reg of *quasi*-besit.

Hoewel die howe al in sommige van hierdie beslissings die kluts kwyt geraak het met die toepassing van die beginsels van die mandament van spolie op die afwykende feite in sulke sake (juis omdat die korrekte teoretiese verklaring vir die uitbreiding van die mandament van spolie na sulke gevalle onduidelik was:

sien hieroor 1983 *SALJ* 689–699), kan daar in beginsel geen besware teen sodanige uitbreiding bestaan nie, solank die beginsels van die mandament korrek toegepas word (op grond van die korrekte teoretiese verklaring van die uitbreiding). 'n Goeie voorbeeld van die korrekte benadeling is te vinde by Du Plessis (vonnisbespreking van *Beukes v Crous* 1975 4 SA 215 (NK) in die 1976 *Bulletin* van die Fakulteit Regte PU vir CHO 27 30–31). Volgens Du Plessis kan sogenaamde "onliggaamlike sake" soos servitute, vruggebruik en selfs vorderingsregte ook, vir die doeleindes van die mandament van spolie, sogenaamd "besit" of "*quasi*-besit" word, maar dit beteken in werklikheid net dat *die daadwerklike gebruik of die uitoefening van bevoegdhede wat normaalweg uit die genoemde regte voortspruit, deur die gespolieerde uitgeoefen is. Daar word dan in sodanige gevalle nie gekyk of die betrokke reg aan die gespolieerde toegekom het nie, maar of die gespolieerde wel daadwerklik die bevoegdhede wat uit sodanige reg sou voortspruit, gebruik of uitgeoefen het.* Op hierdie basis kan daar ook geen besware teen sodanige uitbreiding wees nie (Sonnekus maak wel in sy *Sakereg Vonnisbundel* (1980) 54 56 daarteen beswaar). Dit is trouens geen werklike uitbreiding nie – die toepassing van die mandament van spolie is juis in hierdie gevalle aanvaarbaar indien 'n mens die doel van die mandament nie in die beskerming van besit soek nie, maar in die beskerming van die regsorde teen onnodige en onregmatige eierigting. Iemand soos De Waal, wat wel die doel van die mandament van spolie in die beskerming van besit soek, behoort inderdaad besware teen sodanige toepassing van die mandament te hê aangesien daar geen egte besitsverhouding tussen 'n spesifieke regsubjek en 'n spesifieke saak ter sprake is nie.

'n Verdere beswaar teen die toepassing van die mandament in gevalle soos hierdie is deur die respondent in die *Naidoo*-saak geopper, naamlik dat dit die mandament tot beskikking van persone stel wat daarmee indirek die remedie wil misbruik om spesifieke nakoming van kontraktuele verpligtinge af te dwing. Dit is waar dat die mandament nie vir daardie doel misbruik moet word nie, maar dit is inderdaad ook nie wat in die *Naidoo*-saak gebeur het nie. Die bestaan van kontraktuele verpligtinge tot lewering van die elektrisiteit behoort juis vir die doeleindes van die mandament irrelevant te wees aangesien die regte en aansprake van die partye daardeur ten onregte ter sprake sou kom. In hierdie geval het die hof egter nie die respondent gelas om die nakoming van sy kontraktuele verpligtinge teenoor die applikant te herstel nie, maar om die *status quo ante* wat deur sy onregmatige eierigting versteur was, te herstel. Die *status quo ante* is vóór die spoliasie juis daardeur gekenmerk dat die applikant – afgesien van die regmatigheid daarvan – daadwerklike fisiese gebruik van elektrisiteit uitgeoefen het deur die okkupasie van die betrokke perseel. Gebruik van die elektrisiteit was dus 'n deel van die fisiese of feitelike gebruiksituasie wat bestaan het. Daarom kan daar met hierdie toepassing van die beginsels van die mandament geen fout gevind word nie.

1 3 'n Verdere aspek van die twee skrywers se besprekings wat net kortliks vermelding verdien, betref die werkswyse wat in hierdie skrywer se eerste bespreking gevolg is. De Waal beweer naamlik dat hierdie skrywer in die bespreking van veral die onmoontlikheidsvraag "'n kunsmatigheid in sy argument [inbou] wat meebring dat hy heelwat meer in hierdie beslissing lees as wat daar staan en dit dan as steun gebruik vir 'n standpunt wat myns insiens vir ernstige kritiek vatbaar is" (1984 *THRHR* 115 118). Dit is natuurlik waar dat die hele vraag na die juridiese aard van elektrisiteit en die verweer van onmoontlikheid nooit deur regter Eloff aangeraak is nie, maar die feit dat 'n hof 'n bepaalde beslissing oor 'n bepaalde boeg gooi, verhoed die regswetenskaplike natuurlik nie om nogtans die teoretiese en hipotetiese moontlikhede van 'n bepaalde feitestel te verken nie – dit is eintlik jammer dat hierdie faset van vonnisbesprekings somtyds afgeskeep word. Die huidige skrywer se eerste bespreking moet in hierdie hipotetiese lig beoordeel word (vgl 1983 *THRHR* 237 238: "Hierdie beskouing [van die hof] verhoed 'n mens egter nie om te wonder of dit ook moontlik sou wees . . ." en wat daarop volg). Daar word dus aanvaar dat geeneen van die standpunte oor die onmoontlikheid van herstel die *Naidoo*-saak as gesag kan gebruik nie, maar die hipotetiese verkenning van die betrokke feitestel bring tog bepaalde interessante implikasies vir die aanvaarbaarheid van die verskillende standpunte duideliker na vore.

1 4 Die werklike geskilpunt tussen die genoemde twee skrywers lê eintlik op 'n heel ander vlak. Dit raak in die eerste plek die volgende twee fasette van die toepassing van die mandament van spolie: (a) wat is die werklike doel van die mandament – beskerming van die regsorde, of beskerming van besit? en (b) is die verweer van onmoontlikheid van herstel 'n geldige en aanvaarbare verweer teen die mandament? Streng gesproke moet die antwoord op laasgenoemde vraag uit die antwoord op eersgenoemde vraag voortspruit, sodat hier eintlik net een geskilpunt bestaan: die ware doel en funksie van die mandament van spolie. Die twee skrywers werk vanuit twee geheel en al teenoorstaande standpunte in hierdie verband: De Waal aanvaar dat die mandament in die eerste plek op die beskerming van *besitsverhoudinge* ingestel is, terwyl die huidige skrywer van mening is dat die mandament in die eerste plek op die handhawing van die *regsorde* ingestel is.

2 Doel van die Mandament

2 1 Ten einde 'n transendentale kritiek van die onderskeie standpunte oor die doel van die mandament van spolie te kan skryf, is dit vooraf nodig om die presiese strekking van die verskillende standpunte duidelik en sistematies te ontleed.

De Waal verkies om die mandament van spolie nie as 'n remedie te sien wat in die eerste plek die regsorde teen eierigting en vredesbreuk beskerm nie. Daarom beskryf hy die mandament as "'n regsmiddel wat besitsverhoudinge beskerm *ten einde* te verhoed dat die reg in eie hande geneem word en die

regsorde sodoende versteur word" (1984 *THRHR* 115 118). Elders stel hy dit duidelik dat die herstel van besit, as 'n besondere verhouding tussen 'n spesifieke regsubjek en 'n spesifieke saak, by toepassing van die mandament van spolie voorop staan (sien De Waal *Die Moontlikheid van Besitsherstel as Wesenselement vir die Aanwending van die Mandament van Spolie* (ongepubliseerde LLM-verhandeling Universiteit van Stellenbosch (1982)) 91; asook "Die Mandament van Spolie – Meer as Besitsherstel?" 1978 *Responsa Meridiana* 275–278).

Die enigste logiese interpretasie van hierdie twee stellings in hulle onderlinge samehang kan sistematies soos volg uiteengesit word: (a) besit is 'n besondere regsverhouding tussen 'n spesifieke regsubjek en 'n spesifieke saak; (b) die mandament van spolie is 'n regsmiddel wat in die besonder op die beskerming van besit as sodanig gerig is; (c) wat die regspreserverende funksie van die mandament van spolie betref, staan hierdie funksie nie uit as die primêre funksie van die regsmiddel nie, maar moet daar eerder gesê word dat die mandament die regsorde teen eierigting en vredesbreuk beskerm net soos ander regsreëls dit doen; (d) die mandament beskerm die regsorde dus teen eierigting en vredesbreuk juis deur besit te beskerm, naamlik deur 'n legale en geïnstitusionaliseerde regsweg te skep waarlangs besit beskerm kan word sonder om eierigting aan te wend.

Die feit dat De Waal ontken dat die mandament 'n unieke en buitengewone regspreserverende funksie vervul, impliseer dat hy die regspreserverende funksie van die mandament op presies dieselfde basis as die regspreserverende funksie van ander regsmiddels soos die *actio legis Aquiliae* of die *actio rei vindicatio* benader. Die opvallende is dat hierdie ander regsmiddels se regspreserverende funksie in 'n sekere sin in die *voorkoming* van eierigting gesien kan word – die *actio legis Aquiliae* voorkom eierigting en gevolglik vredesbreuk deur 'n legale en geïnstitutionaliseerde regsweg daar te stel waarlangs die partye se geskil oor die betaling van skadevergoeding besleg kan word, net soos die *actio rei vindicatio* 'n legale en geïnstitutionaliseerde regsweg daarstel vir die beslegting van die partye se geskil oor die eiendomsreg op 'n betrokke saak. De Waal meen dus waarskynlik dat die mandament van spolie eierigting en gevolglik vredesbreuk voorkom deur 'n legale en geïnstitusionaliseerde regsweg (die mandament van spolie) daar te stel waarlangs die partye se geskil oor besit opgelos kan word. Dit beland De Waal egter onmiddellik in 'n onverkwiklike teenstrydigheid.

2 2 Die *actio rei vindicatio* beskerm eiendomsreg deurdat 'n legale remedie vir die beslegting van eiendomsgeskille daargestel word, en terselfdertyd word die regsorde beskerm omdat sodanige geskille nie deur middel van eierigting besleg hoef te word nie. Dieselfde konstruksie kan op aksies soos die *actio legis Aquiliae*, die *actio iniuriarum* en die meeste ander remedies toegepas word, sodat 'n mens kan sê dat die meeste regsreëls die regsorde indirek beskerm deur die direkte beskerming van individuele regte *langs 'n legale regsweg* te reël. Die probleem is dat dieselfde konstruksie nie sonder meer op die mandament van spolie toegepas kan word nie.

Die enigste manier waarop bogenoemde konstruksie op die mandament van spolie toegepas kan word, is om te sê dat die mandament van spolie die regsorde *indirek* beskerm deur die *direkte* beskerming van individuele regsverhoudinge (naamlik besit) *langs 'n legale regsweg* te reël, met ander woorde deur die mandament van spolie as alternatief vir eierigting aan te bied in die oplossing van besitsgeskille (dit is myns insiens 'n billike en getroue weergawe van wat De Waal inderdaad sê). Net soos die verontregte eienaar ter wille van die regsorde gedwing word om sy eiendomsreg deur middel van die *actio rei vindicatio* eerder as deur eierigting te realiseer, word die verontregte besitter, aldus De Waal, gedwing om ter wille van die regsorde sy aanspraak op besitsherstel deur middel van die mandament van spolie te realiseer eerder as deur eierigting. Die regspreserverende funksie van die mandament word dus beperk tot die voorkoming van eierigting aan die kant van die gespolieerde. Hierdie konstruksie hou twee ernstige teenstrydighede in: (a) dit is baie duidelik uit al die bronne oor hierdie aksie dat die moontlike toekomstige eierigting van die gespolieerde nie die inspirasie agter die mandament is nie, maar wel die *afgehandelde eierigting van die spoliator*; en (b) as die mandament gesien word as 'n legale weg waarlangs die gespolieerde sy aanspraak op besit kan realiseer, is die gevolg onvermydelik dat die reg of aanspraak van die onderskeie partye in só 'n prosedure oorweeg moet word – iets wat duidelik juis nie in die mandament gedoen word nie.

2 3 Die enigste weg waarlangs De Waal die gevolge van hierdie teenstrydighede kan vermy, is deur te erken dat die mandament (a) die afgehandelde eierigting van die spoliator in die oog het eerder as die moontlike toekomstige eierigting van die gespolieerde, en (b) die voorafgaande besit van die gespolieerde sal herstel afgesien van die regmatigheid daarvan. Albei hierdie onvermydelike konklusies onderskei die mandament van spolie van enige ander regsmiddel wat die regspreserverende funksie daarvan betref: (a) in geen ander regsmiddel word reeds afgehandelde eierigting as sodanig bestry nie; en (b) in geen ander regsmiddel word die herstelbevel gemaak afgesien van die regmatigheid van die herstelde regsposisie nie. Hierdie oorwegings dwing 'n mens om te erken dat die regspreserverende funksie van die mandament van spolie op 'n heel ander vlak en op 'n heel ander wyse funksioneer as dieselfde funksie van ander regsreëls – die mandament van spolie moet dus *in die besonder* as 'n remedie vir die beskerming van die regsorde gesien word. In die lig hiervan was De Waal (1978 *THRHR* 115 118) se opmerkings miskien ietwat oorhaastig en oorvereenvoudig.

2 4 Daarteenoor wil die huidige skrywer hom juis skaar by diegene wat van mening is dat die mandament van spolie as regsmiddel deur sy unieke regspreserverende of regspolitieke funksie gekenmerk word (sien bv weer die onlangse artikel van Klopper 1983 *Obiter* 71–112 veral 81). Dit impliseer dat die regspreserverende funksie van die mandament van spolie, vergeleke met ander regsmiddels, op 'n eiesoortige vlak funksioneer. Waar die regspreserverende funksie van die meeste regsreëls as *die voorkoming van eierigting deur die voorsiening van 'n legale alternatief* beskryf kan word, moet die funksie van die mandament

gesien word as die *bestryding van reeds afgehandelde en onregmatige eierigting, deur die summiere en absolute omkering van die gevolge daarvan.* Vir die bereiking van daardie doel word die *status quo ante* summier herstel, sonder enige ondersoek na die regmatigheid van die vooraf bestaande posisie, of na die meriete van die partye se onderskeie aansprake in daardie verband (vgl *Nino Bonino v De Lange* 1906 TS 120 122). Uit die bykans onoorsigtelike volume van bronne wat hierdie interpretasie van die stelreël dat *spoliatus ante omnia restituendus est* bevestig, kan die volgende as voorbeelde aangehaal word:

> "Wanneer in dit hoofdstad van den Oranjevrijstaat het toegelaat zou kunnen worden dat een bende van achttien personen zou gaan om op eigen gezag goederen weg te voeren terwijl die zijn in het bezit van anderen waartoe zij geen recht van ingang hadden, dan zou men bijna kunnen zeggen dat de gerechtshoven maar moeten gesloten worden, want 'de sterkste man is baas'. Dit zou slaan aan den wortel van die veiligheid der maatschappij" (per r Buchanan in *Curatoren van 'Pioneer Lodge No 1' v Champion* 1879 OFS 51 54).

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do so as a preliminary to any inquiry or investigation into the merits of the dispute" (per hr Innes in *Nino Bonino v De Lange* 1906 TS 120 122).

> "[T]he injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands" (per ar Van Blerk in *Yeko v Qana* 1973 4 SA 735 (A) 739G).

> "Die hoofdoel van die mandament is om te verhoed dat vredesbreuk gepleeg word deurdat die reg in eie hande geneem word. Daarom is die grondliggende beginsel by die mandament van spolie die volgende stelreël: *spoliatus ante omnia restituendus est*" (Van der Merwe *Sakereg* (1979) 88).

2 5 Die regspreserverende funksie van die mandament is egter nie net 'n kwessie van prioriteit nie – die unieke rol wat die mandament van spolie in hierdie verband speel, sluit juis enige ander doel uit. Daarom kan daar nie gesê word – soos De Waal (1984 *THRHR* 115 118) doen – dat die mandament sy *regspolitieke doel* bereik juis *deur besitsverhoudinge te beskerm* nie. Juis omdat die gevolge van spoliasie summier ongedaan gemaak word sonder enige ondersoek na die regmatigheid van die vooraf bestaande verhouding van fisiese beheer of gebruik van 'n saak, word ook *onregmatige* besitters of houers deur die mandament van spolie in die *status quo ante* herstel, en dit is in hierdie gevalle wat die begrip *besitsbeskerming* problematies raak. As die mandament van spolie daarvoor voorsiening maak dat 'n onregmatige verhouding van beheer of gebruik van 'n saak summier in ere herstel word nadat dit versteur is, kan daar sekerlik nie sonder meer gesê word dat die *onregmatige verhouding* sodoende deur die reg *beskerm* word nie – die reg beskerm immers net regserkende belange of regte? Of moet 'n mens hier 'n onregmatige reg konstrueer? Dit is regswetenskaplik veel suiwerder om te erken dat die reg wel van die bestaan van hierdie verhouding kennis neem, en dit *teen onregmatige eierigting* in stand sal hou, nie om die verhouding as sodanig te beskerm nie, maar om die *regsorde self* te beskerm teen die eierigting.

