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TB Smith

In memoriam

With the death on 15th October 1988 of Professor Emeritus Sir Thomas Broun Smith QC FBA, of Edinburgh University, Scots law has lost one of its most enthusiastic and effective protagonists.

Born in Glasgow in 1915, he attended Glasgow High School and Sedburgh, then went up to Christ Church, Oxford, where he gained first class honours in the School of Jurisprudence and an Eldon Scholarship. In 1938 he was called to the English Bar by Gray's Inn. He served in the armed forces during the war, rising to the rank of Lieutenant-Colonel. He was admitted advocate in Scotland in 1947 and was appointed, in 1949, to the Chair of Scots Law at Aberdeen University, where he also served, for two periods, as Dean of the Law Faculty.

In 1958 he moved to Edinburgh University: first, to its Chair of Civil Law and then, in 1968, to the Chair of Scots Law. Again, at Edinburgh, he served as Dean of the Law Faculty. He had been a part-time member of the Scottish Law Commission from its foundation in 1965, and in 1972 he joined its full-time staff. As an Honorary Professor he continued to teach at the University, his main offering being an honours course in Law Reform. He retired from the Commission in 1980 and in 1981 he was made Knight Bachelor for services to Scots law. In that year he took on what proved to be his final great task, the production, as its general editor, of *The laws of Scotland: Stair memorial encyclopaedia*. He inspired some 250 contributors, including judges, practitioners, civil servants and academics, to write for the *Encyclopaedia*, offering them, as he put it, "no reward other than a niche in the hall of fame". Six of the 25 volumes have already appeared and the others will be published within the next few years.

Sir Thomas's main concern was always the preservation and development of, and stimulation of interest in, Scots law. In 1961 he gave the Hamlyn Lectures, his title being "British Justice: The Scottish Contribution". He wrote several books, notably his learned, but readable, *A short commentary on the law of Scotland*, and over a hundred articles and other contributions to legal literature. He was principally responsible for establishing, in 1960, the Scottish Universities Law Institute, the aim of which was to commission the writing and publication of textbooks on branches of Scots law. Some dozen such publications of the Institute are now available.

Sir Thomas made many visits to universities in other countries, including the universities of Cape Town and the Witwatersrand in 1958. In 1959 the University of Cape Town conferred on him one of his several honorary degrees, an LLD. In 1968 he visited the university in Roma, Lesotho, and was admitted to the local bar. Over the years he welcomed many South African academics to Scotland. He was an admirer of the South African legal system. He recognized that it had, as a "mixed system", many affinities with Scots law and he actively encouraged the use of South African legal materials by Scottish academics and practitioners. While Dean of the Edinburgh Law Faculty, he arranged to admit

to the faculty law students from Botswana, Lesotho and Swaziland. Under this scheme about 300 such students came to Edinburgh for two years over a 20 year period.

Sir Thomas was a kind and sympathetic friend, always ready to help all those, and there were many, who sought his advice and aid. However, his greatest talent was undoubtedly his ability to encourage and inspire others also engaged in the great common task of expounding, evaluating and developing Scots law.

RD LESLIE
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VERENIGING VIR DIE REKENAAR IN DIE REG

Die Suider-Afrikaanse Vereniging vir die Rekenaar in die Reg (SAVRR) is op Vrydag 16 September 1988 by 'n kongres op die kampus van die Witwatersrandse Universiteit gestig. Ongeveer 180 persone uit die regswêreld het die kongres bygewoon. Afgevaardigdes na die kongres het 'n grondwet vir die Vereniging aangeneem, en die volgende ampsdraers verkies:

Prof Francois Venter (PU vir CHO) as President; mnr André van Vuuren (Direkteur-generaal van die Vereniging van Prokureursordes) as Vise-president; dr Sieg Eiselen (PU vir CHO) as Sekretaris/penningmeester; adv Anton Mostert SC (Johannesburg Balie) vir regsdatabasisse; prof Dana van der Merwe (Unisa) vir regsinformatika; dr Michael Lambiris (Rhodes Universiteit) vir RGRO (rekenaargesteunde regsonderrig); en mnr Piet Burger (immateriële goedereprokureur) vir regskantooroutomatisasie. Sy edele regter PJJ Olivier is beskermheer van die Vereniging.

Die adres van die sekretaris/penningmeester is:

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Toward distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation*

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OPSOMMING

Onderweg na eiesoortige beginsels van die Suid-Afrikaanse omgewingsreg: sommige regwetenskaplike perspektiewe en 'n rol vir wetgewing

Hierdie omvattende artikel bestaan uit drie dele. Die eerste deel behels 'n oorsig van huidige denke oor die aard, omvang en rol van die omgewingsreg. In die lig van die bydraes van professore André Rabie, Barend van Niekerk, Christopher Stone en Tony Honoré word dan gepoog om die onderwerp in regswetenskaplike perspektief te plaas. Die skrywer voer aan dat die bevinding van Lord Scarman dat die Engelse gemenereg nie toereikend is om 'n balans tussen aanvaarbare ontwikkeling en die beskerming van die omgewing in die algemene belang te handhaaf nie, ook vir die Suid-Afrikaanse gemenereg geld. Redes word verstrek waarom wetgewing nodig is om 'n leidende en vormende rol in die formulering van eiesoortige beginsels van omgewingsreg te speel.

In die tweede deel word klem gelê op die behoefte aan regsvergelykende navorsing en die aandag word gevestig op die rykdom nuttige en relevante wetgewing in Australië en die VSA. Ses noodsaaklike kenmerke van doeltreffende wetgewing word bespreek: (i) die behoefte om gebruik te maak van 'n verskeidenheid tegnieke ten einde die talryke omgewingsverskynsels voldoende te beskerm; (ii) die noodsaaklikheid om toe te sien dat staatsdepartemente die reg gehoorsaam; (iii) die behoefte aan wetlike – en nie bloot politieke nie – maatreëls; (iv) die daarstelling van 'n vereiste dat redes verskaf word vir alle administratiewe beslissings wat die omgewing wesenlik raak; (v) die daarstelling van 'n vereiste dat elke projek wat die omgewing wesenlik raak, voorafgegaan word deur 'n volledige ondersoek na die uitwerking van die projek op die omgewing; en (vi) die daarstelling van 'n onafhanklike deskundige liggaam ter beskerming van die omgewing. Die bepalings van die Suid-Afrikaanse Wetsontwerp op Omgewingsbewaring (1987) word in die lig van hierdie kriteria geëvalueer.

In die derde deel wys die skrywer daarop dat die reg, wat die openbare mening vorm en ook daardeur gevorm word, 'n belangrike rol in die beskerming van die omgewing speel; daar is nietemin geen juridiese towerformule waarmee alle probleemsituasies opgelos kan word nie. Mens sal net gefrustreer word indien meer van die reg verwag word as wat inderdaad deur die

* Keynote address at the Environmental Law Conference organised by the Society of University Teachers of Law and the Wild Life Society of South Africa, delivered at the Kruger National Park on Thursday 1988-04-21.

regsproses bereik kan word. Die skrywer stel dit duidelik dat 'n lang pad vir Suid-Afrika voorlê voordat die skending van die omgewing as moreel verkeerd beskou sal word. Die bewaring van die omgewing is nie net die taak van die regering en die reg nie. Dit berus ook op die morele oortuigings en die geloof van die individu. Die reg veronderstel dus 'n basis van ooreenkoms en oortuiging waarop alle reëls en medewerking berus. Die skrywer beklemtoon ten slotte dat ons gebied word om God en ons naaste lief te hê – en 'n mens kan nie God en sy naaste liefhê as ons sy skepping en ewebeeld minag nie.

INTRODUCTION

This article is divided into three parts: (i) the current position; (ii) legislative options; and (iii) the moral imperative and beyond.

First, a review of current thinking about the nature, scope and role of environmental law, and an attempt to put the subject into jurisprudential perspective. There, the emphasis will be on the need for new concepts, classifications, basic principles, remedies, methodologies and procedures. I also explain why, in my opinion, we must rely on legislation to play an innovative and seminal role.

Secondly, looking ahead, I examine the prospects for significant developments in South Africa in the light of the proposed new Environment Conservation Act (Notice 798 of 1987), and offer a few thoughts about how our legal system, and especially legislation, may best be used to meet the challenge of world-wide concern for the environment. It is an awesome challenge, requiring us to find and keep a sensible balance between development and environmental protection, in order to achieve both sustainable development and quality of the environment in a world comprising some rich and technologically advanced nations, but many more poor nations clamouring for development.[1] Few will doubt that we have to find solutions of the central problems highlighted in that excellent book, *Our common future*, which was published in 1987 by the World Commission on Environment and Conservation. As Gro Harlem Brundtland, who headed the World Commission, said:

> "Environmental degradation, first seen as mainly a problem of the rich nations and a side effect of industrial wealth, has become a survival issue for developing nations."[2]

This is particularly pertinent in Southern Africa with its mix of first and third world economies. No less importantly, we have to recognise that environmental protection and economically sound development, though often difficult to reconcile, are not necessarily antithetical; and should in all countries aim at being mutually supportive. Indeed, experience abroad has shown that the so-called "environmental lobby" is often most successful when it gives adequate attention to the economic dimensions of its proposals.[3] Brundtland said:

> "The 'environment' is where we all live; and 'development' is what we all do in attempting to improve our lot within that abode. The two are inseparable."[4]

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1 The idea of "sustainable" development – ie enough for present generations having regard to the needs and claims of future generations – was emphasised in the World Conservation Strategy prepared by the International Union for the Conservation of Nature and Natural Resources (IUCN) and is now widely accepted (see *The executive summary* 1980).

2 *Our common future* (1987) xi.

3 See the section on economic considerations in Schoenbaum *Environmental policy law* 20 *et seq.*

4 *Our common future loc cit.*

In short, we need a marriage between ecology and economy, however difficult such a marriage may be. If that is so, then it is for the law and lawyers to help build the framework of legitimacy within which the necessary reconciliation between ecology and economy may take place – openly, dispassionately and reasonably. By training and tradition, the lawyer is a generalist, well-equipped to put the pieces together; he should be a trouble-shooter and peace-maker.[5]

Thirdly, I should like to call attention to the fact that although the law has an important function in protecting the environment, it would be wrong – and can only lead to disappointment and frustration – to place on the legal system tasks beyond its capacity. Basic objectives, such as a wise balance between ecology and economy, and between public and private interests, must be achieved through the operation and interaction of political, economic, ethical and scientific considerations and forces. No doubt, the law can help to ensure that these forces operate openly and dispassionately. No doubt, too, it has a central role in eliminating from the interaction of the relevant forces the destructive element of arbitrary power. But the law itself is not a panacea. There exists no legal magic for providing answers to all the problems of environmental protection. Indeed, the problems of environmental protection cannot be left to the law or to governments to handle alone. Other agencies, such as education and the media, must play a major role; and ultimately, there remains the primacy of individual moral commitment and religious faith.

In a paper entitled *The egology of ecology*,[6] the South African philosopher, Professor Marthinus Versfeld, recently began an address to a group of ecologists by saying:

> "What are we talking about when we talk about 'our environment'? Perhaps you think you know what the words mean. I must try to persuade you that you don't."

It would ill become me to be equally provocative by telling a gathering of environmental lawyers, some of whom are actively teaching the subject, that they don't know what they are talking about when they use the words "environmental law". Such talk is for heroes; but I am clear that what we do, in fact, know about the nature, scope and role of environmental law is less than what we do not know.

Although it is often said that environmental law is in its infancy, it is probably more accurate to regard the subject as still struggling to be born, at any rate in South Africa. There are good prospects, provided that the proposed new Environment Conservation Act finds its way onto the statute book in an appropriate form, that the subject will have an influential future in this country. But the fact remains that we still await the emergence in South Africa of a coherent and logical body of environmental law which has distinctive legal criteria of its own, like the law of contract or the law of delict. This paper is largely concerned with the quest for such criteria.

That is not to say that there is not already a useful place for environmental law among the taught disciplines at university level. On the contrary, it is a matter for congratulation that a subject under that title is being offered as an LLB elective at Unisa and at the University of Natal, and also at post-graduate level at the University of the Witwatersrand. I understand, too, that the subject

5 Rogers *Handbook on environmental law* (1977) 5.
6 presented to the Conference on Environmental Education, Hogsback November 1987.

is soon to be offered as an LLB elective at the University of Cape Town. Nevertheless, these welcome developments do not impair the validity of the contention that the subject itself is still in an embryonic state of development in South Africa.

In the United States, since the enactment in 1969 of that landmark piece of legislation, The National Environment Policy Act (NEPA), and in several other countries with even more sophisticated legislation, the position is different. There, with legislation as the innovative and seminal agency, environmental law has made big forward strides, and has already begun to develop distinctive legal concepts, principles, rules, values, policies and procedures of its own. In this country we lag behind. The legislature has still to supply the framework and the tools that are appropriate and adequate for a massive new job that urgently needs to be done.

There is something else which Professor Versfeld said about the words "our environment" which strikes me as being equally relevant to "environmental law":

> "The words are a noise which we agree to make in order to get to grips with a thing that we are by no means agreed upon. When Socrates says what do you mean, he is saying let's have a look at the thing."[7]

Let us then do just that.

THE CURRENT POSITION

Probably the most helpful point of departure is to discuss what has been said about the nature of environmental law by three authors – Professor André Rabie and the late Professor Barend van Niekerk in South Africa, and Professor Christopher Stone in the United States of America. An analysis of their widely differing views provides a conspectus of current thinking on the subject, and also establishes the need for radical innovation.

The "subject-matter" definition of environmental law

Let us start with Professor Rabie's very lucid, now almost classic, introductory chapter in his monograph *South African environmental legislation*, first published in 1976,[8] and reproduced substantially in the same form in the chapter entitled "Environmental law" in Fuggle and Rabie's *Environmental concerns in South Africa*, which was published in 1983.[9]

Professor Rabie begins his chapter with the key observation that South African environmental law does not constitute a separate branch or body of law "in the sense that it contains separate legal principles".[10] On the contrary, he says that the relevant legal principles are to be found in many conventional branches of law, such as the law of things, administrative law, criminal law, tax law, the law of delict, and so on.[11] He suggests, accordingly, that environmental law may be tentatively defined as

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7 See previous note.
8 *South African environmental legislation* 1976.
9 Fuggle and Rabie *Environmental concerns in South Africa: technical and legal perspectives* (1983).
10 *South African environmental legislation* 3.
11 *loc cit.*

> "encompassing all legal rules aimed at the conservation of the earth's natural resources and the control of environmental pollution . . . its field being circumscribed by the problems with which it deals (ie control of environmental pollution and the use of natural resources), and by the purpose it serves (ie securing an adequate environment for man and conserving natural resources)".[12]

He points out that this definition is not a hard and fast one, since the parameters of the subject are still evolving. Accordingly, "as long as topics perceived to be 'environmental' continue to expand, the definition must be regarded as open-ended".[13] Finally, he calls attention to the fact that a considerable volume of environmental law in South Africa finds a place in a multitude of diverse pieces of legislation, passed over the years at diverse times, but which have evolved on a piecemeal and unsystematic basis.

In essence, what Professor Rabie is saying, is that South African environmental law is a collection or amalgam of legal provisions, drawn from several *conventional* sources "which have in common not so much their special character, but the subject that they regulate".[14]

This may conveniently be called the "subject-matter approach" to the definition of environmental law. It is an approach by no means confined to South Africa, for it characterises English legal writing on the subject, as may be seen, for example, from David Hughes's recent book *Environmental law* (1986), and it has been adopted substantially by many writers in the USA, Canada and Australia.[15]

Nevertheless, in my opinion, the subject-matter approach is not satisfactory, and it may be helpful to take a look at its shortcomings.

In calling attention to these I must not be misunderstood. Professor Rabie's analysis is that of a perceptive legal scholar for whom we all have the greatest of respect. What follows is not a criticism of him, but rather a criticism of the rudimentary state of development of the amalgam of existing and conventional South African laws which it was his avowed purpose to describe. He was dealing with what is, as distinct from what ought to be. Furthermore, we may accept that his analysis correctly reflected the "state of the art", so to speak, in South Africa in 1976, again in 1983, and probably still reflects the position today. But, for reasons which I now proceed to give, we cannot rest content with the subject-matter approach.

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12 *loc cit*; Fuggle and Rabie 32.

13 Fuggle and Rabie 32.

14 *ibid* 35.

15 Bates in his *Environmental law in Australia* (1983) 2 describes environmental law as "any regulation which affects the natural environment per se; or which declares the right of any person to take action to develop or protect it; or which might affect the scenic, historical, artistic or cultural beauty or appreciation of man's efforts to harmonize the built and natural environments". Cf Fisher *Environmental law in Australia: an introduction* (1981) 8 who suggests that environmental law embraces rules which have in view "the protection of the environment, the integration of the environmental dimension into the decision-making process and the use and exploitation of resources". After saying that the law is accustomed to regulating relationships between persons, Fisher (5) suggests that the distinctive feature of environmental law is that it deals with the relationships between man and his surroundings. But is this so? Does it not rather deal with relationships *between persons with reference to, or in regard to, their environment*? See my criticism below of Professor Stone's views in regard to the "rights" of non-human entities.

First, it tends to cloak the fact that if South African lawyers concerned with the protection of the environment are to be relevant and effective, they must reach out beyond the principles, concepts and underlying philosophies of conventional branches of law; for these have grave inherent limitations in the specific context of the environmental challenge. The conventional branches of law were in large measure designed to cope with different problems from those presented by the need to protect the environment in modern industrialised societies and the developing countries.

On this point, a Hamlyn lecture delivered in 1974 by an eminent English judge, Sir Leslie Scarman (later Lord Scarman), entitled "The challenge of the environment", goes to the heart of the matter; and we cannot do better than mark and inwardly digest what he had to say. He was examining the question whether the English common law is able to meet the challenge of the environment. His conclusions, although reached fourteen years ago, are still relevant and equally applicable to South African common law. Lord Scarman said:

> "For environment a traditional lawyer reads property; English law reduces environmental problems to questions of property. Establish ownership or possession and the armoury of the English legal cupboard is yours to command."[16]

After noting that experience has shown that the system has "features of weakness and obsolescence", he came to the following conclusions:

> "The common law concepts ... have failed because they have been ultimately no more than means for protecting private rights and enforcing private obligations: the law had never understood or accommodated a public right or obligation in the environment ... Tied to concepts of property, possession and fault, the judges have been unable by their own strength to break out of the cabin of the common law and tackle the broad problems of land use in an industrial and urbanised society. The challenge appears, at this moment of time, to be likely to overwhelm the law."[17]

He then asked:

> "How is the needed regulation of conflict to be provided – by the legal system as we know it, or by some specialised system, administrative in emphasis and remote from the general law? If the law and lawyers are to retain a relevant role in environmental law, they must find an answer to these questions. And it must be an answer which society finds helpful."[18]

In subscribing to those powerfully expressed views, I should like to add that the common law of South Africa, like the common law of England, has been more concerned with the protection of private individual rights than with matters of public concern. Yet, in actual fact, environmental protection raises issues which fall within the sphere of public rather than private law. The major concern of environmental law is to enforce the public interest in environmental quality for the benefit of present and future generations, and to do so in a way which aims at a wise balance between the public interest in environmental quality and potentially conflicting private interests. In contrast, the underlying philosophy of traditional common law is to award compensation, or to allow an interdict, only in the case of financial damage, or threatened damage, to some individual's private rights; and it is left to the attorney-general to be the custodian of public rights. It is also left very largely to the attorney-general's discretion to bring a criminal prosecution, if he thinks one is competent and appropriate. The result

16 *English law – the new dimension* (1974) 51.
17 *op cit* 59 53.
18 *op cit* 60.

– as the Australian legal writer, GM Bates, observes – is that any rights which a private person may have to complain about an environmental degradation which does not affect his property, must be sought in legislation and not in the common law.[19]

These features of traditional law are quite out of keeping with the demands of contemporary society, which have broken into what Scarman calls "this private world of land ownership". The compelling demand is that amenities such as clean water, clean air, clean sand, clean rocks, sunshine and surf, wildlife and wilderness, are values which should be protected *independent of the ownership or possession of property.*

Not only has traditional law proved to be insufficiently flexible and innovative to satisfy this demand, but some of its principles actually exert a negative and fettering effect on the capacity of the law to promote environmental protection and the optimum utilisation and management of natural resources. To give one example, few legal principles have had a worse effect on the development of environmental law than the sacred cow of our law of land ownership that an owner may do what he likes with his own, save only to the extent prohibited by the law, coupled as it is with the normal – albeit not invariable – statutory obligation on the part of the state to pay compensation for the expropriation of existing proprietary rights.[20]

As I submitted in a monograph entitled *The transformation of the concept of ownership as plena in re potestas* (1984), it is essential to place emphasis on the duties as well as the rights of land ownership, if we are serious about environmental protection.[21] Indeed, in my opinion, the time is past due for it to be clearly established and recognised as a basic principle of our law that landownership involves duties as well as rights, and, further, that rights of ownership of land should not be exercised in a way which is opposed to the public welfare. Fortunately, the trend of development in modern legal systems is precisely in the direction of such a principle.[22]

A second shortcoming of the subject-matter approach is that, by emphasising that environmental law is merely an amalgam of conventional laws without distinctive principles of its own, it tends to discourage the search for distinctive principles – even perhaps to encourage the belief that their non-existence is inevitable.

Many years ago, Mr Justice OW Holmes examined the question whether agency was entitled to rank as a separate branch of the law in the United States.

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19 *op cit* 6. Professor Salvatore Patti considers that what is stated in the text is equally applicable to Civilian legal systems generally. See "Environmental protection in Italy: the emerging concept of a right to a healthful environment" 1984 *Natural Resources Journal* 541.

20 It is not the purpose of this article to deal with the question of statutory liability to pay compensation in the event of expropriation. There is no common-law duty to compensate. See *Joyce & McGregor v Cape Provincial Administration* 1946 AD 658. On the whole subject, see Gildenhuys *Onteieningsreg* (1976) 6 95 *et seq.*

21 Cowen *New patterns of land ownership: the transformation of the concept of ownership as plena in re potestas* Trust Bank Series of Continuing Legal Education Lectures, University of the Witwatersrand (1984) 10–11 78–79.

22 Article 14 par 2 of the Constitution of the Federal Republic of Germany provides: "Ownership involves duties. Its exercise must serve the general welfare." The second sentence of that article is more socialistic in its phrasing than the conservatively phrased proposition in the text.

In order to reach a conclusion, he formulated and applied a jurisprudential test, namely, "does agency bring into operation any new and distinct principles of law which are incapable of further generalization?"[23] A similar question, phrased in a similar way, needs to be re-considered in South Africa today in relation to environmental law. Even if we must accept that Professor Rabie was correct in giving a negative answer in 1976, and again in 1983, that – as he would be among the first to acknowledge – is not the end of the matter. The question to be addressed now is whether we may reasonably look forward in South Africa, in the field of environmental protection, to the establishment (albeit for the first time) of legal principles, concepts, norms, remedies and procedures which, in Holmes's words, are indeed "new, distinct and incapable of further generalization"? And if so, what are they?

Unless clear, affirmative answers can be given to those two questions – which will be addressed in the second part of this article – I fear that few will predict a brilliant future for environmental law in South Africa.

A third shortcoming of the subject-matter approach stems from the difficulty of defining the "environment" for legal purposes. In contemporary legislation and other documents of legal relevance, the word "environment" is used to convey diverse meanings of greatly varying scope. At the one end of the spectrum, in the Tasmanian Environment Protection Act 34 of 1973, the term is defined narrowly (comparatively speaking) to mean "the land, water and atmosphere of the earth". A wider definition was adopted in the legislation which set up the Environmental Protection Council in South Australia – Act 96 of 1972. Section 3 of that legislation defines the term as including

> "any matter or thing that determines the conditions or influences under which any animate thing lives or exists in the State".

A wider definition has also been proposed in the 1987 draft of the South African Environment Protection Bill, namely

> "the aggregate of surrounding objects, conditions and influences, that influence the life and habitat of an individual organism or collection of organisms".

Another wide, but man-centred, definition is to be found in the Australian Commonwealth legislation entitled the Environmental Protection (Impact of Proposals) Act of 1974, which defines the environment as including

> "all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings".

The United Nations Conference on the Human Environment, held in Stockholm in 1972, went so far as to include not only protection of the natural and social environment, but called specifically for the abolition of apartheid and of colonial and other forms of oppression and foreign domination – all in the name of environmental protection.

The problem of finding satisfactory techniques for defining the environment for various legal purposes, is a high priority. It is unlikely that we will find one multi-purpose definition that is equally satisfactory for all legal purposes. Much depends, so it seems to me, on the purpose for which and the context in which the definition is relevant. If one is talking about declaring an area of the environment as a nature area – for example, the Magaliesberg mountain range – a

23 Holmes *Collected legal papers* (1921) 50–51.

wide definition, which will include, for example, archeological remains, is appropriate. A wide definition is also appropriate in regard to the circumstances in which an environmental impact assessment statement may be required. On the other hand, if one is dealing with natural resource conservation, or aspects of pollution, narrower and more specific definitions of the natural environment may be appropriate; and so on.

Plainly, however, the wider the definition of "environment", the wider the range of environmental law on the subject-matter approach, and the more deterring its problems become. As Ingo von Muench observed in a well-known article, if one defines the environment widely, using for example Webster's dictionary meaning, that it is to say,

> "all the conditions, circumstances and influences surrounding and affecting the development of an organism or group of organisms",

then "all law is in some way environmental law",[24] a proposition on which Von Muench commented dourly that it was "a rather dissatisfying result", and which moved an American writer to observe that environmental law is certainly not a modest subject.[25]

My own comment on this aspect of the subject-matter approach to the definition of environmental law must be in blunter terms. Unless distinctive legal criteria can be established which characterise environmental law, it seems to me that the wide-ranging and open-ended diversity of the legal components which comprise the amalgam of environmental law will result in the subject lacking coherence and logical structure. Furthermore, having regard to what is humanly possible, each exponent of the subject is free to give rein to his own preferred area of interest or expertise, and by the same token feels justified in restricting the scope of his enterprise.

A glance at the contents of the many text-books which have been written with the subject-matter definition in mind, confirms this criticism. Some books, and some university courses, especially those in the USA, range very widely and discursively. Others focus on the administrative law aspects; and this seems to be the South African trend. Others, again, emphasise the overall planning of land use, and more particularly town and country planning. Some concentrate on the protection of wildlife and endangered species. Others concentrate on legal remedies and procedural aspects. Yet others give pride of place to the international legal aspects. Very few include anything approaching an *Allgemeiner Teil*; very few, in other words, deal systematically with basic jurisprudential principles, presumably because they are so difficult to find and to formulate, as was brought home to me forcibly when writing this paper. It is fair to say that the discipline is at present characterised by almost free-wheeling eclecticism on the part of its professors. But there are serious dangers in such eclecticism. It has already resulted in the subject being protean; and from there it is a short step to its becoming amorphous.

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24 Von Muench "International environmental law: some remarks" 1983 *Indian Journal of International Law* 211. Von Muench favours giving a narrower meaning to the phrase "protection of the environment" to include "protection against pollution of the air and of the seas, protection against radioactivity, acid rain, deforestation" and similar harms.

25 Currie *Cases and materials on pollution* (quoted by Rodgers *Handbook on environmental law* (1977) 1).

A final point of criticism of the subject-matter approach is related to the preceding one. Some years ago I reviewed a book by Nigel Willis entitled *Banking in South African law.* The author refused to call his book *The South African law of banking* because he considered that the law of banking was non-existent. One might equally well, said Willis, speak of the law of shopping, or of sleeping or walking. I was unable to agree.[26] Admittedly, the law of banking does not contain a set of principles and rules applicable only to bankers or to banking transactions. Again, it is not a separate branch of the law, like the law of contract. But over very many years a general consensus of what should be included in a text-book on banking law has been reached by reliable authors on the subject, rather – as Lord Chorley once put it – by trial and error than by logical discussion.[27] However, what needs to be said is that the parameters and contours of environmental law are not nearly so well-established as are the topics to be included in a book on banking law. We are still at the stage in South Africa where it is more accurate to speak about "Environmental conservation and the control of pollution in South African law" than about South African environmental law. This is unsatisfactory; for it means that South African law is lagging behind other legal systems which, with legislation as the pace-setter, have already articulated and are actively applying in the field of environmental law distinctive concepts, principles, rules, values, remedies and procedures.

Van Niekerk's ecological norm in law

This brings me to Professor Barend van Niekerk's thought-provoking and pioneering article "The ecological norm in law", which he also described, in a sub-title, as "the jurisprudence" of the fight against pollution.[28] In that article he expressed the view that having regard to "the lamentable story of the state of man's environment", and taking into account "the mores of enlightened society", the courts would be justified in recognising "a general jurisprudential norm against ecological damage".[29] Basing his submission on the premise that in every legal system a greater or lesser degree of importance is attached to particular values – for example, the sanctity of human life, and, in capitalist societies such as ours, the sanctity of property – he argued that

> "the sanctity of the human environment occupies one of the highest rungs in the hierarchy of values to which the law affords its protection".[30]

He called for a "balancing of interests in the tradition of Pound's sociological jurisprudence", which he described as being

> "essentially an exercise in the identification of values and the assessing of the relative worth or strength of particular values in a particular society at a particular time".[31]

Van Niekerk proceeded to spell out the practical implications of acceptance of his suggested general norm against ecological damage. He argued[32] (i) that acceptance of the norm would involve the consequence that restrictions against environmental pollution, contained in other laws, would be given greater emphasis because the norm would operate as an additional factor for consideration,

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26 1982 *Acta Juridica* 117.
27 Chorley *Law of banking* (1974) xxvii.
28 1975 *SALJ* 78 *et seq.*
29 *op cit* 82–83.
30 *op cit* 83.
31 *op cit* 79.
32 *op cit* 84 *et seq.*

thereby ensuring more stringent control; (ii) that pollution of the environment as such should be recognised as a basically unlawful act in the absence of justification, with the result that the norm could and should be used as a canon of construction in the interpretation of statutes, on the same basis, for example, as the presumption against injustice; (iii) that the norm could also find expression in private law, and in this regard he contended that a contract requiring a performance "which carries with it substantial ecological risk" should be regarded as *contra bonos mores* and hence invalid (under this head he also contended that the duties recognised by South African neighbour law or *bureareg* could and should be extended so as to protect the environment); and finally (iv) that the norm against ecological damage could be used to make the remedy of an interdict more freely available, so as to allow every member of society *locus standi* to sue in respect of damage to the environment.

In his subsequent article, "Environmental pollution – the new international crime", published in 1976,[33] Professor Van Niekerk pleaded for the recognition of certain kinds of environmental pollution as being what he called "international crimes". He claimed that

> "there appears to be no reason why ecological insults upon the world should not qualify as 'common law crimes against mankind' ".[34]

Quite frankly, I am ambivalent about Van Niekerk's arguments. His articles are packed with suggestive ideas and he writes with infectious enthusiasm. One wishes that he had found an answer to the problem how the law and lawyers may best contribute, in the practical workaday world, to the challenge presented by man's abuse of the environment. However, as a lawyer much concerned with the sobering constraints of daily realities, I have reservations.

To begin with, he relies primarily on the judicial process to give recognition to his suggested norm against ecological damage and for major initiatives in this field. Indeed, he comments adversely on the slowness of the legislative process, owing to what he calls the strength of pressure groups. On the other hand, it is difficult not to agree with Lord Scarman that we have no alternative but to rely on legislation as the pace-setter and the innovative, seminal agency. Slow and fraught with obstacles as legislation might be, Peter Glavovic is probably right in concluding that, in the absence of statutory prodding and guidance, the judicial process is likely to be even slower.[35] We may agree, too, with Professor Johan van der Vyver who, in a persuasive article, insists that statutes cannot solve all social problems.[36] But, while one accepts the necessary limitations in any field of human endeavour of the role of law in any form – whether statutory or judicially declared – when it comes to the question whether legislation or judicially declared law is to be the pace-setter for legal innovation in environmental law, it cannot be denied that the judicial development of this branch of the law has already proved itself to be inadequate. Willy nilly, we have to rely on legislation to galvanise the legal process by providing guidelines for an entirely new initiative. It would seem that only in this way will lawyers

33 1976 *SALJ* 68 *et seq.*
34 *op cit* 74–76.
35 Glavovic "The need for legislative adoption of a conservation ethic" 1984 *CILSA* 148.
36 Van der Vyver "The function of legislation as an instrument of social reform" 1976 *SALJ* 56 *et seq.*

be able to abandon habits of thought and action derived from a society and from times that are no longer relevant.

It is, of course, true that legislation cannot prudently advance too far ahead of social mores. That was convincingly argued by Savigny early in the 19th Century and was dramatically illustrated by the debacle of the prohibition laws in the USA. Furthermore, it is most unfortunately the case that environmental degradation is not yet widely accepted in South Africa as being morally wrong, and that this is a serious negative factor which may take many years of patient public education to remedy. There is, however, a growing social awareness of the need for environmental protection, and in this connection it is worth emphasising that the public statement of standards in appropriate legislation may itself play an important educative role. The problem of making the law bind will of course always remain a central one. Nevertheless, the law may itself influence public opinion as well as being influenced by it.

Reverting to Professor van Niekerk's contribution, I am troubled by the undefined and unqualified language in which his proposed ecological norm is couched. A norm phrased in the broad and sweeping language he suggests, seems to me to be, at one and the same time, too absolute and unqualified, and also too loosely phrased, to be effective in practice. He would make all "environmental damage" and all "pollution" *prima facie* unlawful unless justified.[37] However, the pejorative phrase "environmental damage" and also the term "pollution" each require careful definition if they are to be tools with which lawyers can usefully work. This, I would submit, is one of the most valuable lessons which we have to learn from a study of recent Australian legislation on the subject, which shows a marked preference for the concrete and specific over the abstract and the general. It is more concerned with defining what is meant by clean air and clean water, or by pollution in specific contexts, than with sweeping prohibitions against "pollution" in general. Similarly, as the Australian legislation teaches, the nature of the permissible defences or "justification" for pollution need to be spelled out in some detail. The reason is plain. It is impossible for people in large numbers to live in the environment without – to use a neutral word – "changing" it in *some* degree. A crucial problem is to determine, in a practical and sensible way, what is an "acceptable" or "reasonable" amount of change, as distinct from an unacceptable or unreasonable amount. That was the way in which the issue was formulated by a former chief justice of Australia, Sir Garfield Barwick, in his instructive paper on "Problems in conservation".[38] It is submitted that one way in which the legal process can be used to draw the line is by the provision of legislative definitions of the phrase "environmental damage" and of the word "pollution", as used in various contexts. Furthermore, the relevant legislation should also prescribe in some detail the nature and scope of the available defences.[39]

Another difficulty with Van Niekerk's suggested jurisprudential norm against ecological damage, is that, in my opinion, it is unrealistic to place so much reliance on an attempt to find "the jurisprudential norm" – in the singular. Here,

37 1975 *SALJ* 85.
38 1975 *UNSWLJ* 7.
39 See, e g, the Western Australian Environmental Protection Act 87 of 1986.

again, it may be wiser to follow the Australian lead by looking for more particularity, by being more specific. Recent Australian legislation vests in a specified authority power to formulate a number of environmental "policies" – in the plural – in respect of different aspects or components of the environment; and, at the same time, expressly declares these policies to have the force of law. It is envisaged that each particular policy will be quite specific and detailed, comprising principles, rules and standards which the public can understand and observe and which a court of law can enforce with comparative ease. This seems to be an excellent step in the right direction, which appears to have influenced the draftsman of the relevant 1987 South African bill on the protection of the environment. We shall revert to this important aspect again in the second part of this article.

In regard to Van Niekerk's submissions in the field of international law, I am not optimistic about the prospects for customary international law developing, in the foreseeable future, along the controversial lines proposed by him; and, if I read Fuggle and Rabie correctly, neither are they. It seems to me that the proposals put forward in 1987 by the World Commission on Environment and Development are more realistic.

Seeking to co-ordinate and refine the achievements of the 1972 Stockholm Declaration, the 1981 Nairobi Declaration, and many international conventions and General Assembly resolutions, the commission stated that there is now a need to consolidate and extend the relevant legal principles of international law in a new charter to guide state behaviour in the transition to sustainable development.[40] The commission accordingly recommended that

> "the General Assembly commit itself to preparing a Universal Declaration and later a Convention on environmental protection and sustainable development. A special negotiating group could be established to draft a Declaration text for adoption in 1988. Once it is approved, that group could then proceed to draft a Convention, based on extending the principles in the Declaration, with the aim of having an agreed Convention text ready for signature by states within three to five years".[41]

Possibly the time-schedule envisaged is optimistically short, but the commission's proposals are nevertheless workmanlike and balanced. To facilitate the early launching of the process, the commission also submitted for consideration by the General Assembly, and as a starting point for the deliberations of the special negotiating group, a number of legal principles embodied in 22 articles that were prepared by its group of international legal experts. These are to be found in an annexe to the commission's main report.[42] It is essential reading for anyone concerned with the challenge of reconciling or marrying environmental protection with sustainable development.

I would summarise my reactions to Professor Van Niekerk's arresting views by saying that when recently re-reading his articles, I was constantly reminded of an observation made by Lord Wilberforce on the subject of environmental protection. There is all the difference in the world, he insisted, between general

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40 *Our common future* 330–332. Earlier the commission had said very pertinently: "National and International law traditionally lagged behind events. Today, legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development."

41 *op cit* 333.

42 *op cit* 348–351.

humanistic statements of aspiration and "a tight document prepared by lawyers in well thought out and practical terms".[43] What we are looking for is a workable programme to limit state sovereignty at the international level, to confer enforceable and enforced legal duties at both the national and international levels, and especially to regulate day to day activity in the real world in a practical and sensible way. Judged by these standards, it seems to me that the structure which Van Niekerk commendably – and I must add, very helpfully – tried to erect, needs firmer foundations and a supply of nuts and bolts in order to stand and endure.

Furthermore, he does not distinguish as clearly as one should between the law as it is and the law as he wished it to be. Many of his statements in the present indicative mood would better have been phrased as suggested oughts. To give one example, he said that judicial acceptance of his proposed norm would "allow every member of society locus standi to sue in respect of damage to the environment". Arguably, however, a narrower entitlement would be preferable – giving standing, for example, to recognised conservation bodies such as The Wildlife Society – but the hard fact is that a significant modification of the *locus standi* requirement is not likely to come from the judicial development of our law, but only from legislation.[44] Nevertheless, having said all this, Van Niekerk's effort was a remarkably good try.

Before turning to the legislative options, it remains to refer to the stimulating suggestions of Christopher Stone in the United States of America.

The attribution of legal rights to non-human entities?

It is Professor Stone's contention that the cause of environmental conservation would be considerably advanced if legal systems were to attribute legal rights to "natural objects", like trees, and also to the lower animals. This contention, first put forward by Stone in 1972 in an article entitled "Should trees have standing? – toward legal rights for natural objects",[45] was elaborated by him in 1985 in a further mammoth article entitled "Should trees have standing? revisited: How far will law and morals reach? A pluralist perspective".[46] Stone's contention is particularly significant because it re-opens truly basic jurisprudential questions. What do we, as lawyers, mean by a legal right? In what circumstances and why, does the law attribute rights to any entity, including human beings? How far may the use of the term be extended without abusing, or, at least, overworking it? These are questions on which the last word has by no means yet been said, if it ever will be.

Relying on the analogy of Darwin's insight that the history of man's moral development has been a continual extension of the objects of his social instincts and sympathies, Stone argues that legal history in progressive societies suggests a consistently widening extension of legal rights to entities which were at one time rightless – for example, to children, women, slaves and aliens. He contends

43 Lord Wilberforce "The law: prose and poetry" 1969 *Aust LJ* 418.

44 Cl 30 of the draft new Environmental Protection Bill is a step in the right direction but is too narrowly drafted. It enables governmental bodies to bring civil actions in environmental cases but not private bodies, such as the Wild Life Society. But why not?

45 1972 *Southern Cal LR* 450 *et seq.*

46 1985 *Southern Cal LR* 1 *et seq.*

that both the interests of society and the interests of the relevant entities now require that legal rights be accorded to

> "forests, oceans, rivers and other so-called 'natural objects' in the environment – indeed to the natural environment as a whole".[47]

Although Stone's main concern was with the non-animal components of the environment, he expressly indicates that his submissions apply equally to the lower animals.[48]

Stone's views have stimulated much academic writing, both for and against, and also received some attention in the American courts.[49] His views were supported in the dissenting judgment of Mr Justice Douglas in the case of *Sierra Club v Morton*.[50] On the whole, however, the American judicial response appears to have been negative. A three-member court of appeal in Michigan dismissed an appeal in a suit brought in tort (delict) on behalf of a tree, contenting itself with a deprecatory judgment in verse (a la Ogden Nash) as follows:[51]

> "We thought that we would never see
> A suit to compensate a tree.
> A suit whose claim in tort is pressed
> Upon a mangled tree's behest;
> A tree whose battered trunk was pressed
> Against a Chevy's crumpled crest,
> A tree that faces each new day
> With bark and limb in disarray;
> A tree that may forever bear
> A lasting need for tender care.
> Flora lovers though we three
> We must uphold the court's decree."

What should be the response of the South African legal system to Stone's thesis? To begin to answer that difficult question, a necessary preliminary is to take a brief look back into legal history and also to examine the contributions directly bearing on Stone's contentions made by writers on jurisprudence.

The attribution of legal rights to relics, temples and church buildings is an old story in legal history. Gierke gives several examples of this in Germanic law in the middle ages.[52] Similarly, the attribution of legal duties to animals is also an ancient phenomenon.

> "If an ox gore a man or a woman that they die, then the ox shall surely be stoned and his flesh shall not be eaten."[53]

John Chipman Gray says that in the middle ages animals

> "were summoned, arrested and imprisoned, had counsel assigned them for their defence, were defended, sometimes successfully, were sentenced and executed".[54]

However, he adds, categorically (some may feel too categorically)

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47 1972 *Southern Cal LR* 456.
48 *op cit* 456 n 26.
49 Stone's 1985 article includes valuable references to some of the more modern literature on legal rights for non-human entities.
50 (1972) 405 US 427.
51 *Fisher v Lowe* (1983) 333 NW 2d 67 quoted by Stone 1985 *Southern Cal LR* 3.
52 2 *Deutsche Genossenschaftsrecht* 542–546.
53 *Exodus* XXI 28.
54 *The nature and sources of law* (1983) 45. And see Holland *The elements of jurisprudence* 383 n 4.

> "that this curious development of manners and belief, which is little known, is so foreign not only to any actual but to any rational jurisprudence that I do not feel that I ought to linger on it any longer".[55]

In regard to the possibility of according legal rights to the lower animals, Gray went on to observe:

> "It is quite conceivable that there may have been, or indeed may still be, systems of law in which animals have legal rights – for instance, cats in ancient Egypt, or white elephants in Siam."

Again, however, he adds categorically:

> "The law of modern civilised societies does not recognize animals as the subjects of legal rights."[56]

Arguably, therefore, the attribution of legal rights to non-human entities is, historically speaking, atavistic rather than progressive.

Much of the early English writing on the subject is regrettably cursory and dogmatic, more concerned with assertion and rhetoric than with demonstration. For example, Jeremy Bentham deplored the fact that in law the lower animals "stand degraded into the class of things".[57] On the other hand, John Austin pronounced that it would be "absurd" to attribute legal rights to the lower animals.[58] And, thereafter, throughout the 19th Century and much of the 20th Century, we find Austin's conclusion summarily repeated in many of the standard English text-books on jurisprudence, such as those by Markby,[59] Hearn,[60] Salmond,[61] Allen[62] and Paton.[63]

It would seem that these views of the early English writers on analytical jurisprudence were based on the somewhat superficial proposition that all law is essentially anthropocentric, being designed solely to protect and advance the interests of human beings, as had indeed been expressed centuries before in the *Digest* by the Roman jurist, Hermogenianus: *hominum causa omne ius constitutum*: all law has been established for the benefit of mankind.[64]

Carefully argued discussions are harder to find. Indeed, before the appearance of Tony Honoré's closely reasoned essay on "Rights and the rightless", first published in 1979,[65] the fullest discussions of the subject known to me (and they are not all that full) are those to be found in Gray's *Nature and sources of the*

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55 *op cit* 45.
56 *op cit* 43.
57 *Principles of morals and legislation* (1907) 310. In a footnote Bentham maintained that a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, a week, or even a month, old.

Disputes during the 19th century among non-legal writers about animals' "rights" were not infrequent. See, e g, Salt *Animal's rights* (1892) (arguing for) and Ritchie *Natural rights* (1903) 108–111 (arguing against). Ritchie (110) was prepared "to admit certain animals to a sort of honorary membership of our society".
58 *Lectures on jurisprudence* 5th ed (by Campbell) vol 1 407.
59 *Elements of law* 6th ed 93.
60 *The theory of legal duties and rights* 60. Hearn, like Austin, speaks of the "absurdity" of according legal rights to animals.
61 *Jurisprudence* 10th ed (by Williams) par 112 at 319.
62 *Legal duties* 187.
63 *A text-book of jurisprudence* 3rd ed 259.
64 *D* 1 5 2.
65 *Making law bind: essays legal and philosophical* (1987) 141 *et seq.*

law, in Salmond's *Jurisprudence* and in the writing on legal rights by the 19th-century German Pandectists.

Gray wrote:[66]

> "The interests of brute beasts may have legal protection. Very often, indeed, acts commanded or forbidden towards animals are not commanded or forbidden for the sake of the animals, but for the sake of men; but certain acts of cruelty, for instance, towards beasts, may be forbidden, at least conceivably, for the sake of the creatures themselves. *Yet beasts have no legal rights, because it is not on their motion that this protection is called forth* . . .
>
> In the systems of modern civilized societies beasts have no legal rights. It is true that there are everywhere statutes for their protection, but these have generally been made not for the beast's sake, but to protect the interests of men . . . Such statutes have sometimes, however, been for the sake of the animals themselves. It has, indeed, been said that statutes passed to prevent cruelty to animals are passed for the sake of men in order to preserve them from the moral degradation which results from the practice of cruelty, but this seems artificial and unreal; the true reason of the statutes is to preserve dumb creatures from suffering. Yet even when the statutes have been enacted for the sake of the beasts themselves, the beasts have no rights. The persons calling upon the state for the enforcement of the statutes are regarded by the law as exercising their own wills, or the will of the state or some other organized body of human beings. The law of modern civilized societies does not recognize animals as the subjects of legal rights."

Similarly, Salmond says:[67]

> "Beasts are not persons . . . They are merely things – often the objects of legal rights and duties but never the subjects of them. Beasts, like men, are capable of acts and possess interests. Yet . . . they are not recognised by the law as the appropriate subject matter either of permission or prohibition. Archaic codes did not scruple, it is true, to punish with death in due course of law the beast that was guilty of homicide . . . [he quotes Exodus] A conception such as this pertains to a stage that is long past . . . A beast is as incapable of legal rights as of legal duties . . . *Hominum causa omne jus constitutum.* The law is made for men and allows no fellowship of bonds of obligation between them and the lower animals . . . That which is done to the hurt of a beast may be a wrong to its owner or to the society of mankind, but is no wrong to the beast . . . Duties towards animals are conceived by the law as duties towards society itself. They correspond not to private rights vested in the immediate beneficiaries, but to public rights vested in the community at large . . ."

Salmond's account, though over-stated in part, correctly reflects modern practice. More particularly, judicial pronouncements by the South African courts are in agreement with it. Thus, in *Rex v Moato*, Van den Heever J (as he then was), in discussing the object of Act 8 of 1914, which deals with the prevention of cruelty to animals, said:[68]

> "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."

Again, in the very recent case of *SPCA v University of the Witwatersrand* (No 23288 of 1987 – not yet reported), Van der Merwe J had no difficulty in stating summarily:

> "[I]t was argued on behalf of the respondents that animals do not have legal rights in our legal system and that the law does not confer legal personality on them. That is undoubtedly correct."

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66 *op cit* 20 43 (my italics).
67 *op cit* 319–320.
68 1947 1 SA 490 (O) 492.

It is, of course, conceptually possible for a legal system to attribute legal rights to the lower animals and to natural objects, although in fact modern legal systems do not.[69] And so the questions must be asked: Why do they not do so? Should they do so?

For those who accepted the dominant view of the 19th-century Pandectists regarding the definition of a legal right (and many lawyers still do), it seemed to follow as a corollary that natural objects and the lower animals are incapable of having legal rights. The definition of a legal right favoured by most of the Pandectists (that by Windscheid being typical) is that, in essence, it consists in legally protected will-power or capacity to choose. As Windscheid put it:

> "Recht ist einer von der Rechtsordnung verliehene Willensmacht oder Willensherrschaft."[70]

In short, capacity to will (or capacity to choose) and capacity to have rights were equated; and inasmuch as it did not seem that natural objects and the lower animals (that is, animals other than man) have will-power, it seemed to follow that they cannot have rights. As Goudsmit specifically contended, no conception of a legal right, so understood, can be formed except as attaching to a human person.[71]

At first blush it might seem as if the case for rights for non-human entities is strengthened by Ihering's view that a legal right should be defined, simply as a legally protected interest (*rechtlich geschutzes Interesse*). But this is not compelling. In the first place, although the recognition of an interest, and its legal protection by the imposition of a legal duty on others to respect it, are, it would seem, necessary preconditions for the existence of a legal right, they are not sufficient. In addition, the right must be assertable, or capable of being exercised by the will, or at the election, of the right-holder.[72] And this being so, natural objects and the lower animals appeared to the Pandectists to be excluded. They might have interests and be the beneficiaries of protective measures but they are not right-holders.

Again, even the proposition that the lower animals have "interests" is, on one view, debatable. The term "interest", in the context of legally protected interests which are the foundations of legal rights, came to be defined very narrowly by many lawyers. For example, Paton and the American Restatement regard an interest as an object of *human* desire.[73] This seems to me to be an artificially narrow interpretation (cutting down the dictionary meaning of the word "interest"), but it has nevertheless been an influential one. Paton, for example, after saying that "interest and will should not be set too much in opposition to each other", goes on to contend that

> "interests are but objects of human desire ... the law grants rights not to the human will as an end in itself, but to the human will that is pursuing ends of which the legal system approves".[74]

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69 Honoré *Making law bind* 252.

70 *Pandekten* 9th ed par 37 at 156. "A legal right is a power or control of the will accorded recognition by the legal order" (my translation).

71 *Pandecten-Systeem* par 17 n 1; par 20 n 2.

72 Honoré *op cit* 241–242.

73 Paton *A text-book of jurisprudence* 3rd ed 254; *American restatement of the law of tort* 1st ed vol 1 2: "The word 'interest' is used throughout the Restatement of this subject to denote the object of any human desire."

74 *op cit* 254. Ihering himself confined capacity for legal rights to human beings. See Pound *Jurisprudence* vol IV 254 n 229.

Manifestly, however, this is a far cry from recognising that natural objects and the lower animals have legal rights.

Deeper insight into the subject came with Honoré's essay on "Rights and the rightless". After a careful analysis of the genesis of the rights – legal, moral and political – which a person has as a member of a given society,[75] Honoré raised the critical question: why is it that modern legal systems recognise that children have legal rights although they cannot personally assert these, whereas legal rights are not accorded to such entities as animals, buildings and trees? Yet, they have interests and, as in the case of children, a guardian or representative could be appointed to assert any legal protection accorded to their interests? The crucial consideration, he suggests, is that the societies to which we belong are composed of human beings:

> "Right-holders are those members of our society who by their species, though perhaps not in the particular instance, are choosers."[76]

There are those who consider that Honoré's definition of "the societies to which we belong" is unduly narrow; and that although there are very important differences between humans and the rest of creation, it is also important to recognise that the whole of creation – the entire cosmos – is one interrelated whole. Indeed, the World Commission on Environment and Conservation went so far as to claim that

> "human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature".[77]

I do not find it necessary, in this article, to pursue this line of enquiry because I agree with Honoré that, although it would be conceptually possible for a modern legal system to extend legal rights to trees, buildings and animals, it is unnecessary to do so; and there are also good reasons why the attempt should not be made.

First of all, I am not convinced that it is desirable to depart from accustomed modes of legal thought and speech by extending the idea of a legal right beyond the familiar concept (namely, a legally protected interest enjoyable, normally, by the exercise of will or choice on the part of the right-holder). The point is that if trees may be said to have legal rights, we are speaking about something significantly different from the legal rights of normal human beings. Trees will always need a mediator or human representative to assert their so-called "rights". Honoré observes that "right" is a slippery notion easily abused and that lawyers, in particular, need a careful analysis of rights and the capacity to have rights.[78] To extend the concept beyond the human sphere could certainly take it out of its familiar context, and – so it seems to me – would overwork it.

Secondly, having regard to how Stone's contention would be implemented in practice, I have difficulty in understanding the scope of his proposal and the mechanics for implementing it. Are we, for example, speaking about the rights of species of trees, or of forests, or of all individual trees, of whatever size, or age or kind, including invader species which – like Rooikrantz or Port Jackson – infest the coastal and mountain fynbos of South Africa?

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75 *op cit* 242–243.
76 *op cit* 253.
77 *op cit* 330.
78 *op cit* 241.

Thirdly – and perhaps this is the decisive point – we should ask ourselves whether any significant advantage is achieved by attributing legal rights to trees, animals and buildings which cannot more naturally be achieved by using other legal concepts and another legal terminology. It is submitted that the answer is in the negative. We are inclined to think too much in terms of rights and to neglect the cardinal role of duties. It is by stressing man's duties in regard to environmental conservation and the control of pollution that what we are looking for may be found. Let me elaborate a little on the bearing of this observation in regard to Stone's thesis.

One is inclined to be emotionally attracted by Stone's attempted break with the anthropomorphic maxim that the law is for man alone – *hominum causa omne ius constitutum*. Yet is not the answer to accept the maxim, but to ask the central question what do we mean by "man", when we say that the law exists for his sake? Do we mean each self-seeking and isolated ego preying, without restraint, on his fellows and on the whole environment – the individual of Thomas Hobbes's political philosophy? Or do we mean the responsible human person, whose very existence presupposes membership of society and who recognises the primacy of legal and ethical duties on his part if society is to survive? That question – a central question which pervades Greek, and centuries of later European political thought – cuts to the heart of the matter. It admits, in my opinion, of only one sound answer: the second.

Plainly, we should have no difficulty with the idea that human beings have legal duties with respect to natural objects and animals. But I would accept the traditional view that this does not mean that there must be correlative legal rights in the relevant natural objects and animals. In this regard we should not be misled by the allegation that where there is a legal duty there must be a correlative right, so why not vest that right in things, like trees? It seems to me that – despite the criticism which their contention has attracted – Austin and Allen are correct when they say that there are "absolute duties"; that is to say, duties without correlative rights.[79]

Again, if it is argued that legal duties must be enforceable if they are to have any significance – which is incontestable – it does not follow that we have to say that, from the point of view of substantive as distinct from adjective law, the enforcing authority is vested with a correlative substantive legal right. Indeed, provided that legal duties in regard to the environment are, in fact, adequately enforceable, either at the instance of the state, or by some independent environmental authority, as in some Australian states, I do not think that we have to bother ourselves overly with any such questions as "in whom is vested 'a' or 'the' correlative substantive legal right?" The question seems to me to be a false one.

I was at first sight impressed with Stone's point that by recognising that legal rights inhere in physical objects, we thereby ensure that compensation for environmental injury goes where it may best belong, namely, towards the cleaning up of pollution, or the restoration of environmental damage, and not into the general coffers of the state, as in the case of fines for the commission of criminal acts. But further reflection has persuaded me that the kind of objective which Stone had in mind may be specifically provided for by legislation, as has been

79 Austin *op cit* 406–407; Allen *op cit* 184 *et seq.*

demonstrated in Australia, without resorting to a jurisprudential construction that natural objects have legal rights.

LEGISLATIVE OPTIONS

In recent years a large volume of environmental protection legislation has been passed in many parts of the world, some of it being imaginative and scientific. We in South Africa have much to learn from the better features of legal thinking abroad, especially in countries where climatic and physical features are similar to our own. Accordingly, a first duty of any person concerned with sound innovation in this field is to study and evaluate options which have been considered abroad.

There are those who pin their hopes on the idea of extending the concept of constitutionally guaranteed and court-enforced "human rights" so as to include a fundamental environmental right. In this regard, the Nobel prize winner, Rene Cassin, and WP Gormley speak of "the right to a healthful and decent environment".[80] Similarly, the first principle of the Stockholm Declaration of the United Nations Conference on the Human Environment (1972) states:

> "Man has a fundamental right to . . . adequate conditions of life in an environment of a quality that permits a life of dignity and well-being."

More recently, Professor Salvatore Patti has discerned the emergence in the Italian law of a constitutionally protected right to a "healthful environment" as being implicit in the protection of "personality rights".[81] These are intriguing suggestions which merit serious consideration. Possibly, this conference may be the beginning of South African dialogue on this aspect.

I tend, however, to agree with Fuggle and Rabie that there are serious obstacles in the way of a court-enforced human rights approach. They correctly point out that the establishment of a court-enforced constitutional right to a "healthful", "decent" or "adequate" environment – involving as it does the abolition of the concept of parliamentary sovereignty – would require a radical new constitutional dispensation in South Africa.[82]

That, though desirable in my opinion, may be a very slow and perhaps painful process. And, in addition, there are other difficulties which would have to be overcome.

For one thing, as we are dealing with a new concept, which cannot draw upon centuries of tradition to give it meaning and content, there is the problem of formulating the right in meaningful language. Should one aim at precision and specificity, or is it preferable to choose ambiguity, in the hope that the ambiguity will be creative? Assuming that one opts for creative ambiguity – something along the lines of the language used in formulating the "principle" in clause 2(1)(a) of the 1987 draft South African bill, namely:

> "Every inhabitant of the Republic of South Africa is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment"

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80 "Human rights and environment" *Beitrage zur Umweltsgestaltung Heft A41* (1976) 20. Cf Glavovic 1984 *CILSA* 147 n 20.

81 Patti 1984 *Natural Resources Journal* 535 *et seq.*

82 *op cit* 54.

one's problems are by no means at an end.[83] It is, for example, very widely accepted that few, if any, constitutionally guaranteed human rights can be absolute and unqualified. However, the difficulty of devising a suitable limiting clause – always a great difficulty, even with conventional human rights – is aggravated in the case of a right to an adequate environment. There would probably be an objection in the way of saying that the right may be limited to the extent necessary to ensure "sustainable development" or even to ensure the economic well-being of the country; for that would be to give priority to "sustainable development" or economic well-being, over and above the integrity of the environment. What is needed, of course, is to ensure a balance between environmental protection and sustainable development; but it may be questioned whether that is a matter for adjudication by a court of law. Probably the balance has to be achieved by the interplay of political, economic, scientific and ethical processes. For this reason it seems to me that it would be wise for the lawgiver to set, as one of the desirable goals, the humbler, but crucially important, task of ensuring that the interplay of the relevant processes shall take place openly, honestly, and without arbitrary power being entrusted to any person, institution, or agency of government.

Considerations such as these were, I think, in part responsible for the nature of the choice of available options made in Australia and – on the whole – in the USA. In preference to the introduction of a constitutionally guaranteed "right to an adequate environment", along the lines traditionally used for guaranteeing conventional "human rights", Australian lawyers and, on the whole, American lawyers as well, have chosen the course of formulating a number of detailed national environmental policies, which are specifically given the force of law.[84] However, although given the force of law, these policies are not given the force of constitutional guarantees. They are not of superior validity to legislation, but rank as ordinary law, of great use where, as often happens, vague or ambiguous legislation requires interpretation, and also in the practical daily application of the legal system.

It is true that at least one Australian state (Western Australia), without resorting to a constitutional amendment, has purported, in this field, to abrogate the doctrine of the implied repeal of legislation by later inconsistent legislation. Thus section 5 of the Western Australian Environmental Protection Act provides that

> "whenever a provision of this Act (the Environmental Protection Act) is inconsistent with a provision contained in, ratified or approved by, any other law, the provision of this Act prevails".

I would, however, be very doubtful about the efficacy of a similar provision in South Africa – assuming a government could be persuaded to adopt it.

A comparative analysis of environmental protection legislation abroad has led me to hope that the South African legislature may, in a piece of overarching environmental legislation, conceived along the lines of the proposed new Environment Protection Act, establish definitive and distinctive legal criteria and techniques which will enable lawyers to say, with truth, that South African

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83 for other examples of wide and vague phrasing, see Patti 1984 *Natural Resources Journal* 536 n 3.

84 As observed by Patti *ibid* a few American State constitutions have included a constitutionally guaranteed right to a "healthful environment". But see n 85 below.

environmental law is a separate and distinct branch of law in its own right. I say "conceived along the lines of the proposed new Environment Conservation Act", because although the envisaged legislation has some admirable features, in my opinion it requires much refinement and strengthening.

The role in South Africa of overarching environmental legislation should be basically that of removing proven defects and of filling manifest gaps in the existing dispensation – in short, the creative role of establishing the distinctive principles for which we are searching. So regarded, different analysts and observers, with different points of view and different ranges of experience, will no doubt single out different topics for primary and urgent attention. I have chosen to call attention to six topics.

1 The need for a combination of legal techniques

It is essential to recognise the need to employ, in combination, a diversity of legal techniques for the adequate protection of the great many diverse components of the environment, at the various points of time and in the various contexts in which it is relevant to give them protection. There is little health in seeking to find a single "norm" – to use Van Niekerk's word – which will be universally applicable and effective in regard to all the components of the vastly complex phenomenon called the environment. That is perhaps the main lesson to be learned from a study of modern environmental legislation abroad, and especially from the Australian legislation. That legislation uses, in combination, such concepts as (i) broadly stated "legislative objectives"; (ii) broadly stated "legal principles" and "legal values"; (iii) more specific "legal rules"; (iv) even more specific and detailed "national environment policies", in the plural, which are given the force of law; (v) equally specific and detailed "norms" or "standards"; and (vi) legally obligatory "procedures", for example, procedures in regard to environmental impact assessment statements. We need them all. There is no room here for "either/or" thinking; and it is encouraging that that seems to have been acknowledged by the draftsman of the South African bill on the subject.

An example of a very broadly stated "legal principle" is to be found in clause 2(1)(a) of the 1987 draft South African bill, which provides – in language plainly borrowed from the 1969 American National Environmental Policy Act:

> "Every inhabitant of the Republic is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment."

Although phrased as a legal "right" (note the words "entitled to"), this was not intended, so it would seem, to rank as a civil right in the American constitutional sense. In other words, it was not intended to place judicially enforceable limitations on the power of parliament to curtail the stated right.[85] At the same time, it would seem that it was intended to have some legal effect, in the form of a canon of statutory interpretation, which the courts will be obliged to implement. This appears from clause 3(3) of the bill, which expressly declares that "all other laws" shall be "interpreted and administered" in accordance, *inter alia*, with the said principle.

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85 The corresponding provision in the United States National Environment Policy Act was originally drafted as a "fundamental and inalienable right", but was later watered down (see Glavovic 1984 *CILSA* 148).

Yet other legal principles suggest themselves as being appropriate for additional recognition. For example, in my 1984 monograph on "The transformation of the concept of ownership as plena in re potestas", I quoted Macdonald ACJ's statement that:

> "The idea which prevailed in the past that ownership of land conferred the right of the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations. Legislation dealing with such matters as town and country planning, the conservation of natural resources, and the prevention of pollution, and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimony to the existence of this more civilised and enlightened attitude towards the rights conferred by the ownership of land."[86]

But although the trend is in that direction, we still have a long way to go. Accordingly, it would have been satisfying to see in the proposed legislation a legal principle phrased more or less as suggested earlier, namely, that the ownership of land involves duties, and that the right should not be exercised in a way which is opposed to the public welfare. As we have seen, a similar principle – phrased, however, in more socialistic terms – is to be found in the Constitution of the Federal Republic of Germany.

Among the more detailed "legal rules" which should find a place in the proposed legislation are the kind of rules to be found in some of the recent Australian legislation which spell out, in detail, what is meant by the various kinds of prohibited "pollution", and also spell out the nature of permissible "defences".

In regard to the concept of promulgating detailed national environmental policy statements, which are expressly declared to have the force of law, it is my view that this is potentially one of the best features of the proposed South African legislation, though the actual drafting needs some tightening. Why, for example, does the South African bill not say in so many express words – as in Australia – that national environmental policies have the force of law? However, the concept itself is one of the most helpful ways of ensuring flexibility, and at the same time giving precision and particularity to the legal criteria which are to be observed in environmental protection. As appears clearly from clause 2(2) of the bill, we are not here concerned with only one all-embracing environmental protection policy; for any such statement would necessarily have to be phrased in very wide and vague terms. We are concerned, as in the case of the most recent Australian legislation, with a large number of national environmental protection policies, in the plural, in respect of different components of the environment; for example, policy relating to the construction of works; policy relating to the deposit or discharge of waste into waters in the environment; policy relating to the deposit or discharge of waste onto lands; policy relating to the removal, disposal or reduction of litter in the environment, and so on. If I have correctly interpreted Australian thinking in this matter, they favour policy statements which will be specific, concrete and detailed, containing specific rules and specific norms or standards, rather than statements which are general and abstract. One may reasonably entertain high hopes for the role of

86 *King v Dykes* 1971 3 SA 540 (RA); Cowen *The transformation of the concept of ownership as plena in re potestas* (*supra* n 21) 79.

national environment policy statements in South Africa. If imaginatively conceived, skilfully drafted and given the force of law, they could well become a distinctive cornerstone of South African environmental law.