Daarom is die huidige skrywer van mening dat die mandament van spolie glad nie daarop ingestel is om besitsverhoudinge te beskerm nie. Daar word bloot van die bestaan van feitelike verhoudings tussen regsubjek en saak kennis geneem sodra sulke verhoudings 'n minimum van stabiliteit bereik, met die gevolg dat enige onregmatige versteuring daarvan moontlik tot vredesbreuk kan lei. Ter wille van die regsorde sal sodanige versteurings dan ook summier ongedaan gemaak word deur die *status quo ante* te herstel sonder enige navraag na die regmatigheid van die *status quo ante*. Die hele werking van hierdie remedie kan dus volledig en sinvol verklaar word sonder om na *besit* te verwys. Vanweë die feit dat *besit* in ieder geval só 'n vae en verwarrende term is (sien bv Van der Walt se pleidooi vir 'n meer wetenskaplike en konsekwente aanwending van die term in 1983 *THRHR* 332–339 335), en siende dat die mandament deur eienaars, *bona fide possessores, mala fide possessores*, regmatige houers en onregmatige houers gebruik kan word, is dit onnodig en misleidend om die remedie net aan *besitsverhoudings* te koppel. Die vereistes vir die mandament van spolie dui daarop dat enige fisiese beheer op of gebruik van 'n saak, wat met 'n bepaalde ingesteldheid uitgeoefen word, voldoende sal wees om die verhouding as 'n regsfeit (deel van die *status quo*) te kenmerk. Die skrywer hiervan wil dus aan die hand doen dat die mandament nie 'n remedie vir die beskerming van besit genoem moet word nie, omdat die mandament (a) in die eerste plek op die beskerming van die regsorde ingestel is, en nie op die beskerming van die individuele reg op besit nie; en (b) nie net besitters van die remedie gebruik kan maak nie. Dit is regswetenskaplik veel meer aanvaarbaar om te sê dat die mandament van spolie in die eerste plek daarop ingestel is om die regsorde teen onregmatige eierigting te beskerm, en dat persone wat 'n saak regmatig beheer of gebruik, indirek die voordeel van daardie beskerming geniet, hoewel ander ook die mandament kan instel. Wanneer besit dus inderdaad deur toepassing van die mandament beskerm word, moet dit as 'n indirekte bonus beskou word eerder as die doel van die remedie.

2 6 Die *Naidoo*-beslissing bied juis 'n goeie illustrasie van hierdie uitgangspunt. Ten tyde van die spoliasiehandeling was die applikant in werklikheid 'n taamlik moedswillige en *mala fide* onregmatige okkupeerder van die perseel (en gebruiker van die elektrisiteit). Om te sê dat die mandament van spolie aangewend is om hom in daardie posisie te beskerm, kom uiters gekunsteld voor – waarom sou die hof moeite doen om 'n *mala fide*-okkupeerder se regsposisie as sodanig in stand te hou? Die enigste sinvolle rede daarvoor is dat herstel van die *status quo ante* in belang van die regsorde is, maar dan is die hele prosedure gerig *teen* die spoliator se optrede *in belang van* die regsorde, met die gespolieerde as bykans toevallig bevoordeelde. Die howe het al uitdruklik te kenne gegee dat die onregmatig bevoordeelde se posisie nie daardeur gekondoneer word nie (*De Jager v Farah and Nestadt* 1947 4 SA 28 (W) 35; *Kelly v Kok* 1948 3 SA 522 (A) 530; *Yeko v Qana* 1973 4 SA 735 (A) 739A; *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K) 117A). Die feit dat die howe so min oor die *kwaliteit* van die vooraf bestaande verhouding bekommerd is, is 'n aanduiding

van die feit dat die herstel daarvan primêr in belang van die regsorde gedoen word en nie in belang van die betrokke regsubjek nie. Daarom is De Waal se suggestie (*Verhandeling* 53 90) dat die hof in die *Fredericks*-saak deur vekeerde oorwegings beïnvloed is, ongegrond. Die verwerplike optrede van 'n eiemagtige spoliator is nie in die mandament van spolie 'n onbenullige oorweging wat aan die juridiese konstruksie van 'n besitsverhouding ondergeskik is nie, maar juis dié belangrikste oorweging van almal. Nie die besit van die gespolieerde nie, maar die optrede van die spoliator is die fokuspunt van die mandament.

3 Die Verweer van Onmoontlikheid

3 1 Hierdie verweer is nooit in die *Naidoo*-saak geopper nie, maar die besondere feite van daardie saak maak dit tog moontlik om bepaalde baie interessante implikasies vir die verskillende standpunte oor die verweer van onmoontlikheid uit die beslissing af te lei.

3 2 De Waal (1984 *THRHR* 115 116) omskryf die verweer van onmoontlikheid van herstel as "die objektiewe onmoontlikheid aan die kant van die *spoliator* om die *status quo ante* te herstel, aangesien die gespolieerde saak vernietig, wesenlik beskadig of aan 'n *bona fide*-buitestaander vervreem is." Daarmee word aanvaar dat (a) herstel nog moontlik is solank die saak nog herstel of teruggekry kan word; (b) herstel of herinstallering van die saak, benewens blote teruggawe daarvan, deur die hof gelas kan word. (Sien verder hieroor De Waal *Verhandeling* 93 e v; Delport en Olivier *Sakereg Vonnisbundel* (1981) 99; Erasmus Van der Merwe en Van Wyk *Lee and Honoré – Family, Things and Succession* (1983) 251.)

3 3 De Waal skaar hom aan die kant van diegene wat van mening is dat die verweer van onmoontlikheid van herstel, soos hierbo omskryf, 'n geldige verweer teen die mandament van spolie daarstel. Hy bied ook die enigste poging tot 'n sistematiese of regswetenskaplike verantwoording van hierdie standpunt in sy verhandeling. (Sien verder 1978 *Responsa Meridiana* 275–278; Van der Merwe *Sakereg* 92; Sonnekus *Sakereg Vonnisbundel* 55 en 1979 *TSAR* 168 171–172; Delport en Olivier *Sakereg Vonnisbundel* 99–100; Schoeman *Silberberg and Schoeman – The Law of Property* (1983) 141–144; Erasmus van der Merwe en Van Wyk *Lee and Honoré – Family, Things and Succession* 251.) Die beslissings wat gewoonlik vir hierdie standpunt as gesag aangevoer word, is veral *Potgieter v Davel* 1966 3 SA 555 (O); *Burnham v Neumeyer* 1917 TPD 630; *Louw v Herman* 1922 CPD 252; *Elastocrete v Dickens* 1953 2 SA 644 (SR) en *Jivan v National Housing Commission* 1977 3 SA 890 (W).

3 4 De Waal is die enigste van hierdie persone wat sy standpunt teoreties motiveer, en die motivering kan sistematies soos volg saamgevat word (sien *Verhandeling* 90): (a) Besit is 'n besondere verhouding tussen een regsubjek en een saak; (b) die mandament van spolie is in die eerste plek daarop gerig om daardie besondere verhouding te beskerm; (c) die besondere verhouding gaan tot niet by vernietiging of onomkeerbare vervreemding van die saak; (d) daarna

kan die besondere verhouding nie meer *herstel* word nie, en is die mandament van geen verdere nut nie. Dit is dadelik duidelik dat De Waal die teoretiese motivering vir sy besondere standpunt oor die verweer van onmoontlikheid van herstel suiwer op sy siening van die doel van die mandament van spolie baseer, en wel op die siening dat die mandament net op die herstel van die versteurde besitsverhouding gerig is. Hierdie veronderstelling is reeds hierbo gekritiseer, en streng gesproke verval die basis van De Waal se argument daarmee.

3 5 Die teenoorstaande standpunt hou in dat onmoontlikheid van herstel nie in beginsel 'n geldige verweer teen die mandament is nie. Hierdie standpunt is al ingeneem deur Scholtens 1966 *ASSAL* 221–222; Blecher 1978 *SALJ* 8 11 en die huidige skrywer 1983 *THRHR* 237 238–239. Dieselfde benadering is ook gevolg in *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K). Die kern van hierdie benadering val telkens terug op die doel van die mandament van spolie as regsmiddel vir die beskerming van die regsorde as sodanig teen eierigting en vredesbreuk: as die regsorde effektief teen eierigting en vredesbreuk beskerm moet word, kan hierdie verweer in beginsel nie aanvaar word nie.

3 6 Die kern van die huidige skrywer se beswaar teen eersgenoemde groep skrywers is juis geleë daarin dat hulle die doel van die mandament van spolie uit die oog verloor wanneer hulle hierdie verweer behandel, en sodoende allerlei *relevante* gegewens uit die oog verloor, en allerlei *irrelevante* gegewens in die spel bring. So word daar byvoorbeeld van die ongerief of nadeel van die spoliator gewag gemaak, en hierdie ongerief word dan teen die tydelike voordeel van die gespolieerde opgeweeg (De Waal 1984 *THRHR* 115 117), terwyl albei oorwegings eintlik irrelevant is. Die relatiewe voordeel en nadeel van die partye by 'n mandament van spolie is streng gesproke irrelevant vanweë die robuuste karakter van 'n remedie wat in belang van die regsorde self aangewend word: "The essence of the remedy by way of spoliation is that it is a robust one. Discretion and considerations of convenience do not enter into it" (per r Addleson in *Runsin Properties v Ferreira* 1982 1 SA 658 (SOK) 670G; sien ook Taitz 1982 *SALJ* 351–355). In die proses word die werklik relevante oorweging, naamlik die behoud van 'n regsorde, uit die oog verloor omdat die individuele nadeel van die spoliator op die voorgrond geplaas is. Feit is dat die nadeel van die spoliator gewoonlik in verhouding sal wees tot sy onregmatige optrede en gevolglik tot die gevaar wat hy vir die regsorde geskep het. Daarmee word nie gesê dat die individu se belang voor die algemene belang moet swig nie, maar wel dat die individuele belang van beide partye in hierdie aksie irrelevant is.

3 7 Vir sover die verweer van onmoontlikheid van herstel dus aanvaar kan word, kan dit alleen geskied binne die grense van die werklike doel van die mandament van spolie. As dit eers vasstaan dat die *status quo ante* nie in belang van die gespolieerde nie, maar in belang van die regsorde self herstel moet word, kan daar opnuut na die feit van onmoontlikheid van herstel gekyk word. Die belangrike feit wat dan vasstaan, is dat nie soseer die besit of die voordeel of die reg van die gespolieerde herstel moet word nie, maar wel die stand van

sake soos dit vooraf was. Dit kan sonder twyfel in sommige omstandighede absoluut en totaal onmoontlik en onsinnig wees om die vorige stand van sake te herstel, en dan is die verweer van onmoontlikheid iets wat ernstig deur die verhoorhof beoordeel sal moet word. Die blote feit dat die betrokke saak vernietig of vervreem is, maak dit egter nie noodwendig onmoontlik om die vorige stand van sake te herstel nie: 'n nuwe klomp sinkplate sal die plakkerhuis net so goed weer opbou as wat aanskakeling van die elektrisiteitstoevoer weer gebruik van die perseel sal herstel.

3 8 Die voordeel van die *Naidoo*-saak is dus daarin geleë dat dit uitwys dat (a) die verweer van onmoontlikheid eintlik nie by gevalle van *gebruik* of sogenaamde *quasi*-besit werk nie, en (b) die verweer van onmoontlikheid van herstel by generieke sake en verbruikbare sake moontlik irrelevant is aangesien sodanige sake natuurlikerwys *vervang* kan word. Die teoretiese waarde van die *Naidoo*-saak is daarin geleë dat dit 'n lastige alternatief vir die *Fredericks*-saak bied: in daardie saak kon die applikant die verweer van onmoontlikheid moontlik ook ontwyk het deur te sê dat hy nie soseer in besit van die individuele sinkplate geïnteresseerd is nie as in die gebruik van die plakkerswoning. Enige sinkplate kan die woning herstel vir sy gebruik, net soos enige spesifieke hoeveelheid elektriese krag die perseel kan herstel vir gebruik. Daarmee word eintlik net aangedui dat die *aard en bestemming van die betrokke saak* moontlik 'n faktor kan wees by beoordeling van hierdie verweer. Só kan die aard en bestemming van 'n unieke skildery die onmoontlikheid van herstel byvoorbeeld hoogs relevant maak, net soos die aard en bestemming van sinkplate of elektrisiteit of water dit irrelevant maak.

3 9 Wat eintlik hier bepleit word, is 'n meer *genuanseerde* beoordeling van die feit dat die vorige stand van sake nie herstel kan word nie in die lig van die feit dat die herstel van die *status quo ante* nie die individuele belang van die gespolieerde dien nie, maar die regsorde. In die genuanseerde benadering sal nie die nadeel of voordeel van die betrokke partye voorop staan nie, maar wel die nadeel van die regsorde – die vraag sal dus wees hoe die feit van onmoontlikheid verdiskonteer kan word in die belang van die regsorde. Faktore wat relevant mag wees, is onder andere die volgende: (a) die aard en bestemming van die betrokke saak; (b) die rede vir onmoontlikheid; (c) die sprake van onmoontlikmaking deur die spoliator, of onmoontlikwording buite sy beheer en dies meer. Wanneer dit werklik onmoontlik blyk te wees om die *status quo* te herstel, moet daar 'n alternatief gevind word, weer eens in die lig van die feit dat die regsorde gedien word. Dit hou byvoorbeeld in dat skadevergoeding aan die gespolieerde *nie* 'n aanvaarbare alternatief is nie aangesien sy belange nie op die spel is nie.

4 Slotbeskouing

4 1 Daar word aan die hand gedoen dat die mandament van spolie as 'n remedie vir die beskerming van die regsorde teen eierigting en vredesbreuk gesien moet word. Dit impliseer dat die mandament nie ingestel is op die beskerming van besit nie, hoewel sekere regmatige houers en gebruikers van sake 'n mate van gemoedsrus uit die insidentele beskerming van hulle regte mag put.

4 2 In die lig van die werklike doel van die mandament is die feit van onmoontlikheid van herstel nie gelyk aan 'n afdoende verweer vir die respondent nie. Daarom moet die feit van onmoontlikheid op 'n genuanseerde wyse toegepas en beoordeel word. In gevalle van werklike onmoontlikheid moet 'n alternatief gevind word vir herstel. Só 'n alternatief sluit nie skadevergoeding aan die gespolieerde in nie. 'n Beter moontlikheid is om in ieder geval die bevel tot herstel te verleen en om die besondere omstandighede van die onmoontlikmaking of onmoontlikwording, tesame met die meriete van die partye se aansprake op beheer van die saak, in 'n eventuele klag van minagting van die hof teen die respondent te ondersoek. Daardeur word die belang van die regsorde meer konsekwent en billik gehandhaaf as deur die blote kwytskelding van die respondent van sy verpligting om te herstel.

4 3 De Waal se siening van die mandament word oorheers deur die motief van besitsherstel, wat by hom sterk in die teken van individuele belang geïnterpreteer word. Só 'n benadering is egter onversoenbaar met die werklike regspolitieke funksie van die mandament van spolie, en gevolglik word die werklike regspolitieke funksie vervang met 'n teoretiese konstruksie wat aan die regspolitieke funksie van alle ander regsmiddels gelyk gestel word, maar wat deur innerlike teenstrydighede verskeur word. Die resultaat is 'n onbevredigende dubbelslagtigheid in die teoretiese verklaring van verskillende aspekte van die mandament, ook met betrekking tot die verweer van onmoontlikheid van herstel. Daarteenoor verkies die skrywer hiervan 'n benadering wat van die ondubbelsinnig regspolitieke interpretasie van die mandament uitgaan, en waarin alle aspekte gevolglik vanuit daardie vertrekpunt verklaar word. Daar word aan die hand gedoen dat hierdie benadering nie alleen in ooreenstemming met die belangrikste gesag oor die onderwerp is nie, maar ook die meeste van die teoretiese probleme met hierdie remedie uitskakel. Terselfdertyd bewaar dit 'n belangrike bousteen in die Romeins-Hollandse tradisie waardeur die regsorde se voorkeur vir legale optrede sinvol beskerm word.

AJ VAN DER WALT
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SKADEVERGOEDING WEENS DIE VERLIES AAN TOEKOMSTIGE VERDIENSTE OF ONDERHOUD, EN ONREGMATIGE BEDRYWIGHEDE IN DIE VERLEDE

"[D]ie misdaad van die vaders [word] besoek aan die kinders" (Exodus 20 v 5). Die letterlike toepassing van hierdie Bybelse middellike strafnorm om die ontvanklikheid al dan nie van 'n afhanklike se deliktuele vorderingsreg te bepaal, sal onredelik en regtens ongegrond wees. Dieselfde geld die gebruikmaking van die verwerplike *versari in re illicita*-idee (sien *S v Van der Mescht* 1962 1 SA 521(A); *S v Bernardus* 1965 3 SA 287(A)) om 'n benadeelde se onregmatige

bedrywighede in die verlede op 'n huidig onbesmetlike vorderingsreg te projekteer. Die ongekwalifiseerde toepassing van sekere gewysdes óf die onnadenkende pleitopsteller sal presies bogemelde onlogiese gevolge in werking stel. Opsommenderwys wentel die probleem eerstens om die geval waar die eiser weens die optrede van 'n ander sodanig beseer word dat hy geheel of gedeeltelik nie meer die arbeidsmark kan betree om homself en sy afhanklikes te onderhou nie, óf tweedens om die geval waar 'n eis van afhanklikes ter sprake is weens die ontydige doding van hul broodwinner. Gestel die beseerde of oorledene het sy inkomste of 'n gedeelte van sy inkomste verkry deur sy arbeidskragte vir onregmatige bedrywighede aan te wend: Behoort hierdie onregmatige bedrywighede van die verlede 'n beletsel teen 'n eis vir die verlies aan verdienvermoë of verlies aan toekomstige onderhoud te wees?

Eerstens word die posisie van die eiser wat in die verlede inkomste deur onregmatige optrede verwerf het, behandel. By 'n vorige geleentheid het ek die regsaard van die sogenaamde *earning capacity* of verdienvermoë bespreek (Claasen "Die Regsaard van Arbeid in die Suid-Afrikaanse Reg" 1983 *TRW* 8 ev). Die terminologie, "verdienvermoë," is volgens my benadering verwarrend. Beter beskrywend is die "verlies aan toekomstige verdienste," die rede synde dat met die fiktiewe verwesenliking van vorderingsregte uit toekomstige diens- of lasgewingskontrakte gewerk word. Die arbeidsvermoë is nie 'n persoonlikheidsreg nie, maar slegs as middel tot verwesenliking van toekomstige vorderingsregte juridies relevant. Vanselfsprekend sal die *quantum* of omvang van hierdie verdienste van persoon tot persoon verskil omdat dit deur individuele en hoogs persoonlike faktore soos intelligensie, opleiding, vindingrykheid, energie, ensovoorts bepaal word. Dit is verder my standpunt dat elke mens, tensy hy weens fisiese of geestelike gebreke verhoed word, in staat is en regtens altyd geregtig sal wees om 'n inkomste op die arbeidsmark te verdien. Dat die idee deur die gemeenskap onderskraag word, blyk uit die beginsel van sosiale uitkering indien daar aan die werkende mens geen werk gegee kan word nie. Enige onregmatige en skuldige inwerking op hierdie potensiële vorderingsregte behoort in beginsel 'n eis onder die *actio legis Aquiliae* aan die benadeelde te verleen. Word die posisie verander as die eiser onmiddellik voor die ongeval sy arbeidskragte in 'n onwettige bedrywigheid aangewend het?