The idea of promulgating policy statements which are to have the force of law is not new in South Africa, the best known examples being the various policy statements declared by the Department of Education in terms of the provisions of section 2(2A) of the National Policy for General Education Affairs Act 76 of 1984. Under that act the documents setting out policies – which are obtainable on written request from the director-general – are, however, often long, discursive documents, setting forth historical developments, goals and aspirations. Much less frequently do they prescribe legal rules, and specific norms or standards, of the kind which a court of law would feel comfortable in applying or enforcing. In my opinion something quite specific is needed in regard to national environmental policy statements. However, in its present form, the draft Environment Protection bill is silent (I venture to think unfortunately silent) about the format and requirements of national environmental policies having the force of law; and at this stage one can only speculate as to their format.

As the manifest object was to leave the details of policy to be promulgated from time to time by the minister, one obviously cannot expect to find the relevant details in the enabling legislation. However, we would do well in this regard to take a leaf out of the Australian legislative book. Not only does the more recent legislation in some of the Australian states declare in so many words that approved environmental policy statements shall have the force of law, but in the relevant empowering legislation fairly detailed indications are given concerning the format and requirements of a typical environmental policy statement. It is there envisaged that a policy statement will establish the basis or bases on which the part of the environment to which it relates is to be protected; and, in addition, the policy statement may (i) lay down programmes for such protection, or for the prevention, control or abatement of pollution; (ii) identify and declare specific "beneficial uses" to be protected under the approved policy; (iii) set out the standards or norms to be used in measuring environmental quality; (iv) specify the qualities and maximum quantities of any waste to be permitted to be discharged into the relevant portion of the environment; (v) specify the maximum levels of noise, odour, or electromagnetic radiation permitted to be emitted into the relevant portion of the environment, and so on.[87] That kind of particularity in the enabling legislation is desirable and helpful.

2 How to ensure that government departments will comply

Modern legislation on environmental protection recognises that major government departments and other public authorities are often among the most damaging of polluters and degraders. Accordingly, it is considered important to lay down a legal duty, binding on such bodies, to ensure that approved environmental protection policies will, in fact, be taken into account and observed in relation to (a) the formulation of proposals; (b) the carrying out of works and projects; (c) the negotiation, operation and enforcement of agreements; (d) the making of recommendations; and (e) the incurring of expenditure, by or on

87 See s 35 of the Environmental Protection Act 1986, Western Australia.

behalf of the government, a government department, or any other public authority. This is, in fact, recognised in the 1987 draft of the South African bill. Unfortunately, clause 3(1) of the bill, which recognises the principle, would present difficulties of enforcement in its present form. Nevertheless, a national environment policy, approved and promulgated in terms of an act of parliament, is likely to be taken far more seriously than a policy declaration in terms of a so-called "white paper". Having made this positive comment, it is my duty, however, to warn against a danger.

3 The need for legal and not merely political sanctions

From the point of view of enforcement, modern environmental protection legislation seems to me to fall into two broad categories. In the one, the governing philosophy is that environmental protection is a political rather than a legal issue. The administration is given not only the duty of establishing policy and standards, but also the responsibility for their enforcement, leaving everything in the last analysis to ministerial discretion. In the other category, legal duties are established which are directly enforceable in the courts. The latter has long been the American preference, and is becoming increasingly acceptable in Canada and Australia, though GM Bates has complained that too much of the Australian legislation is still couched in vague terms which are difficult to enforce judicially.[88] It is submitted that judicial enforceability is what is needed in South Africa. The emphasis should be on providing remedies in open court rather than having to resort to political and administrative lobbying and compromise. However, the overall impression left by the draft bill, is that our legislation is likely to oscillate between both concepts, with the emphasis, perhaps, on leaving matters ultimately to ministerial discretion. Indeed, in this connection, clause 28(7)(b) specifically provides that a regulation which may affect the activities of any authority or government institution shall only be promulgated with the concurrence of such authority or institution.

Be this as it may, it is important that teeth be given to the legislation. And to this end, I would like to make the following proposals, each of which should, in my opinion, find a place in due course in strengthened South African environmental protection legislation. Their acceptance would help towards making South African environmental law a subject having its own distinctive criteria.

4 Reasons to be given for administrative decisions substantially affecting the environment

I have elsewhere stated at length the reasons why reasons should be given for decisions.[89] It may suffice here to say that it would be difficult to find any field in which there is greater need to give reasons for administrative decisions than in respect of decisions materially affecting the environment. The public disclosure of full and honest reasons is a powerful – perhaps the most powerful – safeguard against administrative arbitrariness. Inadequate reasons or bad reasons usually carry their death wound on their face and are – to say the least – embarrassing to those who indulge in them. We are all aware that governmental authorities prefer not to give reasons for decisions, and that it is not easy to

88 *Environmental law in Australia* 4.
89 See, e g, the *Special Supplement* to *Ekos* no 2 11–12.

find examples of cases where the duty to give reasons has been officially recognised. However, one important and relevant example is to be found in the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act of 1947, section 5 of which imposes a duty upon the registrar of fertilizers to furnish reasons for the decisions which he is authorised to make.[90] That duty should be generalised so as to become a distinctive criterion in the whole field of legal protection of the environment.

5 Projects materially affecting the environment to be preceded by environmental impact assessment statements

Some ten years ago, Messrs Hall, Fulton, Watson, Clarke and I suggested, in a published paper on Environmental Impact Assessment Statements, that no project materially affecting the environment should be carried out without the prior publication of a suitable environmental impact assessment statement, and that the courts should be given limited jurisdiction to monitor the observance of specified procedures and requirements for the preparation of such statements.[91] That paper still seems to me to be sound and relevant. Perhaps one may emphasise, yet again, that the publication of properly prepared environmental impact assessment statements, and the limited monitoring by the courts of the procedures followed, is an excellent method of ensuring what is needed, namely, rational, unemotional and effective public participation in the conservation process. Perhaps, too, we should bear in mind Professor JL Sax's observation that the whole object of the exercise is to

> "restrain projects that have not been adequately planned and to insist that they do not go forward unless and until those who wish to promote them can demonstrate that they have considered and adequately resolved reasonable doubts about their consequences".[92]

On the subject of environmental impact assessment statements, the 1987 South African bill has in clause 21 taken a step – albeit a small and hesitant one – in the right direction. However, the proposed dispensation is less stringent than that which was advocated by my colleagues and myself, and far more is left to ministerial discretion than is normal in comparable legislation abroad. Nevertheless, the subject has, at long last, been seriously addressed.

6 The need for an independent environmental protection authority

One of the valuable innovations to be found in recent Australian state legislation on environmental protection is the establishment of an independent environmental protection authority with power to bring civil actions in cases of damage or threatened damage to the environment and with the specific duty to protect the environment and to promote approved policies. Section 8 of the Western Australian Environmental Protection Act of 1986 specifically provides that neither the authority, nor its chairman, when acting as chief executive officer, shall be subject to the direction of the minister. It would be satisfactory if one could record that a similar dispensation is to become a distinctive feature of South African environmental law.

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90 Another example is to be found in the regulations under the original South African Sectional Titles Act dealing with the power of local authorities to refuse approval of a sectional title scheme.

91 Reprinted as a special supplement to *Ekos* no 2.

92 Sax *Defending the environment* (1972) 113.

However, on this point the 1987 South African bill adheres more to the philosophy that the relevant sanctions are political. Thus, clause 30 provides that it is the minister, an administrator of a province, or an authority entrusted with the administration of the act (not an independent authority), who may institute a civil action to advance the general policy and objects of the act. Nevertheless, this is, yet again, a step in the right direction.

THE MORAL IMPERATIVE AND BEYOND

I have left to the last the core question: why environmental law? Why, indeed, environmental protection? I shall be comparatively short on this cardinal aspect because in my opinion it ultimately hinges on an act of faith.

Many different answers have been given to the question why protect the environment, ranging from a perceived need for "survival" to complex economic arguments. We dare not neglect rational debate of this kind. It may sometimes, perhaps often, be decisive. However, my experience has been that not infrequently rational discussion proves to be inconclusive. There are occasions when people argue equally rationally and logically but in support of conflicting underlying values. Indeed, in the course of a rational debate, it may become apparent that the issue does not depend exclusively on legal or economic considerations, or that it does not fall exclusively within the province of one of the natural sciences. One may then be thrown back on justifying one's ethical convictions, or at an even deeper level, on justifying one's ultimate view of life. One is forced to justify, or at least to state, one's ultimate premises – one's *point of departure* for rational argument.

There seems to me to be no escape from these ultimates. As suggested at the outset of this article, the role of law in environmental protection, though important, is limited. Binding and enduring law presupposes a basis of social acceptance of the moral and other values on which the legal system rests. Herein lies what is perhaps the most exciting challenge currently facing environmental law. No doubt that law is not only shaped by, but also shapes, public opinion. The fact remains however that we still have a long way to go in South Africa towards establishing a conventional moral conviction that environmental degradation is wrong. Yet environmental law, unless underpinned by such conventional morality, must remain weak. Again, conventional morality, unsupported by a widespread morality of the individual conscience, is unstable.

Furthermore, a morality of the individual conscience ultimately rests on an act of faith – whether it be faith in reason, or faith in God, or whatever. Ultimately, there has to be personal commitment. I, therefore, have no alternative but to declare my own.

While I would be among the last to under-estimate the force of rational debate, in the ultimate analysis there seems to me to be only one sure answer to the challenge of the environment. It is a religious answer and I put it forward in humility. We are enjoined to love God and our neighbours as ourselves. You cannot love God if you treat his creation with contempt. That to me is very nearly the bottom line. But not quite. We get the environment we deserve. Our

surroundings can be no better than we perceive and wish them to be. Things went sour in the Garden of Eden. Man's greed and ego-centredness then, and ever since, have caused all creation to groan, in St Paul's tremendous phrase.[93] But there is a way of redemption. It is in St John's Gospel, Chapter 14, verse 6, where the Saviour says: "I am the way, the truth and the light."

93 Romans 8:22; and see Versfeld *Die neukery met die appelboom.*

Two decades ago there was a dearth of authority on this matter in our law. Since then there have been many decisions. I think it unnecessary to refer to them or the long discussions therein contained. To my mind the simple practical guide in cases of appropriation of confidential documents or ideas is the commandment "Thou shalt not steal". I hope that by saying this I do not call down on me the wrath of the doctors. I can already see what they may say. The word "unscientific" may figure. But I do not see that simple practical test as being in conflict with the more elaborate definitions which may be needed in cases of complication (per Schutz AJ *in Easy-find International SA (Pty) Ltd v Instaplan Holdings* 1983 3 SA 917 (W) 927).

Consumer law: the need for reform*

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OPSOMMING

Verbruikersreg: die behoefte aan hervorming

Verbruikers in Suid-Afrika word benadeel met betrekking tot hulle regte op veiligheid, eerlikheid, billike ooreenkomste, kennis, keuse, privaatheid en die geleentheid om gehoor te word. Verbruikers in die Verenigde Koninkryk, Australië en die Verenigde State van Amerika geniet veel beter beskerming. Indien dit noodsaaklik is om verbruikersregte in hoogs gesofistikeerde samelewings te beskerm, is dit des te meer noodsaaklik in 'n land soos Suid-Afrika met 'n groot bevolking van halfgeskoolde verbruikers.

Die tyd is ryp vir 'n deurdringende evaluasie van verbruikersreg in Suid-Afrika. Daar is 'n behoefte aan 'n uitgebreide en omvattende wet op handelsgebruike soortgelyk aan die Engelse *Fair Trading Act* van 1973 en die Australiese *Trade Practices Act* van 1974. Daar is ook 'n behoefte aan 'n sterk uitvoerende verbruikers-administrateur wat soos die Engelse *Director of Fair Trading* die bevoegdheid behoort te hê om beheer oor die miskenning van verbruikersregte uit te oefen. Die administrateur behoort die bevoegdheid te hê om aansoek te doen om interdikte, om siviele remedies toe te ken, om strafsanksies op te lê en handelspraktyke deur lisensiëring te beheer.

Hierdie voorstelle sal waarskynlik die teenkanting van die "vrye mark"-voorstanders ontlok. Desnieteenstaande is dit noodsaaklik dat onbillike en oneerlike praktyke in die handel so gou as moontlik uit die weg geruim word. Indien dit nie gebeur nie en Suid-Afrika se enorme bevolking van uitbuitbare verbruikers nie teen die vergrype van gewetenlose sakepersone beskerm word nie, sal daar weinig steun vir 'n kapitalistiese of semi-kapitalistiese ekonomie wees indien daar 'n verskuiwing in die politieke mag plaasvind.

INTRODUCTION

It is more than ten years since the Trade Practices Act of 1976[1] was assented to in South Africa, although it only came into effect in 1977. It therefore seems appropriate to consider the question of consumer law reform in this country. One of the purposes of the Act is to control activities which

> "may directly or indirectly injure . . . the relations between businesses and consumers".[2]

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1 Act 76 of 1976.

2 s 15(1) of Act 76 of 1976.

The other aims are to control certain advertisements and the use of trade coupons.[3] It is significant, however, that the South African act has only 25 sections while its Australian counterpart has 172.[4] Hence the need to reflect on whether the Trade Practices Act itself should be expanded, and whether legislation such as the Credit Agreements Act of 1980[5] and other statutes that affect consumers[6] should be amended or enlarged.

The concept of "a bill of rights" has become fashionable.[7] It is interesting to note, therefore, that in 1962 President Kennedy referred to a "consumer's bill of rights" and proposed that this should include four basic rights: the right to *safety*, the right to *information*, the right to *choose* and the right *to be heard*.[8] Since then others have added further categories like the right to *honesty*, the right to *fair agreements*, the right to *privacy* and the right to *correct abuses*.[9] In keeping therefore with the current predilection for a bill of rights it is intended to discuss the question of consumer law reform against the background of the following consumer's rights: (1) the right to safety; (2) the right to honesty; (3) the right to fair agreements; (4) the right to know; (5) the right to choose; (6) the right to privacy; and (7) the right to be heard.

1 RIGHT TO SAFETY

1 1 Product safety

Unlike the mass of legislation protecting consumers in the United States of America[10] there is very little safety law in South Africa, apart from what is to

3 Preamble to Act 76 of 1976.
4 Trade Practices Act of 1974.
5 Act 75 of 1980.
6 E g, the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972, Health Act 63 of 1977, Medicines Control Act 101 of 1965, Hazardous Substances Act 15 of 1973, Electricity Act 40 of 1958, Nuclear Energy Act 92 of 1982 and Aviation Act 74 of 1962.
7 E g, the Law Commission is presently considering the question of a bill of rights for South Africa, and the KwaZulu/Natal Indaba constitutional proposals also include a *Bill of Rights* (1986).
8 Cf Ziegel "The future of Canadian consumerism" 1973 *Can Bar R* 194. This "bill of rights" was given legislative authority by President Nixon in his "buyer's bill of rights" in 1969 when he introduced a consumer protection programme by: (a) creating a new Office of Consumer Affairs; (b) introducing a product safety programme within the Department of Health, Education and Welfare and empowering it to fix minimum safety standards for products and to ban from the marketplace those products that fail to meet those standards; (c) proposing a Consumer Fraud Prevention Act to outlaw unfair and deceptive practices; (d) increasing the effectiveness of the Federal Trade Commission; (e) proposing a Fair Warranty Disclosure Act to prohibit the use of deceptive warranties; (f) proposing a Consumer Products Test Methods Act to provide incentives for increasing the amount of accurate and relevant information concerning complex consumer products; (g) resubmitting the Drug Identification Act concerning the identification coding of drugs; (h) encouraging the establishment of a National Business Council to assist the business community in meeting its responsibilities to consumers; and (i) exploring the establishment of a Consumer Fraud Clearing House to increase emphasis on consumer education and new programmes in the field of food and drug safety. (President Nixon "Buyer's bill of rights" in Gaedeke and Etcherson *Consumerism: viewpoints from business, government and public interest* (1972) 329 *et seq*; Ziegel 194 *et seq.*)
9 Ziegel 194 *et seq.*
10 E g, the Consumer Products Safety Act 15 USCA par 2051; Federal Hazardous Substances Act 15 USCA par 1261; Poison Prevention Packaging Act 15 USCA par 1471; Flammable Fabrics Act 15 USCA par 1191; Refrigerator Safety Act 15 USCA par 1211; National Traffic

be found in the common law and preventative legislation.[11] South Africa has the usual preventative legislation governing foodstuffs and cosmetics,[12] health,[13] medicines,[14] hazardous substances,[15] electricity,[16] atomic energy[17] and aviation,[18] but there is very little assistance given to consumers who suffer harm as a result of unsafe products. At the same time organisations such as the South African Bureau of Standards[19] have not yet set comprehensive safety standards for such lethal weapons as motor cars. Furthermore, very often there are so many loopholes governing the sale and distribution of products like dangerous electrical goods[20] and others, that the consumer has to fall back on his common-law rights. In any event, the South African Bureau of Standards tends to be producer- rather than consumer-orientated.[21] Certainly South Africa has nothing like the

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and Motor Vehicles Safety Act 15 USCA par 1381; Federal Food Drug and Cosmetic Act 21 USCA par 301; Occupational Safety and Health Act 29 USCA par 651; Federal Aviation Act 49 USCA par 1301 and Toxic Substances Control Act 15 USCA par 2601. See generally Page, Keeton, Owen and Montgomery *Products liability and safety: cases and materials* (1980) 17 *et seq* and supplements.

11 See below.

12 The Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 makes it an offence to sell, manufacture or import harmful food, cosmetics and disinfectants (s 2) or to use prohibited processes or containers (s 4) or to remove nutritious or other properties from such foodstuffs (s 2(c)).

13 The Health Act 63 of 1977 is concerned with the rendering and co-ordination of health services in South Africa (preamble). It also deals with food handling. Regulations made in terms of the act cover matters such as the minimum standards of hygiene required for food handling and premises used for the sale of food (s 35). E g, the act prohibits the sale of unhygienic or contaminated food and enables the Minister of National Health and Population Development to control the storage, display or service of milk and articles of food (*ibid*).

14 The Medicines Control Act 101 of 1965 provides for the registration and control of drugs and medicines (s 14 19).

15 The Hazardous Substances Act 15 of 1973 controls substances that might cause injury through their toxic, corrosive or flammable nature, including certain electrical products (s 2).

16 The Electricity Act 40 of 1958 as amended (s 19 Act 54 of 1986) creates a rebuttable presumption of negligence on the side of an "undertaker" for damage or injury caused by induction or electrolysis or otherwise by means of electricity generated or transmitted by, or escaping from, the plant or machinery of any undertaker (s 50). An undertaker is a person who supplies electricity (s 1).

17 The Nuclear Energy Act 92 of 1982 provides that a person holding a nuclear licence is liable for any nuclear damage caused during the period of responsibility for the licence (s 4(1)).

18 The Aviation Act 75 of 1962 imposes strict liability on the owner of an aircraft for any material damage or losses caused by the aircraft, during flight, taking off, or landing or by any other person in any such aircraft or by any article falling from such aircraft, to any person or property on land or water (s 11(3)).

19 established in terms of the Standards Act 33 of 1962 (s 4) to test commodities and materials from which they are manufactured, as well as to control the use of standardisation marks (s 14) and to prescribe compulsory standards for certain products (s 15).

20 During 1985 a lethal electrical extension cord was being marketed in the supermarkets but could not be banned by the South African Bureau of Standards because there was a loophole in the regulations governing the importation of dangerous electrical products. The Bureau of Standards, however, refused to name the product and it was left to the newspapers to warn the public (cf *Sunday Tribune* 1985–12–20).

21 Cf Verster, Director General of SA Bureau of Standards "Sharpening the edge" Supplement to *Financial Mail* 1985–12–06: "The man in the street does not have a very clear idea of the aims and objectives of the SABS. Our work centres mainly on bulk buys and on trade

Products Safety Commission in the United States of America[22] which exercises control over thousands of manufactured products from toasters to lawnmowers. The Commission has powers to require the recall, repair or replacement of defective or unsafe products and may order a refund of a purchase price. It also imposes heavy fines and terms of imprisonment, and may issue, amend or revoke safety rules.[23] The Trade Practices Act in South Africa has not really been used as a weapon to control unsafe products in the market-place. It could be argued that its ambit is broad enough. Unless, however, a special body is created to deal with product safety we are unlikely to make further progress in this field in South Africa.

1 2 Product liability

Once a consumer in South Africa is injured by an unsafe product the matter is governed by the common law.[24] This means that if there is a contractual relationship between the manufacturer and the consumer, the latter can sue for and recover consequential damages without proving fault.[25] If no contract exists or the product was purchased from a retailer, the consumer can sue the manufacturer only if fault is proved.[26] This is usually very difficult. If the product was purchased from a retailer who professes skill and expert knowledge in the product, then he or she could be sued for consequential damages without the consumer having to prove fault.[27] In all other cases, however, the injured person would have to prove fault.[28] This causes problems because most lay-people are unfamiliar with the manufacturing process. Although the fault principle is also still used in the United Kingdom[29] and Western Europe,[30] a number of Royal Commissions[31] and a European Economic Community Commission[32] have recommended the abolition of the fault principle in respect of unsafe products. In

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between industries, rather than on the general public. However, everything we do eventually helps the public, because if you can make trade more efficient then everybody benefits." In 1985 the SABS had 2 500 mark holders and there were about 100 organisations listed as SABS approved manufacturers (*ibid*).

22 established in terms of the Consumer Product Safety Act of 1972 Pub L No 92–573, 86 stat 1207 (1972), (codified as 15 USC pars 2051 – 2081 (1976)), 15 USC pars 2056(A)(1), 2056(a)(2) and par 2057 (1972).

23 Cf Murphy, Santagata and Grad *The law of product liability, problems and policies* (1982) 174.

24 Cf Van der Walt "Die deliktuele aanspreeklikheid van die vervaardiger vir skade berokken deur middel van sy defekte produk" 1972 *THRHR* 224; McQuoid-Mason "Common law protection of the consumer in South Africa" 1974 *Acta Juridica* 53; De Jager "Die grondslae van produkte-aanspreeklikheid ex delicto in die Suid-Afrikaanse reg" 1978 *THRHR* 347; Van der Merwe and De Jager "Products liability: a recent unreported case" 1980 *SALJ* 83.

25 Cf *Kroonstad Westelike Boere Ko-op Vereeniging v Botha* 1964 3 SA 561 (A) 572.

26 *Cooper and Nephews v Visser* 1920 AD 111 114; *A Gibb and Son v Taylor and Mitchell Timber Supply Co* 1975 2 SA 457 (W) 460.

27 *Kroonstad Westelike Boere Ko-op Vereeniging v Botha supra* 571.

28 Cf McQuoid-Mason 1974 *Acta Juridica* 58.

29 *Vacwell Engineering Co Limited v BDH Chemicals Limited* 1971 1 QB 88; *Wright v Dunlop Rubber Co Ltd and ICI* 1972 18 *Knights Indus R* 255; *Fisher v Harrod's Limited* 1966 Lloyd's L R 500. Cf Lowe and Woodroffe *Consumer law and practice* (1985) 66 *et seq.*

30 See generally Reich and Micklitz *Consumer legislation in the EC countries: a comparative analysis* (1980).

31 Law Commission *Liability for defective products* Law Comm no 82 (1977); *Royal commission on civil liability and compensation for personal injury* (Cmnd 7054 1978) 262–274.

32 *Proposal for a council directive concerning liability for defective products*, submitted by the Commission to the Council 1979–10–01; European Convention on Products Liability in regard to Personal Injury and Death, European Treaty Series no 91, 1977; cf Cranston *Consumers and the law* (1984) 157.

the United States strict liability is imposed on manufacturers of defective products.[33] As South Africa has become more industrialised it seems that the time is ripe for the imposition of strict liability on manufacturers in this country.[34] Such a principle would not be foreign to our law where strict liability is already imposed on manufacturers where there is a contractual relationship between the manufacturer and the consumer.[35] Other examples are strict liability imposed on the press for defamation[36] and on the owners of domestic animals which cause injuries to others while acting ferociously.[37] The American experience has been that the imposition of strict liability on manufacturers has not significantly increased the prices of manufactured products.[38] Strict liability on manufacturers for injuries by third parties could be developed by the courts,[39] otherwise it will be necessary for parliament to intervene with special legislation.

2 RIGHT TO HONESTY

The right to honesty in the market place may sound quaint and old-fashioned to cynical businessmen,[40] but it is a right to which all civilised societies should aspire. In South Africa today there is very little protection for consumers against dishonesty in the market place which does not constitute fraud.[41] For instance, apart from limited protection in statutes such as the Credit Agreements Act[42] and the Trade Practices Act [43] as well as some ethical codes,[44] there is no real protection for consumers against unethical door-to-door salespersons, bait and switch tactics, referral sales and fake contests. In such cases consumers will usually have to rely on common-law remedies.

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33 *Henningsen v Bloomfield Motors Incorp* 161 A 2d 69 (1960); *Greenman v Yuba Power Products Inc* 377 P 2d 168 (1964); *Second restatement on torts* par 402A. See generally Epstein *Modern products liability law* (1980).

34 Cf Van der Walt 1972 *THRHR* 249; McQuoid-Mason 1974 *Acta Juridica* 71.

35 Cf *Kroonstad Westelike Boere Ko-op Vereeniging v Botha supra* 572.

36 *SAUK v O'Malley* 1977 3 SA 394 (A) 407; *Pakendorff v De Flamingh* 1982 3 SA 146 (A) 154. cf Burchell *The law of defamation in South Africa* (1985) 181 *et seq.*

37 *O'Callaghan v Chaplin* 1927 AD 310; *SAR & H v Edwards* 1930 AD 3; *Solomon v De Waal* 1972 1 SA 575 (A).

38 Ontario Law Reform Commission *Report on products liability*, Ministry of the Attorney General (1979) 73; cf Croyle "An impact analysis of judge-made liability policies" 1979 *Law and Soc R* 949.

39 Cf *Pakendorf v De Flamingh supra* 158: "Dit is natuurlik aanloklik om die risiko-aanspreeklikheid ten opsigte van produkte toe te pas omdat 'n koerant as 'n 'produk' beskou kon word." Was the Chief Justice suggesting that the risk principle applies to products liability in South Africa?

40 Cf Corbett J in *Dunn and Bradstreet v SA Merchants Combined Credit Bureau* 1968 1 SA 209 (C) 218 *et seq*: "It must be conceded that these phrases 'fairness in competition' and 'honesty in trade' have an old-fashioned ring about them which may cause the cynic in business to smile, but it is right that the court should have regard to and emphasise these virtues."

41 Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another (Hunt *South African criminal law and procedure* vol II (1970) 714). An action for damages may also lie for damages for a wilful falsehood (*Geary and Son (Pty) Ltd v Gove* 1964 1 SA 434 (A) 441).

42 s 6(1) of Act 75 of 1980.

43 s 9 and 13 of Act 76 of 1976.

44 E g, the codes of the Furniture Traders Association, the Advertising Standards Authority and the Direct Marketing Association.

2 1 Door-to-door sales

In door-to-door sales there is incidental protection under the "cooling off" provisions of the Credit Agreements Act[45] and the provisions against misleading advertising in the Trade Practices Act.[46] In the United States the Federal Trade Commission requires door-to-door salespersons verbally to inform consumers about their right to cancel the contract and to reduce these rights to writing in the agreement.[47] In South Africa the "cooling-off" period must be reflected in a credit agreement[48] but need not be verbally explained to the consumer. This means that if the agreement is taken away after being signed and a copy not left behind, the customer may not know that he or she has a right to cancel the contract. The American rule requiring the salesperson verbally to draw attention to the cancellation clause should be included in the South African Credit Agreements Act.

2 2 Referral sales

"Referral sales" situations occur where a salesperson tells customers that if they give the names of friends or other likely buyers they will be given a bonus or a discount on their purchases.[49] This enables shops to increase their sales by obtaining the names of new potential customers. Referral sales, however, are often misleading because when the people who do the referring subsequently attempt to claim a bonus or discount they are told that they will only receive it if the person named actually makes a purchase. In many states in the United States referral sales are unlawful and the consumer is entitled to cancel the contract and demand a refund.[50] It is submitted that similar safeguards should be introduced into our Trade Practices Act.

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45 S 13(1) of Act 75 of 1980 allows the credit receiver to cancel the contract within five working days of its conclusion provided that: (a) the initiative for the agreement emanated from the credit grantor or his representative; (b) the credit agreement is signed by the consumer away from the credit grantor's business premises; and (c) the written transaction was not initiated and concluded "entirely by means of the official State postal service of the Republic" (see GN R2572 in *Government Gazette* 7328 of 1980-12-12 (s 3)).

46 S 9 Act 76 of 1976 provides that no person shall: (a) publish or display any advertisement which is false or misleading in material respects or cause such advertisement to be published or displayed; and (b) in connection with the sale or leasing of goods or the rendering of or provision of any service "directly or indirectly make any statement or communication or give any description which is false or misleading in material respects in respect of the nature, properties, advantages or uses" of such goods or services, or "in respect of the manner in, conditions on, or prices at which" such goods or services are purchased or leased or otherwise required (in the case of goods) or rendered or provided (in the case of services). S 13 of the act provides that no person who sells or leases goods or renders or provides any services, shall in any advertisement or in any other way: (a) give a false or misleading indication if such goods or services are sold or leased by him, or such services rendered or provided by him, at a price which is less than the price at which such goods are actually sold or leased, or rendered or provided by him (s 13(1)(a), (b) and s 13(2)(a), (b)).

47 CCH *Consumer credit guide* par 525.

48 s 13(1) of Act 75 of 1980.

49 Spanogle and Rohner *Consumer law: cases and materials* (1979) 158.

50 Epstein and Nickles *Consumer law* (1980) 39.

2 3 Fake contests

"Fake contests" occur where a seller pretends that a consumer has won a "free gift". The customer is told that all he or she has to do is to buy something else to go with it.[51] For example, a housewife may be telephoned and told that she has won a contest for "free bedding" for her bedroom which she will receive if she buys a bedroom suite. In the United States it would be illegal to use the word "free" in an advertisement and then to require a consumer to do something in order to claim the free item.[52] The consumer would be entitled to cancel the contract if he or she was lured into buying the bedroom suite as a result of the fake contest. In our law it would be difficult for a consumer to prove a fraudulent misrepresentation inducing the contract. Presumably he or she would not enter into the contract once it was incorrect. Consumers, however, should be protected against being lured into shops on this fraudulent basis. This could be interpreted as a contravention of the provisions of the Trade Practices Act that deal with false or misleading advertising.[53] The act would have more force, however, if this practice was specifically outlawed.

2 4 Bait and switch

"Bait and switch" is another deceptive sales practice that is used by unscrupulous shops. The practice involves an offer to sell a product at what sounds like a very good price – almost too good to be true. The seller, however, does not really want to sell the product or "bait" that is offered. It is simply used to entice the buyer into the shop. Once the consumer is in the shop, the product turns out to be much less appealing than expected and the seller "switches" the consumer to a more expensive item.[54] Salespersons using bait and switch tactics tell customers that the advertised products are inferior and try to refer them to higher priced items. In some shops salespersons who successfully switch customers to more expensive items are paid increased commissions. Sometimes the product advertised as bait may not even be in stock. Bait and switch tactics give sellers a strong advantage over unwary consumers. As they are already in the shop and expecting to buy something, but disappointed in the quality of the bait, customers are unlikely to go out and look at prices in other shops.

In South Africa a shop that uses bait and switch tactics may perhaps be prosecuted for misleading advertising in terms of the Trade Practices Act but this may be difficult to prove.[55] In the United States the Federal Trade Commission has rules against bait and switch practices and will take appropriate

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51 Cf Lipson "Creepy contracts and all that crawls: a series of case studies": unpublished paper delivered at the Checkers Award for Consumer Journalism Seminar 1986–11–06.

52 Cf *Federal Trade Commission v Mary Carter Paint Co* 382 US 46, 86 S CT 219, 15L ed 2d 128 (1965); Spanogle and Rohner 57 *et seq*. A trader who informs a consumer that he or she has won a "fake" contest would be liable for prosecution by the Federal Trade Commission in terms of s 5 of the Federal Trade Commission Act 15 USCA which states: "Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are declared unlawful." Epstein and Nickles 25.

53 s 9 and 13 of Act 76 of 1976.

54 Epstein and Nickles 26 *et seq*.

55 S 9 of the act requires proof that the seller had published or displayed an advertisement "which is false or misleading in material respects". (Cf Roberts "Misleading advertising and the law" 1980–81 *NULR* 444 *et seq*).

action when it receives complaints from consumers.[56] In most instances where bait and switch advertising is proved a consumer may be entitled to cancel the contract and recover the purchase price. Bait and switch tactics should be specifically outlawed in the Trade Practices Act.

2 5 Benefit societies

"Benefit societies" are another device used by unscrupulous businessmen to exploit consumers, particularly poor people.[57] A benefit society is a business or organisation that invites the public to become members. It takes contributions from them and in return promises various benefits, usually financial assistance for sickness, retirement, education, the birth of a child, funeral and medical expenses or unemployment. It may also provide insurance and grant loans. Such societies should be registered with the Registrar of Friendly Societies,[58] but since 1984 many have operated illegally without registration. The Legal Resources Centre in Johannesburg has managed to have many of these closed down.[59] The Friendly Societies Act should specifically mention benefit societies to protect unsophisticated consumers who fall foul of people who spend their time collecting benefit society membership fees without granting benefits to their members. This matter could be handled by a person similar to the British Director of Fair Trading[60] who is likely to be more effective than the commercial branch of the South African police which has its hands full dealing with other matters.

3 RIGHT TO FAIR AGREEMENTS

There are two problem areas concerning the right to fair agreements. The first concerns unfair contracts and so-called guarantees; the other is in respect of credit agreements.

3 1 Unfair contracts

The concept of "freedom of contract" in South Africa means that people may include in contracts any terms they like provided they are not contrary to public policy[61] or restricted by a statute such as the Credit Agreements Act.[62] The latter,

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56 The Federal Trade Commission "Guides on bait advertising" 16 CFR 238 (1968) make the following practices evidence of bait and switch advertising: (a) refusal to show the advertised items; (b) disparagement of the advertised product; (c) failure to have the advertised item available in reasonable quantities; (d) refusal to promise to reveal the advertised item within a reasonable time; (e) failure to deliver the advertised item within a reasonable time; (f) discouraging sales personnel from selling advertised products (cf Epstein and Nickles 26 *et seq*).

57 Cf Legal Resources Centre *Advice office training manual* (1985) 250 *et seq.*

58 s 5 of the Friendly Societies Act 25 of 1956. S 2 of the act lists a number of benefits which a society may give to its members and if any one of these benefits has been provided by a society it may be regarded as a friendly society and required to be registered under the Friendly Societies Act (s 43).

59 *Advice office training manual* 245 *et seq.*

60 The activities of the director general of fair trading in the United Kingdom are governed by the Fair Trading Act of 1973 (cf Lowe and Woodroffe 257 *et seq.*)

61 E g, an undertaking by which one of the contracting parties binds himself in advance to condone or submit to the fraudulent conduct of the other (*Wells v SA Allumenite Company* 1927 AD 69). The courts will also not uphold agreements in which people agree to deprive themselves of legal rights generally or to limit their future rights to obtain relief from the courts, for any wrong committed against them (*Schierhout v Minister of Justice* 1925 AD 417 424; cf *Claasens v Monica Motors* 1976 2 SA 83 (O)).

62 s 6(1) of Act 75 of 1980.

for example, does not allow sellers to exclude common-law liability for hidden defects in products sold under a credit agreement.[63] As a result, people may generally include all kinds of unfair terms in their contracts which are to the detriment of consumers. The most common example of this is to be found in so-called "guarantees". Many manufacturers provide guarantees with their products but usually the only guarantee that the consumer gets is that his common-law rights are being taken away or limited. As a general rule a one-year "guarantee" means that the defect must manifest itself within one year otherwise the consumer will lose his right to claim. At common law the period would be very much longer.[64] Such guarantees usually also exclude liability for "any consequential damages". This means that if a person is injured by an unsafe product he or she will not be able to sue the manufacturer for any additional damage that might arise, for example, pain and suffering, disfigurement, medical expenses and loss of earnings. Unfortunately, in South Africa, otherwise than in the United Kingdom,[65] the United States[66] and Australia,[67] the courts will not strike out a so-called guarantee which is patently unfair (for example takes away most of the consumer's legal rights).[68]

The increased use of "standard form contracts" has meant that it is very difficult for consumers to make major purchases (for example of cars or houses) or to enter into agreements (for example leases or credit sales) without having unfavourable conditions imposed upon them by the manufacturer or seller.[69]

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63 Cf s 6(1)(d). Therefore the credit grantor warrants: (a) that the consumer will not be unlawfully evicted from possession of or deprived of the use of the goods sold (Hackwill *Mackeurtan's sale of goods in South Africa* (1984) 164–171); 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 134–140).

64 E g, in terms of s 11(d) of the Prescription Act 68 of 1969 the period of prescription for latent defects would be three years irrespective of whether the action arose from the *actio ex empto* or the *aedilitian* actions (cf Mackeurtan 133).

65 E g, in Britain the Unfair Contract Terms Act of 1977 prohibits guarantees or contracts that state: (a) the seller does not warrant that the goods are as described or shown by sample or are fit for the purpose or of questionable quality (s 6); (b) there is no liability for negligence that causes death or injury (s 2); (c) there is no liability for negligence related to a defect in the goods resulting in loss or damage to the goods if the guarantee is given by a manufacturer when the purchase is made from a retailer (s 5); and (d) there is no liability for any misrepresentation by the seller or his agents unless the trader proves that the exclusion clause was reasonable (Misrepresentation Act of 1967). See generally National Confederation of Consumer Groups *Handbook of consumer law* (1982) 73 *et seq*; Lowe and Woodroffe 113 *et seq*; Harvey *The law of consumer protection and fair trading* (1984) 105 *et seq.*

66 In the United States the courts may declare certain clauses in a contract "unconscionable" where there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party" (*Diamond Housing Corp v Robinson DC App* 257 A 2d 492 493 (1969); cf Spanogle and Rhoner 450).

67 E g, s 7(1) of the New South Wales Contracts Review Act of 1980 allows the court to grant relief where "the court finds a contract or provision of a contract has been unjust in the circumstances related to the contract at the time it was made, if it considers it just to do so and for the purpose of avoiding as far as practical an unjust consequence or result" (cf Goldring and Maher *Consumer protection law in Australia* (1983) 31 *et seq*).

68 In South Africa the courts will not strike down a clause for being "unconscionable" but may mitigate the oppressive effect of the contract to some extent by the principles of restricted or narrow interpretation (cf *Allen v Sixteen Stirling Investments (Pty) Limited* 1974 4 SA 164 (D); *Kemsley v Car Spray Centre (Pty) Ltd* 1976 1 SA 121 (SEC)). See generally Aronstam *Consumer protection, freedom of contract and the law* (1979) 33 *et seq.*

69 Cf Aronstam 16 *et seq.*

Where, however, the product is purchased under a credit agreement in terms of the Credit Agreements Act any attempt to limit the purchaser's common-law rights is regarded as unenforceable.[70]

The South African Law Commission is presently considering the question of unfair contract terms. It is hoped that the Commission will follow the provisions of the English Unfair Contract Terms Act[71] or the New South Wales Contracts Review Act,[72] or the principles of the law governing unconscionability applicable in the United States.[73] This would prevent manufacturers and sellers from evading their common-law duty to protect consumers against defective products manufactured by them.

3 2 Credit agreements

The Credit Agreements Act of 1980[74] replaced the Hire Purchase Act of 1942.[75] The latter had been passed in response to the problems of the white community on the platteland who were easy prey to credit salesmen in the 1930s.[76] The Credit Agreements Act was supposedly introduced to protect the position of the broader buying community in South Africa in the 1970s and 1980s.[77] The act re-enacted most of the provisions of the old Hire Purchase Act but in some respects took away with the one hand what it gave with the other.

The lure of easy credit often causes problems for consumers and in most Western countries there is considerable protection for them.

3 2 1 The agreement

In South Africa, the Credit Agreements Act made some cosmetic changes to the Hire Purchase Act but many safeguards have been excluded which would be found, for instance, in the English Consumer Credit Act of 1974.[78] For example, in England a hire purchase agreement cannot be enforced until the purchaser receives a copy of the duly completed agreement.[79] In South Africa a copy of the agreement must be delivered to the credit receiver within fourteen days, but such failure to deliver does not invalidate the contract.[80] Most credit agreements contain numerous clauses setting out the rights of the credit grantor.

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70 s 6(1)(d) of Act 75 of 1980.
71 Unfair Contract Terms Act of 1977.
72 Contracts Review Act of 1980 (NSW).
73 Cf Aronstam 192 *et seq.*
74 Act 75 of 1980.
75 Act 36 of 1942.
76 As the then Minister of Railways and Harbours said during the second reading debate it was introduced for "the prevention of the exploitation of wealth in the country by the stronger economic class at the expense of the weaker classes of our community" (*Reports of select committees* 1939–05–03, vol 2 16; cf McQuoid-Mason "Putting the 'con' in consumer protection, the Credit Agreements Bill and the consumer" 1978 *NULR* 196).
77 McQuoid-Mason 1978 *NULR* 196.
78 Consumer Credit Act of 1974.
79 s 63(5) of the Consumer Credit Act of 1974.
80 s 10(1) of the Usury Act of 1968. This section applies to money lenders, credit grantors and lessors. A money lender, credit grantor or lessor who contravenes s 10(1) of the act would, however, be liable on conviction to a fine not exceeding R1 000 or to imprisonment for a period of not more than 2 years or to both such fine and imprisonment (s 17). Consumers would be borrowers, credit receivers and lessees respectively (cf Cassim "Consumer protection in the Credit Agreements Act" 1984 *THRHR* 316 n 33).

The act should also provide that a fair summary of the rights of the credit receiver must be included in the agreement.[81] In cases of credit agreements that do not comply with the Act, the *onus* should not be on the credit receiver to prove that he or she was prejudiced thereby, but on the credit grantor to show that there was no prejudice to the credit receiver. The act should also prohibit any clauses which state that liability passes to the credit receiver before the goods have been delivered to him,[82] and should impose specific penalties for credit grantors who include prohibited clauses in their agreements.[83] These penalties should not only take the form of a fine but should also enable the credit receiver to cancel the agreement forthwith.[84] This is to prevent unsophisticated purchasers from being exploited by unscrupulous sellers who might deceive them as to their legal rights.

3 2 2 Cooling-off period

The "cooling-off" provisions of the act[85] are a major improvement in consumer credit protection, but the penalties for credit grantors who fail to refund monies within ten days of a notice of cancellation should be specifically spelt out.[86] In addition, failure to pay on time should result in interest payments calculated from the expiry of the tenth day, and the granting of a lien over the goods in favour of the credit receiver until the money is refunded.[87] Furthermore, as in the English Consumer Credit Act, the "cooling-off" period should run only from the date when the credit receiver receives a copy of the agreement.[88] This is to prevent credit grantors holding back copies of the agreement until the "cooling-off" period has expired, by which time the credit receiver will have lost his or her opportunity to utilise the cooling-off provisions.

3 2 3 Repossessions

The sections dealing with repossession should also be amended. For example, where a credit grantor repossesses goods without a court order, or the consent of the credit receiver, he or she is required to hold them for 30 days before reselling them (to allow the consumer to pay the arrears).[89] This may lead to abuse, particularly where unsophisticated and disadvantaged credit receivers are involved. England overcame this problem by introducing a section in the Consumer Credit Act which provides that where the purchaser has paid a third or

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81 Cf McQuoid-Mason 1978 *NULR* 197 *et seq.*

82 At common law, during the sale of specific goods the risk passes to the purchaser as soon as the agreement of sale to the purchaser is concluded and before delivery or payment of the price, unless the seller or purchaser is *in mora* (*Goldstein v Harripersad* 1942 NPD 158 162; cf *P A Pahad v Director of Food Supplies* 1949 3 SA 695 (A)). If the seller is *in mora* with delivery the risk reverts to him and he becomes in effect the insurer of the goods (Mackeurtan 180).

83 This has been done in s 167 of the English Consumer Credit Act of 1974.

84 Cf s 91 of the English Consumer Credit Act of 1974, which terminates the contract automatically.

85 s 13(1) of Act 75 of 1980.

86 At present the only penalties are provided for in the clause dealing with general contraventions of the act (s 23).

87 Cf s 70(2) of the English Consumer Credit Act of 1974; cf McQuoid-Mason 1978 *NULR* 201.

88 s 68 of the Consumer Credit Act of 1974.

89 s 12 of the Credit Agreements Act 75 of 1980.

more of the purchase price the seller cannot repossess the goods without a court order.[90] It also makes it an offence to enter a person's premises to repossess goods subject to a credit agreement without a court order or the purchaser's consent.[91] Furthermore, apart from being an offence, conduct in contravention of the English Act will automatically terminate the agreement, release the purchaser from all liability, and enable the person to a refund of all monies paid in terms of the agreement.[92] The fact that such protection is provided to consumers in a country with a sophisticated and literate population indicates that it is even more necessary in a country like South Africa with a large semi-literate consuming public.[93] In the case of written voluntary repossessions it is necessary for greater safeguards to protect credit receivers who are semi-literate or not proficient in one or other of the official languages in which the document is drafted. An adequate safeguard would be to require such credit receivers to sign the document in the presence of a justice of the peace or other responsible person who could certify that the contents of the document were explained to the credit receiver and that it was signed by the consumer.[94]

In terms of the Hire Purchase Act[95] a hire purchase seller could not go beyond a warrant of execution to recover damages resulting from a breach of a hire purchase agreement by the buyer unless a new agreement had been negotiated.[96] In terms of the Credit Agreements Act,[97] if the credit receiver decides not to repossess the goods because they are not worth repossessing or have been lost, he or she may go beyond a warrant of execution to recover the money.[98] For instance, an application could be made for a garnishee or section 65 order compelling the credit receiver to pay in instalments.[99] Therefore, if unscrupulous traders sell shoddy goods to ignorant consumers, and such goods are not worth repossessing, the defaulting consumer may be defenceless against enforcement court procedures that go beyond a warrant of execution.

3 2 4 Miscellaneous

The act particularly weakens the protection given to consumers by stating that "a credit agreement which does not comply with any such requirement shall not merely for that reason be invalid".[100] Less scrupulous traders might be prepared to take the risk that improperly executed agreements, or agreements without the required clauses will not necessarily be invalidated. This contrasts with the English Consumer Credit Act where such clauses make the agreement "not properly executed".[101] The act could also be more efficiently enforced if, like its English counterpart,[102] specific offences were mentioned as opposed to a general

90 s 90 of the Consumer Credit Act of 1974.
91 s 92 of the act.
92 s 91 of the act.
93 McQuoid-Mason 1978 *NULR* 204.
94 McQuoid-Mason 1978 *NULR* 209.
95 Act 36 of 1942.
96 s 18 of Act 36 of 1942; cf *Market Furnishers v Reddy* 1967 1 SA 528 (A).
97 Act 75 of 1980.
98 s 19 of Act 75 of 1980.
99 in terms of the Magistrates Court Act 32 of 1944 (cf McQuoid-Mason 1978 *NULR* 204 *et seq*).
100 s 5(2) of Act 75 of 1980.
101 s 61(1) of the Consumer Credit Act of 1974.
102 Consumer Credit Act of 1974.

offence for contravening the provisions of the act.[103] Experience has shown that it is much easier for law-enforcement agencies to enforce specific offences rather than general offences.

There are also a number of other general provisions that could be introduced to eliminate unfair and unethical practices used against unsophisticated and ignorant consumers. These could include, for example, the canvassing of prospective purchasers at their homes which is an offence in terms of the English Consumer Credit Act.[104] Likewise, the use of simulated legal processes (for example documents containing the words "summonsed") and threats to enforce rights which do not exist, should be made criminal offences.[105]

(To be continued)

103 S 167(1) of the Consumer Credit Act of 1974 refers to a list of offences and penalties in Schedule 1 to the act.
104 s 49 of the Consumer Credit Act of 1974.
105 Cf *The Natal Mercury* 1976–08–23 16. See generally McQuoid-Mason 1978 *NULR* 208.

Algehele sekerheidsessies

(*vervolg*)*

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GEVOLGTREKKING

Verskeie uiteenlopende menings oor die aard van sessie *in securitatem debiti* word in die Suid-Afrikaanse reg aangetref. In die positiewe reg geniet die verpandingskonstruksie die meeste steun en dit bied weinig praktiese probleme.[152] Die grootste beswaar teen hierdie konstruksie is dat dit 'n juridiese onding[153] sou wees en dat die toonaangewende beslissing van die appèlhof, *National Bank of SA v Cohens Trustees*, verkeerd[154] beslis is.

Die meerderheid skrywers,[155] in navolging van De Wet en Yeats, konstrueer 'n sessie *in securitatem debiti* as 'n volkome sessie, gekoppel aan 'n *pactum fiduciae*, en meen dat dit die *enigste wyse* is waarop sekerheid deur middel van vorderingsregte gestel kan word. Hierdie standpunt geniet weinig[156] steun in die positiewe reg. Sommige skrywers[157] aanvaar dat 'n sessie *in securitatem debiti* as 'n verpanding of as 'n algehele sessie gekonstrueer kan word en dat daar telkens na die bedoeling[158] van die partye gekyk moet word om vas te stel watter

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* Sien 1988 *THRHR* 434–453.

152 *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy supra* 780E–G. Die posisie van die pandgewer/sedent word volkome bevredigend deur die pandregbeginsels gereël. Daar is ook geen onsekerheid oor die vraag tot watter boedel die vorderingsreg vir belastingdoeleindes behoort nie; die sedent bly reghebbende en die sessionaris verkry slegs 'n beperkte saaklike reg. Wat rente betref, kan daar in 'n *pactum antichresis* ooreengekom word dat die pandnemer die rente op die vorderingsreg mag hou. Aangesien hy nie reghebbende is nie, sal hy die rente in naam van die pandgewer/sedent moet vorder. In lg geval sal die rente egter die pandnemer toeval en sal hy daarop belasting moet betaal.

153 De Wet en Yeats 371; Van der Merwe 483; Harker 1980 *SALJ* 289; 1981 *SALJ* 61.

154 Hierdie uitspraak word in vae terme soos "hierdie beslissing lyk nie juis nie" (sien Pahl 143) en "dit is die steunpunt van die dwaalleer dat verpanding van vorderingsregte moontlik is" (De Wet en Yeats 370) gekritiseer; sien ook Harker 1981 *SALJ* 61.

155 Benade "Sekerheidstelling deur middel van aandele" 1964 *THRHR* 279 e v; Van der Merwe 475 e v; Joubert 198; Christie 463.

156 Die enigste beslissings waarin uitdruklik verklaar is dat dit die enigste vorm is, is *Lief v Dettmann supra* en *Trust Bank of Africa Ltd v Standard Bank of SA supra.*

157 Scott *Sessie* 303 e v; Scott *Cession* 144; Malan 209 e v. Pahl (196) aanvaar aanvanklik dat albei vorme moontlik is, maar verwerp die verpandingskonstruksie in sy gevolgtrekking in navolging van die *Lief-* en *Trust Bank*-sake. Dit is nie heeltemal duidelik uit sy bespreking nie, maar dit lyk of Joubert 1971 *THRHR* 82 die twee vorme naas mekaar erken.

158 In *The Bank of Lisbon and SA v The Master supra* 294E beklemtoon die regter die bedoeling van die partye.

soort sekerheidstelling die partye beoog het. Ook hierdie standpunt geniet in 'n geringe mate direkte[159] steun in die positiewe reg. Volgens 'n ander standpunt[160] het mens hier met 'n *sui generis* vorm van sekerheidstelling te make. Laasgenoemde standpunt geniet feitlik[161] geen positiefregtelike steun nie.

In die enkele beslissings[162] wat 'n sessie *in securitatem debiti* as 'n volkome sessie sien, word weinig aandag aan besonderhede gegee of aan die probleemgebiede wat in die Duitse reg[163] oorkom moes word om aan hierdie regsfiguur erkenning te verleen en wat tans nog probleme verskaf.[164] As gevolg van die afwesigheid van riglyne in die gewysdes wat hierdie konstruksie handhaaf, steun die voorstanders daarvan, in hul poging om die beginsels wat op algehele sekerheidsessies van toepassing is in besonderhede weer te gee, meesal op gewysdes wat oor pandgewing handel. Vanweë die afwesigheid van duidelike riglyne is daar ook geen eensgesindheid onder skrywers oor die regsreëls wat op hierdie regsfiguur toepassing vind nie; daar is selfs nie eensgesindheid oor so 'n belangrike aspek soos die rol en inhoud van die *pactum fiduciae* nie. Van der Merwe[165] vereis geen uitdruklike *pactum fiduciae* nie, terwyl Pahl[166] dit wel vereis en ook meen dat die kennisgewingsplig en verpligtinge wat met die versorging en terugbesorging van die oorgedraagde reg te doen het direk uit daardie ooreenkoms ontstaan.

Na my mening bied pandregbeginsels in die meeste opsigte[167] bevredigende[168] oplossings vir die probleme wat by verpanding van vorderingsregte kan ontstaan,

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159 *Alexander v Standard Merchant Bank Ltd* 1978 4 SA 730 (W). 'n Groot mate van indirekte steun kan afgelei word uit die feit dat die howe vir 'n periode van ongeveer 100 jaar die twee vorme afwisselend erken en toegepas het; veral uit die uitspraak in *The Bank of Lisbon and SA v The Master supra* 292B e v kan egter afgelei word dat die twee vorme naas mekaar 'n bestaansreg het.

160 Harker 1981 *SALJ* 290; 1981 *SALJ* 56; 1986 *SALJ* 200.

161 behalwe moontlik in die sake in vn 182 hieronder aangehaal.

162 *Sutherland v Elliott Bros* 1842 2 M 349; *Wetzlar v The General Insurance Co* 1884 3 SC 86; *Wright & Co v The Colonial Government* 1891 8 SC 260 (word net beslis dat die sessionaris volreghebbende word in die geval van 'n algehele sekerheidsessie); *Trautman v The Imperial Fire Insurance Co* 1895 12 SC 38 (solank die skuld onbetaald is, is die sessionaris 'n volreghebbende, andersins 'n pandhouer); *Estate Van den Heever v Greyling* 1907 24 SC 414 (word eintlik nie aandag aan die aard en gevolge van die sekerheidsessie gegee nie, maar die afleiding kan gemaak word dat dit as 'n volkome sessie beskou word); *Rothschild v Lowndes* 1908 TS 493 (egter gekwalifiseer deur regter Innes self in *National Bank v Cohen's Trustees* 1911 AD 235); *Estate Fitzpatrick v Estate Frankel* 1943 AD 207; *Lief v Dettmann supra* en *Trust Bank of Africa v Standard Bank of SA supra*. Hierdie sake handel almal slegs oor die aard van 'n sekerheidsessie en beskou dit as 'n algehele sessie, sonder om op die besonderhede in te gaan.

163 Sien in die verband veral Serick I 2, II 71 e v; Coing 1 e v, 1973 *Rabels Z* 202 e v.

164 Bv die vraag of die aksessoriteitsbeginsel ook hier geld, die verklaring van die posisie by insolvensie en beslaglegging, ens.

165 481. Joubert 198 is skynbaar ook hierdie mening toegedaan, alhoewel hy eintlik net beweer dat al die bykomende bedinge en verpligtinge geïmpliseer moet word.

166 133 182 185; sien ook Benade 1964 *THRHR* 283 286 290.

167 behalwe miskien in die geval waar die skuldenaar wil betaal voordat pandrypheid ingetree het (Scott *Cession* 140; 1987 *THRHR* 187) en die feit dat die sessionaris, nadat die skuld betaalbaar is en die sedent nie kan betaal nie, die hele bedrag kan vorder en slegs die oorskot moet oorbetaal (Scott 1987 *THRHR* 189).

168 Die oplossings is so bevredigend dat die voorstanders van die algehele sekerheidsessiekonstruksie hierdie uitsprake gebruik as gesag vir die posisie by algehele sekerheidsessies (sien ook *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy supra* 780F–G).

en my standpunt is steeds[169] dat albei vorme van sessie *in securitatem debiti* 'n bestaansreg het en erken behoort te word. Van der Merwe[170] is verkeerd[171] as hy beweer dat

> "enige afwyking van hierdie dogmaties korrekte standpunt (naamlik dat sodanige sessie 'n volkome sessie is) . . . hierdie gebied van ons reg in onnodige onsekerheid [sal] dompel".

Daar is weinig onsekerheid oor die beginsels en praktiese toepassing van die verpandingskonstruksie. Daar kan eerder gesê word dat daar veral in die Suid-Afrikaanse reg[172] onsekerheid is oor die beginsels wat op algehele sekerheidsessies van toepassing is en dat regsgeleerdes bekommerd moet wees oor die gevolge wat sodanige sessies volgens die voorstanders van hierdie konstruksie het.

Van der Merwe[173] en ander voorstanders[174] volstaan by die reël dat die reg volkome oorgedra word. Van der Merwe noem dan die posisie by insolvensie en die feit dat die sedent

> "in gepaste omstandighede as gevolg van die werking van die leerstuk van estoppel verhinder word om 'n verdere sessie deur die sessionaris aan 'n *bona fide* buitestaander ongedaan te maak"

as nadele waarmee die sedent by 'n algehele sekerheidsessie rekening moet hou.[175] Van der Merwe gee egter geen aandag aan die probleme by beslaglegging[176] of by belasting[177] nie; en wat die tweede nadeel betref, kan daarop gewys word dat 'n beding dat die reg nie verder oorgedra mag word nie 'n *pactum de non cedendo* is wat volgens die positiewe reg[178] die effek het dat dit derdes ook bind aangesien so 'n beding die reg in 'n onoordraagbare reg "verander".[179] Hierdie beswaar is dus nie wesenlik nie.

Wat die posisie by insolvensie betref, is dit vanselfsprekend 'n geweldige nadeel, nie alleen vir die sedent self nie maar ook vir sy skuldeisers. Dit is egter 'n nadeel waaraan voorstanders van die algehele sekerheidsessie-konstruksie onstellend[180] min aandag gee. Juis hierdie nadeel beweeg sommige skrywers[181]

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169 *Sessie* 313; *Cession* 144.
170 486.
171 soos die onlangse appèluitsprake trouens ook aangedui het.
172 Alhoewel daar probleme in die Duitse reg is, is daar geen onsekerheid oor die bestaan van die regsfiguur of oor die feit dat daar 'n duidelike onderskeid tussen hierdie regsfiguur en pandgewing is nie.
173 484.
174 Benade 1964 *THRHR* 283; De Wet en Yeats 371; Pahl 134.
175 Van der Merwe 485. Benade 1964 *THRHR* 286 noem ook hierdie nadeel, asook ander nadele vir die sessionaris (287 e v).
176 Die rede hiervoor is waarskynlik die feit dat hy die reël van volregsoordrag deurgaans handhaaf en die sekerheidsdoel van die sessie negeer.
177 Volgens sy benadering val die vorderingsreg die sessionaris toe en sal hy ook daarop belasting moet betaal.
178 Sien Scott "Pacta de non cedendo" 1981 *THRHR* 148 e v; 1987 *De Jure* 32 e v.
179 By reeds bestaande regte, soos dié wat hier bespreek word, behoort daar slegs van kontrakbreuk sprake te wees aangesien die motivering vir die onoordraagbaarheid, nl dat dit as onoordraagbare reg geskep is, nie hier toepassing vind nie. In die positiewe reg word hierdie onderskeid nie altyd duidelik gemaak nie.
180 De Wet en Yeats noem dit nie eers nie en dit hinder Pahl skynbaar ook nie. Sien verder Willis *Banking in South African law* (1981) 157 e v; Christie *The law of contract in South Africa* (1983) 463. Sien egter Harker 1981 *SALJ* 63 65.
181 Harker 1981 *SALJ* 68.

en die regspraak[182] egter om in die geval van insolvensie pandregbeginsels op 'n algehele sekerheidsessie toe te pas.

Veral die probleme rondom insolvensie, beslaglegging en belasting by 'n algehele sekerheidsessie noop 'n mens om ernstig oor hierdie vorm van sekerheid te besin. Die volgende moontlike benaderings ten opsigte van hierdie regsfiguur kan onderskei word. Daar kan eenvoudig geargumenteer word dat 'n algehele sekerheidsessie so 'n ernstige nadeel by insolvensie van die sessionaris inhou dat slegs 'n verpanding – en nie hierdie vorm van sekerheid nie – erken moet word;[183] of dat, aangesien hierdie vorm van sekerheid dogmaties die enigste aanvaarbare vorm van sekerheidstelling deur middel van vorderingsregte is, bogenoemde nadeel as onvermydelik deur die partye aanvaar moet word;[184] of dat beide vorms van sekerheidstelling erken moet word.[185] In laasgenoemde geval moet dan bepaal word of die nadeel van 'n volkome regsoordrag by insolvensie in die geval van 'n algehele sekerheidsessie op die koop toe geneem moet word. Indien wel, kan geargumenteer word dat die sedent die reg nie van onregverdigheid kan verwyt nie omdat hy ten minste 'n keuse[186] ten opsigte van die vorm van sekerheidstelling gehad het: indien die onbevredigende gevolge by insolvensie[187] onaanvaarbaar is, moet gepoog word om dit uit te skakel.

In die lig van die behoefte[188] wat in die praktyk aan algehele sekerheidsessies bestaan, behoort daarna gestreef te word om hierdie regsfiguur te erken. Vanweë die sekerheidsdoel[189] wat daarmee nagestreef word, moet gepoog word om aan die partye se bedoeling dat die vorderingsreg net tydelik of vir 'n sekere doel aan die sessionaris oorgedra word, gevolg te gee. Die belange van die partye en derdes moet egter nie uit die oog verloor word wanneer oplossings gesoek word vir die probleme by insolvensie, beslaglegging, ensovoorts nie.

Aanknopingspunte vir die erkenning van hierdie regsfiguur en die oplossing van die probleme wat daarmee verband hou, kan in die gemenereg gesoek word en as daar geen aanknopingspunte gevind word nie, kan daar as laaste uitweg na die wetgewer gekyk word.

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182 *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019 1026; *Kimberley Motor Supplies Co (Ltd) v Union Trade Promotion Co* 1938 GWL 23 33; *Motala v Latib* 1964 1 SA 851 (T) 854D–E. Nienaber 2 *LAWSA* par 369 gee die posisie ook so aan.

183 Alhoewel so 'n benadering heelwat probleme sou uitskakel, negeer dit praktyksbehoeftes en sou tot 'n verarming van die reg lei. Sover ek weet, is daar ook niemand wat so 'n benadering bepleit nie.

184 Dit is waarop De Wet en Yeats en Van der Merwe se benadering ongeveer neerkom.

185 Dit is my uitgangspunt en hierdie benadering is in *Alexander v Standard Merchant Bank Ltd supra* gevolg.

186 Dit is prakties natuurlik nie 'n vrye keuse nie, aangesien die algehele sekerheidsessiekonstruksie die voordeligste vir die sekerheidsnemer is en hy nie die verleë party is nie.

187 Dit sluit beslaglegging en belasting in.

188 Hier word veral gedink aan die feit dat publisiteit nie 'n vereiste is nie en dat die sessionaris nie aan die beperkings waaraan die pandhouer gebonde is, onderworpe is nie.

189 Die oogmerk is dus om die vorderingsreg slegs vir 'n beperkte tyd en rede aan die sessionaris oor te dra. Benade 1964 *THRHR* 286 wys ook daarop dat die sedent by 'n gewone sessie die bedoeling het om finaal van sy reg afstand te doen, terwyl die bedoeling by 'n algehele sekerheidsessie is dat die vorderingsreg weer aan hom terug oorgedra sal word na delging van sy skuld.

In die Duitse reg is hierdie hele aangeleentheid deur die regspraak[190] hanteer. Die oplossing waartoe daar gekom is, is interessant[191] en werk skynbaar bevredigend[192] maar is nie sonder probleme[193] nie. Die manier waarop die Duitsers te werk gegaan het en die juridiese regverdiging van die partye se regsposisie kom my egter soms kunsmatig voor. Na my mening bied nòg Serick[194] se beroep op die *quasi*-saaklike werking van die sekerheidsooreenkoms, nòg die howe[195] en skrywers[196] se beroep op die onderskeid tussen ekonomiese of materiële eiendomsreg aan die een kant, en formele eiendomsreg aan die ander kant 'n dogmaties volkome bevredigende verklaring van die betrokkenes se regsposisie.

'n Konsekwente toepassing van die reël dat 'n algehele sekerheidsessie die reg ten volle op die sessionaris laat oorgaan, het geen onbillike resultate waar die skuldeisers van die sedent op die oorgedraagde reg beslag wil laat lê nie. Aangesien dit inderdaad nie meer deel van sy boedel is nie kan hulle nie daarop beslag lê nie; hulle is ook nie oor die bates in sy boedel mislei[197] nie want dit behoort nie meer op sy boeke aangeteken te wees nie; die sessionaris se sekuriteit is ook hoegenaamd nie in gevaar nie.