Die appèlhof het in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906(A) soortgelyke feite, wat as regsvraag aan die appèlhof voorgelê is, oorweeg. Die eiseres het ongeveer twintig jaar lank vrugte verkoop teen 'n weeklikse profyt van R14,00, sonder dat sy in besit van 'n marskramerslisensie was. Na die ongeluk wat aanleiding tot haar aksie gegee het, was sy sodanig beseer dat sy nie meer kon loop nie. Haar eis het onder andere twee bedrae, naamlik R1 484,00 weens verlies aan inkomste reeds gely en R4 000,00 weens verlies aan toekomstige inkomste, ingesluit. Baie belangrik is die feitebevinding van die hof *a quo* waarop die uitspraak van die appèlhof gefundeer is:

> "It is abundantly clear from that amendment, and from the evidence that was given by the second plaintiff herself, which was in fact the only evidence relating to her earnings, past and future, that her loss of earnings has been based entirely on her occupation or

> trade as a hawker of fruit . . . There is no evidence whatever to suggest that she could or would have earned any income in any other legitimate way. The damages that she claims . . . are to compensate her for income that she would have earned illegally" (910–911A–B).

Dit onderskryf die respondent se betoogshoofde:

> "It was open to her to call evidence establishing what a person of her age, health and capabilities *could reasonably be expected to earn* in the legitimate labour market" (909H).

Die eise word myns insiens tereg afgewys weens openbare beleidsoorwegings omdat die skade reeds gely enkel en alleen op 'n onregmatige optrede in die verlede gebaseer is en die toekomstige skade op die voortsetting van die onregmatige bedrywigheid gefundeer is.

Die reg is op die feite korrek toegepas. Waarteen ek egter wil maan, is 'n foutiewe aanname dat die blote feit van onwettige bedrywighede in die verlede 'n persoon se eis om toekomstige verdienste sal fnuik. Dit behoort duidelik te wees dat indien die pleitstukke en getuienis nie die toekomstige skade se realisering op die onregmatige optrede gefundeer het nie, maar op die potensiële realisering van die eiseres se vorderingsregte (inagnemende al bogenoemde persoonlike eienskappe) in die normale arbeidsmark, die bevinding in die guns van die eiseres kon gewees het. Logieserwys kon haar onwettige bedrywighede 'n aanduiding van haar arbeidspotensiaal wees. Natuurlik kan 'n verweerder beweer dat 'n eiser waarskynlik *ad infinitum* met onregmatige bedrywighede sal voortgaan. In sodanige gevalle sal die eiser om suksesvol te wees, die hof op 'n oorwig van waarskynlikheid tot die teendeel moet oortuig. Die prosesregtelike faktor doen egter nie afbreuk aan die beginsel nie. Die *Dhlamini*-saak moet myns insiens nooit verstaan word as sou dit 'n streep deur 'n eiser se eis om *toekomstige* verdienste trek waar hy in die *verlede* op 'n onregmatige wyse sy inkomste verdien het nie. Dit is beslis aanduidend welke omsigtigheid van pleitbesorgers in die voorbereiding van hulle kliënte se eise in soortgelyke feitekomplekse geverg word.

In die voorafgaande paragrawe is die byvoeglike naamwoord *onregmatige* optrede of bedrywighede sonder kwalifikasie gebruik. Ek meen dat, vanuit regswetenskaplike oogpunt beskou, die eiseres se deliktuele vordering afgewys is omdat onregmatigheid (*duty of care*) ontbreek. *In casu* is die feitelike benadeling nie 'n regskrenking nie. By die vraag of daar 'n regskrenking voorhande is,

> "word eenvoudig met die algemene regsgevoel van die gemeenskap gewerk."

(Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 61; *SAUK v O'Malley* 1977 3 SA 394(A) 403; Van der Walt 1983 *THRHR* 438–445.) Die reg kan nie 'n gedraging, wat volgens die regsoortuiging van die gemeenskap onhoudbaar is, beskerm nie. Juis omdat die appellante aan die feitebevinding gebonde is, het hulle gepoog om aan die dilemma te ontsnap deur eerstens te betoog dat die oortreding alleen die van 'n belastingmaatreël is waarby geen publieke beleid betrokke is nie en tweedens dat onderskei moet word tussen handelinge wat nie inherent skandelik is nie en handelinge wat misdadig of *contra bonos mores* is. By ontduiking van 'n blote belastingmaatreël en handelinge wat nie inherent skandelik is nie, behoort 'n hof nie 'n eis op grond van

openbare beleid af te wys nie (912E–F). Die betoog is dat eiseres se gedraging aldus beskou en bereg moet word. Omdat die openbare gesondheid en nie alleen wetgewing in verband met belasting ter sprake is nie, bevind die appèlhof dat belangrike publieke oorwegings, *in casu* openbare gesondheid, die skade voortvloeiende uit die onwettige bedrywigheid as nie-regmatige inkomste aanmerk. Die appèlhof wou tereg nie 'n opinie uitspreek of die oortreding van 'n statutêre verbod en strafbare handelinge in elke geval die toets behoort te wees of skadevergoeding toegeken sal word nie (915D–E). Sekerlik behoort dit 'n faktor te wees in die totaal van omstandighede wat juridies bepaal of die benadeling, volgens die regsgevoel van die gemeenskap, regmatig of onregmatig is.

Vervolgens ontstaan die vraag na die afhanklikes se eis weens die verlies aan toekomstige onderhoud waar die broodwinner, wat onmiddellik voor sy dood sy inkomste uit 'n onregmatige bedrywigheid verkry het, onregmatig en skuldiglik gedood word. Die herkoms en geskiedkundige ontwikkeling van die aksie van afhanklikes is voldoende in die twee aantekeninge van Polak ("Civil Liability in the Law of South Africa for the Wrongful Causing of Death" 1931 *SALJ* 191 ev) en Kotze ("Aspekte van die Ontwikkeling van die Aksie van Afhanklikes ex Delicto" 1956 *THRHR* 126 ev) weergegee. Hahlo en Kahn (*South Africa, The Development of Its Laws and Constitution* (1960) 539) som dit soos volg op:

> "[I]n accordance with the principle *in homine libero nulla corporis aestimatio fieri potest*, (*D* 9 3 1 5) no action lay in Roman law for the wrongful killing of a freeman. In Germanic law, on the other hand, from the earliest times an award of cattle or money called "*soengeld*" could be made to the next of kin of the deceased, the object of the award being to discourage acts of personal vengeance. The reception of Roman law in the Netherlands made a reconciliation of these two doctrines essential and resulted in the adoption of the principle of *soengeld* as a sort of equitable extension of Aquilian liability, and in this form it has become part of modern South African law."

Die howe se benadering tot die aard van die afhanklikes se eis word weerspieël in hoofregter Innes se *dictum* in *Jameson's Minors v CSAR* 1908 TS 575:

> "Our law, while recognising no right of action on behalf of the deceased's estate, give to those dependent on him a direct claim, enforceable in their own names, against the wrong-doer. This is a right not derived from the deceased man or his estate, but independently conferred upon members of his family" (583–584).
>
> "But while on the one hand it resembles the ordinary action for personal injury in that it is based upon *culpa*, and while the breach of duty essential to its existence is the breach of a duty owed at the time of the wrongful act to the injured man; yet, on the other hand, the compensation claimable under it is due to third parties, who do not derive their rights through his estate, but on whom they are automatically conferred by the fact of his death. The action is one *sui generis*; probably its anomalous character may be accounted for by reference to its original source; but, whatever the explanation, the fact remains that it exists quite independently, and is not in any way derived from the deceased or through his estate. (Voet, 9, 2, 11; Grotius, 3, 32, 2)" (584–585).
>
> "Their action not coming to them either directly or indirectly through their father's estate, there is no logical ground for holding that it can be affected by his contractual relationship with the defendant administration. The fact that he undertook to bring no action for personal injury if he lived can in no way alter their right to sue for damages when he dies" (588–589).
>
> "It is not practically possible for a railway by contract to limit its liability to the family of a passenger. All it can do is to contract with the passenger himself. And if the latter

voluntarily undertakes to accept all personal risks it does seem anomalous that, if he were severely injured and rendered incapable of supporting his family, he could recover no damages so long as he lived, while the moment he died the family could institute an action for heavy damages" (589).

Die aksie van afhanklikes word as *sui generis* geëtiketteer omdat dit onder die *actio legis Aquiliae* resorteer en uit 'n onregmatige daad teenoor die oorledene voortspruit. As sodanig behoort dit volgens algemene beginsels aktief oorganklik te wees, maar die aksie kom die afhanklikes direk in hulle eie naam toe. Alhoewel dit 'n onregmatige daad teenoor die oorledene is, is geen verweer wat teen die oorledene opgewerp kan word, of enige kwytskelding van die oorledene teenoor die onregpleger, of enige bydraende nalatigheid van die oorledene teen die afhanklikes se eis houdbaar nie (584–585; *Union Government v Lee* 1927 AD 202; tans reël a 2 (1B) en die tweede voorbehoudsbepaling van a 2 (6) van die *Wet op Verdeling van Skadevergoeding* 34 van 1956 hierdie aangeleentheid).

Met betrekking tot hierdie tradisionele beskouing

"het meerdere skrywers reeds die aandag daarop gevestig dat die aksie onder bespreking alleen verklaar kan word aan die hand van 'n onregmatige daad wat direk teenoor die benadeelde gepleeg is. Inderdaad is dit dan ook so dat, gesien die uitbreiding van Aquiliese aanspreeklikheid in ons hedendaagse reg en die beskermingsbehoeftigheid van die vorderingsreg teenoor derdes, die onderhawige aksie nie langer as 'n onverklaarbare anomalie in ons regsisteem hoef te bly ronddobber nie.

Word eenmaal uitgegaan van 'n onregmatige daad teenoor die benadeelde self, kry sy aksie vorm en inhoud, pas dit in by die grondslae van ons reg aangaande die onregmatige daad en verdwyn die twyfelagtige eer wat dié aksie tot dusver te beurt geval het om as *sui generis* bestempel te word – 'n attribuut wat telkens aan 'n regsverskynsel toegedig word as teken dat dit nie begryp word nie"

(Van der Merwe en Olivier 348–349; sien ook Conradie 1943 *THRHR* 133 ev; Van der Walt 1983 *THRHR* 437–445).

Ek stem met laasgenoemde standpunt saam. Logika dwing 'n mens tog om te aanvaar

"dat die eis van 'n afhanklike . . . weens die dood van iemand anders, op 'n onregmatige daad berus wat direk teenoor die eiser gepleeg is en wat geleë is in die skending van laasgenoemde se vorderingsreg op onderhoud."

(Van der Merwe en Olivier 354). Hierdie vorderingsreg is die spieëlbeeld van die prestasieverpligting van die onderhoudspligtige. Dit is daarom erkende reg dat die afhanklikes se skade op basis van die toekomstige verdienste van die broodwinner bereken word.

Vir ontvanklikheid van 'n afhanklike se vorderingsreg teenoor die broodwinner moet aan drie vereistes voldoen word (Boberg *The Law of Persons and the Family* (1977) 249; Lee en Honoré *Family, Things and Succession* (1983) 181–182):

a Die afhanklike moet onvoldoende fondse hê om homself te onderhou.

b Die persoon van wie die onderhoud gevorder word, moet in staat wees om die afhanklike te onderhou.

c Die verhouding tussen die partye moet van so 'n regsaard wees dat daar 'n regsplig tot onderhoud bestaan.

Die ooreenstemmende voorvereistes van 'n afhanklike se eis by die broodwinner se dood, is in die volgende *dictum* van appèlregter Rabie vervat:

> "Om in haar aksie te kon slaag, moes die appellante bewys dat die respondent die oorledene wederregtelik gedood het; dat die oorledene tot haar onderhoud bygedra het en dat hy dit gedoen het en sou voortgaan om dit te doen omdat hy regtens daartoe verplig was."

(*Van Vuuren v Sam* 1972 2 SA 633(A) 635D–E). Ek stem egter met Boberg 305–306, veral vn 14, saam dat die *obiter* opmerking, as sou die oorledene voor sy dood inderdaad onderhoud voorsien het, bevraagteken kan word. Verskeie faktore soos siekte, slapte in die ekonomie, ensovoorts mag 'n persoon verhoed om tydelik inkomste te verdien en daarom behoort die opmerking slegs te slaan op 'n ander invalshoek ten opsigte van die werklike voorvereiste, naamlik dat die oorledene *in staat* moet wees om afhanklikes te onderhou. Word hierdie vorderingsreg aangetas op 'n onregmatige en skuldige wyse wat vermoënsbenadeling tot gevolg het, behoort daar vir die benadeelde (afhanklike) 'n eis *ex delicto* voorhande te wees, maar

> "it is against public policy to compensate for loss of support provided by a deceased during his lifetime from illegal activities."

(Suzman, Gordon en Hodes *The Law of Compulsory Motor Vehicle Insurance in South Africa* (1982) 113 vn 161). My standpunt is dat die sake waarop die skrywers steun nie so 'n kategoriese stelling regverdig nie. Beter verantwoord is Lee en Honoré se stelling dat

> "the dependants of a person who has been negligently killed cannot claim for loss of support *derived from illegal activities*" (182 vn 1, my kursivering).

Myns insiens is die afwysing van die betrokke afhanklikes se eise, weens 'n bepaalde feitebevinding, op die afwesigheid van onregmatigheid gebaseer. Net soos die posisie van die benadeelde self – soos hierbo bespreek – is die vorm waarin die pleitstukke gegiet is en waarop die feitebevinding dan rus, die oorsaak van die ongelukkige regsgevolge. Andersins sou die privaatreg 'n straffunksie vervul of een persoon se onregmatige optrede in die verlede 'n derde se toekomstige vorderingsregte ten laste kon lê. Dit moet beklemtoon word dat ook die afhanklike se eis staan of val op die feitelike bevinding of die toekomstige onderhoud *ad infinitum* uit onwettige bedrywighede sou spruit, sogenaamd *permanens turpitudo*, soos hoofregter Rumpff dit in die *Dhlamini*-saak uitgedruk het. Die sake waarin sodanige afhanklikes se eise ter sprake was, word vervolgens bespreek.

In *Booysen v Shield Insurance Co Ltd* 1980 3 SA 1211 (SOK) (sien ook *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953(A)) is die oorledene opsetlik of nalatig deur 'n motor omgery sodat sy aanvallers klaarblyklik die *coup de grace* kon toedien terwyl hy hulpeloos in die pad gelê het. Benewens 'n bedrag van R30,00 per week wat die oorledene as assistent in sy skoonpa se winkel verdien het, het hy 'n paar maande voor sy dood by sy huis onwettig danse gehou, films vertoon en drank verkoop om sy inkomste aan te vul. Aan sy afhanklikes kon hy 'n aansienlike toelaag vir huishoudelike en persoonlike uitgawes gee. By sy dood was daar byvoorbeeld R600,00 in die huis en R700,00

in 'n bankrekening. Die hof bevind dat hierdie onwettige bedrywighede se voortbestaan uiters onseker was, nie alleen omdat die polisie dit enige tyd kon stopsit nie, maar ook omdat toekomstige professionele bioskope en danssale moontlik 'n fatale uitwerking op die winsgewendheid van sy bedryf sou hê. Die oorledene

> "seems to have been something of an entrepreneur and may repeatedly have been looking for other ways of increasing his income" (1214H);
>
> "[T]he evidence shows that he was an enterprising, energetic man who was on the lookout for means of making money. I think therefore that if he had been forced to cease his activities in connection with the cinemas and dances, it is probable that he would have found some way of supplementing his income" (1215B–C).

Ek is van mening dat dit onrealisties en 'n mosie van wantroue in ons regpleging as geheel wees indien 'n hof sou aanvaar dat 'n persoon vir altyd met onwettige bedrywighede kan voortgaan. Die hof merk dan *obiter* op dat as die oorledene net beseer was, hy in navolging van die *Dhlamini*-saak onsuksesvol in sy eis sou wees. Ek het reeds standpunt ingeneem dat dit 'n verkeerde interpretasie van die *Dhlamini*-beslissing is. Vir die eerste maal is die eis van afhanklikes nou ter sprake. Regter Addleson is nie ontvanklik vir 'n eiesoortige beregting van die afhanklikes se eis, anders as die van die broodwinner self, nie. Tereg sê die regter dat die kern van die regsvraag wentel, om "grounds of public policy." Na my mening gaan dit hier weer eens om die teenwoordigheid van onregmatigheid al dan nie. Die hof bevind dat dit teen die openbare beleid sal wees

> "to recover compensation based on the earnings from illegal activities" (127C).

Daarom sal die eis *slegs* faal as 'n eiser se pleitstukke en getuies steun op die voortsetting van ontwettige bedrywighede. Vergelyk die sprekende voorbeeld van regter Addleson:

> "[I]t is difficult to conceive that our Courts would allow the husband or child of a deceased prostitute to recover compensation for loss of support based on the claim that during her lifetime she had maintained them – *and would have continued to maintain them – on the proceeds of her prostitution*" (1217H, my kursivering).

Gelukkig vir die afhanklikes in hierdie saak was daar 'n bevinding dat die oorledene sy skoonpa se winkel sou oorneem na vyf jaar en kon hulle hul toekomstige verlies, vanaf die vyfde jaar na afsterwe, op die winkel se inkomste steun. Hoe tragies 'n ander bevinding sou wees, blyk uit die vermoë van die oorledene om sy gesin in die toekoms goed te sou kon onderhou het.