In die geval van die sedent se insolvensie maak dit prakties ook nie veel verskil nie of die reël gehandhaaf word dat die sessionaris volreghebbende is en

190 Hierdie erkenning het geskied deur 'n proses van interpretasie van die gemenereg, die Romeinsregtelike *fiducia cum creditore* en die Germaansregtelike *Treuhand*, in die wetgewing, die *KO* en die *ZPO* (sien bespreking hierbo en gesag in vn 163).

191 Begrippe soos *quasi*-saaklike werking, *Umwandlungsprinzip*, *Unmittelbarkeitsprinzip*, *Einziehungsermächtigung*, die *Schwankungsbreite des Treuhandrechtes*, *wirtschaftlichem* en *formal juristischem Eigentum*, ens is almal vreemd aan ons reg en in 'n mate ook aan ons regsdenke, maar bied tog oplossings vir die praktiese probleme waarmee die Duitse juriste gekonfronteer is.

192 By Serick, in sy vyf bande oor o a hierdie aangeleentheid, is daar skynbaar nie twyfel hieroor nie. Sien egter Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97 e v 230 e v; "Die publisiteits- en *paritas creditorium*-beginsel by mobiliêre sekerheidsregte in die Duitse reg" 1984 *TSAR* 53 e v 105 e v.

193 Dit blyk bv uit die skrywers se regverdiging van die posisie by insolvensie (sien bespreking hierbo by punt 7; sien ook Sonnekus 1983 *TSAR* 97 e v 230 e v; 1984 *TSAR* 55 e v).

194 Serick II 63 103 toon duidelik aan dat die vorderingsreg in die boeke van die sekerheidsgewer aangetoon moet word. As rede voer hy aan dat "für die Aufstellung der Bilanz sind wirtschaftliche Gesichtspunkte massgebend". Vir boekhouding- en belastingdoeleindes bly die vorderingsreg dus deel van die sekerheidsgewer se boedel. Serick moet dus afwyk van sy reël dat die reg volkome oorgedra is en hom wend tot die onderskeid tussen ekonomiese en streng juridiese maatstawwe. In hierdie opsig is die howe en ander skrywers se benadering dus meer konsekwent.

195 Sien veral Serick III 233 e v. Die howe is egter ook nie konsekwent nie. Een van die gevalle waar hulle onderskeid tussen materiële en formele eiendomsreg nie bevredig nie (Serick III 237 e v) is waar die sekerheidsnemer en -gewer albei op die *Drittwiderspruchsklage* by beslaglegging kan staatmaak. In die geval van die sekerheidsnemer is hy volgens die regspraak daarop geregtig omdat hy "volles bürgerlichrechtliches Eigentum" het en die sekerheidsgewer omdat hy ekonomiese eiendomsreg het. Volgens Serick oortuig dit nie "dass bei der Pfändung durch die Gläubiger des einem auf die volle bürgerlichrechtliche Rechtstellung, bei der Pfändung durch die Gläubiger des anderen auf die wirtschaftliche Berechtigung abgestellt und die Drittwiderspruchsklage jeweils wechselseitig auf diese verschiedenen Grundlagen, die sich nicht miteinander zugleich vereinbaren lassen, gestützt wird" (238). Daar kan met Serick se kritiek saamgestem word, maar soos hierbo aangetoon word, bied sy standpunt ook nie altyd 'n bevredigende verklaring vir die partye se regsposisie nie.

196 Sien gesag in vn 142.

197 In die Duitse reg bly die vorderingsreg nog op die boeke van die sekerheidsgewer en dit kom hom "angeblich" toe (Serick III 233). Gevolglik word die *Drittwiderspruchsklage* aan die sekerheidsnemer gegee.

dat die kurator van die insolvente boedel 'n eis vir terugoordrag van die reg na betaling of by nie-betaling 'n reg op die oorskot het, en of van die reël afgewyk word met die gevolg dat die vorderingsreg terugval in die sedent se insolvente boedel sodat die sessionaris 'n voorkeurreg[198] tot bevrediging uit die sekerheidsobjek verkry.

As die reël dat die reg volkome oorgedra is konsekwent toegepas word, val die vorderingsreg vir belastingdoeleindes die sessionaris toe en behoort hy daarop belasting te betaal.[199] Dit is veral by insolvensie van die sessionaris of by beslaglegging deur sy skuldeisers dat die belange van die sedent en sy skuldeisers benadeel kan word en 'n belangebotsing kan ontstaan.

Die Suid-Afrikaanse howe kan, soos die Duitse regspraak, in die gemenereg[200] aanknopingspunte vir die erkenning van 'n algehele sekerheidsessie as regsfiguur vind, maar na my wete is daar geen aanknopingspunte[201] om te argumenteer dat die sekerheidsgoed by insolvensie en beslaglegging weer in die sedent se boedel terugval nie.

Die sogenaamde funksionele verdeling[202] van eiendomsreg tussen ekonomiese of materiële eiendomsreg (*beneficial ownership*) en formele eiendomsreg (*legal ownership*)[203] sal myns insiens nie maklik in ons reg byval vind nie en sal beslis nie deur die regspraak "ingevoer"[204] word nie. Hierdie probleem van verdeelde eiendomsreg kom ook op ander gebiede[205] van die reg ter sprake, maar die posisie van die sekerheidsgoed by 'n algehele sekerheidsoordrag stem veral ooreen met die posisie van trustgoed.[206] Hier het die howe ook nog nie sover gegaan om die

198 Hierdie voorkeurreg kan 'n saaklike reg of 'n reg op afgesonderde bevrediging wees (soos in die Duitse reg) of dit kan moontlik 'n persoonlike voorkeurreg wees (soos wat Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 116 246 in gedagte het): "Mits aan die publisiteitsvereiste voldoen word, hoef 'n nuwe voorkeurreg egter nie noodwendig 'n saaklike reg op bepaalde sake van die kredietnemer te wees nie. Alle sekerheidsregte hoef dus nie noodwendig aan die norme van die sakereg te voldoen nie." Waar daar geen publisiteit is nie, kan moontlik geargumenteer word dat die persoonlike reg uit die sekerheidsooreenkoms vanweë die sekerheidsdoel van die oordrag in die uitsonderingsgevalle van insolvensie en beslaglegging saaklike werking verkry; dit is in ooreenstemming met Serick se benadering.

199 Alhoewel belastingreghandboeke geen aandag aan hierdie probleem gee nie, wil dit voorkom of die vraag aan wie die vorderingsreg toeval, beantwoord word aan die hand daarvan of die "cedent has divested himself of the right to claim . . ." (sien *Silke on South African income tax* (1982) par 2 21).

200 Sien die bronne aangehaal deur De Wet en Yeats 369 vn 186; Pahl 103 e v; Van der Merwe 478 vn 394 395.

201 d w s nòg in die gemenereg nòg in wetgewing.

202 Sien Van der Walt *Die ontwikkeling van houerskap* (proefskrif PU vir CHO 1985) 453 e v.

203 Hierdie onderskeid kom uit die Engelse reg (sien Fischer "Trust, *fiducia*, bewind (administration) stichting (foundation)" 1957 *THRHR* 25; Honoré *The South African law of trusts* (1985) 15 e v).

204 Die Suid-Afrikaanse howe is konserwatief in hulle benadering tot regsontwikkeling en wyk nie maklik af van wat algemeen as die Romeins-Hollandse reg beskou word nie. Hierdie onderskeid is trouens al deur die howe verwerp (sien *Lucas' Trustee v Ismail and Amod* 1905 TS 239).

205 Voorbeelde van gevalle waar hierdie onderskeid moontlik 'n rol kan speel, is die volgende: trustreg, aandele, sekerheidseiendom (sessie *in securitatem debiti*, eiendomsoordrag tot sekerheid, eiendomsvoorbehoud), erfpag, huurpag, *fideicommissa* en moontlik selfs by estoppel.

206 Die Duitsers het dan ook juis die ontwikkeling in die trustreg as uitgangspunt gebruik vir die erkenning van algehele sekerheidsessies (sien bespreking hierbo by punt 1).

onderskeid tussen materiële en formele eiendomsreg te aanvaar nie met die gevolg dat die trustee as eienaar[207] van die trustgoed beskou word. Vir belastingdoeleindes[208] word daar egter wel 'n onderskeid gemaak en die trustee kan in verteenwoordigende hoedanigheid (met ander woorde as trustee), of in persoonlike hoedanigheid belas word. Insolvensie van die trustee en beslaglegging deur sy skuldeisers skep egter ook probleme. Honoré[209] betoog dat die trustgoed wat duidelik as sodanig geïdentifiseer is, nie deel van die insolvente boedel is of vir beslaglegging vatbaar is nie. Die onderliggende gedagte by so 'n benadering is duidelik: die belange van derdes word nie benadeel nie aangesien daar publisiteit aan hulle gegee is dat die goed trustgoed is en nie die trustee persoonlik toekom nie.

Dieselfde benadering kan ten aansien van algehele sekerheidsessies gevolg word ten einde die onderskeibare sekerheidsgoed af te sonder.[210] Die Akteswet[211] maak voorsiening vir die registrasie van sessies van geregistreerde verbande en die rojering daarvan.[212] Op hierdie wyse kan dus by 'n algehele sekerheidsessie van verbandversekerde vorderingsregte aan die publisiteitsvereiste voldoen word. Wat ander vorderingsregte betref, kan sowel op die akte van sessie as die dokument waarin die reg wat oorgedra word, beliggaam is, duidelik aangedui word dat die sessie slegs as sekuriteit dien.[213] As derdes, veral dan die sessionaris se skuldeisers, daarvan bewus is dat die vorderingsregte slegs as sekuriteit oorgedra is, word hulle nie aangaande die kredietwaardigheid van die sessionaris mislei nie, en kan hulle nie by insolvensie of beslaglegging daarop aanspraak maak dat die sekerheidsgoed tot die insolvente boedel behoort[214] nie.

By hierdie benadering is dit egter nie duidelik wat die begunstigde[215] (sekerheidsgewer) se posisie is nie: het hy 'n persoonlike reg met saaklike werking,[216] 'n persoonlike voorkeurreg,[217] 'n beperkte saaklike reg of verdeelde eiendomsreg?

Aangesien hierdie aangeleentheid nog nie eers in die trustreg opgelos is nie, en met die onsekerheid rondom die begunstigde se regsposisie[218] in gedagte, wil dit my voorkom of daar nie van die howe verwag kan word om gemeenregtelike beginsels so te interpreteer dat die algehele sekerheidsedent in die geval van die sessionaris se insolvensie of by beslaglegging deur sy skuldeisers beskerm word nie.

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207 *McCullough v Fernwood Estate* 1920 AD 204 209. A 12 van die Wet op die Beheer van Trustgoed 37 van 1988 bepaal nou uitdruklik dat die trustgoed nie deel van die persoonlike boedel van die trustee vorm nie.
208 Honoré 332 e v.
209 54 432 e v.
210 Daar kan bv op die dokumente waarin die vorderingsregte beliggaam is, aangedui word dat dit slegs as sekuriteit gesedeer is.
211 A 3(f) Wet 47 van 1937.
212 De Wet en Yeats 374 en Pahl 195 kritiseer hierdie bepalings in die Akteswet en meen dat dit gewysig moet word.
213 Dit sal voldoende publisiteit wees in daardie gevalle waar die positiewe reg lewering van die dokument as geldigheidsvereiste vir die sessie stel.
214 Die sekerheidsgewer word hier deur die werking van die kennisleer beskerm.
215 Die trustoprigter kan self begunstigde wees, selfs enigste begunstigde (sien Honoré 5).
216 soos Serick dit waarskynlik sien.
217 soos Sonnekus 1983 *TSAR* 116 246 en Malan 211 vn 304 voorstel.
218 Honoré 432 e v doen bg oplossing aan die hand om die begunstigde se posisie te versterk.

As 'n oplossing vir bogenoemde probleem egter in die *regspraak* gevind *moet*[219] word, is daar enkele uitsprake[220] waarin die mening gehuldig word dat 'n algehele sekerheidsessie 'n volkome regsoordrag teweegbring, maar dat hierdie volreg by insolvensie weer 'n pandregagtige karakter kry. Die meerderheid skrywers en uitsprake gee weinig aandag aan hierdie gesag. Dit is myns insiens te verstane aangesien hier 'n vermenging[221] van die regsbeginsels van twee uiteenlopende regsfigure plaasvind.

Aangesien dit duidelik is dat die probleem moeilik op 'n suiwer dogmatiese grondslag oplosbaar is, kan die hulp van die wetgewer ingeroep word.

Hier is daar ook weer verskillende moontlike benaderings: die hele gebied van sekerheidstelling kan gekodifiseer word;[222] slegs die regsposisie ten aansien van sessies *in securitatem debiti* kan deur wetgewing gereël word;[223] slegs die regsposisie ten aansien van algehele sekerheidsessies kan statutêr bepaal word; of artikel 84 van die Insolvensiewet kan gewysig word om die sekerheidsnemer in 'n soortgelyke posisie as die kredietverskaffer (huurkoopverkoper) te plaas of om sekere persoonlike regte as voorkeurregte te behandel.

Aangesien daar nie soveel onsekerheid in die regspraak is oor die beginsels wat op die verpanding van vorderingsregte van toepassing is nie en weinig praktiese probleme met die toepassing[224] daarvan ondervind word,[225] behoort daar nie statutêr met hierdie regsfiguur ingemeng te word nie. Wat die algehele sekerheidsessie betref, is daar in die regspraak voldoende gesag vir die erkenning van hierdie regsfiguur. Die enigste wetswysiging wat hier nodig is, is 'n wysiging van die Insolvensiewet soos hierbo uiteengesit. Die enigste werklike nadeel wat dan nog vir die sedent oorbly, is sy posisie by beslaglegging deur die sessionaris se skuldeisers. Hierdie probleem kan moontlik in ooreenstemming met die posisie in die trustreg, soos hierbo uiteengesit is, opgelos word.

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219 in die afwesigheid van wetgewing of uit vrees dat wetgewing verdere probleme gaan skep.

220 Sien vn 182 hierbo.

221 Sien Scott 1987 *THRHR* 193.

222 soos wat in die VSA deur die *Uniform Commercial Code* gedoen is. Die probleme rondom alle sekerheidsregte of voorkeurregte kan dan daarin aangepak word, bv besitlose pandreg, registerpand ens. Sonnekus 1983 *TSAR* 99 115 is 'n voorstander van so 'n benadering. Ten spyte van sy weldeurdagte en deurvorste hervormingsvoorstelle (1983 *TSAR* 242 e v), sou ek tog huiwerig wees om hierdie geweldige en ingewikkelde opdrag aan die wetgewer oor te laat. Sonnekus sien so 'n wet as die derde in 'n trilogie, die ander twee synde die Wet op Kredietooreenkomste 75 van 1980 en die Woekerwet 73 van 1968. Lg wette word deur regsgeleerdes as van die moeilikste in die privaatreg beskou, al het die adjunk-minister tydens die debattering van die Woekerwet (toe nog die Wet op die Beperking en Bekendmaking van Finansieringskoste) beweer dat die wet eenvoudig is en dat die publiek hierdie wetgewing sal verstaan: sien Otto *Die regte van 'n huurkoper t o v beëindiging van die kontrak* (proefskrif UP 1980) 461 vn 10. Sonnekus 1984 *TSAR* 120 en Otto 459 e v is albei egter van mening dat wetgewing geslaagd kan wees. Dit veronderstel m i natuurlik dat aan sekere basiese vereistes voldoen word en dat onkundiges hulle so min as moontlik daarmee bemoei.

223 Sien Scott 1987 *THRHR* 194. Otto 460 skyn ten gunste van allesomvattende wette te wees eerder as losstaande wette wat net sekere aspekte van 'n groter geheel dek.

224 Die regsbeginsels wat op 'n verpanding van vorderingsregte en op 'n algehele sekerheidsessie van toepassing is, moet net duidelik uitmekaar gehou word (sien bv die kritiek teen *Marais v Ruskin supra* in 1987 *THRHR* 190 e v. Willis 158 vermeng ook die beginsels wat op hierdie twee regsfigure toepassing vind.

225 *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy supra* 780E–G.

Daar sal myns insiens dus 'n beleidsbesluit deur die regspraak geneem en 'n keuse gemaak moet word tussen bogenoemde moontlike benaderings tot die verskynsel van sessie *in securitatem debiti.*

Vanweë die onsekerheid wat nou nog, meer as tevore, in die regspraak oor hierdie regsfiguur bestaan, bepleit ek 'n duidelike uitspraak waarin bogenoemde moontlike benaderings ontleed en 'n keuse gemaak word. Indien bevind word dat albei konstruksies moontlik is, kan die wetgewer net die sedent se posisie by insolvensie verbeter. Indien die wetgewer om een of ander rede nie hierdie verandering teweegbring nie, sou ek verkies dat 'n verpanding as die enigste vorm van sekerheidstelling deur middel van vorderingsregte erken word; dat 'n algehele sekerheidsessie, waarvolgens daar nie afgewyk word nie van die reël dat die reg vir alle doeleindes in die sessionaris se boedel val, dus verwerp word aangesien so 'n konstruksie nie gevolg aan die partye se bedoeling gee nie en ernstige nadele vir die sekerheidsgewer (skuldenaar) en sy skuldeisers inhou.

Wanneer oor regshervorming besin word, moet die probleme[226] wat ondervind word om hierdie regsfiguur te erken, asook die probleme[227] wat op erkenning volg deeglik in oënskou geneem word. Alles in ag genome, vra 'n mens jouself die vraag of 'n erkenning van 'n algehele sekerheidsessie nie meer probleme skep as wat dit oplos nie,[228] en of die praktyksbehoeftes hier nie op 'n ander wyse deur wetgewing meer bevredigend hanteer kan word nie.[229]

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226 As die uiteindelike effek van die huidige Duitse benadering in ag geneem word, nl dat 'n algehele sekerheidsessie die reg volkome op die sessionaris oordra en dat hy dus daaroor kan beskik – 'n optrede wat weliswaar in stryd met sy kontraktuele verpligtinge is – maar dat die reg vir boekhouding- en belastingdoeleindes tot die boedel van die sedent behoort en ook by insolvensie en beslaglegging as deel van sy boedel beskou word, ontstaan die vraag of hierdie regsfiguur nie tog maar net 'n poging is om die publisiteitsvereiste by saaklike sekerheidsregte te ontwyk nie. Dit is 'n interessante, ingewikkelde juridiese toertjie, maar is dit die moeite werd? Soos Sonnekus 1984 *TSAR* 66 tereg beweer, kan " 'Sicherungsabtretung' in die Duitse reg slegs danksy kunstige interpretasie-arbeid met die erkende beginsels van die Duitse sakereg versoen . . . word".

227 Afgesien van die probleme wat uit bg bespreking blyk, sien veral Sonnekus 1984 *TSAR* 56–57.

228 soos Sonnekus oortuigend aantoon.

229 Vir Sonnekus 1983 *TSAR* 11 97 115 is wetgewing die aangewese uitweg, maar soos ek reeds hierbo aangetoon het, het ek bedenkinge oor die uiteindelike inhoud van so 'n wet op sekerheidsregte – soos telkens vantevore geblyk het, is daar nl 'n groot verskil tussen wat die opstellers van 'n wetsontwerp en hulle adviseurs beoog en wat die parlement daarvan maak.

Onus of proof in provisional sentence proceedings

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OPSOMMING

Bewyslas in voorlopige vonnisverrigtinge

In die artikel word weer eens gewys op die verwarring wat dikwels ontstaan tussen die egte bewyslas (wat nooit verskuif nie) en die weerleggingslas (wat wel tydens die verhoor van die een party na die ander kan verskuif). Veral by voorlopige vonnisverrigtinge is daar nog nie pertinent hieroor beslis nie.

Daar word gekyk na die posisie in die Romeins-Hollandse reg en na die posisie voor die beslissing in *Allied Holdings v Myerson* 1948 2 SA 961 (W). Die gevolgtrekking is dat daar nie gesag bestaan vir die stelling dat die algehele bewyslas op die verweerder rus nie.

In die *Myerson*-saak word daar egter beslis dat die egte bewyslas wel op die verweerder rus en dat die enigste bewyslas wat deur die eiser gekwyt moet word, betrekking het op die nakoming van enige voorwaarde vir die reg om 'n eis in te stel en op die geldigheid van die verweerder se handtekening. Dié beslissing word gekritiseer en daar word betoog dat dit aan verhandelbare dokumente 'n ongeregverdigde "mystique" toeken. Nogtans is die korrektheid van die *Myerson*-uitspraak nie ernstig bevraagteken in enige daaropvolgende saak nie.

Daar word aan die hand gedoen dat die basiese reël dat hy wat beweer, moet bewys, ook hier toepassing moet vind, en dat die feit dat met 'n likwiede dokument gewerk word, nie 'n afwyking van hierdie reël regverdig nie. Die eiser moet bewys dat die betrokke dokument 'n likwiede dokument is; dat hy die "bevoordeelde" van die dokument is; en (die belangrike punt) dat hy waarskynlik in die hoofverhoor sal slaag.

INTRODUCTION

In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,[1] Corbett JA stated that

> "the word onus has often been used to denote, *inter alia*, two distinct concepts: (i) 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; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents onus in its true and original sense."[2]

Hoffmann and Zeffertt[3] show in their chapter on the burden of proof that these two aspects of onus, namely the onus of proof and the evidentiary burden, have

1 1977 3 SA 534 (A).
2 548.
3 *South African law of evidence* (1981).

often been confused. It is clear, however, that the true onus is fixed at the commencement of trial once the issues have been determined by the pleadings; the evidentiary burden, on the other hand, may shift from one party to the other during the course of the trial.[4] The authors do not deal with the question of provisional sentence; nor, as far as the present writer can ascertain, has any court drawn the distinction mentioned above in a provisional sentence case. It seems that this failure has contributed to some of the difficulties which have arisen concerning onus in provisional sentence cases.

THE ROMAN-DUTCH POSITION

The Roman-Dutch writers are somewhat less than helpful on the question of onus; nevertheless, some consideration of the views of Van der Linden is necessary because subsequent courts have endorsed them. In his *Judicial practice*,[5] Van der Linden says:

> "In order to oppose a decree of provisional payment, the defendant must be prepared with such counter proofs as shall satisfy the court that the probability of success in the principal case is against the plaintiff."

This passage is cited with approval by Van der Keessel[6] and Menzies[7] as well as *King Bros v Harris & Co*,[8] but it does not provide much insight into the question of onus; it simply indicates that the defendant has to adduce strong counter proof if he is to avoid provisional sentence.[9] As Menzies[10] puts it:

> "[I]f the court consider(s) that these allegations, duly proved in the principal case, would ensure a judgment for the defendant, and if they cannot be answered or explained by the plaintiff, provisional sentence will not be granted."

It is clear from this extract that what rests on the defendant is an *evidentiary* burden, which, if satisfied, will shift to the plaintiff. No express indication is given as to the incidence of onus of proof.

THE SITUATION BEFORE *ALLIED HOLDINGS V MYERSON*

Herbstein and Snitcher[11] summarised the position in 1933 as follows:

> "[T]he plaintiff must satisfy the court that in the event of his being ordered to go into the principal case the probabilities of success will be in his favour . . . It is only necessary for the plaintiff to show a *prima facie* case and generally speaking the liquidity of the documents will prevail in the absence of evidence to the contrary rebutting the inference of liability arising therefrom."

However, despite stating unequivocally that the onus rests on the plaintiff, the authors[12] go on to say that if the balance of probabilities favours neither party, provisional sentence will be granted.

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4 *ibid* 386.
5 Vol I 207.
6 *Theses selectae* 526.
7 1 M *Prefatory remarks* 8.
8 1903 TS 389 391.
9 It may well be that Van der Linden's remarks were directed at dispelling the notion of one school of Dutch jurists that any defence raised by the defendant had to be of the same liquidity as the document on which the claim was brought: see 1 M 7–8; Van Zyl *The judicial practice of the Colony of the Cape of Good Hope* (1902). The views of this school have been rejected as out of keeping with South African law: *Sonfred (Pty) Ltd v Papert* 1962 2 SA 140 (W) 145B–C.
10 8.
11 "Provisional sentence" 1933 *SALJ* 175 315.
12 *ibid*, relying on *Fichardt's Estates v Mitchell* 1921 OPD 165.

In support of their statement concerning onus, the authors rely on *Cilliers v Sharonowitz*[13] and *Golub v Rachaelson*.[14] It seems, however, that these cases take the matter no further than the proposition of Van der Linden cited above. In *Raubenheimer v Campher*[15] and *Trustees Stellenbosch Bank v PA Myburgh*,[16] the Cape court made pronouncements indicating that the overall onus rests on the plaintiff, but neither of these is a model of clarity.[17]

On the other hand, a number of cases take the opposing point of view. In *Mitchell Brothers v Weir & Co Ltd*,[18] the full bench of the Eastern districts local division held that

> "the onus is clearly on the defendant to show that if he went into the principal case the probability of success in the action would be with him".[19]

Similar statements are to be found in *Gluyas v Perk & Co*[20] and *Bulman & Co v Retief*.[21] In the *Mitchell Brothers* and *Gluyas* cases it is possible to ascribe these statements to a description of the quantum of proof required from the defendant and as references to the evidentiary burden. In the *Bulman* case, however, the court indicated that if the balance of probabilities were not in the defendant's favour, provisional sentence would be granted.[22] This attitude was echoed in *Estate Late Morton Greene v Spies*[23] where Hathorn J stated that

> "counsel on both sides recognised, very properly, that the general principle which the court will apply is that provisional judgment will be granted unless the balance of probabilities is that the defendant will succeed in the principal case".[24]

The import of this statement is clearly that the overall onus rests on the defendant. No authority was cited for the proposition in any of the cases mentioned and it is submitted that there is no authority to support it; there is, however, a proviso which has been developed by the courts.

The necessity of establishing on whom the onus rests, is clearly seen only in the situation where the probabilities are evenly balanced. Although this may seem an unlikely scenario, it must be remembered that the court is dealing with evidence of a *prima facie* nature[25] which is on affidavit and there are many cases in which courts have found themselves unable to pronounce conclusively on the probabilities. If, as has been held by some of the courts mentioned above, the onus rests on the defendant, then he is obviously at a great disadvantage if he cannot swing the balance conclusively in his favour, and has yet managed to negative the presumption created by the liquid document in favour of the plaintiff.[26] The courts have recognised this as an invidious position and a rule

13 19 CTR 922.
14 1925 WLD 188.
15 1874 Buch 7.
16 1876 Buch 206.
17 Reservations about the exact meaning of both of these judgments were expressed in *Morris & Berman v Cowan (II)* 1940 WLD 33 36 37.
18 1912 EDC 447.
19 450.
20 1923 WLD 35 37.
21 1926 WLD 185 185.
22 *ibid.*
23 1933 NPD 328.
24 330.
25 1 M 8; Herbstein and Snitcher 315.
26 Herbstein and Snitcher 317.

was developed in *Fichardt's Estate v Mitchell*[27] where the claim on which provisional sentence was sought formed part of a much larger transaction between the parties. De Villiers JP held:[28]

> "Under the circumstances it does not seem advisable to grant provisional sentence at the present moment, for that would have the disadvantages of deciding the matter piecemeal and of prejudging on affidavit evidence a matter which can be much more satisfactorily determined when oral evidence is produced. The expedient course will, therefore, be to postpone this case . . . in order to afford defendants an opportunity of bringing the action they contemplate."

Once again, no authority was cited for this approach and it is extremely doubtful whether the courts ever possessed such a discretion;[29] its existence has, however, been accepted in a number of cases. Greenberg J in the *Bulman* case was not prepared to depart from the development in the *Fichardt* case[30] and in the *Morton Greene* case[31] the court considered the *Fichardt* case to have established a rule that where the probabilities do not favour the defendant, provisional sentence will be granted except in special circumstances of which there is no *numerus clausus*; a larger transaction of which the claim forms a part is not a prerequisite.[32] Subsequently the rule appears to have been accepted, but on a number of occasions the Transvaal courts have refused to extend the circumstances in which the rule may be applied beyond those present in *Fichardt*'s case.[33] In *Burger v Heydenrych*,[34] the rule was described as a radical modification of provisional sentence principles[35] and Hofmeyr J refused to follow it.[36] *Burger*'s case has, however, never been followed[37] and the latest decision on the point, *Mao-Cheia v Neto*,[38] which contains a full review of the authorities, adopts a liberal approach to the refusal or postponement of provisional sentence in appropriate cases.[39] Such an approach is also evidenced by the judgment of Margo J in *Vally v Moosa*.[40] The contrary submission of Herbstein and Van Winsen[41] is therefore without foundation.

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27 1921 OPD 152.
28 154.
29 See the *Morton Greene* case *supra* 330–331.
30 *supra* 186. He justified it on the "tendency of the courts to modify the doctrines on which provisional sentence is granted in order to meet new circumstances that arise . . .", as seen in *Pepler v Hirschberg* 1920 CPD 438. See, however, the criticism of this in *Barclays Western Bank v Pretorius* 1979 3 SA 637 (N) 652F.
31 *supra* 332.
32 The authority for this is *Roberts v Willet* 1928 CPD 529.
33 *Rood v Van Rooyen* 1934 TPD 110; *De Villiers v Michaeletos* 1937 TPD 71; *Strachan & Co v Murray* 1939 WLD 93. In the last case the court criticised, correctly it is submitted, the reason given in *Fichardt's* case *supra* relating to the difficulty of deciding the matter on affidavit; this does not affect the general approval of the rule.
34 1957 4 SA 416 (SWA).
35 421D.
36 421E–F. There was apparently no previous decision of the South West African division on the subject.
37 In *Cronje v Cronje* 1968 1 SA 134 (O), Hofmeyr J himself adopted a considerably watered-down approach and postponed a provisional sentence application.
38 1981 3 SA 829 (C).
39 *Morton Greene*'s case *supra* was approved, as was *Ottico Meccanica Italiana v Photogrammetric Engineering (Pty) Ltd* 1965 2 SA 276 (D) in which the court declined to follow the *Burger* case *supra*.
40 1973 2 SA 204 (W).
41 *The civil practice of the superior courts in South Africa* 3ed by Van Winsen, Eksteen and Cilliers (1979) 553.

The one occasion on which the question of onus was specifically considered by the appellate division was in *Union Share Agency & Investments Ltd v Spain*.[42] The court there considered the statement in *Pepler v Hirschberg*[43] that the liquidity of a document is not destroyed by the fact that payment depends on a simple condition[44] and that the onus rests on the defendant to prove non-fulfilment of the condition. The appellate division held that[45]

> "the onus to prove his case always lies on the plaintiff: if, in the circumstances stated by Kotze JP, no evidence is given by the defendant, provisional sentence will be granted: on the other hand, if evidence is called by the defendant, it will be for the court to determine whether, in the circumstances, a sufficiently clear case has been made out by the plaintiff to justify the granting of provisional sentence".

This appears to be a clear statement of law, indicating that the overall onus indeed rests on the plaintiff. This is also apparent from a *dictum* in the minority judgment of Schreiner AJ in *Abrahams v Campbell Bros, Carter & Co Ltd*.[46] The statement of the law was, however, explained away by Ramsbottom J in *Inglestone v Pereira*;[47] the *dictum* in *Spain*'s case, he said, related only to situations of conditional indebtedness or denial of signature.[48] Where the plea is confession and avoidance, the onus is

> "clearly on the defendant and in the provisional case he would have to show a balance of probabilities in his favour".[49]

The only authority cited for this proposition was Van Leeuwen[50] who deals only with the onus to prove that money has not been received where there has been a renunciation of the *exceptio non numeratae pecuniae*; this is not the same as the onus in provisional sentence proceedings. Thus, unfortunately, the decision of the appellate division in the *Spain* case[51] has been emasculated and the emasculated version seems to have prevailed.[52]

There is one final case which must be mentioned in connection with the overall onus and that is *Morris and Berman v Cowan (II)*.[53] In this case it was held that the concept of probabilities in provisional sentence cases is the same as in any civil case. The probability must be "of sufficient weight to throw the onus on

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42 1928 AD 74.
43 1920 CPD 438.
44 See the discussion relating to this point by Beck "Liquid documents in provisional sentence proceedings" 1987 *SALJ* 452 *et seq.*
45 79.
46 1937 TPD 269: "*Spain*'s case . . . shows that it is not correct to treat the liquid document as shifting the onus from the plaintiff to the defendant. In the absence of a defence the acknowledgement in a document affords *prima facie* evidence of liability and provisional sentence will be granted. But, apart from defences where the onus must lie upon the defendant, if the latter denies the indebtedness, the balance of probabilities on all the evidence before the court must be clearly in favour of the plaintiff before provisional sentence can be granted" (276). It is submitted that the reference to defences where the onus lies on the defendant is misplaced; it seems that this confuses the onus in the principal case with that in the provisional sentence proceedings.
47 1939 WLD 55.
48 70.
49 71.
50 *Roman-Dutch law*, Kotze's translation 2ed Vol II 122–124.
51 *supra* n 42 45.
52 See the discussion of *Myerson*'s case *infra*.
53 1940 WLD 33.

the other side to rebut it".[54] This is clearly a reference to the evidentiary burden. The court also stated that

> "the law to be applied is that the defendant must raise a substantial probability that he will succeed in the principal case before he is entitled to have provisional sentence refused on a liquid document".[55]

The *dictum* is of considerable importance because it has subsequently been approved by the appellate division in *Marshall v Bull Quip (Pty) Ltd.*[56] It is submitted that this is significant because it does not specifically place the overall onus on the defendant.[57]

THE DECISION IN *ALLIED HOLDINGS LTD V MYERSON*

As has been pointed out above, there is no authority for placing the onus in provisional sentence on the defendant. If, however, some of the court decisions are equivocal on the point, the same cannot be said of *Allied Holdings Ltd v Myerson.*[58] In this case, Price J considered the matter at length from a theoretical point of view; it seems that this is the first (and only) time that the subject has been given a judicial airing other than on a purely casuistic basis.[59] The court[60] distinguished between the onus in the provisional sentence proceedings and that in the principal case, pointing out that the latter may be relevant in considering the probabilities of success in the principal case. Price J went on to say:[61]

> "Although in the principal case the onus may sometimes be on the plaintiff, the above authorities and other, which are too numerous to mention seem to me to concur (in spite of a passage here and there which may seem to support a different contention) in establishing the principle, that in the provisional sentence case itself the onus is always on the defendant to show that there is a balance of probabilities in his favour, and that if he is unable to do so then the court must grant provisional sentence against him. If this rule did not exist the form of procedure which we call provisional sentence would be almost, if not quite, useless. Provisional sentence is an extraordinary remedy whereby a plaintiff, armed with a liquid document, can obtain a speedy judgment. If the rule were that he could not get judgment unless he could show a balance of probabilities in his favour then provisional sentence would be worthless to him. He would be in the same position as if he were bringing an ordinary action."

The judge explained that the only onus which rests on the plaintiff is to prove the fulfilment of any condition precedent to his right to sue[62] or the validity of the defendant's signature.[63] This explanation was presumably undertaken in the light of the *dictum* in *Spain*'s case mentioned above.[64]

Myerson's case was strongly criticised by Mulligan[65] as placing upon the defendant *onera probandi* which properly lie on the plaintiff.[66] Mulligan maintained

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54 35, relying on *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 263.
55 37.
56 1983 1 SA 23 (A) 30C.
57 This point is discussed further *infra.*
58 1948 2 SA 961 (W).
59 All the cases following the *Fichardt* rule *supra* have of necessity had to reach a decision on the subject. It seems that not one of them went behind a simple statement of the onus.
60 966–967.
61 967.
62 968 969.
63 967.
64 This is the same interpretation as that adopted in *Inglestone*'s case *supra.*
65 "Bonds, negotiable instruments, provisional sentence and their *mystiques*" 1951 *SALJ* 396 *et seq.*
66 *ibid* 385.

that the law had been incorrectly stated in the *Myerson* case and that in essence there is no difference between provisional sentence and trial procedure with regard to onus.[67] While the liquid document raises a presumption of indebtedness,

> "if facts emerge which deprive the document of its probative force, then the plaintiff fails, unless other facts be proved which restore the probability of indebtedness".[68]

He stressed the decision of the appellate division in the *Spain* case and referred to the unreported decision of *Braude v Zlotnick*[69] as support for the generality of the proposition in the *Spain* case.[70] He pointed out further:[71]

> "To ascribe to negotiable instruments anything more than their probative value is to endow them with a *mystique*, and if *mystique* is allowed to enter the court by the door, logic will fly out by the window."

It is submitted that Mulligan's arguments are correct.[72] It seems, however, that they have never been considered by the courts and there has never been a serious investigation of the subject by the appellate division.[73] Before considering the views of other courts, however, it is necessary to examine closely the statements in *Myerson*'s case.

In the first place, the "concurrence of authorities" relied on by the court[74] is more apparent than real. Three of the cases cited are no authority for the proposition that the onus rests on the defendant.[75] *Coetzer v Krause*[76] relied on *Inglestone v Pereira* and added nothing to it. It has already been shown that the *Inglestone* case is arguably incorrect[77] and *Spain*'s case was not considered, nor was any Roman-Dutch authority produced to support the views expressed by the court.

Secondly, the court's reference[78] to the two kinds of onus in provisional sentence matters did not seem to clarify any confusion in this regard. It is important to distinguish the onus in the provisional sentence application from that in the principal case,[79] but it is important only in order to consider clearly what the

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67 *ibid* 399.
68 *ibid.*
69 1937–05–22 (W).
70 Schreiner AJ held the words of Solomon CJ to be of general application (see Mulligan 1951 *SALJ* 400).
71 *ibid* 401.
72 Unfortunately he does not seem to say specifically that the onus in the provisional sentence case rests on the plaintiff and he does not consider the situation of evenly balanced probabilities. He does make it clear, however, that there is no general rule of law casting the onus on the defendant.
73 or any other court, for that matter. On the two occasions on which the appellate division has mentioned onus, *Barclays National Bank Ltd v HJ de Vos Boerdery Ondernemings (Edms) Bpk* 1980 4 SA 475 (A) and *Marshall v Bull Quip (Pty) Ltd* 1983 1 SA 23 (A), the court did not enter into the reasons behind the incidence of onus; see *infra.*
74 967.
75 *Golub v Rachaelson* 1925 WLD 188 only required "counter proofs of such importance that the probability of success in the principal case is against the plaintiff" for the refusal of provisional sentence (191–192). This certainly leans towards placing the onus on the defendant but the case did not deal with the situation of balanced probabilities. The statement in *Morris & Berman v Cowan supra* is even more equivocal. *Batten & Co Ltd v Levinson* 1939 WLD 364 only said that the "defendant has far from succeeded in showing that the balance of probabilities is in his favour . . ." (366).
76 1942 OPD 122.
77 See *supra.*
78 966.
79 See also *Hicks v Dobriskey* 1976 2 SA 792 (R).

plaintiff in a provisional sentence application is required to prove. This the court did not do; instead it embarked on an explanation of the *mystique* of liquid documents.[80]

The contention of Price J was that, unless the onus were placed on the defendant, the plaintiff would be in the same situation as in an ordinary action whereas a liquid document is supposed to give the plaintiff an advantage over his opponent.[81] With due respect, this does not reflect the true nature of the remedy. Provisional sentence *is* the same as any other proceeding in that the plaintiff is required to prove his case. It differs from the ordinary procedure in that, unless the defendant is able to provide substantial proof negating the presumption of indebtedness created by the liquid document, he will be required to pay the amount claimed *immediately* if he wishes to defend the action. The statement by the court that provisional sentence is worthless unless the onus is placed on the defendant is therefore incorrect; it is also not borne out by the cases which show that provisional sentence is often granted and it is no easy matter for the defendant even to balance the probabilities.

There is another aspect of the court's reasoning which calls for comment. It was stated that initially the plaintiff has to prove nothing; he merely alleges possession of a liquid document and is thereby entitled to judgment.[82] The use of the word "initially" gives rise to a strong inference that the court was confusing the overall onus with the evidentiary burden. One cannot say that the plaintiff is entitled to judgment without proving anything. He must prove, at the least, that he has a liquid document signed by the defendant in his favour as well as the fulfilment of any conditions precedent to payment. If these matters are undisputed by the defendant, they are taken as proved and the evidentiary burden will rest on the defendant. It does *not* mean that the plaintiff no longer has to prove his case in the absence of a dispute.

A liquid document is no more than a means of proving indebtedness; it is, in essence, an informal admission which may be contradicted or explained away.[83] Its advantage lies in the fact that a provisional payment can be compelled at an early stage of court proceedings, thereby removing the attractiveness of litigious delay by a dilatory debtor. It is submitted that in the *Myerson* case, Price J incorrectly and unjustifiably interpreted liquid documents as being possessed of some magic which brings about a shifting of the onus of proof onto the defendant. Not only does this make matters unbearably difficult for the defendant, but it flies in the face of the accepted principles regarding onus discussed above. By adopting this approach, the courts have also forced themselves into a corner, illustrated by the development of the *Fichardt* rule. Price J himself was confronted with the problem in *Levy v Fairclough et Uxor.*[84]

In that case the defendant intended to claim damages for fraud surrounding the transaction of which the provisional sentence claim represented a part. Price J stated:[85]

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80 967.
81 *ibid.*
82 *ibid*; see further *infra.*
83 Hoffmann and Zeffertt 153. This may be contrasted with the case of a formal admission which amounts to a waiver of proof (*ibid* 329–330). The suggestion in *Pretorius v Weedon* 1961 3 SA 702 (N) that a liquid document is equivalent to a formal admission (710B–E) is without foundation; it is not supported by the quotation from Schorer's note to Grotius.
84 1950 2 SA 240 (W).
85 244.

> "It seems to me improbable that the plaintiff will be able to satisfy the court in the main action that the defendant, a man of very slender means, purchased this business knowing that it could never get a licence . . ."

This appears to be a strange statement to make if the onus rests on the defendant. However, the court did not decide the matter on this basis; it went on to hold that[86]

> "it is not essential that in the main action the claim should be one to set aside the larger contract, but that if substantially the same issues are to be investigated as those raised in the provisional sentence case, then the court has a discretion to postpone the claim for provisional sentence pending the trial of the larger issues which will determine the rights of the parties in the provisional sentence case . . . This is surely equitable. Provisional sentence provides an extraordinary and swift remedy in favour of a party armed with a liquid document, but if that document is merely part of a larger transaction then it would be grossly unfair to grant provisional sentence while the larger dispute remains outstanding, the determination of which might leave a balance in favour of the defendant in the provisional sentence proceedings".

There is no good reason why it is only in situations of "larger transactions" that potential prejudice should be such as to permit postponement of provisional sentence;[87] the real equities lie in placing the *proper* onus on the defendant and *refusing* provisional sentence unless the probabilities lie in favour of the plaintiff. If this were to be recognised, there would be no need to invent situations in which it is "equitable" to postpone the granting of the remedy. Besides, if the importance attached to liquid documents by the court in the *Myerson* case is an accurate reflection of the law, then postponement of the provisional sentence action on the document is quite incompatible with the *raison d'être* of the remedy.

THE POST-*MYERSON* ERA

Apart from Mulligan's lone voice in the wilderness, no one has seriously questioned the authority of *Myerson*'s case; nor has there been any probing judicial investigation into the accuracy or justice of the law as it has come to be practised. Most of the decisions simply restate the proposition as it is found in the *Myerson* case and the appellate division has also followed this route. More recently, however, there have been some signs that the onus question has not been finally settled.

The first statement by the appellate division was made in *Dickinson v SA General Electric Co (Pty) Ltd*:[88]

> "Applying the general rule in provisional sentence cases, it would follow that the appellant (defendant) in order to escape provisional sentence, must satisfy the court that it is unlikely (on a balance of probabilities) that the respondent (plaintiff) will succeed in the principal case (Van der Linden *Jud Prac* bk 2 ch 6 s 13, *Morris & Berman v Cowan*) . . . As here the onus in the principal case would be on the respondent . . . that general rule would require the appellant to show that it is unlikely (on a balance of probabilities) that the respondent will succeed in discharging that onus."[89]

From this extract it would appear that the "general rule" was sanctioned by the highest court. It must be pointed out, however, that the statement is not supported by the authorities quoted.[90] Of some interest, however, is the manner in

86 245–246.
87 This was recognised by the court in *Barclays National Bank Ltd v Chaldon Investments (Pty) Ltd (2)* 1975 2 SA 350 (W).
88 1973 2 SA 620 (A).
89 630F–H; the *Myerson* case was cited as authority.
90 See *supra* (text to n 53) and *infra*.

which the rule was framed. Instead of stating that the defendant must prove that he will succeed, the court held that the onus is on the defendant to show that the plaintiff is unlikely to succeed. This seems to go against the principle that a litigant is not required to prove a negative[91] but otherwise places the onus squarely on the defendant.

In *Barclays National Bank Ltd v HJ de Vos Boerdery Ondernemings (Edms) Bpk*[92] the *dictum* of the court was not quite as unequivocal:

> "In order to defeat appellant's claim for provisional sentence, respondent had to produce such counter-proof as to satisfy the court that the probability of success in any principal case which might eventuate is against appellant."[93]

This appears to be more in line with the general statement by Van der Linden[94] indicating that the defendant must have a strong case in order to defeat a provisional sentence application. Although it might be contended that the distinction between this statement and that in *Dickinson*'s case is rather a fine one, the interpretation suggested above is borne out by the subsequent decision of *Marshall v Bull Quip (Pty) Ltd.*[95] It was there held by Corbett JA that[96]

> "[d]efendant must raise a substantial probability that he will succeed in the principal case before he is entitled to have provisional sentence refused on a liquid document".

There can be no denying that this is a correct statement of the law; a liquid document is very strong *prima facie* evidence of the plaintiff's claim and will not be lightly defeated by a defendant with less than a watertight case. In the cases where the issues have been so complicated that the court has been unable to decide on affidavit where the balance of probabilities lies, the sentiment has often been expressed that it would be undesirable for such a matter to be decided without a full trial.[97] As far as the overall onus is concerned, however, it seems that the appellate division has not stated unequivocally that this rests on the defendant; nor, conversely has it been stated that if the probabilities are evenly balanced, then provisional sentence must be refused.

WHAT HAS TO BE PROVED

Bearing in mind that provisional sentence is an extraordinary remedy,[98] and that the defendant is at a procedural disadvantage because of the existence of a liquid document, one would expect the courts to insist on a strict compliance by the plaintiff with all the requirements of the remedy. What has to be established, therefore, is exactly what these requirements are.

In the first place, the plaintiff must establish that the document on which he claims provisional sentence is a liquid one;[99] there are many cases dealing with aspects of liquidity, but they have not dealt with the question of onus. It is submitted that, as the liquid document is the basis on which provisional sentence

91 See Hoffmann and Zeffertt 398–399.
92 1980 4 SA 475 (A).
93 484D.
94 See *supra* n 5.
95 1983 1 SA 23 (A).
96 30C.
97 See *Mao-Cheia v Neto* 1981 3 SA 829 (C). It is in such cases that the court tends to exercise its discretion to postpone provisional sentence.
98 In the sense that it makes possible the granting of a judgment without the testing of evidence by cross-examination.
99 The test of liquidity is dealt with in 1987 *SALJ* 452 *et seq.*

is granted, liquidity must be established by the plaintiff. This proposition has a number of consequences:

a It must be established that the amount is due unconditionally or, if payment is subject to a simple condition, that such simple condition has been fulfilled;[100] in the case of a bill, the plaintiff will have to prove presentment.[101]

b The defendant's signature must be shown to be genuine.[102] If there is a dispute on this point, then oral evidence may be permitted.

Secondly, the plaintiff must prove that he is the "beneficiary" of the liquid document; it may be that he is the named creditor or mortgagee in which case an allegation would suffice in the absence of a dispute, but he may also sue as a cessionary[103] or a successor in title.[104] Where the document is a bill of exchange, the plaintiff may have to prove that he is a holder in due course.[105] It does not seem to have been contested that in these instances the onus rests on the plaintiff.

Thirdly, and this is the controversial point, the plaintiff must establish on a balance of probabilities that he is likely to succeed in the principal case. As has been indicated above, a number of cases have stated that the onus is on the defendant to prove that he will succeed, while it has also been suggested[106] that the defendant bears the onus in the provisional sentence case where the onus rests on him in the principal case. It is submitted that neither of these approaches is correct.

The plaintiff is claiming that he is entitled to an immediate, albeit provisional, payment of the debt. In order to justify this, he relies on a document which is a strong indication that his claim is justified. However, he may know, in exactly

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100 See the *Spain* case *supra* 79 and the *Inglestone* case *supra* 62–63.

101 It appears from Herbstein and Van Winsen 568–571 that there have been differences between the provinces on this issue, as well as a fair amount of general confusion, which is not clarified by the authors' treatment. It is submitted that, unless a notarial protest is required, it is sufficient to prove presentment and dishonour by way of affidavit; this is, after all, the conventional way of proving facts in provisional sentence cases. Strictly speaking, of course, this amounts to extrinsic evidence, but there has never been any suggestion that the liquidity of the document is affected. By analogy with the *Pepler* rule *supra*, an allegation together with a lack of denial by the defendant ought to be sufficient proof, and has been held so in *Nelson v Mears* 1949 1 SA 154 (W) and *Todd v Els* 1952 3 SA 832 (N). *Nelson*'s case was, however, disapproved in *Webb v Coetzee* 1951 2 SA 176 (W) and it is submitted that this is the better approach; failure to provide such proof would mean non-compliance with the Bills of Exchange Act 34 of 1964 and would probably mean that judgment would not be given by default. In *Leon Manser (Pty) Ltd v Kajee* 1984 3 SA 883 (N) it was held that a bank's rubber stamp on the back of a cheque was sufficient proof of presentment, even in the face of a denial by the defendant (885C–D). The defendant was criticised for making a bare denial without laying a proper foundation for the defence (884H). It is submitted that this is misconceived; the onus rests on the plaintiff to prove presentment, not on the defendant to prove non-presentment. Interestingly enough, however, the court ultimately appeared to weigh up all the facts and decide in favour of the plaintiff on a balance of probabilities (885D); the question of onus was not discussed.

102 *Williamson v Dragon Mountain Inn (Pty) Ltd* 1962 3 SA 447 (N) 453.

103 See *supra*; *Barclays National Bank Ltd v Chaldon Investments (Pty) Ltd*; *Barclays National Bank Ltd v Swartzberg (1)* 1975 2 SA 344 (W).

104 See *Standard Bank Swaziland Ltd v Prins* 1976 4 SA 565 (C). It seems that an additional document evidencing the change of title does not destroy liquidity provided that it is conclusive.

105 e g to sue an aval (Herbstein and Van Winsen 568).

106 The *Abrahams* case *supra* 276; Mulligan 401.

the same way as a plaintiff suing on an ordinary contract, that the agreement has been induced by fraud; in such circumstances it hardly seems fair to place the overall onus on the defendant. It is submitted that the document is no more than an element used by the plaintiff in establishing that he will succeed on a balance of probabilities in the principal case. If he fails to establish this, either because the defendant manages to negate the probative value of the liquid document, thereby showing that he is likely to succeed, or because he is able to raise sufficient doubts to prevent the court coming to any conclusion on a balance of probabilities, then provisional sentence must be refused.

The defendant starts off at a disadvantage because, as has been stated,[107] a great deal of cogent evidence is required in order to destroy the value of a liquid document; to lumber him with the overall onus in addition is surely to place him in an unjustifiably difficult position. It is submitted that, apart from the statement in *Dickinson*'s case, the views expressed thus far by the appellate division are consonant with such an approach and that it is undoubtedly the most equitable to both the plaintiff and defendant.

It must be acknowledged that, to a certain extent, provisional sentence procedure is incompatible with the *audi alteram partem* rule and requires a court to grant judgment in the absence of a proper hearing of the defendant's case. It is presumably this aspect which has led to the observation that provisional sentence is an oppressive procedure.[108] The courts, in recognition of this, have developed the discretion discussed above. It is submitted, however, that if provisional sentence is granted only where the plaintiff has established, on a balance of probabilities, that he will succeed in the principal case, then there will be far fewer cases where the courts feel themselves possibly to be causing hardship to defendants by granting provisional sentence or compelled to postpone the granting of the remedy, thereby defeating its object from the point of view of the plaintiff.

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107 *Marshall v Bull Quip supra* 30C.
108 See 1987 *SALJ* 452 *et seq.*

BUTTERWORTH-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworth-prys vir die beste eersteling-bydrae van 1988 toegeken is aan:

JJ du Plessis,
Universiteit van die Oranje-Vrystaat.

Aquilian damages for personal injury and death

Robert J Koch
BSc LLB
Fellow of the Faculty of Actuaries in Scotland; Advocate of the Supreme Court of South Africa

OPSOMMING

Aquiliese skadevergoeding vir persoonlike beserings en dood

Die onlangse beslissing van die appèlhof in die *Summers*; *Carstens*; *Nhlumayo*-saak 1987 3 SA 577 (A) het 'n nuwe realisme vir die berekening van skadevergoeding daargestel. Die afgelope agtien maande het 'n reeks uitsprake en nuwe reëls met betrekking tot saamgestelde rente, inflasie ten aansien van algemene skadevergoeding en opgehoopde verliese, buitelandse koerse en inbetalings by die hof, die lig gesien. Sake wat nog aandag verg, sluit uitsprake wat voorbehou word, tempering van skadevergoeding en aftrekbare byvoordele in.

Periodieke skadevergoedingstoekennings bly in Suid-Afrika 'n regsprobleem wat van die welsynsproblematiek daarvan onderskei word. Die voordele van periodieke toekennings is miskien nie so reëel as wat baie van die voorstanders daarvan te kenne gee nie. Die Suid-Afrikaanse konteks verg inagneming van ons besondere sosiale struktuur. Die "once-and-for-all"-reël geld nog vir statutêre periodieke toekennings. Die nuwe hofreël 34A wat tussentydse betalings reël, skep die moontlikheid van hersienbare periodieke toekennings.

Verdienvermoë is 'n persoonlikheidsgoed. Die woord *verdienvermoë* word soms gebruik in die sin van "die huidige waarde van verwagte verdienste". Die beginsel van waardasie van 'n kans is die grondslag van alle geldelike vergoeding, veral enkelsomvergoeding. Dit is belangrik om tussen 'n verwagting en 'n voorspelling te onderskei. Die gedagte dat 'n enkelsomtoekenning gebruik kan word om deur die verbruik van rente en kapitaal die verlore inkomste te vervang, is 'n onvoldoende en oorvereenvoudigde model vir die berekening van skadevergoeding. So 'n model is slegs geskik indien daar van 'n terugvallende trust of 'n onmiddellike lewensannuïteit (pensioen) gebruik gemaak word.

Van der Walt het 'n vergoedingsmodel voorgestel, gebaseer op *nuttigheid* (utility), *planmatigheid* (a structured life plan) en *verkeerswaarde* (objective value). Hierdie benadering tot vergoeding werp lig op probleme soos die waardasie van 'n kans, verkorte lewensverwagting, besparings weens die onmoontlikheid om 'n huwelik te sluit, inagneming van belasting en aftrekking vir algemene gebeurlikhede.

Die inhoud van iemand se vermoë (*patrimonium*) moet bepaal word met verwysing na sy (die eiser se) persoonlike of subjektiewe siening daarvan. Die waarde van die huidige nuttigheid van hierdie lewensplan verg 'n proses van objektivering wat al die verskillende komponente in ag neem. Vergoeding word bereik deur die aanvulling van die huidige enkelsomnuttigheidswaarde tot die vlak wat dit sou bereik het as die besering of dood nie plaasgevind het nie.

As vergoeding op realisme gebaseer moet word, is dit nodig dat die huidige reëls ten aansien van byvoordele versag word. Kritiek op die *Dippenaar*-saak 1979 2 SA 904 (A) is ongegrond. Die inhoud van 'n "dienskontrak" behoort volgens billikheidsoorwegings bepaal te word en nie *stricto jure* nie. Versekerings- en staatsfondse word nou daargestel as die meganismes vir die oorplasing van die koste van katastrofale verliese vir die enkeling na die gemeenskap. Sulke voordele behoort in die algemeen afgetrek te word. Aftrekkings behoort nie gedoen te word

indien die onvermydelike verlies van 'n derde party dan nie vergoed sou word nie. 'n Menigvuldigheid van verskillende aksies is onwenslik. Die Wet op Berekening van Skadevergoeding is onbillike wetgewing. Dit behoort herroep en vervang te word deur 'n Wet op Versoeningsgeld vir Afhanklikes. Die eise van afhanklikes behoort verdeel te word ooreenkomstig die bydraende nalatigheid van die broodwinner.

THE DATE FOR DETERMINATION OF VALUE

Introduction

The single most important event in the compensation calendar within recent times has been the judgment handed down by the appellate division in *General Accident Insurance Co SA Ltd v Summers*; *Southern Versekeringsassosiasie Bpk v Carstens*; *General Accident Insurance Co SA Ltd v Nhlumayo*,[1] to which will be referred more briefly hereafter as the *Summers* appeal. To most observers this judgment did little more than restate the obvious.[2] To those who have puzzled over the conflict between the rules of precedent, the formalisms of practice and the dictates of natural justice, the judgment has been a purgative, a turning point between the medieval and the modern. The *Summers* appeal would seem to have generated a crisis of juristic conscience that has brought in its wake a series of welcome developments:

Compound interest

Anatocism, the charging of interest on interest, was prohibited in the Roman-Dutch law. This prohibition survived to modern times in respect of *mora* interest. The appellate division recently ruled that interest-on-interest is no longer prohibited, even in respect of *mora* interest.[3]

Voet[4] says that

> "just as interest on interest will not be tolerated so too it is not permitted to claim damages for the late payment of damages".

With the passing of the rule against anatocism we may therefore, it seems, anticipate relaxation of the prohibition of interest on damages.[5]

General damages for pain and suffering and loss of amenities

In the *Sodoms* case[6] the appellate division discouraged a slavish adherence to the consumer price index when assessing general damages. There is a school of thought which interprets this decision to mean that past awards should not be adjusted for inflation to the time of judgment.[7] I have never been able to accept such an interpretation. The *Sodoms* judgment, it seems, states no more than that a court should not arrive at its final result by mechanically taking the amount

1 1987 3 SA 577 (A).
2 See, e g, 1986 *ASSAL* 197–200; 1987 *ASSAL* 189–192.
3 *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298–299.
4 45 1 11.
5 Corbett & Buchanan *The quantum of damages in bodily and fatal injury cases* (1985) 30.
6 *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 3 SA 134 (A) 141G–H.
7 Notably Adv JL Buchanan of Corbett & Buchanan fame, who puts this view very strongly in a recent letter addressed to Juta's, parts of which were copied to myself.

awarded in an earlier judgment and adding inflation. The essence, perhaps imperfectly stated, of the *Sodoms* judgment is that a judge is expected to exercise judgment, that is, to consider the result of an inflation-adjusted calculation and to accept or adjust it according to the general equities of the case.[8] The mathematical or logical and the intuitive should be mutually supportive, not mutually exclusive. It has recently been argued that general damages should be ascertained by adjusting for inflation to the date of the delict and not the date of the trial.[9] The court noted that it was entitled to take account of supervening events:

> "One of the things I do know is the present value of money and that is a factor which I take into account in assessing the general damages, that is to say the present value of money, not what it was at the date of the delict."

Past loss of earnings

The *Summers* appeal was concerned with three separate actions. In all these matters the plaintiffs had claimed past losses based upon an arithmetical summation of the earnings or support which would notionally have been provided had the injury or death not occurred. The notional past earnings or support had been estimated with full allowance for salary increases since the time of the injury or death. This popular method for assessing past losses fails to take account of the fact that, had the earnings or support been timeously provided, they could have been spent at a time when goods and services were considerably cheaper than the inflated prices prevailing at the date of the trial. It has recently been argued that an addition should be made to past loss to allow for this "loss of buying power". The argument found favour with the court and the past losses calculated on the usual basis were increased accordingly.[10] To illustrate the point, consider the following calculation of past loss of earnings calculated to a trial date at 1 January 1989 for an injury which occurred at 1 January 1984:

Year	*Nominal Rands*	*Inflation Factor*	*Real Rands*
1984	10 000	1,89	18 900
1985	11 200	1,63	18 256
1986	12 880	1,36	17 517
1987	14 812	1,18	17 478
1988	16 589	1,06	17 584
Totals	65 481		89 735

The popular approach yields a past loss of R65 481 whereas if allowance is made for loss of buying power the past loss becomes R89 735, an increase due to inflation of R24 254.

Foreign currencies

In England a court may award damages in terms of the currency of a foreign land.[11] Such South African authority as exists[12] is a ruling for damages expressed in terms of US dollars to be converted to rands at the exchange rate prevailing

8 See, e g, the observation by Rabie JA in *Nochomowitz v Santam Insurance Co Ltd* 1972 3 SA 640 (A) 644G–inf. In my own work *Damages for lost income* (1984) 60 I used the following expression: "If you are expected to give a weather report you will do well to look out the window before speaking." For a discussion of relevant general equities see 57–61.

9 *Beverley v Mutual & Federal Insurance Co Ltd* 1988 2 SA 267 (D) 271.

10 *Everson v Allianz Insurance Co Ltd* 1988-08-29 case no 6698/85 (C) (unreported).

11 *The Despina R* 1979 1 All ER 421 (HL).

12 *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co SA (Pty) Ltd* 1985 2 SA 142 (W).

at the date of the breach of contract. An amount of R731 840,71 was awarded when the relevant dollars were worth R1 207 423,52 at the date of the trial. The apparent inequity of this ruling is largely, it seems, to be laid at the door of counsel for plaintiff who had failed to argue that the court could make its award in terms of a foreign currency.[13] One needs, however, to distinguish damages for breach of contract, where the parties had the opportunity to negotiate on such issues, and what one might call "destructive" damages where the victim had no opportunity to negotiate with the wrongdoer.[14] In a recent Swaziland judgment concerning damages for personal injury, the court considered itself competent to make an award expressed in terms of a foreign currency.[15] However, this was not considered necessary in the circumstances since the latest exchange rate was at hand and the court was able to effect an immediate conversion of the foreign currency and to couch its order in terms of local currency.

Offer to settle in terms of Rule of Court 34

In the *Summers* appeal[16] it was argued that if a defendant has made an adequate offer to settle, then by discounting to the date of trial, which may be several years later, a perfectly adequate offer would be rendered inadequate. The appeal court dismissed this argument, noting that the old rule 34 was unsatisfactorily worded. The wording of this rule has since been changed.[17] No longer is it a "payment into court"; instead, there is an "offer to settle". If one bears in mind the comments of the appellate division in the *Summers* appeal it seems clear that the new rule 34 is intended to permit a defendant to word his offer of settlement to include escalation of the amount initially offered. The formula for escalation could be in line with the consumer price index until date of trial or uplifting[18] or could specify a fixed rate of escalation.

Reserved judgments

It is not uncommon for a court to take six months or longer to produce a judgment.[19] If the resulting award is based upon values determined as at the date of the trial, then the claimant will suffer a loss of buying power during the period of the delay. It seems clear that if full restitution is to be achieved, the court must when giving judgment make a proper adjustment to the values as at date of trial. Delays in giving judgment are beyond the control of the litigating parties. If the matter is not to be re-opened for further evidence then the court must itself *mero motu* make a suitable adjustment. It remains to be seen how our courts will deal with this problem of equitable restitution.

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13 See *ibid* 152B–D.
14 See Spandau "Inflation and the law" 1975 *SALJ* 35–36.
15 *Infolsdottir v Mutual & Federal Insurance Co Ltd* 1988-05-27 civil case no 1054/86 (Swaziland) (unreported).
16 616B–D.
17 GG4152 1987-11-27 R2642.
18 At least one MVA insurer has already adopted this approach.
19 In *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) a period of 6 months elapsed. In the unreported judgment *Stockwe v AA Mutual Insurance Assn Ltd* (case no 2/1986 (E)) the court took close on a year to decide against discounting to date of delict. Compensation was based upon values at the date of the trial some 12 months previously.

Interest on damages

Interest on damages remains prohibited. I have noted above that the abandonment of the prohibition against anatocism, interest on interest, may well usher in a similar abandonment of the rule against interest on damages. As regards future loss, the procedure of discounting to date of trial already includes the necessary allowance for interest for the pre-trial period.[20] It would be wrong to make any further addition of interest. I have noted above that an adjustment may be made for loss of buying power on past loss. By denying interest on the past loss the plaintiff is deprived of the real rate of return only, that is, the difference between the interest rate and the inflation rate.[21] During the past few years in South Africa the interest and the inflation rates have been very nearly equal. The denial of a real rate of return is therefore at present of little financial consequence.

Mitigation of damages

It frequently happens that a plaintiff has during the pre-trial period had the benefit of substantial collateral payments which are not to be deducted in assessing the damages. Such a plaintiff will have had the financial means to purchase goods and services at lower prices in earlier years. Justice does not require that such plaintiffs be awarded compensation for loss of buying power.[22] This consideration is particularly relevant to claims by dependants who have had the benefit of the use of life insurance or pension money.