By appèl is slegs teen die *quantum* en sekere aspekte in verband met die Motorvoertuigassuransiewet geappelleer. Ek is van oordeel dat die appèlhof, hoewel *obiter*, my mening steun. Ongelukkig is geen kennis daarvan in die twee latere beslissings geneem nie. Appèlregter Trollip verklaar:

> "In law a claim for future loss of support is ordinarily based on the deceased's earning capacity and, in so far as the trial Court can determine it on the available information, the income he would have earned in the future. The particulars furnished by plaintiff in (a) to (e) relate to all the income the deceased was earning at the time of his death. That is indicative, *inter alia*, of his earning capacity . . . I should add here that, even though some of the activities mentioned in (e) had ceased before his death and other's were found by the Court *a quo* to be illegal, they can nevertheless be relied upon as some indication of his earning capacity" (964B–E).

asook:

> "I can see no reason why the income derived from his regular work and his sidelines [oa onwettige dans, fliek en drankverkope] . . . cannot be used to measure to some extent at any rate, his future earning capacity" (965B–C).

Enige ander beskouing bots met 'n mens se logika en regsgevoel. Die appèlhof toon duidelik aan dat die verlies aan onderhoud die teenkant van die oorledene se *earning capacity* is en dat dit ook onder andere deur sy onwettige bedrywighede bewys kan word. As dit nie aangetoon kan word dat die toekomstige inkomste altyd uit onwettige bedrywighede sou wees nie, moet die afhanklikes (en so ook die broodwinner self) se eis suksesvol wees. As dit andersins nog teen die openbare beleid sal wees, vereenselwig die gemeenskap hom met die antieke en verfoeilike middellike strafidee in die privaatreg.

In *Mba v Southern Insurance Assocation Ltd* 1981 1 SA 122(Tk) is eksepsie aangeteken teen die afhanklike se skuldoorsaak wat in haar nadere besonderhede op die oorledene se inkomste van R600,00 per maand uit 'n roofhuurmotor steun. Regter Rose-Innes gee die eksepient gelyk, met 'n beroep op die *Dhlamini*- en *Booysen*-sake:

> "Plaintiff would be precluded from recovering compensation for loss of support and maintenance for herself and the children *if the support and maintenance was or would in future have been derived from the deceased's illegally earned income*"(124H, my kursivering).

Belangrik vir my standpunt oor hoe die pleitstukke in hierdie sake interpreteer moet word, is ook die volgende uitlating van regter Rose-Innes:

> "It was suggested on behalf of plaintiff that the exception should be upheld *because the plea did not negative the circumstance that the deceased might have had income or assets unaffected by his illegally earned income from his taxi business, nor did it negative the possibility that plaintiff might be able to establish her loss of support by showing that the deceased was potentially able to support her and the children and would have done so in a lawful manner, should his illegal activities have come to a stop.* That is *not* how I read the plea. *It avers that plaintiff 's and the children's maintenance and support was being furnished, and would in future have been furnished, from income of the deceased derived from activities which are illegal. For the purposes of the exception that averment must be accepted as fact. It may very well be that plaintiff at a trial, and if necessary with an appropriate amendment of her particulars of claim, may be able to prove a loss of support unaffected by any illegal earnings of the deceased, but that is not the question before me on exception and I am unable to make any comment in that regard*" (125H–126A, my kursivering).

In *Fortuin v Commercial Union Assurance Co of SA Ltd* 1983 2 SA 444(K) trek waarnemende regter Comrie die saak tot sy logiese konsekwensie deur. Hy ag hom nie gebonde aan die *Booysen*- en *Mba*-sake, wat volgens hom gekwalifiseer moet word, nie. *In casu* het Gert Fortuin sy "fortuin" gesoek in die verkoop van brandhout, sonder 'n marskramerslisensie. Hy was 'n hardwerkende en vindingryke man. In 'n stadium het hy bewus geword dat sy bedryf 'n lisensie vereis. Hy het navrae gedoen en vier dae voor sy dood het die lisensieraad die voorgeskrewe aansoekvorms aan hom gepos. Die hof bevind dat die oorledene waarskynlik met die aansoek om 'n lisensie sou voortgegaan het

en waarskynlik sou geslaag het. Daarom sou hy waarskynlik 'n wettige inkomste verdien het en slaag die eiseres gevolglik in haar eis.

JY CLAASEN
Universiteit van die Oranje-Vrystaat

LEGAL REPRESENTATION: RIGHT OR PRIVILEGE?

Legal representation is often regarded as an absolute right of a litigant or accused. While that which applies to civil litigants when examining the right to legal representation also applies to the accused in criminal trials, the above-stated misconception is probably prompted by the bold, unqualified terms of section 73(2) of the Criminal Procedure Act 51 of 1977 ("the Act") which reads as follows:

> "An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question."

One's initial reaction is to wonder at the apparent superfluousness of the section. After all, in a refined legal system such as ours it surely goes without saying that an accused has a *right* to legal representation. However, an examination of our legal background and practice shows that the issue is not as simple as all that.

1 Roman and Roman-Dutch Law

Voet (3 3 14) states the position in Roman law thus:

> "An attorney can take the principal's place in all *civil* causes, unless circumstances demand the presence of the principal himself, and the judge so orders. So far is this so that if the defendant does not appear the judge, in ordering him to be again summoned, can add a threat of imprisonment to meet the case of disobedience . . . In such case however the defendant appears to fulfil his duty if he has sent an attorney armed with the fullest instructions and so equipped that he can make good the absence of his principal and can do, say and admit what the principal could have done had he been present . . ." (Gane's translation, my italics).

It would appear, therefore, that the legal representative in civil cases, if properly instructed, stepped into the litigant's shoes in most respects, and was somewhat more representative of his client than is the case in South Africa today. According to Van Leeuwen (*Roomsch-Hollandsch Recht* 4 4 6) attorneys were principals in the case, and execution of the judgment was also carried out against them.

From Voet's statement one would expect that it would follow that in criminal cases the accused, as in the case of a civil litigant, would be entitled to legal representation. However, in Roman law a strictly enforced rule (see Van der Linden's note on Voet) existed that attorneys were not allowed to represent clients in criminal cases (see *D* 48 1 13 1). Voet raised some exceptions in this regard (3 3 14):

> "But in criminal cases an attorney is not admitted, neither on the side of the defendant, lest in his absence the judicial proceedings should be rendered futile, nor for the same reason on the side of the accuser, in case he should by virtue of his accusation have to

> be brought under the law of like for like for not having proved the charge. Exceptions are when a distinguished person sues or is being sued; or when some just reason for absence has merely to be put forward; or lastly when a defendant can be condemned in absence." (See also Van Leuwen 4 4 6.)

(Voet was of the opinion that legal representation of an absent accused was possible only after the accused had "joined issue" in person.)

The Roman-Dutch practice, it would seem, was somewhat less rigid than that of Roman law. According to Voet (3 3 15):

> "The practice of the present day does not much differ from these principles of Roman Law. The rule has prevailed in such practice that in criminal cases an attorney cannot intervene for a defendant unless a special order to that effect has been obtained from the judge. The accused person himself, after being summoned to be present in body must also present himself in person until the judge upon his application remits the need for personal appearance. It should however be added that, being present in person, he can *by permission of the judge employ the services of an advocate or the aid of an attorney, if perchance he is without skill in the business of courts*" (my italics).

(Van Leeuwen 4 4 6 noted another improvement: in Roman-Dutch law "execution of the sentence is not carried out against (attorneys) but against their principals" (Kotze's translation).

According to Van der Linden (*Judicieele Practijcq* 4 5 6) the accused was entitled to the assistance of an attorney at certain *pre-trial* proceedings. However, at the conclusion thereof

> "the attorney's assistance ends simultaneously: while it stands to reason that, *at the trial, the accused must defend himself, without being provided with any assistance*" (my translation and italics).

But Van Leeuwen stated the law of his time to be such as to require that

> "in the Superior Courts no-one may appear before the judge without the protection of an Advocate and the assistance of an Attorney. Except that in small cases either an Advocate or Attorney alone may defend the case. Before the inferior tribunals the attorneys alone conduct and defend the case; except where in matters of great importance, and for better security, they engage an Advocate to assist them, which they are at liberty to do" (4 4 3, and see also Merula (*Manier van Procederen* 4 36 1 4–6)).

Our own practice corresponds substantially with Van Leeuwen's expression of the practice in Roman-Dutch law.

Although, according to Van Leeuwen 4 4 4, attorneys could undertake "all civil and non-punishable cases," in criminal and "punishable" cases the accused nevertheless had to be present at the trial, unless excused. What is important, though, is that such cases could be undertaken by attorneys (4 4 5).

2 South African Law

It was only late in 1819 that a right to legal representation in criminal cases was first extended to accused persons in South Africa (by article 65 of Lord Charles Somerset's Proclamation of 2 September 1819). However, following the practice described by Voet 3 3 14, such representation was permitted only after the accused had answered all judicial questions following upon the reading of the indictment to him. (This procedure corresponds substantially with section 115 of the Act; see also *S v Wessels* 1966 4 SA 89 (C) 92C.)

It is by reason of the evolutionary process just described that the legislature saw fit to write the accused's "right" to legal representation into the Criminal Procedure and Evidence Act 31 of 1917 (section 218) and its successors (Act 56 of 1955, section 158; Act 51 of 1977, section 73(2)). This right of the accused was regarded as a common-law right prior to the promulgation of the 1917 Act (in *Li Kui Yu v Superintendent of Labour* 1906 TS 181) and also, it seems, thereafter (in *Dabner v SAR & H* 1920 AD 583). By the time the 1955 Act was promulgated the accused's right to legal representation had been so entrenched that it was stated (in *R v Slabbert* 1956 4 SA 18(T) 21G) that it could not be alienated by the state.

This right of the accused to the services of "his counsel" (see the wording of the successive acts; see also *S v Heyman* 1966 4 SA 598(A) 603E–F, and *Wessels* (*supra*) for the right to legal representation of a recalcitrant witness in jeopardy of imprisonment) has been taken to mean the right to representation by *counsel of his choice.* However, such right is not absolute. Despite the sentiments expressed in *Slabbert* (*supra*) it was held in *Ex parte Hathorn* 1960 2 SA 767(D) and in *Brink v Commissioner of Police* 1960 3 SA 65(T) that the accused's right to legal representation is *alienable at the state's instance.* And in *R v Gannon* 1911 TPD 270, when application was made for a postponement owing to the unavailability of counsel of the accused's choice (who was elsewhere engaged in a matter which, it had been anticipated, would conclude earlier) De Villiers JP remarked (270):

> "I have already intimated that parties who ask for postponements in this way must take their chance of the case being heard."

To which Mason J added (270):

> "Personally, I do not think it is an adequate reason for a postponement, that counsel wants to do all the Johannesburg work and all the Pretoria work as well!"

3 Court's discretion

When the accused in a criminal trial seeks a postponement to enable him to engage the counsel of his choice, a number of factors fall to be considered by the court. In terms of section 168 of the Act, which provides as follows:

> "A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which to the court may seem proper and which are not inconsistent with any provision of this Act."

The court is vested with a discretion which is to be exercised judicially, as appears from the judgments in *R v Zackey* 1945 AD 505 511 and *Isaacs v University of the Western Cape* 1974 2 SA 409(C) 411. This means that the court must decide whether the grant (or refusal) or a postponement would be "in the interests of justice." In this regard, it has been held (in *Estate Norton v Smerling* 1936 OPD 44) that the court has to consider, *inter alia*, whether the applicant for a postponement is *dominus litis*, for the court's discretion is more limited in considering an application by a party who is not *dominus litis* (this would include the

accused). Furthermore, it is submitted, the court should guard against falling into the trap of equating the *interests of the accused* with "the interests of justice."

It is submitted that the accused's right to counsel of his choice is to be considered in conjunction with all the circumstances of the case, including the accused's own actions or omissions leading up to his application for postponement. Generally, it is submitted, the accused will bear the *onus* (for he is seeking the court's indulgence – *Isaacs* 411H) of showing (a) good cause, and (b) absence of prejudice to the state.

a *Good cause*

"Good cause", it is contended, comprises two components, viz (i) that the *accused will be prejudiced* by a refusal of his application for a postponement to obtain legal representation; and (ii) the *absence of fault* on the accused's part.

i Where the respondent in an application for ejectment sought a postponement owing to the unavailability of counsel of his choice, postponement was refused in the absence of prejudice to the respondent, and the matter proceeded with the respondent unrepresented (*Duncan v Roets* 1949 1 SA 226(T)). It is insufficient for an applicant in such circumstances to make a bald allegation that he will be prejudiced by the refusal of his application; it must be made apparent to the court *in what manner* he will be prejudiced (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed 453).

For the applicant for a postponement to secure legal representation to succeed on this aspect of his application, he must therefore clearly establish that he *stands to suffer real prejudice* (*Duncan* 227) or at least *clear potential prejudice* (*Munnich v Munnich's Est* 1942 EDL 36). The court's approach on appeal or review is to require the applicant to satisfy the court that "there is a reasonable possibility, falling little short of a probability, that a miscarriage of justice will take place" if the application is refused (*R v Zuma* 1946 NPD 199 203).

ii In general, an applicant for a postponement in order to obtain legal representation is estopped from seeking the court's indulgence (for an indulgence it is (see *Isaacs* 411; *R v Beukes* 1939 EDL 112 118)) where he has been the author of his own dilemma. In *R v Second* 1969 4 SA 255(RAD) the accused had been in custody for a month before his trial. He had made no attempt to engage the services of a legal representative through the prison authorities or his family, and had first raised the question of legal representation with his wife when she had visited him on her own initiative a few days before the trial. At the commencement of his trial the accused had sought a postponement to enable him to obtain legal representation, but this had been refused. On appeal Quènet JP held as follows (257C):

> "[T]he question is not whether an accused has the right to legal representation but whether he has had sufficient time to arrange for such representation . . . Where the application is clearly vexatious or frivolous or *where the accused has been guilty of gross negligence, he cannot, if the application is refused, complain of a violation of his . . . rights*" (my italics).

In *Beukes* the accused had been served with a summons (on 14 November) to appear in court on 25 November to answer charges in terms of the Insolvency Act. The accused had consulted an attorney only on 19 November, as a result of which the latter had applied for a postponement of the trial to enable him to prepare the accused's case. This application had been refused, the attorney had withdrawn and the then unrepresented accused had been convicted and sentenced. On review Lansdowne JP said (117):

> "I find in most of the cases in which relief of the nature of that now sought has been granted that there has been no fault on the part of the suppliant for relief, but that has not been invariably the case . . . [T]he Courts have not regarded themselves as absolutely bound to refuse relief . . . because there has been some blame attached to the conduct of the suppliant."

In granting the review application Lansdowne JP pointed out that the accused's books of account might possibly be complicated, thus necessitating lengthy preparation of his defence. However, the Judge President went on to say (118):

> "While there must be an extremely sparing exercise of this power by the Court . . . I think that, having regard to all the circumstances, the power should be exercised in favour of the applicant in the present case. I would like to add, however, that this case must not be regarded as a precedent. This is very much a borderline case. *The applicant is himself largely to blame for the difficulty in which he finds himself, and the scale has only just barely gone down in his favour*" (my italics).

In *Madnitsky v Rosenberg* 1949 2 SA 392(A) the defendant had had six months in which to prepare his case and instruct counsel. There had also been gross delay on the defendant's part in making discovery. On the appointed trial date the defendant's counsel applied for a postponement, which was refused. Counsel then withdrew and the defendant applied for a postponement to obtain the services of other counsel. This was also refused. On appeal Tindall JA, in delivering the judgment of the court, held as follows (399):

> "No doubt a court should be slow to refuse to grant a postponement *where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics*, and where *justice demands* that he should have further time for the purpose of presenting his case. In the present case, however, it cannot be said that those requisites were satisfied and, in all the circumstances, I am not prepared to hold that the trial Judge did not exercise his discretion judicially" (my italics).

The *locus classicus* on this aspect of the law is *Zackey* where the facts were briefly that:

- on his first appearance in he magistrate's court the accused had requested and had been granted a postponement of the trial for 11 days to enable him to obtain legal representation;
- 11 days later, just before resumption of proceedings against him, he had consulted an attorney for the first time;
- the attorney could not defend the accused at such short notice but had appeared to apply for a further postponement;
- such application had been refused on the grounds that the accused had offered no explanation of his remissness in engaging an attorney's services;

that a further postponement would have "immobilised the whole court for practically the rest of the day;" and every court day had been fully booked up for a considerable period;

- the accused had then been tried, convicted and sentenced in the absence of a legal representative;
- the supreme court had declined to upset the magistrate's findings or orders.

On appeal to the Appellate Division Greenberg JA held as follows (512):

> "I have already set out the facts which were before the magistrate, and I shall assume that the refusal of an adjournment deprived the appellant the opportunity of engaging another attorney and that the services of an attorney may have secured his acquittal. But there is no doubt that at a certain stage this consideration, weighty as it is, must be put aside . . . I conclude, therefore, that the contention advanced in argument that the paramount consideration of a trial is that no injustice shall occur does not mean that an order can never be made which may result in the conviction of an accused who, but for such order, might have been acquitted."

b *Absence of prejudice to the State*

As has been submitted above, the concept of justice entails the consideration of both parties to a dispute, and must apply equally to the state, where it is one of such parties (see also *Zackey* 512). It is therefore contended that, over and above establishing that he will suffer prejudice should relief be refused and showing absence of fault, the applicant for a postponement to obtain legal advice must also establish absence of prejudice to his opponent. In civil cases the courts are in a position to cure such prejudice by making an appropriate order as to costs in favour of the party who is ready to proceed with the trial. However, no such remedy is available in criminal cases, and prejudice occasioned by a postponement cannot be mitigated.

In *Zackey* 512 the Appellate Division clearly considered the facts of a congested roll and of inconvenience to the court as considerations which may validly lead to the refusal of a postponement. In *R v Bikitsha* 1960 4 SA 181 (E) 182 a full bench of the Eastern Cape Division of the supreme court held that where the accused, who was not in custody, had failed to secure legal representation during the 13 days preceding his trial, and a postponement would *inconvenience* the prosecutor, a postponement had been legitimately refused.