Deductible collateral benefits

Consider an injured plaintiff whose terms of employment provided for a substantial accident insurance payment immediately after his injury. By the time of the trial he will have had the benefit of using this money for several years. It would be unjust to deduct from his damages the amount originally received. Some additional deduction needs to be made to allow for the benefit of the use of the money. The amount to be deducted will depend upon what allowance has otherwise been made for loss of buying power on lost earnings and medical expenses paid.[23] The benefit of the early receipt may well be merely the addition of inflation to the amount originally received (this would be proper if the amount has been fully expended by the time of the trial). Alternatively a court may wish to take cognisance of what has actually been done with the money (for example used to pay off a house bond). The same considerations would apply to the deduction from a widow's loss in respect of an accelerated benefit.

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20 Koch *Damages for lost income* 110; *Summers* appeal 613–614.

21 See Koch *Damages for lost income* 74–75.

22 In *Harbutt's Plasticine Ltd v Wayne Tank & Pipe Co Ltd* 1970 1 All ER 225 (CA) 228–229 Lord Denning refused to allow interest on damages in circumstances where the plaintiff had already received insurance money to cover his loss. The equitable considerations governing mitigation are extensively canvassed in *Asamera Oil Corp Ltd v Sea Oil & General Corp* 89 DLR (3d) 1 (SCC).

23 As a general rule past medical expenses paid are liquidated and *mora* interest may be claimed thereon.

COMPENSATION BY INSTALMENTS

Financial devices for providing compensation

Past loss cannot be compensated otherwise than by a lump sum payment to which the above considerations apply. Future loss, on the other hand, can be compensated either by the payment of a once-and-for-all lump sum or by regular instalments designed to reproduce as best possible the expected lost earnings or support. There are two other important, if neglected, ways of dealing with the problem: "immediate increasing life annuities" (pensions), and "reversionary trusts". These I will discuss later in this article. For the moment I will deal exclusively with compensation by instalments.

Damages or social welfare

Undoubtedly the most advanced working system of instalment compensation is to be found in New Zealand.[24] The implementation of that system has required the abolition of the right of an individual to bring an action in court for damages for personal injury and death. Every person is covered for injury and death by compulsory self insurance or state insurance. Compensation for personal injury and death has been removed from the legal sphere and made part of central government's social welfare obligations. For a number of reasons, which I shall not enumerate here, I do not anticipate that we will see a New Zealand-style system in South Africa within the foreseeable future. Our immediate need in South Africa is not a New Zealand-style system placed beyond the jurisdiction of the courts but an instalment system within a judicially dominated framework.

Pros and cons of an instalment system

The perceived advantage of an instalment system of compensation is that a court is thereby relieved of the need to predict the future. The major unknowns which are revealed by unfolding reality are inflation, taxation, remarriage and mortality.

The advantages of knowing actual inflation are dubious, since salary increases, particularly in South Africa over the last few years, have been anything but in line with inflation. One therefore needs to make provision for regular evidence from a suitable source as to the relevant salary increase. The longer the period since the injury or death the more difficult it becomes for anyone, even an erstwhile employer, to provide the necessary information. There is an ever-widening funnel of doubt.[25] The use of a wage index is preferable to the use of an inflation index. This, however, provides no assistance as regards possible promotions and demotions, changes in fringe benefits, branching out into self-employment or change of career path or employer. In one matter the salary was to be determined by reference to a certain management post.[26] Shortly after the agreement was finalised the employer downgraded the post and filled it with a young employee at a very much lower salary.

The advantages of knowing precisely when the claimant will die, cannot be disputed. However, with loss of support claims the major contingency is the

24 Hutchison "Accident compensation: New Zealand shows the way" 1985 *THRHR* 24.
25 Redington "Review of the principles of life office valuations" 1952 *JIA* 296.
26 See agreement reproduced in Koch *Damages for lost income* 253–255.

longevity of the breadwinner. He is dead. No amount of waiting can improve on estimates derived from actuarial tables. Many injured persons today receive large lump-sum payments from their employers. These payments derive from accident and disability insurance cover provided by the employer and fall to be deducted in assessing the damages. I have yet to see a solution to this problem which does not require reliance upon actuarial capitalisation calculations.[27] A similar problem arises when a widow has inherited a large estate. The calculation of the accelerated benefit to be deducted requires a calculation of the present lump-sum value of what would have been inherited had death occurred at some later date.[28]

In so far as remarriage is concerned the benefits of instalment compensation are of dubious value. It is a well-known actuarial fact that widows who stand to lose a pension if they remarry judiciously abstain from remarriage.[29]

Instalment compensation renders possible a very much more accurate assessment of the future course of tax rates. The advantages of having this knowledge are, however, dubious. Those who have had practical experience of drafting instalment compensation agreements will be aware that proper allowance for taxation requires the most convoluted methods of calculation to allow for residual earning capacity and general contingencies. Instalments of compensation are taxable income in the hands of the claimant.[30] The advantages of full information are negated by the complexities of the necessary calculations.[31]

Instalment compensation in South Africa

Compensation by instalments is possible in South Africa for motor accident victims but only with the consent of the defendant.[32] Instalment compensation cannot be demanded by a plaintiff. The MVA fund has discouraged settlements on an instalment basis owing to the administrative burden and the additional cost which accrues when the instalments are subjected to taxation.

The majority of claimants in South Africa are Non-whites who earn so little that their incomes are not subject to taxation and all its complexities. There is a serious lack of reliable statistical information concerning black mortality. The mutual support norms amongst the lower income groups render it extremely difficult for such persons to preserve their capital over long periods. These are weighty considerations in favour of effecting compensation to such persons by

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27 See, e g, the solution proposed by Milburn-Pyle "Damages and compensation" 1980/81 *TASSA* 136.

28 *Groenewald v Snyders* 1966 3 SA 237 (A) 248E.

29 See statistics reproduced in Koch *Damages for lost income* 329. Davel *Skadevergoeding aan afhanklikes* (1987) 128 n 957 displays little sympathy for a woman who deliberately refrains from remarriage.

30 The revenue authorities in South Africa will treat as tax-free payments made to meet medical and related expenses. However, instalments in respect of lost earnings or support are fully taxable in the hands of the recipient and must therefore be grossed up in order to ensure the required net income.

31 See the instalment agreements published in Koch *Damages for lost income* 248–255.

32 s 8(5) of the Motor Vehicle Accidents Act 84 of 1986, interpreted in *Marine & Trade Insurance Co Ltd v Katz* 1979 4 SA 961 (A). In *Wade v Santam Insurance Co Ltd* 1985 1 PH J3 (C) the court expressed the opinion that it was competent to make an instalment award outside the ambit of the act. It is doubtful whether the *Wade* decision would have survived exposure to the appellate division.

instalments. However, rural Blacks can be difficult to contact. One cannot know if they are alive or dead or have received their money. Until communication systems are improved this group will be better compensated by lump sum.

Caveats

A major deficiency with the present legislation is that it does not make provision for judicial variation of an instalment agreement. In other words, the once-and-for-all rule continues to apply for all matters not explicitly addressed in the original agreement.

Proponents of instalment compensation, judicial and academic, should, I submit, be wary of allowing their enthusiasm to devolve into misplaced paternalism, foisting upon claimants a system of compensation which they do not want. The Pearson Commission[33] has observed in this regard:

> "The lump sum has advantages of immediacy, certainty and flexibility, and the evidence tends to show that people prefer it, and if so they should not be accused of imprudence. The importance of certainty becomes evident if one bears in mind the number and variety of misfortunes which can befall nations as well as individuals."

It is also important to remember that instalment payments are subject to a deduction for general contingencies.[34] I will return to this consideration later in this article in relation to the concept of *utility*.

INTERIM PAYMENTS

Following upon the findings of the Vivier Commission,[35] rule 34A has been added to the uniform rules of court to govern interim payments in respect of claims for damages for personal injury or death. Once liability has been established:

- A plaintiff may approach the court for an interim payment;
- further applications may be brought at any time on good cause shown; and
- the court may prescribe the procedure for the further conduct of the action.

A claimant may die at any time. It follows that the interim payment should relate to accrued loss (past loss) only. However, as the months pass, the past loss increases and the rules permit the claimant to approach the court for further payments pending a final action. There seems to be no reason why a court should not streamline the procedure by ordering the payment of regular amounts, instalments of accruing loss. If my reading of the new rule is correct, then it provides the means for a working *reviewable* system of instalment compensation.[36] The practical need for *stare decisis* and the once-and-for-all rule remains satisfied in that the action can be brought to finality. However, if there is any doubt as to the full extent of a claimant's injuries, or other grounds of convenience, the matter can be held open. It is no longer necessary for plaintiffs to live

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33 Vol 1 155 par 716: "Royal commission on civil liability and compensation for personal injury" (Cmnd 7054 1978) (Chairman: Lord Pearson); see too Luntz *Assessment of damages for personal injury and death* (1983) 26.

34 Davel *Skadevergoeding aan afhanklikes* 128 n 955.

35 "Commission of inquiry into the handling of litigation in terms of the Motor Vehicles Accident Act 84 of 1986" RP35/1987.

36 Van der Walt *Die sommeskadeleer en die "once-and-for-all" reël* (doctoral thesis UNISA 1977) 291–485.

in penury during the pre-trial period. A sad fact of litigation, however, is that the plaintiff will often see little if anything of his interim payment, since the full amount will usually be absorbed by litigation costs. Attorneys and expert witnesses also have to live during the pre-trial period and advocates insist on their money within three months.

EARNING CAPACITY

When a person is injured and is prevented by the injuries from taking up employment a loss of earning capacity ensues. The expression *earning capacity* means different things to different people and extreme care must therefore be exercised with its usage and interpretation. It is submitted however, that notwithstanding differences there are a few basics:

Work capacity The capacity to work is an amenity of life that attaches to the human soul and forms a major part of our completeness as a member of society. The capacity to work is therefore an interest of personality. It is not an asset which can be owned, bought or sold, like a car or a book. The exercise of a capacity to work commonly generates earnings. It is therefore generally called "earning capacity".

Earnings Earnings are the fruits of the exercise of earning capacity. These may take the form of a weekly wage, a monthly salary, irregular business profits and sometimes a major capital gain after many years of labour. Whereas earning capacity is an interest of personality, earnings themselves are patrimonial and may be exchanged for goods and services or saved.

Present value When compensation by means of a once-and-for-all lump sum is effected, it becomes necessary to establish a single lump-sum capitalised value for the earnings which would, in the absence of the injury, have been generated by the exercise of earning capacity.

With this common ground established, the thesis may now be expanded further, beginning with those enigmatic words of Rumpff JA:

> "Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."[37]

Everyone will agree that the primary consequence of a serious injury is an impairment of earning capacity, an interest of personality that is non-patrimonial. The quotation tells us, however, that "earning capacity" is measured by reference to expected income. Rumpff JA, we may thus conclude, viewed "earning capacity" as an asset in the claimant's patrimonium.[38] He has therefore used the words "earning capacity" to designate what I have above labelled "present value". The message which I believe Rumpff JA was seeking to communicate was that the present lump-sum value has a quality and characteristics which distinguish it from the "expected income" upon which the lump-sum value is generally based. What is important is that the present value includes discounts for the risk of death and other contingencies of life. He has, however, confused much of his audience by using the expression "earning capacity" in

37 *Santam Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 150A–C; *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 111D.

38 This echoes the views of Barwick CJ in Australia (see *Atlas Tiles v Briers* 1978 21 ALR 129 (HC) 135.25 136.15).

the dual meaning of an interest of personality, which is the primary loss, and a "present value", the true here-and-now financial loss.

Once the components, earning capacity, earnings and present value have been identified, it is perhaps easier to grasp the duality of loss arising from personal injury. It is neither personal nor patrimonial, and yet it is also both simultaneously. I refrain from describing it as *sui generis* for that is to sever it unnecessarily from the mainstream of Aquilian liability.

One commonly finds a distinction made between "loss of earning capacity" and "loss of earnings". If the distinction had been directed at highlighting the difference between infringement of a right of personality and the associated patrimonial loss, I would accept it unhesitatingly. I am all too aware, however, that such profundity is usually absent, the focus being on the superficial issue of whether financial loss is determined by use of an actuarial calculation or a general robust assessment.[39] I shall address in greater detail below the notion that an actuarial calculation is merely an aid to arriving at a fair general assessment. The fundamental character of "present value" is not altered by the use or non-use of an actuarial calculation.

When I suffer a loss of earning capacity (as defined above) there are two components to my loss: financial loss based on the income I could have expected to derive from exercising my earning capacity, and a loss of amenities. It is not uncommon for a person to forego substantial earnings in favour of the spiritual satisfaction of a congenial type of work. If he is injured and thereby prevented from pursuing his chosen career, his financial loss may be small but his loss of amenities substantial. In theory one might expect separate awards for loss of earning capacity and loss of the present value of expected earnings. In practice the terminology tends to obscure the issues.[40]

VALUE OF A CHANCE

The assessment of damages requires a comparison between a hypothetical state of affairs which would have prevailed had the injury not been inflicted, and an actual state of affairs having regard to the injury. When compensation is awarded by a once-and-for-all lump sum, it is necessary to formulate hypotheses for the future in both the injured and the uninjured conditions. Uncertainty is an unavoidable fact of both instalment and lump-sum compensation.

Fundamental to the determination of "present value" is the principle of valuation of a chance. The essence of this principle is that the value of the income or expenditure is determined as though it were a certainty. A percentage deduction is then made to allow for the contingency that the event may not have occurred.[41] The principle is applicable to both past and future hypothetical events. Thus in one matter a young girl was awarded compensation for the loss of the

39 *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 113–114. It is a tragic fact of the courtroom that success in advocacy depends as much on confusing members of the judiciary as enlightening them.

40 In the latest judgment on the subject the court details the amenities of life but does not mention capacity to work: *Administrator-General, SWA v Kriel* 1988 3 SA 275 (A) 288.

41 *Blyth v Van den Heever* 1980 1 SA 191 (A) 225–226; *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 2 SA 642 (A) 650–657.

chance in the past to win a competition.[42] More usually the principle is applied to future events.

A claimant may have had a 35% chance of promotion. He will thus be awarded 35% of the additional earnings which would have accrued from the promotion. It should be noted that, for the examples cited, the principle remains applicable regardless of whether compensation is awarded by lump sum or instalments. It is otherwise for future medical expenditure where waiting will reveal whether the expenditure will become necessary. None the less, even for medical expenditure, the principle is applicable if compensation is to be awarded by means of a once-and-for-all lump sum.

"VERWAGTE INKOMSTE" – EXPECTED INCOME

The principle of valuation of a chance is to be distinguished from the rule of evidence which requires proof on the balance of probabilities. The former is a rule governing quantification of damages, the latter a test of credibility. Some care needs to be exercised to distinguish correctly between these two vitally different issues. It is only for events which have *actually occurred* that one may legitimately require proof on the balance of probabilities. Evidence as to hypothetical events involves opinions, beliefs as to the *likely* course of events in the absence of any event having taken place. There is no single correct reality to be extracted from the evidence. What an expert believes would have been the likely course of events is itself the fact to be extracted from the evidence. The expectations of the reasonable man are all-important. The proper approach to such uncertainty is a percentage deduction from the relevant value.[43] The difficulty which many experience with distinguishing between these two types of evidence is revealing of the nature of "fact" in a court of law.

The confusion is compounded, or perhaps exemplified, by the use of the word "prediction" in relation to hypothetical events. When hypothesising, the normal mental procedure is to say "but on the other hand", so that there are always a series of different possibilities, scenarios. When we select one of those scenarios as a basis for assessing compensation this is not because that is what would actually have happened. It is selected because it is perceived as the most likely of the various possibilities. In statistical science there is defined the vitally important concept of an "expectation".[44] An expectation is not a prediction, it is the basis upon which we conduct our affairs, in and out of court, in the face of uncertainty. It is the basis upon which ventures, business and otherwise, are launched, and goods are bought and sold. Damages for loss of earning capacity are assessed on the basis of "verwagte inkomste" (expected income), not predicted income.[45] An expectation as regards earnings may usefully be described as a "personalised average";[46] here all available information is brought to bear upon individualising the career path but there remains uncertainty and the need for a form of mental averaging.

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42 *Chaplin v Hicks* 1911–1913 All ER 224 (CA); *Trichardt v Van der Linde* 1916 TPD 148.
43 *Parry v Cleaver* 1969 1 All ER 555 (HL) 576–577.
44 Koch *Damages for lost income* 52–55.
45 See the words of Rumpff JA quoted above in relation to earning capacity; see too *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) 1020G.
46 See cases cited in Koch *Damages for lost income* 22 n 3.

CONSUMING INTEREST AND CAPITAL

The principle of valuation of a chance gives rise to an apparent anomaly. If I have been awarded 35% of the value of my loss as a certainty and the loss does not materialise then I am richer by the amount awarded. If the loss does materialise then I have only 35% of the amount I need. It matters not how diligently I invest my 35%; it will assuredly be too much or too little. What I can do, is to approach an insurance company and ask them to insure me against the risk. The premium they will charge should approximate fairly closely to my 35% lump sum. My compensation money is now gone forever but I have the assurance that my expense, or loss of earnings, will be covered if and when it arises.

The standard actuarial calculation proceeds on the basis of this principle of the value of a chance, the chance of early or late death at any time up to age 99 and beyond.[47] It is nonsense to suggest that a plaintiff should be compensated for a period which terminates with his expectation of life. 50% of plaintiffs will outlive the expectation of life. A coloured male now aged 40 has, according to the 1979/81 census tables, a life expectancy to age 65,32. Some courts would suggest that no compensation should be awarded for loss of pension benefits after age 65. When he gets to age 60, however, his expected age at death has changed to 72,96.[48] If he has diligently invested his compensation money and consumed it precisely in accordance with the model adopted by the court he will have nothing for his old age. A calculation done on the basis of an expectation of life is no more than the value of the chance of the earnings, just as for the 35% award discussed in the previous paragraph.

The initial reaction of many to this anomaly in our compensation methods is to shout for immediate reform and the introduction of mandatory instalment compensation. This, however, is merely to sweep the theoretical problems under the carpet so that we do not have to be reminded of the economic facts of life. I have pointed out that even under instalment compensation we cannot avoid the principle of valuation of a chance when dealing with deceased breadwinners or foregone possible promotions. The principle of valuation of chance is fundamental to all monetary compensation, particularly lump-sum compensation.

Not all losses are losses of income. A widow may have lost the expectation of a substantial inheritance which would have accrued had her husband lived.[49] Where there has been an actual inheritance there is a need to value the expectation of inheritance had the death not occurred.

In general, commentators are in agreement that the principle of valuation of a chance, as a method for assessing damages, is essential to achieving fairness between man and man and man and state.[50]

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47 See Koch *Damages for lost income* 46–47. Davel *Skadevergoeding aan afhanklikes* 98 n 602 suggests that not all actuaries use the year-by-year method. She has overlooked an important reference in *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) 1024G–H. She has also failed to grasp the nature of the actuarial debate which is concerned with the advisability of telling the courts the truth about actuarial calculations. Actuaries worldwide are entirely in agreement as to their preference for the year-by-year method.

48 The expected age at death is like the end of a rainbow – no living person ever gets there.

49 Consider a widow who was her husband's sole heir. Had he lived and inherited from his parents his estate would have been greatly swelled. By reason of his early death his widow loses this valuable *spes*.

50 Boberg *The law of delict* (1984) 477; Van der Walt *Die sommeskadeleer* 447.

The point I have sought to make, is that once one introduces an allowance for uncertainty, be it by contingency deduction, expectation of life, expected earnings or valuation of a chance, the resulting present value is unsuitable for use by consuming interest and capital to replace the lost income. The fault, I submit, lies not with the methods for assessing lump-sum compensation but with the paradigm, the underlying theory, with which so many seek to explain the discounting technique. If in geography I subscribe to the view that the earth is flat I will experience serious difficulties with circumnavigating sailors and communications satellites. To say that the result of an actuarial calculation may be used by consuming interest and capital to replace the lost income,[51] is little different from solving problems in geography on the basis that the world is flat. It is a gross oversimplification of what is going on.

In order to make sense of the ubiquitous presence of the value of a chance within compensation calculations we need to modernise our perception of what lump-sum damages are all about. Modern business science and valuation theory utilises a mathematical decision tool which is generally known as "financial modelling" or "discounted cash flow" (DCF). These techniques are extensively used for purposes of property valuation. Their earliest application was by actuaries and their forebears for pricing immediate life annuities. The "new" actuarial science of the nineteenth century has been superseded by the more sophisticated financial modelling techniques of the twentieth-century computer age. Financial models have many purposes. When used for assessing damages payable once-and-for-all by lump sum, the values that are produced have many of the attributes of a value in exchange, a *verkeerswaarde* or market value. These abstract values reduced for contingencies may therefore usefully be described as estimates of the present value in exchange of the income flow which has been lost. I shall return to this analogy below.

REVERSIONARY TRUSTS

The notion of consuming interest and capital is a valid financial model for a life office or pension fund where there are numerous lives at risk. The profits from those pensioners who die young are used to subsidise pensions to those who live well beyond their three score years and ten. For a single individual there can be no averaging for he is but one. If he dies early he leaves money to his heirs; if he lives too long he will run out of money. There is a financial device which may be used to overcome some of these problems, namely a reversionary trust. Such a trust is funded on the basis that the claimant will live way beyond his expectation of life to age 99 and perhaps beyond. An amount is then calculated which will, by consuming interest and capital, produce the required payments during future years. However, if the claimant dies, then all money remaining in the trust reverts to the defendant.

Such schemes are infinitely preferable to awards by courts which make no deduction for contingencies and allow the claimant to retain the proceeds even if the contingency does not arise. Thus a court may wish to make allowance for a major operation in ten years' time but with the knowledge that there is only a 40% chance that such operation will be necessary. If the claimant is to be

51 The *locus classicus* for this fiction is *Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A.

given 100% of the money,[52] then it would be fair to order that it be paid into a reversionary trust to be repaid to the defendant if not utilised.

The major application for reversionary trusts arises in claims for support from a deceased estate.[53] The idea is to set aside sufficient funds for the child with a generous addition for contingencies. If the child dies or becomes self-supporting earlier than expected, then the surplus funds revert to the heirs.

IMMEDIATE LIFE ANNUITIES

An immediate life annuity is a contract of insurance in terms of which the insurer accepts a single lump sum premium *immediately* in consideration for an undertaking to pay from now on regular monthly or yearly amounts for a stated period, or subject to specified contingencies, usually the lifetime of the annuitant.[54] The original purpose of actuarial evidence was to establish the cost of purchasing a suitable immediate annuity.[55] The purchase of immediate life annuities has generally fallen into disfavour with the courts and only the methods of calculating the price have been retained, dressed up in clichés about consuming interest and capital over the expectation of life.

The advantages of using an insurance contract are:

- The insurer assumes the mortality risk and possibly other risks (for example medical costs).
- Most major insurers offer excellent investment returns (16% *per annum* +).
- Pensions escalating by as much as 15% per year compound and more, can now be purchased. At least one company offers payments with profits; that is to say, the monthly payments are increased according to the performance of the underlying investments.
- Insurers now permit partial surrender of immediate annuities purchased with free capital. The capital is therefore no longer irretrievably committed to the insurer.

The disadvantages of using an insurance contract are:

- Judges seem to object to making a contribution to the administration expenses of insurers.[56] And yet these are no different from the costs of a curator which have been allowed.[57]
- It is also objected that the capital is lost on death. This objection appears to be groundless, since, had the delict not been committed, the claimant would

52 See the unreported judgment in *Rouen Pallas v Lesotho National Insurance Co Ltd* 1987-07-02 case no 1123/84 (E) where the court refused to reduce a claim for uncertain medical expenses.

53 Boberg *The law of persons and the family* (1977) 279–289. The right which a child has to support from a parent, or the estate of that parent, cannot be bought off as can a right to sue for damages. The prodigal son may always return to share his father's table (*Schierhout v Union Government* 1926 AD 286 291; *Greathead v Greathead* 1946 TPD 404 411; Spiro *Law of parent and child* 3ed 365 n 52 53).

54 In modern times the word "annuity" has become synonymous with retirement annuity which is a deferred, not an immediate, annuity.

55 *Clair v PE Harbour Board* (1886) 5 EDC 311.

56 Boberg 1964 *SALJ* 214 n 14; Davel "*Die dood van 'n broodwinner as skadevergoedingsoorsaak*" (doctoral thesis UP 1984) 362 n 423.

57 *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) 1029.

have had only income, not capital, and this income would have terminated on death just as with an immediate life annuity.

- The annuity payments are subject to taxation in the hands of the claimant. The lump sum award must therefore be increased to ensure a proper after tax income.[58]
- Insurance companies are not making any special effort to design contracts suitable for compensation financing. In the USA some insurers are aggressively seeking out the large premiums which such contracts can bring in.[59]

(*To be continued*)

58 s 10A of the Income Tax Act 50 of 1962.
59 Blattenburg (1986) 20 *The Actuary* 1 (Newsletter of the Society of Actuaries in America).

AANTEKENINGE

ENKELE UITGANGSPUNTE VIR 'N SUID-AFRIKAANSE ONDERSOEK NA BEHEER OOR ONBILLIKE KONTRAKSBEDINGE*

1 Inleiding

In hierdie bydrae word die praktiese en teoretiese raamwerk bespreek waarbinne die ondersoek in verband met Projek 47, *Onbillike kontraksbedinge en die rektifikasie van kontrakte*, van die Suid-Afrikaanse Regskommissie geskied. Eers word sekere grondtrekke van die kontraktereg aangestip. Daarna word tussen die begrippe "kontraktuele billikheidsmaatstaf" en "algemene geregtigheidsideaal" onderskei. Vervolgens word die standaardbedingverskynsel na vore gebring. Dan word daarop gewys dat 'n saamgestelde benadering nodig is om die probleme wat met onbillike kontraksbedinge ondervind word, die hoof te kan bied. Die behoefte aan die herstel van sekere skeeftrekkings wat daar ten opsigte van ons klassieke kontrakteregteorie ontstaan het, word deurgaans beklemtoon.

'n Algemeen erkende feit aangaande kontrakte en die kontraktereg is dat dit baie nou verband hou met ander lewensterreine soos die ekonomie, sosiologie, politiek, antropologie en geskiedenis (Von Mehren *A general view of contract*, *International Encyclopedia of Comparative Law* vol 7 (1982) hfst 1). Die kontraktereg en kontrakte kan dus vanuit verskillende oogpunte benader word. Gevolglik moet daar ook in die soeke na juridiese antwoorde op die probleem met betrekking tot onbillike gewone en standaardbedinge in die handelsverkeer, behoorlik met die werklikhede en eise van die handelsverkeer rekening gehou word.

2 Kontraktuele billikheid en algemene geregtigheid

Aspekte van die onderskeid tussen 'n *kontraktuele billikheidsmaatstaf* en die *algemene geregtigheidsideaal* is vir die bepaling van 'n denkraamwerk vir hierdie ondersoek van groot belang. Op die oog af kan dit na haarklowery of vae filosofering lyk om tussen dié twee dinge te probeer onderskei. Een opvallende verskil tussen *kontraktuele billikheid* en die *algemene geregtigheid* is egter dat die kernvraag by kontraktuele billikheid is of in 'n gegewe geval aan die bestaande juridiese, sosiale en ekonomiese norme met betrekking tot die aanwending van die kontrak as instrument in die betrokke vertakking van die handelsverkeer voldoen word; daarteenoor is die kernvraag in verband met

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* Die advies van prof ADJ van Rensburg van die Universiteit van Wes-Kaapland op vroeëre weergawes van hierdie aantekening word met dank erken. Die standpunte hierin is egter steeds die skrywer s'n.

algemene geregtigheid of die bestaande toedeling van juridiese, sosiale en ekonomiese middele en geleenthede, vir sover dit per kontrak geskied, in die betrokke gemeenskap aan die een of ander gelykheidsideaal voldoen. Eersgenoemde is dus in die eerste plek op verbeterde funksionering van die kontraksinstrument gerig, terwyl laasgenoemde met die nodigheid en wenslikheid vir die verandering van die gemeenskap waarbinne die kontrak aangewend word, te make het (Von Mehren 72). Kontraktuele billikheid is sekerlik nie heeltemal los te maak van sy verband met die algemene geregtigheidsideaal in 'n besondere regsgemeenskap nie. By die formulering van 'n kontraktuele billikheidsmaatstaf moet daarom noodwendig met die breë geregtigheidstrewe en -toestand in die betrokke regsgemeenskap rekening gehou word. Nietemin moet die verband tussen hierdie benaderingswyses nie as 'n regstreekse verband in enige opsig hoegenaamd gesien word nie.

Die onderhawige ondersoek het te make met die norm en stelsel waardeur vasgestel kan word watter mate van billikheid met betrekking tot die aanwending van die kontrak as instrument in die handelsverkeer vereis word alvorens dit in die gemeenskap as kontrak aanvaarbaar is en afgedwing behoort te word. Dit is die vraag na wat hierbo *kontraktuele billikheid* genoem is. Dit is dus nie primêr 'n ondersoek wat daarop gerig is om "die verbruiker" (wie dít ook al mag wees) se bedingingsposisie in die algemeen te verbeter nie. Laasgenoemde sou nader gekom het aan wat hierbo as die *algemene geregtigheidstrewe* aangedui is. Eweneens is die ondersoek ook nie daarop gerig om eensydig beheer oor standaardbedinge in te voer nie. Ook só 'n strewe sou meer met ideologie as met kontraktuele billikheid te make hê.

3 Die klassieke beginsels van ons kontrakteregteorie

Ons klassieke kontrakteregteorie word gekenmerk deur veral die beginsels van *kontrakteervryheid*, *konsensus* en *afdwingbaarheid* (kyk bv Lotz "Die billikheid in die Suid-Afrikaanse kontraktereg" (intreerede 1979 Unisa 1). Hierdie beginsels verteenwoordig uitgangspunte wat in die openbare belang geld en word myns insiens beliggaam in die goeie trou-vereiste van ons kontraktereg (kyk bv *Tuckers Land and Development Corp v Hovis* 1980 1 SA 645 (A) 652G).

Aan hierdie beginsels en vereiste moet in die moderne handelsverkeer uitvoering gegee word. Die handelsverkeer word vandag gekenmerk deur die deelname van individue, ondernemersgroepe, ander belangegroepe en die owerheid, welke deelname in 'n klimaat van strawwe mededinging ooreenkomstig vryemarkbeginsels geskied. Net soos vryheid nie sonder verantwoordelikheid kan bestaan nie, kan individuele kontrakteervryheid egter nie sonder gepaste beheer werklik tot sy reg kom nie. Ten diepste het 'n mens gevolglik hier te make met die spanningsveld tussen die ekonomiese aktiwiteite van individue ten opsigte waarvan dit hulle vrystaan om hulle sake volgens hulle eie oordeel in te rig, en dié ten opsigte waarvan hulle private besluitneming aan die hand van algemene maatstawwe uitgesluit of beperk word (Von Mehren 11–21). Dit gaan dus om die vraag na die grense waarbinne toegelaat kan word dat partye hulle kontrakteervryheid uitoefen.

Beskouings oor waar die perke van kontrakteervryheid lê, sal uiteraard uiteenlopend wees. Ons het gevolglik hier te make met 'n gebied waar ten volle rekening gehou moet word met die verskillende opvattings in die gemeenskap ten aansien van ekonomiese aktiwiteite in die algemeen en die sosiale verantwoordelikheid

van ekonomies aktiewe individue en groepe in die besonder. Verder sal mense verskil oor die mate waarin die gemeenskap (deur sy organe aan die hand van oorwegings van die openbare belang) by die kontraktuele verhoudinge tussen individue betrokke behoort te raak. Daar sal noodwendig van tyd tot tyd, van gemeenskap tot gemeenskap én ten opsigte van afsonderlike aspekte van die kontrakteregterrein, hieroor verskillende standpunt ingeneem kan word.

4 Standaardbedinge as 'n belangrike fokuspunt van enige ondersoek oor onbillike kontraksbedinge

Standaardbedinge, waarvan daar reeds voorbeelde in die Middeleeuse geskrifte van notarisse voorkom, is vir hierdie ondersoek van groot belang. 'n Interessante vroeë standaardbeding kom voor in die 12de en 13de eeue ter verbetering van die lot van pelgrims tydens hulle skeepsreis na die Heilige Land:

> "[T]he space for one pilgrim shall be 6½ to 7 handbreadths long and 2½ handbreadths wide, providing that two pilgrims may be housed in this space 'if it is customary so to place them in the ships, that the one should put his feet next to the head of the other" (Von Mehren 21 vn 53).

Uit hierdie voorbeeld blyk meteen die belangrike rol wat tóé reeds deur handelsgebruike en voorbehoudsbepalings in die betrokke bedryfsvertakking se standaardkontrakte gespeel is! Daar is inderdaad ook op hierdie terrein min wat werklik nuut genoem kan word.