4 Conclusion

It would seem, therefore, that an accused person has a *right* to legal representation; that such right is, however, subject to a court's discretion whether or not it will grant a postponement to enable the accused to exercise that right – at which stage, it is submitted, legal representation ceases to be a right and becomes a mere *privilege*. This privilege may be forfeited when the accused has been negligent in the matter of obtaining legal representation *and* is unable to explain his remissness; when he has failed to show that he will suffer prejudice should a postponement be refused; and if he is unable to show that the state will not be prejudiced.

An unusual application of the aforementioned principles is to be found in *S v Dladla* NPD 2 August 1982 (unreported). There, the accused faced 24 charges, including six of murder. He had been arrested on 24 June 1981; released on bail on 30 April 1982; served with the indictment on 14 June 1982. He first instructed an attorney for trial purposes on 29 July 1982 – the trial had been set down to commence on 2 August 1982, and to run for 2 weeks. The state had gathered 38 witnesses from as far afield as Cape Town and South-West Africa. The questions of postponement and prejudice are dealt with in the judgment of Page J, as follows (33):

> "The accused seeks a postponement because of the following circumstances. When he appeared before the magistrate he indicated that he was represented by an attorney and that he would make arrangements for retaining his own counsel. He was in fact thereafter represented by an attorney who sought and obtained bail on his behalf. When the matter was set down for trial, the Attorney-General . . . was informed (by the attorney) that the accused had failed to furnish sufficient cover (to brief counsel). The Attorney-General then approached the Bar Council to arrange for the appointment of *pro deo* defence for the accused."

The Bar Council had then appointed *two* counsel to represent the accused who, however, refused their services, insisting on counsel *of his choice.* Page J continued (34):

> "In the light of this attitude *pro deo* counsel had no option but to . . . withdraw. In order to make hemselves available for this trial they have been put to great inconvenience and financial sacrifice and it is a matter of regret that this fate should have overcome them."

So much for inconvenience to *pro deo* counsel. The accused had then applied for a postponement in order that he could sell his cattle to raise counsel's fee; to engage counsel of his choice (who was in any event unavailable); and to obtain a transcript of previous trials which, he alleged, might have a bearing on his case. The accused's explanation of his failure to secure counsel's services before the trial appears from Page J's further judgment (35):

> "In essence he stated that he did not take the steps to make provision for meeting the necessary requirements, because he was not aware of exactly how much it would cost, and that he was precluded by the unavailability of his attorney from ascertaining what the precise cost was until a very late stage; at which time he was unable in the remaining period to obtain the necessary money."

So much, also, for the accused's explanation. Page J continued as follows, dealing with the state's submissions and the question of prejudice (35–37):

> "Counsel for the State opposed the application, contending in the first place that the situation which had arisen was attributable to the accused's own fault and secondly that the prejudice which would be occcasioned to the State by granting a postponement at this stage, far outweighed the alleged prejudice which the accused might suffer if he was required to proceed with the trial, with the counsel presently at his disposal. Whilst the situation which has now arisen is *undoubtedly due in the main to the accused's own remissness* in not instructing his attorney properly or timeously, the culpability of his actions is not to my mind such that it absolves the Court from its duty of ensuring that he is given a proper opportunity of exercising his *right* to be represented by a counsel of hs choice . . .
>
> As regards the relative prejudice which will be suffered, it is apparent that the *prejudice to the State . . . will be immense.* A great deal of preparation which has gone into this trial will in all probability be wasted. The costs of gathering witnesses together from the four corners of the land will have been incurred for nothing, not to mention the inconvenience occasioned to those witnesses by the fact, not only that their present trip has

been in vain, but also that they will have to attend the trial at a postponed date. One must also bear in mind that with the passage of time the powers of recollection of witnesses becomes increasingly vague and this also is a factor contributing to the prejudice that the State will suffer.

Against this *grievous prejudice*, I have had to weigh up what the consequences will be to the accused if he is forced to continue with the trial today. I do not think that his desire to be represented by Mr Z or his desire that Mr Z should be properly equipped with the records of the previous hearings, is unreasonable; and I think that if he is deprived of that right, he will undoubtedly be prejudiced...

Under the circumstances it seems to me that the prejudice which he will suffer... outweighs that which will be suffered by the State if a postponement is granted. I am accordingly constrained to accede to his request for a postponement" (my italics).

It is submitted that this approach comes perilously close to elevating the accused's desire to be represented by counsel *of his choice* to an absolute right, not to be forfeited even in the light of his own remissness and in the face of "grievous prejudice" to the state. However, in a case of such a serious nature, it may well be argued that the accused is to be shown every indulgence, a commodity not available in less serious cases.

5 Suggestions

In view of the problems encountered in practice, particularly with illiterate unrepresented accused, it is suggested that the right to legal representation conferred by the Criminal Procedure Act should always be brought to the accused's notice, either upon his arrest or on his first appearance in court, or both. It is submitted that this view is supported by thhe following *dictum* of Didcott J in *S v Hlogwane* 1982 4 SA 321(N) 323C:

"A judicial officer trying an accused person who has no legal representation *must explain to him his procedural rights*, and assist him to put his case before the court whenever his need for help becomes apparent" (my italics).

Although that case concerned the right to subpoena witnesses, it is submitted that the right to legal representation is one of the fundamental procedural rights of an accused. That much appears from the judgment of Botha JA in *S v Seheri* 1964 1 SA 29(A) 34H-35A:

"Hulle het toe geen regsverteenwoordiging gehad nie, en was waarskynlik onbewus van wat hulle ter ondersteuning van hulle aansoek aan die hof moes voorlê. *Enkele vrae deur die voorsittende regter* kon die moeilike posisie waarin die appellante hulle bevind het, en *hoe hulle, sonder ernstige ongerief vir die hof, onder die omstandighede regsbystand* kon verkry, opgeklaar het, en kon bes moontlik tot ander insigte aanleiding gegee het... Waar 'n aangeklaagde geen regsverteenwoordiging het nie, rus daar omvangryker pligte op die regterlike amptenaar om toe te sien dat geregtigheid geskied" (my italics).

It would, however, be inadequate for a judicial officer merely to inform the accused of his *right* to legal representation. It is submitted that the judicial officer's advice should go further so as to include a warning that the *right* can

be reduced to a *privilege* (which he may forfeit) should he, in blameworthy circumstances, fail to be represented at his trial.

J VAN DER BERG
University of the Western Cape

KONKUBINAAT

In die afgelope tyd het die konkubinaat weer eens die belangstelling van juriste geprikkel. Aangesien die begrip "konkubinaat" gedurende die na-klassieke en Justiniaanse tydperk van die Romeinse reg vaste vorm gekry het en sedertdien geen verandering ondergaan het nie, sal dit nie onvanpas wees nie om 'n nuwe omskrywing van die figuur te probeer gee wat moontlik beter aan moderne behoeftes sal beantwoord.

'n Konkubinaat is 'n duursame, monogame samewoning as man en vrou van partye wat nie met mekaar wil, kan of mag trou nie. Hierdie definisie bevat die tradisionele elemente van duursaamheid en monogamie, maar open die moontlikheid om ook verhoudings tussen twee mans of twee vroue wat saamwoon onder die begrip konkubinaat te betrek. Die slot van die definisie onderskei die konkubinaat van die huwelik en bring ons ook by die vraag na die oorsake van die konkubinaat.

Tradisioneel het die klem op die eerste groep, naamlik diegene wat nie *wil* trou nie, geval omdat die Justiniaanse konkubinaat 'n tweederangse huwelik was waarop die belangrikste huweliksbeletsels van toepassing geword het (vgl *D* 25 1 7 3 en 4, *D* 23 2 56, *C* 5 4 4, *C* 5 26 1 en *PS* 2 20 1). Die oorsake wat in sulke gevalle tot 'n konkubinaat aanleiding gegee het, val buite die juris se werksgebied en gevolglik is hierdie aspekte deur die regswetenskap afgeskeep of verdraai.

'n Illustrasie kan gevind word in die huwelikswetgewing van keiser Augustus, wat beoog het om die Romeinse huwelik te bevorder en te bestendig en om dié rede die aantal huweliksbeletsels verminder het. Die *communis opinio* aanvaar egter, sonder bevraagtekening, dat Augustus se huwelikswetgewing, indien dit die konkubinaat nie in die lewe geroep het nie, dit dan tog aangewakker het. Derhalwe kan die vraag geopper word of dit nie dalk wenslik is nie dat die juris hom meer oopstel vir interdissiplinêre studies met die medewerking van sosioloë, teoloë en ander deskundiges na gelang die onderwerp dit vereis.

Die tweede kategorie, naamlik diegene wat nie met mekaar *kan* of *mag* trou nie, verdien die aandag van die juris.

Die gangbare huweliksbeletsels, gebaseer of bloed- of aanverwantskap, word in Suid-Afrika aangevul met huweliksbeletsels op grond van ras (vgl die Wet op Verbod van Gemengde Huwelike 55 van 1949). Hierdie situasie open 'n moontlik groot terrein vir die konkubinaat en voeg 'n addisionele aspek aan die konkubinaatsproblematiek toe.

Die Suid-Afrikaanse reg ignoreer die konkubinaat want dit reël die huwelik, maar verleen geen regsgevolge aan die konkubinaat of die ontbinding van 'n konkubinaat nie.

In geval van 'n konkubinaat is daar geen onderhoudsplig teenoor die lewensmaat gedurende die konkubinaat, geen onderhoudsplig teenoor die gewese lewensmaat na die ontbinding van die konkubinaat, geen aksie op grond van die opsetlike of nalatige veroorsaking van die dood van 'n broodwinner, geen intestate erfopvolging ten opsigte van die oorlede lewensmaat, geen wetlike reëling van konkubinaatsgoedere, geen moontlikhede van pensioen en geen gesamentlike inkomstebelasting nie.

Sommige van hierdie leemtes kan deur middel van 'n kontraktuele reëling aangevul word. Die reëling sal uiteraard van geval tot geval verskil na gelang van die omstandighede, byvoorbeeld of daar kinders uit 'n vorige huwelik of uit die konkubinaat gebore is, of albei partye werk, wie die eienaar van die woning is, ensovoorts. (Die model wat in die bylae verskyn, is uiteraard slegs 'n riglyn en is op basis van die vennootskapsooreenkoms opgestel.)

Die vraag of 'n soortgelyke kontrak as *contra bonos mores* beskou moet word, is deur die beslissing in *Ally v Dinath* 1984 2 SA 451(T) uit die weg geruim. Die erkenning dat dergelike kontrakte tussen konkubinante egter stilswyend deur hulle optrede aangegaan kan word, open die moontlikheid vir eise op die Amerikaanse model, terwyl die vraag na die regsgevolge van dergelike ooreenkomste teenoor derdes, onbeantwoord gebly het.

In die lig van die populariteit van en die onsekerheid rondom die konkubinaat ontstaan die vraag of dit nie wenslik is dat die reg regsgevolge aan die konkubinaat moet verleen nie. Die antwoord op hierdie vraag word oor die algemeen emosioneel beïnvloed en die belangrikste argument lui dat die toekoms van die huwelik, die hoeksteen van ons samelewing, daardeur in gevaar gestel sal word. Daar kan egter op gewys word dat sedeloosheid, buite-egtelike kinders, egskeiding en owerspel eweneens beskou kan word as faktore wat die huwelik bedreig, maar desnieteenstande nie deur die reg geïgnoreer word nie. Egskeiding, owerspel, sedeloosheid, buite-egtelike kinders en die konkubinaat is so oud soos die huwelik.

'n Ander argument is dat dit tot chaos sal lei as die reg kennis sou neem van die konkubinaat omdat die huwelik die enigste verhouding is wat deur die reg erken word en wat tot regsekerheid lei. Hierdie punt bring ons by meer praktiese implikasies. Watter regsgevolge, indien enige, sou aan die konkubinaat verleen moes word? Indien dieselfde regsgevolge aan die konkubinaat gekoppel word as aan die huwelik, ontstaan die vraag wat dan nou die verskil tussen die twee instellings sou wees. Indien beperkte regsgevolge, soos byvoorbeeld 'n wedersydse onderhoudsplig en vaderskapsvermoede, die konkubinaat as 'n tweederangse huwelik sou daarstel, sou daardie reëlings dan nie net tot voordeel strek van konkubinante wat nie met mekaar kan of mag trou nie? Voorts kan gevra word of dit wenslik is om sulke verhoudings te wettig.

Dit sou dan noodsaaklik word om voorvereistes in te voer wat tot gevolg sal hê dat die groepe wat nie met mekaar kan of mag trou nie, ook nie met mekaar in konkubinaat kan of mag saamwoon nie. Die leemte sou dus slegs gevul word ten behoewe van daardie konkubinante wat nie van die huwelik, as dié vorm van saamwoon en saamleef wat deur die reg vereis word, gebruik wil maak nie. Of die vul van hierdie leemte 'n hoë prioriteit behoort te geniet, is te betwyfel.

Ten slotte moet aandag aan die regsvergelykende benadering gegee word. Is regsvergelyking met betrekking tot die konkubinaat noodsaaklik, nuttig of miskien selfs oorbodig? Hoewel dit onteenseglik altyd nuttig is om 'n mens se gesigsveld te verruim en die positiewe resultaat van regsvergelyking miskien juis daarin geleë is dat die beoefenaar tot die konklusie kom dat daar baie paaie is wat na Rome lei, val dit *in casu* te betwyfel of regsvergelykende navorsing op hierdie gebied 'n oplossing kan bied. Die Christelike basis van die Suid-Afrikaanse staat, die afkeer van sosialisme en kommunisme en die veelrassige bevolking is die mees voor-die-hand-liggende faktore wat regsvergelyking op die gebied van die onderhawige onderwerp nutteloos maak.

Om hierdie opmerkings nie op 'n al te negatiewe noot af te sluit nie, kan verwys word na die bylae wat op 'n beskeie manier probeer om 'n aanvaarbare oplossing vir die konkubinaatsproblematiek te verskaf!

Bylae

Die ondergetekendes: 1 .....

2 .....

verklaar dat hulle met mekaar saamleef of werk, met die doel om mekaar ideële en materiële hulp en bystand in die volledigste sin van die woord te verskaf, waaronder onder andere die gesamentlike voer van 'n huishouding verstaan word.

Om die finansiele gevolge van hierdie verhouding te reël, verklaar die partye dat hulle met mekaar 'n vennootskap aangaan onder die volgende bepalings:

1 Die vennootskap is met ingang van ..... vir 'n onbepaalde tydperk aangegaan.

2 a Elke vennoot sal die volgende inbring:

i sy volledige arbeid en ywer ten opsigte van die gemeenskaplike huishouding asook sy netto-inkomste uit ..... (sy werk). Huishoudelike arbeid en inkomste uit arbeid word as gelykwaardige prestasies beskou;

ii sy huisraad, met uitsondering van klerasie en juwele. Hierdie goedere is aan die partye bekend en geen nadere omskrywing is noodsaaklik nie;

iii indien moontlik die regte met betrekking tot die gemeenskaplik bewoonde woning, welke inbring deur middel van notariële akte sal geskied indien dit so vereis word.

b Ten opsigte van die in klousule 2 a ii en iii bedoelde inbring, sal die party wat meer inbring as die ander party gekrediteer word in 'n gesamentlike boekhouding vir die waarde wat hy/sy meer inbring.

3 a Die uitgawes in verband met die gemeenskaplike huishouding word betaal uit die gesamentlike inkomstes soos bedoel in klousule 2 a i; hierdie inkomstes sal in 'n gesamentlike rekening inbetaal word en albei vennote kan afsonderlik oor daardie rekening beskik.

b Albei vennote is verplig om uit hulle privaat vermoëns eweredig by te dra tot die uitgawes van die gemeenskaplike huishouding wat nie uit die inkomstes of die vermoë van die vennootskap betaal kan word nie.

4 a Elke vennoot is, behoudens alle vermoënsbestanddele wat val onder klousule 2 b, geregtig op die helfte van die vermoë van die vennootskap.

b Indien geen vennoot sy private regte op enige saak kan bewys nie, behoort daardie saak tot die vermoë van die vennootskap.

5 Die werksaamhede in die vennootskap word deur die partye onderling gereël.

6 a Elke vennoot ontvang maandeliks 'n onderling ooreengekome bedrag vir eie gebruik.

b Die oorblywende bedrag bly in die vermoë van die vennootskap.

c Die vennote is verplig om mekaar in te lig oor die finansiële posisie van die vennootskap en om mekaar op enige tydstip insae te gee in die relevante dokumentasie.

7 Die vennootskap word beëindig:

- deur die dood van een van die vennote;
- deur eensydige opsegging deur een van die vennote;
- deur bankrotskap van een van die vennote.

8 a Indien die vennootskap beëindig word deur die dood van een van die vennote op 'n tydstip wanneer die partye saamleef, kom alle gemeenskaplike bates die oorlewende toe onderworpe aan die verpligting om alle gemeenskaplike laste van die vennootskap vir sy uitsluitlike rekening te neem, alles sonder enige vergoeding oor en weer.

b Hierdie beding word onder andere gemaak ter voldoening aan 'n dringende morele verpligting wat op albei partye oor en weer rus om in die onderhoud van die langslewende te voorsien.

9 Indien die vennootskap beëindig word deur opsegging, sal die vennootskapsvermoë so spoedig moontlik deur albei vennote gesamentlik verdeel word.

10 Elke vennoot het die reg om die vennootskap deur opsegging te beëindig, mits sodanige opsegging te goeder trou deur middel van 'n kennisgewing aan die ander vennoot plaasvind. Na beëindiging van die vennootskap sal die

vennote deur oorlegpleging besluit watter vennoot in die woning sal bly woon. Op hierdie vennoot rus dan die verpligting om die ander vennoot te help om 'n geskikte woning te vind.

11 Indien die vennootskap beëindig word deur opsegging, is die kapitaalkragtigste vennoot verplig, om indien dit nodig is, aan die ander party lewensonderhoud te verskaf. Partye beskou hierdie as 'n dringende morele verpligting. Die bedrag wat uitbetaal word, word bepaal deur faktore soos die inkomste, vermoëns en leeftyd van die partye, asook ander omstandighede soos die duur en die aard van die saamleef en/of saamwerk.

12 Die premies van lewensversekeringspolisse word betaal deur die party wat as begunstigde in die polis aangewys is. Hierdie kostes sal nie ten laste van die gemeenskaplike rekening wees nie of op enige ander wyse met die ander vennoot verreken word nie.

Ph J THOMAS
Universiteit van Pretoria

Constructive interpretation is the life of the law. (Per *Pollock.*)

VONNISSE

PROBERT v BAKER 1983 3 SA 229 (D)

Is a claim for repayment of the price plus interest following failure to deliver the res vendita *best described as a claim for restitution or as one for negative* interesse?

In *Probert v Baker* 1983 3 SA 229(D) the defendant, who was the seller, failed to deliver the *res vendita* to an agreed stakeholder as he had undertaken to do (230F–H). (As to the fact that the firm in question was assumed to be a stakeholder see 232G–H.) Following this breach of contract the plaintiff, the buyer, cancelled the sale (231C–D). The stakeholder having gone insolvent eight days after cancellation, and the plaintiff 's claim on insolvency having produced no dividend (231D), the plaintiff sued defendant "for recovery of the price paid" (231E–F) together with interest thereon from the date of cancellation (233E–F).

Both counsel argued the case on the basis that the claim was one for restitution (233B–C). The court held (per Nienaber J)

> "That is neither accurate nor helpful. The action is no longer a true enrichment action in the old mould (De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 2nd ed at 63, 141–144, 310). It is probably better to regard it as a distinct and peculiar contractual remedy. (Cf *Johnson v Jainodien and Another* 1982 (4) SA 599 (C) at 605.) But does it allow for recovery from the guilty party where the performance was not rendered to him but to a third party, either in terms of the initial contract or in terms of a subsequent arrangement?"

The judge did not answer the question he posed but treated the claim as one

> "perfectly consistent with [a] claim for damages for breach of contract. That, to me, appears to be sensible way of approaching the problem. The only question, then, is whether damages can be computed in law so as to correspond to the price paid by the purchaser" (233F–G).

With respect, was the judge's criticism that the approach of both counsel was "neither accurate nor helpful" justified? The criticism could only be justified, it is thought, if (1) restitution is not available in any circumstances as one of the remedies an aggrieved party may choose when he cancels a contract following a major breach, or (2) restitution, though available in some circumstances as a remedy following a major breach of contract, was not available in the circumstances of *Probert's* case, above. There are many contracts, for example contracts of service, where restitution is not appropriate as a remedy; but there are others where it is common, particularly sales where an unpaid seller seeks recovery of the *res vendita* or a buyer to whom the *res vendita* has not been delivered seeks recovery of the price: see the authorities referred to in the present writer's

The Principles of the Law of Contract 3 ed (1980) 396 notes 168–169 and *The Law of Sale and Lease* (1984) chapter 8 where *Landau v City Auction Mart* 1940 AD 284 294 is quoted. (The first of these books is referred to hereinafter as *Contract*.)

The remedy of restitution is, of course, not confined to actions for breach of contract. It is available in other contexts as well, for example in cases on misrepresentation, non-disclosure, *metus* and undue influence (*Contract* 198).

Claims for restitution are in essence claims for restoration to the *status quo ante*: Julian, followed by Ulpian (*D* 21 1 23 7), Voet (21 1 4), Pothier (*Sale* para 218), and Steyn CJ in *Van Zyl v Credit Corporation of SA Ltd* 1960 4 SA 582(A) 589H–590A. See also *Davidson v Bonafede* 1981 2 SA 501(C) 504H–505B, 509D–511H; *Johnson v Jainodien* 1982 4 SA 599(C) 604C–D, 605E–F; *Contract* 198. In *Probert's* case, in the judge's own words (231E–F) "the plaintiff sued the defendant for recovery of the price paid" after cancelling the sale following defendant's failure to deliver the *res vendita*; that is, apart from the question of interest which is referred to below, he asked to be restored to the position in which he had been before the contract was entered into. This being so, it is difficult to understand why the court took the view that counsel should not have argued on the basis that they did.

It will be remembered (see the quotation in the second paragraph of this note above) that the judge acknowledged that restitution is one of the remedies for breach of contract but called it "a distinct and peculiar" one. The particular difficulty the court had in mind (*ibid*) concerned the availability of the remedy where

> "the performance [by the aggrieved party] was not rendered to [the party in default] but to a third party either in terms of the initial contract or in terms of a subsequent arrangement."

This difficulty is encountered whether the claim in circumstances such as those in *Probert's* case is looked upon as one for restitution or for damages. The price could not be restored by the third party because it (the third party, a firm) had gone insolvent. As payment to the third party was the agreed method of performance the rules in *Harper v Webster* 1956 2 SA 495(FC) and *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818(D), quoted in *Contract* 199–200, are in point. As to the difficulty in claims for damages, see *Contract* 425–427. The cases there referred to are mainly on *vis maior*. Ulpian (*D* 19 2 11 1) and, following him, Pothier (*Letting and Hiring* para 195) mention the same principle in connection with actions by a contracting party. Pothier says (Mulligan's translation):

> "If, though forbidden by the lease to keep any inflammable material, the lessee does so, he will be liable for a fire, even where it takes place through *casus fortuitus* for then it is his breach of the lease and therefore his fault that has occasioned the fire . . ."

The requirement of causation being common to both remedies (restitution and damages), if the defendant's action or inaction was causally significant in the sense in which the phrase is used in *Contract* 418–419, 426–427, 482–488, either remedy was available; if it was not, neither was available. That it was causally significant is clear from the fact that, had the defendant not delayed, the money would have been paid to plaintiff long

before the firm became insolvent: 231B–C. It follows that the answer to the questions posed by the judge at 233C–D (quoted in the second paragraph of this note above) depends on the causal significance of the defaulting party's action or inaction. In the circumstances of *Probert's* case the answer, it is thought, is in the affirmative.

The court preferred to look upon the claim as one for damages: see the quotation from 233F–G in the second paragraph of this note above. Nienaber J pointed out that the usual award of damages involves looking forward "to the position he [the aggrieved party] would have occupied had the contract been fulfilled" (234E–F), and continued:

> "But it may suit his purpose to look backwards instead, to the position in which he would have been if no contract had been entered into at all. By the very act of cancelling the contract the aggrieved party is trying to sever all contractual links and to divest himself of the consequences of the contract. There would be no inconsistency in granting him the right, at his election, to turn the clock backwards instead of forward in an effort to restore the *status quo* by means of a claim for damages. Upon cancellation the parties are liable, in so far as it may be feasible to enforce it, to effect restitution of what each has received: a claim for damages, calculated along the lines of negative *interesse*, would therefore simply be following suit."

With respect, this gives rise to difficulties in terminology. If turning the clock back "restores the *status quo* [*ante*]", the parties being liable "to effect restitution," what reason is there for not acknowledging that "restitution" is an appropriate term for the remedy, it being understood that restitutionary damages may be claimed together with restitution?

Different meanings have sometimes been attributed to the term "restitutionary damages." At 234B–D the judge mentioned that a claim for recovery of the price paid has been referred to as one for "restitutionary or restitutional damages." The term is so used in *Salzwedel v Raath* 1956 2 SA 160(E) at 164A (referred to by the judge at 234D – the other references are problematical); but it is thought that failure to distinguish between restitution itself and restitutionary damages, which are supplementary to restitution, is a source of confusion: see *Contract* 175 200–201.

The claim in *Probert's* case included interest from the date of cancellation. This is standard in claims for restitution (see the authorities in *Contract* 198 notes 363, 364, and, in addition, Grotius 3 48 5 and Voet 4 1 21–22).

It follows from what is said above that what the court in *Probert's* case allowed the plaintiff to claim as "negative *interesse*" was also claimable under the heading of "restitution." Further, the term "negative interest" is not classical (*Contract* 209 note 17) and is not free of difficulty (see DJ Joubert, "Negatiewe Interesse in Kontrakbreuk" 1976 *THRHR* 1 esp 12–14).

The circumstances of *Probert's* case being unusual, the decision to award the plaintiff the price paid plus interest is to be welcomed as an instance of the application of the principles of causation; but, with respect, the criticism by the court at 233B–C of the approach of both counsel does not appear to be justified.

AJ KERR
Rhodes University

S v JANSEN 1983 3 SA 534 (NK)

Noodweer as regverdigingsgrond in geval van 'n tweegeveg

Twee beskuldigdes is in hierdie saak aangekla van moord. Die saak teen een is egter deur die staat laat vaar en daar is slegs teen die ander beskuldigde voortgegaan. Verdere verwysings na "die beskuldigde" in hierdie bespreking moet dus gelees word as verwysende na laasgenoemde.

Uit die feite blyk dat die beskuldigde en die oorledene ooreengekom het om "die probleem" tussen hulle uit die weg te ruim deur 'n tweegeveg met messe. Na bewering het die oorledene eerste na die beskuldigde gesteek. Hierop het die beskuldigde die oorledene 'n dodelike wond in die hart toegedien.

Die beskuldigde beroep hom op noodweer. Hy beweer naamlik dat sy handeling 'n afweershandeling teen die wederregtelike aanval van die oorledene was.

Regter Steenkamp voer aan dat dit ongeoorloof is om iemand tot 'n tweegeveg met messe uit te daag en dat die ooreenkoms in hierdie saak tot 'n "wederregtelike stekery" gelei het. Die regter beslis derhalwe dat die beskuldigde die oorledene se dood wederregtelik veroorsaak het. Nadat hy voorts bevind het dat die beskuldigde *dolus eventualis* ten aansien van die oorledene se dood gehad het, bevind hy hom skuldig aan moord.

Die regter bespreek egter nie die vereistes vir noodweer nie en dui bygevolg nie aan watter vereiste volgens hom nie nagekom is nie. Hy verwys wel na De Wet en Swanepoel (*Strafreg* (1975) 72–73) waar die onregmatigheid van 'n deelnemer aan 'n tweegeveg se handeling soos volg verduidelik word: "Daar kan hier geen sprake wees van 'n waardering van die een se handeling as 'n regmatige afweer van die ander se aanval nie." Die geleerde skrywers verskaf egter geen verdere toeligting van hulle mening nie.

Regter Steenkamp verwys ook na die volgende stelling van Snyman (*Strafreg* (1981) 82): "Die deelnemer wat wen kan nie later aanvoer dat daar 'n wederregtelike aanval op hom was nie." Daar moet egter met Snyman verskil word. Die verloorder se deelname stel inderdaad 'n aanval daar, en om te beweer dat die aanval nie wederregtelik is nie, kom kunsmatig voor. In die lig van die regter se bevinding dat die ooreenkoms " 'n wederregtelike stekery tot gevolg gehad" het (537G), skyn dit asof hy ook nie hierdie sienswyse deel nie. Insgelyks meen De Wet en Swanepoel (*supra* 73) dat beide se optrede onregmatig is.

Burchell en Hunt (*SA Criminal Law and Procedure* vol I (1983) 274) se hantering van die probleem bring mens ook nie nader aan 'n oplossing

nie. Volgens hulle sal die beskuldigde se optrede wel wederregtelik wees, maar hulle dui nie 'n rede hiervoor aan nie.

Die beslissings waarna die regter verwys, verleen ook nie veel hulp in hierdie verband nie.

Na my mening is die standpunt van De Wet en Swanepoel (*supra*) te verkies. Die afweer van die aanval deur die beskuldigde sal normaalweg nie as 'n ware afweershandeling kwalifiseer nie, omdat dit in wese 'n noodsaaklike onderdeel vorm van die beskuldigde se eie wederregtelike aanval. Die feite van hierdie saak bied, na my mening, 'n uitstekende voorbeeld hiervan. Die beskuldigde se afweer van die hou was bloot deel van die uitvoering van sy eie wederregtelike aanval wat hy reeds vooraf beplan het. Selfs indien 'n deelnemer aan 'n tweegeveg se optrede in 'n bepaalde geval wel 'n afweershandeling vorm (in dié sin dat dit onderskeibaar is van die aanvalshandeling), sal sy optrede na my mening steeds nie deur 'n beroep op noodweer regverdig kan word nie vanweë die vereiste dat die afweershandeling in noodweer *noodsaaklik* moet wees om die aanval af te weer. Die deelnemer wat wen, kan tog nie later aanvoer dat sy handeling noodsaaklik was om die aanval af te weer nie aangesien hy reeds in die stadium toe hy die ooreenkoms aangegaan het, die aanval kon voorkom het deur bloot te weier om tot die tweegeveg in te stem. Die regmatigheid van sy optrede behoort dus nie alleen met verwysing na sy finale handeling beoordeel te word nie, maar in die lig van *al die feite van die geval*, insluitende die aangaan van die ooreenkoms.

Toestemming tot benadeling kan uit die aard van die saak nie as verweer dien in 'n saak soos hierdie nie aangesien sodanige toestemming geag word *contra bonos mores* te wees (soos treffend verduidelik word in *S v Robinson* 1968 1 SA 666(A) 678, aangehaal in *casu* 537D–F).

TERTIUS GELDENHUYS
Universiteit van Suid-Afrika

S v HOFFMAN 1983 4 SA 564 (T); R v D 1984 3 WLR 168 (HL)

Kinderdiefstal of menseroof deur 'n ouer

Die feite van *Hoffman* was dat die beskuldigde, na sy egskeiding van sy vrou, hulle vyfjarige seun by haar weggeneem het met haar toestemming op voorwaarde dat hy hom voor sesuur namiddag die volgende dag sou terugbring. Omdat die beskuldigde verneem het dat sy gewese eggenote die kind nie behoorlik versorg nie, het hy hom toe nie ooreenkomstig sy afspraak die volgende dag teruggeneem nie, maar hom vir 'n tydperk van bykans vier jaar in sy sorg gehou. Toe sy gewese eggenote daarop 'n klag van kinderdiefstal teen die beskuldigde by die polisie aanhangig gemaak het, het hy

sy regsverteenwoordiger van die polisiestasie af getelefoneer om advies oor die aangeleentheid in te win. Nadat die beskuldigde die egskeidingsbevel, ingevolge waarvan hy beveel is om onderhoud vir die kind te betaal en waarkragtens sy gewese eggenote beheer en toesig oor die kind verkry het, aan sy regsverteenwoordiger voorgelees het, het dié hom meegedeel dat hy die kind in sy sorg mag hou. As verwere teen die aanklag opper die beskuldigde dat die nodige wederregtelikheidsbewussyn hom ontbreek het en dat hy as vader en voog van die kind nie skuldig bevind kan word aan kinderdiefstal op grond van sy verwydering van die kind uit die beheer en toesig van sy moeder nie. Wat die eerste verweer betref, bevind die hof by monde van regter Gordon (met wie regter Grosskopf saamgestem het) dat wederregtelikheidsbewussyn aan die kant van die beskuldigde nie bo redelike twyfel bewys is nie. Vir sover dit die tweede verweer aangaan, verklaar regter Gordon:

> "Ek is met die submissie eens dat nêrens in die gemenereg òf die gewysdes . . . daar enige gesag [is] wat aandui dat 'n natuurlike vader of voog van 'n kind sodanige kind kan steel nie, selfs al het hy nie op die betrokke stadium beheer en toesig oor die kind nie. Na my mening kan dié punt op beginselgronde beslis word dat die blote aanhou en sorg van 'n kind deur die kind se natuurlike vader en voog, nooit kinderdiefstal of *plagium* kan uitmaak nie. Daar kan geen inperking van die kind se 'liberty' in die sin van bewegingsvryheid in so 'n geval wees nie. Ek stem dus saam met die algemene betoog dat dit duidelik is uit die gemeenregtelike gesag dat kinderdiefstal (of menseroof) nooit ten opsigte van 'n vader en voog se eie kind deur die vader en voog kan geskied nie" (566E–F).

Oor die onskuldigbevinding van beskuldigde in die onderhawige geval kan daar beswaarlik gekibbel word. Of daar nou met betrekking tot die eerste verweer aan 'n suiwer subjektiewe toets dan wel 'n oorwegend objektiewe toets vir wederregtelikheidsbewussyn by opsetsmisdade (vgl De Wet *Strafreg* (1975) 146 ev; Snyman *Strafreg* (1981) 185 ev; Burchell en Hunt *South African Criminal Law and Procedure I* (1982-uitg bewerk deur Burchell, Milton en Burchell) 160 ev) voorkeur verleen word, kan daar weinig twyfel bestaan dat die beskuldigde, in die lig van sy navraag by sy regsverteenwoordiger en dié se advies aan hom, *bona fide* onder die indruk was dat sy optrede regmatig was en dat hy redelike stappe gedoen het om te verseker dat sy optrede regmatig was. Aan die opsetvereiste van kinderdiefstal is daar dus eenvoudig nie voldoen nie.

Die tweede grond vir die onskuldigbevinding van die beskuldigde is egter aanvegbaar. Eerstens gaan dit by kinderdiefstal nie om die *bewegingsvryheid* van minderjariges nie, maar wel om die *gesagsregte* van ouers of voogde oor hulle minderjarige kinders as beskermde regsgoed. *In casu* was die vraag dus nie of die beskuldigde sy *seun* se bewegingsvryheid geskend het deur hom van sy moeder weg te hou nie, maar of hy op die beheer en toesig van die *moeder* oor haar seun inbreuk gemaak het. Slegs indien die beskuldigde sy seun *sonder die seun se toestemming* sou weggeneem het, sou die vraag of die beskuldigde inbreuk op die seun se bewegingsvryheid gemaak het en dus *menseroof* gepleeg het, ter sprake gekom het.

Die vereenselwiging van kinderdiefstal (as misdaad wat ouerlike of voogdelike gesagsregte beskerm) met

menseroof (as misdaad wat 'n mens se bewegingsvryheid beskerm) is, afgesien van die historiese ontwikkeling van die misdaad *plagium* in die Romeinse en Romeins-Hollandse reg waarin hierdie onderskeid nie altyd tot sy reg gekom het nie (sien De Wet en Swanepoel *Die Suid-Afrikaanse Strafreg* (1960) 250 ev; De Wet 256–257; Hunt *South African Criminal Law and Procedure II* (1982-uitg bewerk deur Milton) 506–507; Van Oosten en Labuschagne "Die Plagiariese en Raptoriese Misdade" 1978 *De Jure* 32 ev), ten dele te wyte aan die neiging in ons regspraktyk om albei hierdie misdade met die verskillende regsgoed wat daardeur beskerm word, onder die benaming *kidnapping* tuis te bring. Hierdie verwarring is op die spits gedryf in *S v Levy* 1967 1 SA 351(W) 353 354, waarin regter Hiemstra enersyds De Wet en Swanepoel 255 se omskrywing van vryheidsberowing as die korrekte omskrywing van *kidnapping* aanvaar het, maar andersyds verklaar het dat kinderdiefstal by *kidnapping* ingesluit is – en dít terwyl De Wet en Swanepoel 455 kinderdiefstal en vryheidsberowing juis as twee selfstandige en afsonderlike misdade beskou (sien ook De Wet 257 259–260; 1978 *De Jure* 258–259 270–271 272–273). Ook Hunt ("Kidnapping" 1967 *SALJ* 270 274) het by geleentheid die onderskeid wat hy tussen kinderdiefstal en menseroof maak, verontagsaam deur die opvatting te verkondig dat kinderdiefstal nie slegs in 'n geval van 'n ontneming van ouerlike of voogdelike beheer oor minderjariges gepleeg word nie, maar ook deur 'n ontneming van bewegingsvryheid, 'n standpunt wat hy reggestel het in sy werk *South African Criminal Law and Procedure* (508 509–510 vn 33 512).

Vanselfsprekend word met hierdie kritiek nie ontken nie dat daar in 'n gegewe geval 'n skending van sowel ouerlike of voogdelike beheer as bewegingsvryheid kan plaasvind, te wete waar nóg die ouers of voogde nóg die minderjarige tot die ontneming daarvan toegestem het (vgl *Levy*). Feit is net dat daar van kinderdiefstal geen sprake kan wees as die ouers of voogde tot die ontneming van hulle beheer toegestem het nie en dat daar van menseroof geen sprake kan wees as die betrokke persoon tot die ontneming van sy of haar bewegingsvryheid toegestem het nie. Trouens, dat dié twee misdade uitmekaar gehou moet word, blyk alreeds daaruit dat kinderdiefstal net ten aansien van minderjariges en teenoor ouers of voogde gepleeg kan word, terwyl menseroof teenoor sowel minderjariges as volwassenes gepleeg kan word. Indien 'n volwsassene dus tot die ontneming van sy of haar bewegingsvryheid toestem, word menseroof nie gepleeg nie. Stem 'n minderjarige wat oor *intellectus et judicium* beskik tot die ontneming van sy of haar bewegingsvryheid toe, word menseroof eweneens nie gepleeg nie, maar kan kinderdiefstal steeds gepleeg word indien die ontneming van beheer oor die minderjarige sonder die toestemming van sy of haar ouers of voogde geskied. Omgekeerd, stem die ouers of voogde van die minderjarige tot 'n ontneming van hulle beheer toe, of het die minderjarige geen ouers of voogde nie, of ontbreek ouerlike of voogdelike beheer, kan kinderdiefstal nie gepleeg word nie maar word menseroof steeds gepleeg indien 'n minderjarige met *intellectus et judicium* se bewegingsvry-

heid hom of haar sonder sy of haar toestemming ontneem word (sien Snyman 428–429; Hunt *South African Criminal Law and Procedure* 508 509–510 vn 33 512; 1978 *De Jure* 256 en vgl De Wet 259 vn 115). Het die minderjarige geen ouers of voogde nie, of ontbreek ouerlike of voogdelike beheer en stem hy of sy tot die ontneming van sy of haar bewegingsvryheid toe, kan kinderdiefstal nie gepleeg word nie en word menseroof ook nie gepleeg nie.

Uit die voorgaande blyk meteen dat die skending van ouerlike of voogdelike beheer oor minderjariges en die skending van 'n persoon se bewegingsvryheid apart beoordeel moet word en dat 'n vereenselwiging van kinderdiefstal met menseroof en omgekeerd net tot verwarring aanleiding gee. Waar die beskuldigde se seun in die onderhawige geval vyf jaar oud was toe die beskuldigde hom by sy moeder weggeneem het, kan daar nouliks aanvaar word dat die kind oor die nodige *intellectus et judicium* beskik het om toestemming tot 'n ontneming van sy bewegingsvryheid te verleen of te weerhou. Daarom moet regter Gordon gelyk gegee word dat menseroof hier nie deur die beskuldigde as voog van die kind gepleeg is nie. In die geval van 'n jong kind sonder *intellectus et judicium,* oefen hy sy bewegingsvryheid juis deur sy ouers of voogde uit (sien *Levy* 353; Hunt *South African Criminal Law and Procedure* 508 512 en vgl 1978 *De Jure* 256 vn 201) en is menseroof deur die ouer of voog ten opsigte van sy eie kind dus moeilik voorstelbaar.

Regter Gordon se versuim om hoegenaamd op die vraag in te gaan of kinderdiefstal deur 'n ouer *teenoor die ander ouer* moontlik is, kan egter nie goedgepraat word nie. Trouens, dit was juis die kardinale vraag waarom dit in hierdie saak gegaan het. Dit bring mee dat daar beslis is dat 'n ouer nooit kinderdiefstal ten aansien van sy of haar eie kind kan pleeg nie, sonder dat daar ooit op die vraag ingegaan is of een ouer die gesagsregte van die ander ten opsigte van hulle minderjarige kind(ers) kan skend. 'n Bevinding dat 'n ouer nooit kinderdiefstal ten aansien van sy of haar eie kind kan pleeg nie, sou alleen instemming verdien indien dit berus op die korrekte beginsel dat die een ouer nie die gesagsregte van die ander ten opsigte van hulle minderjarige kind(ers) kan skend nie – wat *in casu* geensins die geval was nie.

Tweedens moet daar in die lig van die voorgaande uitgemaak word of daar hoegenaamd 'n behoefte bestaan om die gesagsregte van een ouer teenoor die ander te beskerm. Word daar in ag geneem dat die enigste beskikbare remedies (a 55 van die Kinderwet 33 van 1960 – vgl a 51 van die Wet op Kindersorg 74 van 1983 – ondervang nie juis die situasie wat in *Hoffmann* voorgekom het nie) wat die ouer het uit wie se bewaring die kind geneem word, 'n interdik teen die ontnemende ouer of 'n klagte van minagting van die hof is (Hoffmann 566A–B), word aan die hand gedoen dat daar wel sodanige behoefte bestaan. Die moontlike argument dat die verontagsaming van 'n egskeidingsbevel in elk geval 'n skuldigbevinding aan minagting van die hof tot gevolg kan hê en dat daar gevolglik wel (onregstreeks) 'n strafsanksie bestaan om die een ouer teen 'n inbreukmaking op sy of haar gesagsregte deur die ander te beskerm, dra ewemin gewig as die moontlike reden-

asie dat menseroof of kinderdiefstal waarby 'n losprys geëis en bekom word in ieder geval ook afpersing uitmaak. Die feit dat een misdaad met 'n ander *kan* ooreenval, hef nie sonder meer die *bestaansreg* van die een of die ander van hulle op nie. Die vraag is hier nie of 'n ander misdaad onregstreeks beskerming aan die slagoffer verleen nie, maar of kinderdiefstal (of menseroof), getoets aan die elemente van die misdaadomskrywing, gepleeg word.

Dat die beskuldigde in die onderhawige geval sy gewese eggenote haar beheer en toesig oor die kind ontneem het, kan kwalik ontken word. Of sodanige ontneming van beheer en toesig wederregtelik was in die lig van die feit dat sy gewese eggenote die kind dalk nie behoorlik versorg het nie en dat die klag eers byna vier jaar later teen die beskuldigde gelê is, val weliswaar te betwyfel, maar dit doen nog steeds nie afbreuk aan die beginsel dat waar sodanige ontneming wel in die betrokke omstandighede wederregtelik sou wees en die beskuldigde aan die opsetvereiste sou voldoen, hy vierkantig binne die raamwerk van die misdaadomskrywing van kinderdiefstal sou val nie. Om iemand wat aan al die elemente van 'n misdaadomskrywing voldoen, onskuldig te bevind, sal nie alleen op 'n teenstrydigheid neerkom nie, maar ook op onbillikheid jeens die slagoffer – teenstrydig omdat 'n onskuldigbevinding aan 'n misdaad nie-voldoening aan die vereistes van die misdaad veronderstel en onbillik omdat die een ouer se gesagsregte arbitrêr geen beskerming teen inbreukmaking daarop deur die ander sal geniet nie.

Daar word in oorweging gegee dat dit 'n hoogs onbevredigende toedrag van sake is dat een ouer opsetlik en wederregtelik, dog straffeloos, die ander ouer sy of haar beheer oor hulle minderjarige kind(ers) kan ontneem. Om hier die een houer, wat sy of haar *gesagsregte* betref, *regteloos* teenoor die ander te laat, altans vir sover dit die strafreg aangaan, skep nie alleen 'n gewisse leemte in die strafregtelike beskerming van ouerlike gesagsregte nie, maar sal stellig ook nie as aansporing vir ouers dien om mekaar se wedersydse gesagsregte te respekteer nie.

Die vraag ontstaan of kinderdiefstal alleen deur geskeie ouers ten aansien van hulle wedersydse gesagsregte oor hulle minderjarige kind(ers) gepleeg behoort te kan word, en of kinderdiefstal ook moontlik behoort te wees waar die ouers apart of selfs saamwoon. Immers, dit is moontlik dat die partye apart woon en die een ouer, wat lank al geen belangstelling meer in die kind getoon het nie, die kind sonder toestemming uit die sorg van die ander verwyder, of dat die partye saamwoon en die een ouer die kind sonder die toestemming van die ander op 'n uitgebreide oorsese reis neem. Daar word voorgestel dat die vraag of kinderdiefstal in sodanige gevalle gepleeg word, uiteraard sal afhang van die betrokke omstandighede, met inagneming van die vraag of die ontnemende ouer regtens die *bevoegdheid* gehad het om die minderjarige uit die beheer van die ander ouer te verwyder en of hy daardie bevoegdheid *behoorlik* uitgeoefen het (sien daaroor Van Oosten "Vermoënsmisdade tussen Eggenote: Enkele Opmerkings" 1979 *SASK* 114 121).

Kortom, met die onskuldigbevinding van die beskuldigde in *Hoff-*

mann kan daar geen fout gevind word nie. Dieselfde kan egter nie gesê word van die kategoriese ontkenning daarin van die moontlikheid van kinderdiefstal deur een ouer teenoor die ander nie. Dit is jammer dat die beginsel dat 'n ouer nooit kinderdiefstal of menseroof ten opsigte van sy of haar eie kind kan pleeg nie, gestel moes word in die eerste gerapporteerde saak waarin die vraag ter sprake gekom het.

In dié verband kan daar interessantheidshalwe en vergelykenderwys verwys word na die ten aanvang vermelde beslissing in *D*, skynbaar eweneens die eerste op die gebied in Engeland, waarin die hof oor die regsvraag moes beslis of 'n ouer *kidnapping* ten aansien van sy eie kind kan pleeg al dan nie. Die feite van die saak was dat die beskuldigde sy vyfjarige dogtertjie by twee geleenthede gewelddadig uit die beheer en toesig van haar moeder, van wie hy geskei was en aan wie beheer en toesig kragtens 'n hofbevel toegeken was, geneem het, eers na Nieu-Seeland en later na Ierland. Die *House of Lords,* by monde van Lord Brandon van Oakbrook, omskryf *kidnapping* as

> "(1) the taking or carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse" (192B).

Volgens Lord Brandon van Oakbrook hou die feit dat die beskuldigde hom in die onderhawige saak aan minagting van die hof skuldig gemaak het, geen verband met die vraag of die beskuldigde in die onderhawige geval *kidnapping* gepleeg het nie (195E–F), ofskoon hy verklaar:

> "The other matter to which I said that I would return is the desirability, as a matter of policy, of prosecuting for kidnapping parents who snatch their own children in defiance of a court order relating to their custody or care and control. With regard to this I accept fully that, in general, is it desirable, as a matter of policy, that the conduct of such parents should be dealt with as a contempt of court, rather than as the subject matter of a criminal prosecution. The latter method of dealing with the problem should, in my view, only be used in exceptional cases, where the conduct of the parent concerned is so bad that an ordinary right-thinking person would immediately and without hesitation regard it as criminal in nature. In all other cases the problem will best be dealt with by the taking of appropriate proceedings for contempt of court. I would add that I would regard it as extremely undesirable that there should, in any circumstances, be any private prosecutions for the kidnapping by a parent of his own child" (197E–H).

Nietemin bevind hy dat die regsvraag of die beskuldigde hom *in casu* aan *kidnapping* skuldig gemaak het, bevestigend beantwoord moet word in die lig van die veranderde sosiale omstandighede en heersende regsopvattings, waarvolgens

> "[s]ince the 19th century... the generally accepted social conventions relating to the paramountcy of a father's position in the family have been progressively whittled away, until now, in the second half of the 20th century, they can be regarded as having disappeared altogether."

Ouers word in die meeste opsigte, en in besonder met betrekking tot hulle gesagsregte oor hulle kinders, as gelykes behandel. Gevolglik kan die feit dat 'n vader homself waarskynlik nie in die negentiende eeu aan *kidnapping* ten opsigte van sy eie kind skuldig sou kon maak nie, die beskuldigde nie in die twintigste eeu van aanspreeklikheid daarvoor vrywaar nie (196B–G). Hy vervolg dan:

> "I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child's consent which is material, what-

> ever its age may be. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent.
>
> I should add that, while the absence of the consent of the person having custody or care and control of a child is not material to what I have stated to be the third ingredient of the common law offence of kidnapping, the giving of consent by such a person may be very relevant to the fourth such ingredient, in that, depending on all the circumstances, it might well support a defence of lawful excuse" (197B–F).

Alhoewel Lord Scarman dit met Lord Brandon van Oakbrook eens is dat die regsvraag *in casu* bevestigend beantwoord moet word, is hy van mening dat aanspreeklikheid vir *kidnapping* hier alleen opgedoen behoort te kan word "when the parent acts in contravention of the order of a court of competent jurisdiction restricting his or her parental rights" (188H).

Tussen *D* en *Hoffmann* is daar, benewens enkele ooreenkomste, verskeie verskille wat onderling met mekaar verband hou: Eerstens was daar in eersgenoemde 'n gewelddadige ontneming, terwyl daar in laasgenoemde geen sprake van 'n onvrywillige ontneming was nie. Tweedens is daar 'n eersgenoemde aanvaar dat die ontneming die toestemming van die minderjarige geskied het, terwyl daar in laasgenoemde nooit pertinent op die vraag of die minderjarige toestemming tot die ontneming (kon) verleen of weerhou het, ingegaan is nie. Derdens was die vraag waaroor die hof in eersgenoemde moes beslis of daar 'n wegname of wegvoering van die minderjarige sonder haar toestemming deur geweld of bedrog en sonder 'n wettige verskoning gepleeg is, terwyl die eintlike vraag in laasgenoemde was of die beskuldigde opsetlik en wederregtelik die minderjarige uit die beheer en toesig van sy moeder geneem het. Laastens het dit in eersgenoemde om die minderjarige se vryheid as beskermde regsgoed gegaan, terwyl dit in laasgenoemde eintlik om die moeder se gesagsregte oor haar minderjarige kind as beskermde regsgoed gegaan het. Kortom, in Suid-Afrikaanse terme uitgedruk, was die vraag in eersgenoemde of menseroof gepleeg is, terwyl die vraag in laasgenoemde was of kinderdiefstal gepleeg is. Suid-Afrikaansregtelike *kidnapping* val dus saam met Engelsregtelike *kidnapping* in dié mate dat albei dié misdade 'n mens, hetsy minderjarige of volwassene, se vryheid beskerm, maar anders as die Engelse misdaad, is die Suid-Afrikaanse misdaad ook gerig op die beskerming van ouerlike of voogdelike gesagsregte oor hulle minderjarige kinders.

Desondanks is dit opvallend dat die *House of Lords* dit in *D* enersyds nodig geag het om die gelykberegtiging van man en vrou se gesagsregte oor hulle minderjarige kinders te boekstaaf, maar andersyds van die standpunt uitgegaan het dat die toestemming van 'n ouer tot die ontneming van die minderjarige uit sy of haar beheer en toesig nie ter sake is by die beant-

woording van die vraag of *kidnapping* gepleeg is al dan nie – behalwe vir sover toestemming van die toesighoudende ouer tot die ontneming van die minderjarige moontlik, afhangende van die omstandighede, 'n wettige verskoningsgrond kan uitmaak. Hieruit wil dit voorkom of *kidnapping* nie gepleeg sal word as die een ouer hulle toestemmingsonbevoegde minderjarige kind met die toestemming van die ander ouer uit sy of haar beheer en toesig neem nie. Omgekeerd, neem die een ouer egter hulle toestemmingsbevoegde minderjarige kind teen sy of haar sin en wil uit die beheer en toesig van die toestemmende ander ouer, sou *kidnapping* wel gepleeg kon word. Andersins sal *kidnapping* nie gepleeg word nie waar 'n toestemmingsbevoegde minderjarige kind hom of haar vrywillig deur die een ouer uit die beheer en toesig van die ander nie-toestemmende ouer laat neem.

Van 'n regstreekse erkenning van die gesagsregte van die een ouer teenoor die ander oor hulle minderjarige kinders kom daar dus by *kidnapping* in beginsel nie veel tereg nie, maar in die praktyk sal die feit dat 'n minderjarige onder die ouderdom van veertien jaar nie geredelik toestemmingsbevoeg geag sal word nie, die toesighoudende ouer se gesagsregte wel enigermate onregstreeks beskerm. Die wenslikheid daarvan om die toestemmingsbevoegdheid van minderjariges aan bepaalde ouderdomsgrense te koppel, moet egter bevraagteken word. In 'n geval soos *Hoffman* sou dit tot die onbevredigende resultaat lei dat die beskuldigde daar inderdaad menseroof gepleeg het, sonder dat daar enige sprake van 'n ontneming (en aanhouding) van die minderjarige teen sy sin en wil uit die beheer en toesig van sy moeder was. Blyk dit egter dat 'n minderjarige inderdaad onvrywillig deur een ouer uit die beheer en toesig van die ander ouer geneem is, is die beslissing in *D* dat *kidnapping* wel gepleeg kan word, te verkies bo die beslissing in *Hoffman* dat menseroof en kinderdiefstal nie deur 'n ouer ten aansien van sy of haar eie kind gepleeg kan word nie.

Ten slotte moet daar weer eens beklemtoon word dat nie elke inbreukmaking deur een ouer op die gesagsregte van die ander, ongeag of hulle geskei is, apart of saamwoon, nou sonder meer kinderdiefstal sal uitmaak nie. Alvorens so 'n ouer aan kinderdiefstal skuldig bevind sal kan word, sal dit in die betrokke omstandighede moet vasstaan dat hy of sy nie alleen 'n *wederregtelike* inbreuk op die gesagsregte van die ander ouer gemaak het nie, maar ook dat hy of sy dit met *wederregtelikheidsbewussyn* gedoen het. In dié verband is dit veelseggend dat 'n ouer aan wie uitsluitlike bewaring oor hulle minderjarige kind(ers) ingevolge 'n hofbevel toegeken is en wat die ander ouer in stryd met sodanige hofbevel en sonder redelike oorsaak toegang tot die kind(ers) weier of verhinder dat toegang tot die kind(ers) verkry word, hom of haar aan 'n oortreding van artikel 1(1) van die Verdere Algemene Regswysigingswet 93 van 1962 skuldig maak. Daarmee word strafregtelike erkenning en beskerming aan die nietoesighoudende ouer se reg van toegang tot sy of haar minderjarige kind(ers) verleen. Terselfdertyd is dit egter ook waar dat die nie-toesighoudende ouer wat sy of haar toevlug tot eierigting sou neem ter afdwinging van sodanige reg van toegang, hom of haar

aan 'n misdaad soos aanranding (sien *S v Kamffer* 1965 3 SA 96(T)) skuldig kan maak. In ooreenstemming hiermee is dit heeltemal voorstelbaar dat so 'n ouer ook deur middel van 'n wederregtelike uitoefening van sy of haar toegangsreg, mits dit aan die vereistes van die misdaadomskrywing voldoen, kinderdiefstal kan pleeg. Insgelyks behoort 'n ouer alleen aan menseroof ten opsigte van sy of haar kind(ers) skuldig bevind te word waar die inbreukmaking op die minderjarige se bewegingsvryheid in die betrokke omstandighede *wederregtelik* en met *wederregtelikheidsbewussyn* geskied het. Terloops dien hier opgemerk te word dat Lord Scarman se vereiste van optrede in stryd met 'n geldige hofbevel darem 'n alte eng en formalistiese siening van wederregtelikheidsbepalende faktore in die onderhawige gevalle weerspieël, asook dat Lord Brandon van Oakbrook se uitlating oor die beskouings van die "ordinary right-thinking person" weliswaar treffend in formulering is, maar nie bepaald insiggewend is oor die faktore aan die hand waarvan wederregtelikheid in die onderhawige gevalle vasgestel word nie.

FFW VAN OOSTEN
Universiteit van Pretoria

KATAGUM WHOLESALE COMMODITIES CO LTD v THE MV PAZ 1984 3 SA 255 (N)

Admiralty jurisdiction: a new direction

Katagum Wholesale Commodities Co Ltd v The MV Paz is the first reported case dealing with the powers conferred on the South African courts by the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act). The particular section involved was section 5(3) which, as Friedman J, in delivering the majority judgment said,

> "in effect empowers a court to arrest at the instance of a foreigner, a ship, owned by a foreigner, as security for a claim pending in some foreign country which is based on a foreign cause of action and is subject to a foreign law" 263E.

The case before the court had no connection whatsoever with South Africa, apart from the fact that the ship involved had put in at Durban; it was registered in Panama, the applicant was a Nigerian company, the claim related to damage which occurred between Antwerp and Lagos and an action *in rem* was proceeding in Hong Kong. The application came before Didcott J but, because he feared the implications of the court becoming "some sort of judicial Liberia or Panama" (263H), the matter was referred to the full bench.

Section 5(3) gives the court a discretion whether or not to exercise jurisdiction and the Natal Provincial Division, without wishing to be overprescriptive, seemed concerned to provide some general guide-lines for the exercise of the discretion. Friedman J

referred to the corresponding sections of the Civil Jurisdiction and Judgments Act 1982(UK) on which the South African Act was based and which had apparently come into being as a result of judicial dissatisfaction with the lack of jurisdiction to attach for purposes of security in such situations (*The Rena K* 1979 1 All ER 397(QB) per Brandon J at 413). Because of the apparent desirability of such jurisdiction and in view of the fact that it would have been open to the applicant to bring a separate action *in rem* in a South African court (notwithstanding that already proceeding in Hong Kong – section 3(5) of the Act) and such court would be able to decline jurisdiction only if it was satisfied that the matter could more appropriately be decided elsewhere (section 7(1)(a)), the court concluded that

> "a court should not be averse to exercising the powers conferred on it by s 5(3) but should rather be disposed to exercise them unless it is satisfied on the facts of a particular case that it ought not to do so" (267F).

Apart from this general attitude, it was held that the applicant should make out a *prima facie* case indicating reasonable prospects of success and should explain why he needs the assistance of a South African court. If it is a question of security that is involved, he should explain why security is necessary, that it has not been obtained and cannot be obtained in the other proceedings (268A–C). The court found that insufficient information had been given and therefore dismissed the application.

In a separate concurring judgment, Didcott J disagreed that the court should be inclined to grant such applications. While he agreed with the principles mentioned above, he added two riders: in the first place, ships should not be scared away because attachments are permitted too freely. On the other hand, undue reluctance to permit actions under section 5(3) could encourage the unnecessary commencement of actions *in rem* to achieve the same purpose. A satisfactory balance would therefore have to be achieved between these extremes (270C–F).

Now, the admiralty courts are entirely separate institutions from the ordinary provincial and local divisions which they appear to be (see Booysen "Admiraliteitshowe in die Suid-Afrikaanse Reg" 1973 *THRHR* 241 249 *et seq*) and apply the English Law of 1890 in admiralty matters (section 6(1)(a)) except in so far as it conflicts with the provisions of any law of the Republic (section 6(2)). Prior to this Act, it was therefore possible to commence an action *in rem* against a ship provided only that the ship was attached within the territorial waters of the Republic (Cheshire & North, *Private International Law* 10 ed 86); this jurisdiction has been retained by section 3(5) of the Act. Attachments of this sort are in conflict with the fundamental jurisdictional principle of South African law that there should be some connection between the action and the court, other than the mere physical presence of property within its jurisdiction (*Maritime and Industrial Services Ltd v Marcierta Compania Naviera SA* 1969 3 SA 28(D)); admiralty actions *in rem* must therefore be regarded as an exception to the rule. The new Act has gone further, however, and provided for attachments to found jurisdiction in actions *in personam* between *pere-*

grini (section 4(4)(a)) and for attachments to provide security even where no action is pending in South Africa. This development, as has been indicated, maintains pace with corresponding English-law developments, and appears to be indicative of the modern trend towards preventing the assets of the defendant from being stealthily secreted away from the grasp of the plaintiff. This is the whole purpose of the Mareva injunction in English law, which has its counterpart in South African law as well (see my article "The Mareva Injunction and South African Law" 1984 *MB*). It appears that, without such statutory intervention, the South African admiralty courts, like their English counterparts, would have been unable to authorise such attachments as security for claims pending elsewhere and in this way the Act has gone some way to updating the very ancient admiralty laws. Section 4(4)(b), however, provides for the attachment of property not within the area of jurisdiction of the court which will become effective on its arrival. It is submitted that this is so opposed to the notion of an effective judgment that it is really unacceptable; a foreigner may approach a court for attachment of a foreign ship that is not even there. If the courts are concerned not to achieve the status of a judicial Liberia, then this section will, at the very least, have to be used with extreme caution.

It is submitted, however, that on the question of the attitude to be adopted by the courts, the view expressed by Didcott J is the correct one. It is unfortunate, therefore, that the majority judgment leant in favour of granting rather than refusing attachments in terms of section 5(3) – it would appear that there is no basis in the Act for the court to grant such an attachment unless satisfied that it should not do so (*ie* placing the onus of proving the unsuitability of the attachment on the defendant). The court should, it is submitted, rather have left the matter at the guide-lines laid down by it, thus requiring each court to exercise its discretion on the facts of the case in front of it. On the facts, however, it is submitted that the court was clearly correct in refusing the application.

It may also be apposite to mention that section 5(3) is not entirely clear: there is only a semi-colon between section 5(3)(i) and (ii). Apart from the dubious grammatical nature of this construction, it does not appear whether both subsections constitute prerequisites for the exercise of the jurisdiction. If they do, then the first portion of subsection (i) does not seem to make sense. If either condition is sufficient, then the security may be sought in actions *in personam* as well, and this would amount to a further inroad into a defendant's rights.

There is a further aspect of the Act which may be a cause for concern and this arises in a situation where there is a dispute as to whether or not the claim is a maritime one. If the court holds that it is, any property attached to found jurisdiction will be deemed to have been attached in terms of the Act (section 7(2)(a)). If, on the other hand, the claim turns out to be something other than a maritime one and jurisdiction was obtained by reason of an attachment the court may permit the action to proceed as though the attachment had been by an *incola* (section 7(2)(b)). The court retains a

discretion to make any other order, but its decisions under section 7(2) are not subject to appeal (section 7(3)) and it can be seen that the possibility now exists of two *peregrini* being able to litigate a *non-maritime* claim in a South African court where there is no *ratio jurisdictionis* apart from the attachment of property. This is a complete departure from established principles, as outlined above and, although it is obviously only a very limited loophole and the courts would probably exercise their discretion against a litigant who appeared to be abusing the procedures of the court, it is yet another step in the widening of the jurisdiction of the courts. In this type of situation, the trend is a cause of concern because jurisdiction exercised as a result of mere attachment, is generally regarded as "excessive" in private international law (see De Winter "Excessive Jurisdiction in Private International Law" 1968 *ICLO* 706) and it seems that, as far as possible, jurisdiction should be limited to that which is internationally recognised.

In conclusion, therefore, it may be stated that the Admiralty Jurisdiction Regulation Act has taken several steps towards expanding the jurisdiction of the South African courts. While some of these aspects appear to keep pace with trends in modern commercial shipping law, others have perhaps taken the matter further than is warranted.

ANDREW BECK
University of Transkei

BOEKE

INHEEMSE PUBLIEKREG IN LEBOWA
MW PRINSLOO in co-operation with AC MYBURGH
Van Schaik Pretoria 1984; xix and 365 p
Price R30,00 + GST

The work is written as a textbook for students and for use in the administration of justice in tribal, magistrates and higher courts as well as for use in the performance of administrative acts by tribal authorities, magistrates and higher authorities in Lebowa.

The method of research and sources include interviews with Sotho experts from fourteen tribes in Lebowa as well as personal observation during court sessions, meetings, the collecting of levies and applications for land and other privileges; comment on the original manuscript of the work by an expert advisory committee; legal and anthropological works; cases of the South African supreme court and appeal courts for the commissioners' courts and cases of tribal courts.

A succinct description of the fourteen tribes researched is provided in the introductory chapter. Chapter 2 deals with the sources of origin and the authoritative sources of indigenous law. Thereafter, the constitutional law, administrative law, criminal law, law of procedure and evidence are treated of in separate chapters.

An endeavour is made in the exposition to formulate general rules from the rules given by the tribes studied. Where differences occur in the rules or their application among the various tribes, these are furnished for the sake of completeness as they are applied in the interim. The law which is described in the work is the contemporary law as known to the experts and applied in the courts. The ancient law as related to the experts, and which is to be found in the literature, is also set out.

Important subjects include rules of succession in respect of chieftainship; the powers and duties of a chief, headman, private council, tribal council, general assembly and the tribal authority; the requirements for a chief's orders and other acts; rules with regard to tribal, trust and private land; twenty-nine specific crimes; tribal courts and their rules of procedure and evidence.

The work also contains appendices in which original and valuable information is provided about the genealogy of the chiefs which were researched, the names and districts of the

recognised one hundred and thirteen Northern Sotho tribes and a description of the tribal group to which each belongs, the male regiments of the tribes studied and thirty-four recorded cases of tribal courts, of which eight were personally observed and the rest recounted to the author by the Sotho experts.

The list of cases and the very complete index enhance the usefulness of the work. The scientific nature of the work is self-evident from the investigative method which is described in chapter 1.

An outstanding feature of the work is the high standard of the language in which the work is written. Ironically, it is against the choice of the language that the only substantial criticism can be levelled. If the readership for which the book is in the main intended is borne in mind, then for obvious reasons, an English version would have been preferable. In the event, it is to be hoped that an English copy will soon follow.

ADRIENNE VAN BLERK
University of South Africa

CRIMINAL LAW

CR SNYMAN

Butterworths Durban and Pretoria 1984; pp 545

Price R64,80 (hard cover) R48,80 (soft cover) + GST

This book is a translation by the author, assisted by Mrs Lesbury van Zyl, of his well-known work *Strafreg*, which appeared in Afrikaans in 1981. In the preface the author emphasises that the work should be viewed not as a second edition of *Strafreg*, but merely as an English translation of the original work. He continues:

> "However, it is hardly feasible to translate a legal work two years after the publication of the original without adding to or changing its content at all, assuming that the author wishes the work to reflect the law as it is when the translated version goes to press. Criminal law is one of the dynamic branches of the law, and since the Afrikaans edition was published there have been quite a number of new decisions, as well as one or two new statutes dealing with criminal law. These decisions and statutes have been incorporated into this translated edition. I have also included references to articles, notes, books, and so forth, published by academic lawyers after the appearance of the Afrikaans edition, but I have resisted the (sometimes strong) temptation to change the text of the book in order to accommodate, discuss or criticise the views of these lawyers, for the sole reason that I did not wish the English version to become a 'second edition' of the original work. The result is that this edition differs in content from the Afrikaans one only to the limited extent that new case law and statutes have been incorporated into it.
>
> The passing and coming into operation of the Internal Security Act 74 of 1982 necessitated a complete rewriting of section E of chapter VIII, which deals with statutory offences against the state. This new section is lengthy because the act in question created a large

number of offences relating to state security, and because the definitions of some of these offences (such as terrorism, subversion and sabotage) are particularly long.

New editions of some of the books referred to in the footnotes have appeared since the Afrikaans edition was published. References to these books now relate to the new editions. Books in this category include *Burchell and Hunt*, *Hunt*, *Baumann*, *Maurach-Zipf* and *Schönke-Schröder*."

In the light of the foregoing, as well as of the fact that *Strafreg* has already been thoroughly reviewed in this journal in 1982 by Steph E van der Merwe (see 1982 *THRHR* 222–225), another review is unnecessary. It suffices to conclude with the following remark from Van der Merwe's review: "*Strafreg* is 'n puik stuk werk en word sonder die minste huiwering aanbeveel."

J NEETHLING
University of South Africa

PLEA PROCEDURES IN SUMMARY CRIMINAL TRIALS

SE VAN DER MERWE, GA BARTON en KJ KEMP

Butterworths Durban en Pretoria 1983; xivv en 166 bl

Prys R27,00 + AVB

Soos in die subtitel aangedui is, is die boek 'n ontleding van artikels 112 en 115 van die Strafproseswet 51 van 1977. Hierdie ontleding, wat grootliks gebaseer is op Steph van der Merwe se *Handleiding* tot artikels 112 en 115 van die Strafproseswet wat in 1980 verskyn het, is 'n uitgebreide en bygewerkte weergawe van *Handleiding*.

Die stof is sistematies ingedeel in vier hoofdele, elk met hoofstukke as onderafdelings. Die onderwerpsgewyse-indeling vergemaklik die hantering van die stof asook naslaanwerk. Die inhoudsopgawe aan die begin van elke hoofstuk is nuttig. Die uitgebreide historiese agtergrond van artikels 112 en 115 is miskien onnodig in 'n werk van hierdie aard.

'n Goeie balans word deurgaans gehandhaaf tussen die bespreking van die regsposisie en moontlike akademiese standpunte.

Die uitgebreide behandeling van hoofregter Hiemstra se standpunte aangaande die uitwerking van 'n beskuldigde se stilswye tydens pleitverduideliking is onnodig. Die uitsprake van die hooggeregshof van Bophuthatswana is tog nie bindend op ons howe nie. By die behandeling van die aanvaarding van pleite kon daar ook na *S v Mokoena* 1981 1 SA 148 (O), asook na *S v Pietersen* 1982 1 PH 416 (K) verwys gewees het.

In verband met artikel 115 het 'n belangrike beslissing *S v Daniels* 1983 3 SA 275 (A) intussen die lig gesien. Dit was egter nadat die werk voltooi is en die outeurs kon dit dus nie opgeneem het nie.

Ten aansien van artikel 312 moet artikel 23 van Wet 59 van 1983 in ag geneem word aangesien dit die aangeleentheid heelwat wysig.

In die geheel is daar baie min tipografiese of setfoute en die werk skep 'n netjiese indruk. Die boek is heelwat meer professioneel as *Handleiding* en sal beslis 'n nuttige handleiding vir die regstudent, regspraktisyn en landdros wees.

HLE VAN DER MERWE
Universiteit van Suid-Afrika

Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary. (Per *Reinhold Niebuhr* in The Children of Light and the Children of Darkness.)