Twee dinge moet vooraf in verband met standaardbedinge duidelik begryp word. Eerstens is individueel onderhandelde kontrakte meestal die gevolg van tweesydige onderhandeling, terwyl oor standaardbedinge juis nie onderhandel word nie (die een party stel tipies die "kontrak" vooraf op en lê dit net vir ondertekening aan die ander party voor). Dit laat die vraag ontstaan of die onderhawige ondersoek nie maar net op die beheer oor standaardbedinge toegespits moes gewees het nie. So eenvoudig is dit egter nie. Ook in onderhandelde kontrakte kom daar gereeld (deur handelsgebruike of andersins inbegrepe bedinge, of deur handelsvoorwaardes) standaardbedinge voor. Voorbeelde hiervan is talle staatskontrakte en gevalle waar kaartjies uitgereik word. Voorts is dit so dat dit selfs by individueel onderhandelde kontrakte gewoon onwaar sou wees om te beweer dat die partye daartoe altyd die reg sodanig ken dat hulle oor die regs- en ander implikasies van dit waaroor hulle ooreenkom, duidelikheid het. Daarbenewens kom om verskillende redes ook in individueel onderhandelde kontrakte onbillike bedinge voor. Die ondersoek word gevolglik op die probleem van kontraktuele onbillikheid as gevolg van die skeeftrekking van die klassieke kontrakteervryheidsgedagte toegespits, ongeag of dit in individueel onderhandelde of standaardbedinge voorkom.

Die onderhawige ondersoek moet skerp op die kontrakte praktyk toegespits wees. Dienooreenkomstig is dit belangrik om te onthou dat nie alle standaardbedinge in die geheel of hoegenaamd op skrif gestel word nie. Heelparty mondelinge kontrakte word byvoorbeeld gesluit op grond van modelvoorwaardes of 'n beleidsdokument of notule wat iewers in 'n lêer by 'n hoofkantoor of hoofamptenaar "ter insae" is. Dieselfde geld vir kontrakte wat net iewers in 'n rekenaargeheue of op magneetband gestoor word. Daarbenewens moet onthou word dat dit gewoonlik die bepalings van die reëlende reg is wat deur die opsteller van standaardbedinge eensydig in sy guns beperk of uitgesluit word. Dieselfde gebeur met talle statutêre bepalings en die reëls wat uit die regspraak blyk.

Daardie bepalings en hofuitsprake is beslis meestal nie bekend aan voornemende kontraktante nie. Selfs die opstellers van standaardbedinge dra soms nie behoorlik kennis van die betekenis van die bedinge wat hulle by hulle kontrakte insluit nie. Hulle maak ongelukkig dikwels gebruik van vooraf vervaardigde standaardkontrakte wat in die handel beskikbaar is. Anders – en dit gebeur meer dikwels – gebruik hulle gewoon voorbeelde wat in die kantoor beskikbaar is of wat van iemand anders verkry en aangepas is. Hierdie faktore kan tot albei partye se nadeel strek. Meestal is dit egter die teenparty vir wie dit baie groot nadeel kan meebring. Hy sal immers tot 'n kontrak moet toetree sonder dat hy werklik oor die inhoud en uitwerking van die kontrak ingelig is of enige beduidende seggenskap daaroor kon uitgeoefen het.

As sodanig is daar natuurlik nie met die standaardbedingverskynsel fout nie. Die handels- en bedryfswêreld kan vandag nie sonder die aanwending van standaardbedinge klaarkom nie. Dit bespaar baie tyd en koste met betrekking tot onderhandelings, verseker eenvormige behandeling deur al die plaaslike en selfs internasionale afdelings van groot ondernemings en bevorder sodoende regsekerheid. Die gebruikmaking van standaardbedinge is dus beslis van lewensbelang vir individuele ondernemings of bedrywe en selfs vir die breë ekonomie en die gemeenskap. Die owerheid kan nie op 'n ander wyse aan die handelsverkeer deelneem nie en groot (en klein) ondernemings moet eenvoudig die stabiliteit van verwagte voordele en risiko's hê wat daardeur gebied word indien hulle hoegenaamd sinvol aan die ekonomiese lewe van die gemeenskap wil bly deelneem. Nietemin is dit bekend dat fyndruk, verreikende afstanddoeningsbedinge en eensydige manipulering van die reëlende reg, bewysreg en jurisdiksiebepalings in die guns van die kontrakopsteller besonder sterk figureer in gevalle waar standaardbedinge ter sprake is. Hierdie is almal voorbeelde van aangeleenthede wat in hierdie ondersoek onder die vergrootglas kom.

Die genoemde feite het al baie mense laat besluit dat die eintlike probleem met betrekking tot onbillike kontraksbedinge met verwysing na die gelykheid of ongelykheid van partye se bedingingsmag uitgedruk moet word. Dit is egter 'n oorvereenvoudiging. Die rede waarom hierdie ondersoek spesifiek op die standaardbedingverskynsel toegespits word, moet nie in die gelykheid of ongelykheid van partye se bedingingsmag gesoek word nie. Daar sal in elk geval selfs onder die mees ideale omstandighede nooit van volkome gelyke bedingingsmag tussen voornemende kontraktante sprake kan wees nie.

5 Die kontrakteoretiese grondslag vir die toetsing van kontraksbedinge

'n Belangrike vraag is of die rede waarom sekere gewone kontraksbedinge as onbillik beoordeel word, nie wesenlik by dieselfde gebrek gesoek moet word as wat uiteraard by standaardbedinge voorkom nie. Dit sal uit verskillende oogpunte nuttig wees as dieselfde kontrakteoretiese verklaring vir sowel die beheer oor standaardbedinge as vir ingryp ten opsigte van onbillike gewone kontraksbedinge gebruik kan word. Gewone onbillike bedinge behoort argumentshalwe net aanvegbaar te wees as werklike kontrakteervryheid afwesig was. So 'n benadering veronderstel natuurlik dat aan duidelik neergelegde vereistes voldoen moet word alvorens gesê kan word dat wedersydse kontrakteervryheid tot sy reg gekom het. Verder berus dit op die uitgangspunt dat die onderhandelingsmeganisme 'n deurslaggewende funksie in verband met die handhawing van

wedersydse kontrakteervryheid vervul. Hierop moet nou eers dieper ingegaan word.

Die klassieke kontrakteregteorie hou in dat dit juridies-eties aanvaarbaar is dat die partye gebonde gehou moet word aan dit waaroor hulle na onderhandeling wilsooreenstemming bereik het. Dit veronderstel natuurlik dat daar wel oor die kontraksluiting en oor die kontraksbedinge onderhandel is of kon word. Waar nie werklik sinvol oor die kontraksbedinge onderhandel kon word of onderhandel is nie, kan daar van enige sinvolle ruimte vir wilsuitoefening deur alle betrokke partye, soos deur die klassieke kontrakteregteorie veronderstel word, geen sprake wees nie. Daarmee het die grondslag weggeval vir die siening dat, as bewys kan word dat 'n kontrak eenmaal tot stand gekom het, daardie kontrak ter wille van die openbare belang onontwykbaar, in ooreenstemming met die kontrakopsteller se *summum ius*, afgedwing moet word. (Die feit dat die wilsbenadering in sekere gevalle deur die vertrouensbenadering tot kontraksluiting aangevul word, maak nie hieraan 'n verskil nie.)

Uiteraard moet daar, benewens aan die konsensusvereiste, altyd ook aan die ander vereistes vir kontraktuele gebondenheid voldoen word. Selfs 'n oppervlakkige kyk na die gewig wat in verband met kontraksluiting en kontraktuele gebondenheid in die algemeen aan die verskillende vereistes toegesê word, bring egter aan die lig dat verreweg die meeste waarde aan die bereiking van wilsooreenstemming tussen die partye geheg word. Dit word afgelei uit die partye se gedrag (bv meestal deur ondertekening van 'n dokument). Aan die ander vereistes word dan relatief min aandag gegee. Veral die geoorloofdheidsvereiste, wat minder formeel is as byvoorbeeld die vereiste van handelingsbevoegdheid, word net in enkele geykte, uitsonderlike gevalle aan die orde gestel. Sodoende het die breë geoorloofdheidsgedagte tot enkele uitsonderingsgevalle vereng geraak. Op hierdie manier het die ruimte vir die aanwending van die goeie troumaatstaf ten opsigte van die inhoud en afdwing van kontrakte aanmerklik gekrimp.

Wanneer gepoog word om die tradisionele benadering oor die totstandkoming en afdwing van kontrakte ongenuanseerd en sonder inagneming van die beperkings waaraan die onderhandelingsmeganisme vandag blootgestel is, op individuele én standaardbedinge toe te pas, blyk dit spoedig dat daar nie sonder kunsgrepe klaargekom kan word nie. Al te dikwels loop dit dan daarop uit dat toevlug gesoek word in 'n onrealistiese en eensydige beklemtoning van die *pacta sunt servanda*-slagspreuk. Die klakkelose afdwing van kontrakte ongeag die gevolge daarvan, soos wat soms plaasvind, is myns insiens in stryd met die geoorloofdheidsgedagte soos uitgedruk in die goeie trou-grondslag van ons kontraktereg. Daarby kan dit die vertroue van die gemeenskap in die kontraktereg en die regstelsel in die geheel toenemend in die wiele ry. Hierteen moet betyds opgetree word. Enige optrede moet egter so geskied dat die handelsverkeer in almal se belang vry van onnodige en teenproduktiewe maatreëls kan gedy.

Die voorgaande kom daarop neer dat die onderhawige ondersoek nie in die eerste plek gesien moet word as 'n ondersoek wat daarop gerig is om op die een of ander wyse gelyke bedingingsmag tussen voornemende kontrakspartye te probeer bewerkstellig nie. Die standaardbedingverskynsel bring egter, omdat onderhandeling daarby wesenlik ontbreek, die geykte uitgangspunte van die klassieke kontrakteregteorie in die gedrang. Die ewewig moet dus betyds deur die invoer van gepaste beheermaatreëls reggestel word.

Dieselfde kan gesê word van ander onbillike kontraksbedinge. Waar partye nie behoorlik op die hoogte is met die inhoud en uitwerking van die bedinge waartoe hulle instem nie, word myns insiens ook nie aan die beginsel van ware kontrakteervryheid voldoen nie. Word sodanige kontraksbedinge sonder meer afgedwing, word nie voldoen aan die eis dat goeie trou in die openbare belang gehandhaaf moet word nie. Enige voorgestelde beheer moet dus wyd genoeg wees om ook onbillike gewone bedinge in te sluit.

Die reëls met betrekking tot skriftelike kontrakte versterk die siening dat die probleme wat op hierdie gebied opduik, nie maar met 'n blote verwysing na beginsels soos kontrakteervryheid en *pacta sunt servanda* bevredigend opgelos sal kan word nie. Daarvoor moet spesifieke maatreëls met die oog op beheer oor spesifiek die standaardbedingverskynsel ondersoek word. Voorts toon tekortkominge ten opsigte van die onderhandelingsmeganisme selfs by oënskynlik onderhandelde bedinge dat ook in daardie gevalle nie noodwendig aan die beginsel van wedersydse kontrakteervryheid en handhawing van die goeie trou voldoen word nie. Dit bring mee dat sowel maatreëls spesifiek gerig op beheer oor standaardbedinge, as die toetsing van gewone kontraksbedinge wat nie aan die geoorloofdheidsnorm voldoen nie, oorweeg sal moet word.

6 Veranderde opvattings oor die aard en doel van die kontrak en die betekenis daarvan vir die tradisionele kontrakteregteorie

Die denkwêreld waarbinne bekende slagspreuke soos *laissez faire*, *pacta sunt servanda* en *caveat subscriptor* tot potensiële uitbuitingsmiddele vervorm geraak het, is die ingevolge waarvan baie sterk klem geplaas is op die individuele mens en sy ongebonde en outonome wil. In daardie trant is byvoorbeeld die bekende *dictum* in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 465:

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

Die resultaat waartoe die toepassing van so 'n benadering gelei het, word gewoonlik met verwysing na die openbare beleid geregverdig – ongeag hoe onbillik daardie resultaat ook al kan wees. In dié proses is gewoon uit die oog verloor dat die openbare beleid in verband met die afdwing van kontrakte eintlik twee teenstrydige oogmerke het, naamlik èn uiters verreikende kontrakteervryheid, èn die beperking daarvan in ooreenstemming met die breë geoorloofdheidsgedagte aan die hand van die goeie trou. Nietemin, solank die vermelde lewensbeskoulike uitgangspunte op die voorgrond gestaan het, is die finaal verbindende aard van kontrakte verklaar met 'n beroep op die openbare beleid as finale regverdiging vir al die resultate van so 'n benadering, sonder dat weer na die billikheid daarvan gekyk is of kon word.

Na gelang egter sedert die einde van die negentiende eeu groter skepsis oor die houdbaarheid van die uiters liberale opvattings begin posvat het (onder andere omdat geblyk het dat die doelwitte daarvan nie haalbaar is nie), word toenemend gevra na die *ekonomiese doel en die sosiale funksie van die kontrak* as faktore wat vir die afdwingbaarheid daarvan belangrik is (kyk hieroor bv Von Mehren 25; Raiser "Vertragsfreiheit heute" 1958 *JZ* 1; Kronman "Paternalism and the law of contracts" 1983 *Yale LJ* 763).

Die oorbeklemtoning van die vryheid van die individuele wil het, ironies genoeg, die kiem van sy ondergang in hom rondgedra. Dit het naamlik, as uitvloeisels van die liberale politieke en ekonomiese opvattings van die negentiende eeu, die voertuig vir die opkoms van veral die gedagtes van sosiale verantwoordelikheid en vooruitgang geword. In die twintigste eeu is die individualistiese opvattings dus al hoe meer verdring deur gedagtes wat juis daardeur aangewakker is, te wete dié van die sosiale verantwoordelikheid van die ondernemersgroep en die vooruitgang van die breë gemeenskap.

Die werklikhede van die twintigste eeu, met die ontgogeling wat onder andere deur twee wêreldoorloë veroorsaak is en die *massafikasie van die individu en die handelsverkeer* wat dit meegebring het, het die idee van die individualistiese, ongebonde, ondernemende mens enige oortuigingskrag wat dit ooit kon gehad het, ontneem.

Die gevolg van die verskynsels waarna hierbo verwys is, is dat onbillike gewone en standaardbedinge vandag grootliks los van die filosofiese grondslae van die klassieke kontrakteregteorie as instrument in die handelsverkeer aangewend word. Die vraag is: wat moet nou in die plek van die versaakte filosofiese grondslae van die kontrakteregteorie kom? Om in reaksie teen die hantering van standaard- en onbillike gewone bedinge té ver in die teenoorgestelde rigting te swaai ten einde die werklike of gewaande misstande veral ten opsigte van verbruikersbeskerming te probeer herstel, sal verkeerd wees. Daarom moet in die loop van hierdie ondersoek na 'n gesonde balans gesoek word. Hier is na my mening die geleentheid vir die duidelike standpuntinname dat elke mens as gemeenskapswese kan lewe sonder dat sy enkelingskap en sy gemeenskapsgerigtheid mekaar weerspreek. *Die gelowige ondernemende mens moet dan ook sy gawes en geleenthede op so 'n wyse gebruik dat sy gemeenskapsverantwoordelikheid nie deur selfsug en selfgelding in die gedrang gebring word nie. Dit is dus 'n kwessie van èn/èn, en nie een van òf/òf nie.*

Die beginsels en reëls van ons kontraktereg is as sodanig in orde. Te veel klem word egter op die *totstandkoming* van kontrakte geplaas. Die *inhoud en uitwerking* van die bedinge op die kontrakspartye word gevolglik nie onderskei nie. Die resultaat is dat nie meer aan die hand van die geykte gemeenregtelike reëls regstreekse beheer uitgeoefen kan word oor die inhoud van bedinge (en veral standaardbedinge) wat die reg wysig op maniere wat met die beginsel van goeie trou in stryd is nie. Dit was nie die posisie in die gemenereg nie. Daarvolgens is wel deeglik deur die beskikbaarstelling van effektiewe regsmiddele gesorg dat in verband met alle fasette van elke kontrak, te wete die totstandkoming, inhoud, oordrag, uitvoering en tot niet gaan daarvan, in die openbare belang aan die vereiste van goeie trou voldoen is. (Die beskikbare gemeenregtelike middele en tegnieke is volledig bespreek deur Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 646. Sien oor die vraag na die resepsie van die *exceptio doli* nou egter *Bank of Lisbon & South Africa v De Ornelas* 1988 3 SA 580 (A).)

Tans is die posisie dat die voorstanders van die benadering dat die openbare belang deur die afdwing *sonder meer* van alle aangegane kontrakte gedien word, vir hulle as 't ware alleenreg op die gebruik van die klassieke beginsels van kontrakteervryheid en *pacta sunt servanda* begin opeis het. Enige beweging in die rigting daarvan om *wedersydse kontrakteervryheid* en die *goeie trou-vereiste*

as dié grondslag van ons geykte kontrakteregteorie op alle fasette van alle kontrakte toe te pas, word dan openlik of op 'n bedekte wyse teengestaan. Wat hierteenoor duidelik verstaan moet word, is dat ons geykte kontrakteregteorie nie eers saam met die individualistiese sienings van die negentiende eeu ontstaan het nie (kyk bv Nanz *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (1985) en Feenstra en Ahsmann *Contract: Aspecten van de begrippen contract en contractsvrijheid in historisch perspectief* (1980)). Daar kan dus onder geen omstandighede toegelaat word dat op die onderhawige terrein die alleenreg op die gebruik van die geykte terme van die klassieke kontrakteregteorie deur die voorstanders van die ekstreme opvattings van die vorige eeu vir hulle sienings opgeëis word nie.

Die eensydige klem wat daar vandag op die *totstandkoming* van kontrakte geplaas word, bied ten spyte van die lippediens wat steeds aan geykte beginsels soos kontrakteervryheid, *pacta sunt servanda* en die openbare belang bewys word, uiteraard geen verklaring vir die verbindende krag van kontrakte waarby daar geen of min ruimte vir *onderhandeling* is nie. Oënskynlik moet die plek van die onderhandelings wat tradisioneel vereis word volgens sommige kampvegters van die vertekende kontrakteleer by standaardbedinge ingeneem word deur die vraag of die kontrakprys en die ander bedinge wat in standaardbedinge staan deur vraag en aanbod in 'n vrye mark tot stand gekom het (Von Mehren 28). Hierdie argument gaan nie op nie. Die rasionalisering waarop dit berus, val dadelik op. Pryse word nie in die handel deurgaans op 'n eenvoudige wyse vasgestel nie. Dit is des te meer die geval in die lig van al die maatreëls en stappe waardeur die vrye werking van die markmeganisme verander of gestuur kan word om allerlei onregstreekse oogmerke te dien. Daarbenewens kan die prysvasstelling in kontrakte wat buite 'n formele marksituasie ontstaan, se verbindende krag uiteraard ook nie deur daardie motivering gedek word nie. Standaardbedinge kom juis baie algemeen voor in markte wat monopolistiese trekke vertoon, of waar 'n groot mate van sentralisasie bestaan. Dit is byvoorbeeld die geval met kontrakte deur en met die staat en verskillende owerheidsorgane (waarby die groot ondernemings van die na-oorlogse wêreld gerus in hierdie opsig gevoeg kan word). Van werklike onderhandeling, of van ware wederkerigheid van verpligtinge soos *in abstracto* by individueel onderhandelde kontrakte gewoonlik veronderstel word, kan selde in verband met standaardbedinge sprake wees (Von Mehren 28–29). Ter illustrasie kan verwys word na die standaardbeding in baie huurkontrakte ingevolge waarvan die verhuurder hom laat vrywaar van enige aanspreeklikheid, hetsy vir skadevergoeding of vir prysvermindering, indien hy om enige rede hoegenaamd nie die huurperseel aan die huurder beskikbaar kan stel nie. Teen hierdie tipe resultate kom daar in die lig van die veranderde omstandighede en opvattings van ons tyd toenemend verset.

Teen die bogenoemde agtergrond beskou, was dit net 'n kwessie van tyd alvorens die taakvervulling deur die kontraktereg in die "nuwe" wêreld ook in die Republiek van Suid-Afrika ter sprake sou kom. Die eise gestel deur 'n wêreld wat gekenmerk word deur massaproduksie, massaverbruik, onregstreekse en al hoe langer wordende bemarkingskettings, magskonsentrasie in die handel en in die owerheid en ook veranderde mens- en gemeenskapsopvattings, maak dat dit as toevallig beskou kan word dat die huidige debat hier deur 'n geskil met betrekking tot 'n voortdurende borgkontrak (in *Neuhoff v New York Timbers*

Ltd 1981 4 SA 666 (T)) aan die gang begin kom het. Dit kon net sowel enige een van 'n groot aantal ander bedinge in borg- of in bykans enige ander soort kontrak gewees het wat die deurbraak veroorsaak het. (Kyk bv Van der Walt "Afstanddoeningsbedinge in sekerheidstellings-, geldleen en skulderkenningskontrakte" 1988 *THRHR* 333; Van Loggerenberg "Onbillike uitsluitingsbedinge in kontrakte: 'n pleidooi vir regshervorming" 1988 *TSAR* 407.) Dit is die rede waarom hierdie ondersoek nie tot borgkontrakte, of tot kontrakte net tussen sekere klasse partye, beperk kon word nie. In beginsel moet na beheer ten opsigte van alle kontrakte en tussen alle kontrakspartye ondersoek en aanbevelings gedoen word.

In vandag se handelsverkeer is die effektiewe funksionering van standaardbedinge van deurslaggewende belang. Dit veronderstel dat die gebruikers daarvan dit sover moontlik ongesteurd moet kan benut. Diegene wat as die nie-opstellende partye by sodanige standaardbedinge betrokke moet raak, se belange kan egter beslis benadeel word deur standaardbedinge wat vooraf daargestel word met net of hoofsaaklik die belange van die opsteller daarvan in die oog. Die opsteller se kontrakteervryheid, in die sin dat hy in sy kontrak kan insit wat hy goed dink, word onder daardie omstandighede dikwels gebruik ten koste van die ander party se kontrakteervryheid (in die sin dat hy oor die bepalings van die kontrak moet kan onderhandel en vry van versteekte druk of waningeligtheid tot instemming moet kan kom). Die dilemma is dus dat die een party se kontrakteervryheid, weens die oorbeklemtoning daarvan, die ander party se kontrakteervryheid kan beperk of uitskakel. Dit moet as strydig met die openbare belang en teen die goeie trou aangemerk word. Kontrakteervryheid moet dus in belang van die handhawing van wedersydse kontrakteervryheid beheer word.

Enige ondersoek wat met die kernsake van ons sosio-ekonomiese en juridiese bestel werk, het met uiters belangrike dinge te make. Daar is verder op hierdie gebied geweldig baie gevestigde belange en opvattings wat in ag geneem moet word. Daarom kan daar besonder baie spanning en heelwat emosie verwag word as die kwessie van 'n gesonde balans (ooreenkomstig die goeie trou-beginsel en wedersydse kontrakteervryheid) deur 'n ondersoek soos hierdie aan die orde gestel word. Deur te sorg dat die klassieke kontrakteregbeginsels vry van allerlei skeeftrekkings steeds toegepas kan word, kan die voordele van die moderne kontrakteertegnieke myns insiens egter behou word sonder om te veel geleentheid vir wanpraktyke te bied, soos wat tans die geval is. Sodanige balans is juis wat met hierdie ondersoek nagestreef word.

7 Die tradisionele antwoord op die nuwe uitdagings

Die klassieke kontrakteregteorie (met die klem op die *onderhandelde aard* van kontrakte) het, veral as gevolg van die toenemende gebruik van standaardbedinge, in die meeste Westerse lande ernstig in die gedrang begin kom. In omstandighede waar nie onderhandel word nie, of waar kontrakte so opgestel word dat nie van enige werklike kennis of begrip van die besonderhede of die implikasies van die bedinge sprake is nie, kan tog nie van "meeting of the minds" gepraat word nie. Nietemin het die kontraktereg, wat die behoefte aan konsekwente toepassing van sy algemene beginsels betref, grootliks apaties, indien hoegenaamd, hierop gereageer. Daar word meestal maar met die opnoem van die beginsels en sienings van die klassieke kontrakteregteorie volstaan. Dit gebeur dan ongelukkig nie op 'n manier wat die skeeftrekkings waarna hierbo verwys is, aan die kaak stel nie.

Prakties is die enigste gronde waarop aan 'n kontrak ontkom kan word, dus steeds dié wat met wilsgebreke by kontraksluiting verband hou, naamlik dwaling, wanvoorstelling, vreesaanjaging en onbehoorlike beïnvloeding. Natuurlik moet ook aan die ander vereistes, waaronder die geoorloofdheidsvereiste, voldoen word. Laasgenoemde vereiste neem egter meestal 'n ondergeskikte posisie in en het heeltemal vereng geraak, soos hierbo verduidelik is. Vandaar ook die geringe aantal sake wat daaroor in ons hofverslae gevind kan word.

In die meeste Westerse lande was die voorgaande ook maar die algemene stand van sake totdat hulle wetgewers die eise wat deur onbillike (gewone en standaard-) bedinge aan die kontrakteregteorie gestel is, deur middel van algemene en spesifieke wetgewing die hoof begin bied het. In die Suid-Afrikaanse reg het hierdie optrede nog nie baie verder gekom as *ad hoc* reëlings soos dié spesifiek met betrekking tot krediettransaksies en strafbedinge nie. Origens moet die opsteller van bedinge net sorg dat hy die ander party sover kry om met sy voorstelle in te val, waarna daar nie meer aan die letter van die kontrak – ongeag die inhoud en gevolge daarvan – ontkom kan word nie. (Hierdie probleem is vererger noudat afstanddoening van rektifikasie ook meer algemeen begin voorkom.)

Die oortuiging agterliggend aan hierdie ondersoek is dat ons beslis nie langer kan aanhou om die besondere nuwe eise wat deur die standaardbedingverskynsel en onbillike kontraksbedinge aan die kontrakteregteorie gestel word, te ignoreer of met verwysing na die beginsels van kontrakteervryheid en *pacta sunt servanda* te probeer wegpraat nie. Daar sal nou opgetree moet word om te verseker dat ons hierdie uitdagings in ooreenstemming met die klassieke kontrakteoretiese beginsels en ter bevordering van 'n gesonde kontrakteregpraktyk sal kan hanteer.

Die voorgaande kom daarop neer dat die standaardbedingkontrak, gehelp deur die skyn van aanvaarbaarheid wat die gemelde vertekening van die beginsels van die klassieke kontrakteregteorie daaraan verleen het, en voortgedra deur die eise van die handelsverkeer, as 't ware 'n lewe van sy eie begin voer het. Dit het in al die regstelsels wat by die ondersoek betrek is, gebeur. Die verskil is dat die probleem in talle ander lande reeds aanspreek is. Wat die Suid-Afrikaanse reg betref, is die onderhawige ondersoek dus een wat dalk reeds vroeër die gekoördineerde aandag van regslui moes ontvang het. Nietemin het ons tans die voordeel dat veel geleer kan word uit die ervaring wat reeds in ander lande opgedoen is. Regsvergelyking is dus vir hierdie onderwerp baie sinvol.

Die probleem waarmee 'n mens hier te kampe het, is dus enersyds dat daar nog nie vanuit die tradisionele kontrakteregteorie spesifieke aandag aan die eiesoortige reguleringsbehoeftes van standaardbedinge gegee is nie. Wat inhoudelike beheer ten opsigte van die billikheid van sogenaamd onderhandelde bedinge betref, staan sake nie beter nie. Die probleem is nie soseer dat die handelslui hulle teen die reëls van die kontraktereg verset het of dit nou begin doen nie. Dit is eerder 'n geval dat hulle die kontrakt*reg* in hierdie opsig as min-beperkend beskou ten opsigte van wat hulle deur standaardbedinge met betrekking tot die reëlende reg wil en kan bereik. Vandag staan die kontrak *as instrument* waardeur by uitstek aan die handels- en regsverkeer deelgeneem word, dus grootliks los van die beproefde regs- en juridies-etiese grondslae daarvan.

As die voorgaande siening steek hou, moet verwag word dat enige poging om 'n verandering aan daardie toedrag van sake te bewerkstellig, met 'n mate van onsekerheid en selfs ernstige vooroordeel bejeën sal word. Daar word deur soveel opstellers van standaardbedinge klakkeloos van plaaslike en internasionale

"voorbeelde" af gewerk; reeds bestaande standaardbedinge word nie dikwels genoeg hersien om seker te maak dat dit nog met die stand van die reg en die omstandighede tred hou nie; en daar is helaas selfs diegene wat bereid is om voorbedagte misbruik te maak van reëls met betrekking tot skriftelike kontrakte (soos die integrasiereël) en die beperkte beskikbaarheid van verwere soos die *exceptio doli.* Van laasgenoemdes kan selfs regstreekse besware teen enige ondersoek na of hervorming van die huidige toedrag van sake verwag word. Hierdie weerstand, wat soms net op 'n kommunikasiegaping en gevolglike vooroordeel berus, kan moeilik oorskat word.

8 Die wenslikheid van selfkontrole

Gelukkig is daar ook bedryfsvertakkinge wat hulle verantwoordelikhede teenoor alle gebruikers van hulle standaardbedinge insien. Al hoe meer van hulle is ook bereid om hand in eie boesem te steek nog voordat dit selfs gevra word – nie dat dit uit suiwer altruïsme geskied nie. Die verstandige ondernemer en die groepe waarin hulle hulle saamtrek weet ook wat hulle sal kan belemmer in die bereiking van hulle regmatige handelsoogmerke. Daarom poog hulle, in belang van al hulle lede en die landsekonomie, om sover moontlik praktyke uit te skakel wat die hele bedryf kan benadeel. Vandaar dat ook andersins monopolistiese bedrywe en ondernemings spontaan tot die standaardisering van standaardbedinge en kontrole oor die etiese gehalte van hul kontrakte en die dienste deur hulle lede gelewer, oorgegaan het en dit toenemend doen. Dit dien die openbare belang en moet aangemoedig word.

Daarmee is egter nog glad nie gewaarborg dat die belange van die nie-lede van sodanige groepe die nodige erkenning en beskerming ontvang nie. Wat die ondernemers wel daarmee gedoen het, is om die onderlinge verhoudinge onder deelnemers aan hulle ondernemersaktiwiteite sodanig te orden dat hulle nie die water vir mekaar troebel maak nie. Daarby kom nog dat buitestaanders nie altyd bewus word van sodanige interne optrede, of van dissiplinêre beheer wat binne bedryfsliggame oor die optrede van hulle lede uitgeoefen kan word nie.

Oral waar selfkontrole bewustelik toegepas word, kom die probleem van effektiwiteit natuurlik skerp na vore. Hoe sterker die afdwingingsmiddele wat by so 'n stelsel ingebou is, hoe meer vertroue behoort dit in te boesem. Enige sodanige stelsel kom egter ook voor enorme wantroue te staan – veral as dit oor die raakvlak tussen ondernemers en verbruikers handel. Buitestaanders sal waarskynlik, ongeag hoe goed 'n stelsel van selfkontrole ook mag lyk, moeilik aanvaar dat dit nie 'n geval is van wolf wat skaapwagter gemaak is nie.

Ofskoon 'n mens dus soms krities sou kon wees oor stelsels vir selfkontrole, moet toegegee word dat dit tog in die algemene belang aangemoedig moet word. Veral waar ondernemers deur raadpleging daartoe kom om aanvaarbare modelkontrakte en praktyksgewoontes in spesifieke bedrywe nageleef te kry, moet dit ondersteun word.

Die selfbeheer-aktiwiteite van die ondernemers vind ongelukkig egter meestal plaas buite die gesigsveld van die afnemerspubliek en sonder dat hulle of iemand anders daarvan weet. Dit word ook selde nodig of wenslik geag dat hulle enige regstreekse insette tydens daardie proses maak. Onder daardie omstandighede sal die meeste lede van die afnemerspubliek waarskynlik moeilik glo dat hulle rol in hierdie oefening in selfkontrole anders uitgedruk kan word as dié van die naamlose, gesiglose objekte van die ondernemers se handelsoefies. Ongelukkig

dien die feit dat vele ondernemers hulle nie aan sulke bedenklike praktyke skuldig maak nie, en die geweldige invloed wat byvoorbeeld advertensieveldtogte het, net om sommige van die reeds oningeligte verbruikers boonop té goedgelowig te maak. Eers nadat iemand sy kop gestamp het, of iemand naby genoeg aan hom bedroë uit 'n kontraksituasie afgekom het, raak hulle versigtiger. Hulle oormatig negatiewe reaksie na so 'n ervaring dra ongelukkig dan by tot 'n gevoel van agterdog en wantroue in die algemene moraliteit van alle ondernemers en die vermoë van die reg om aan hulle die beskerming te verleen wat na hulle mening nodig was. Sodoende word die funksionering van die handel belemmer en kom die openbare belang in die gedrang.

Die afnemer-party van enige handelstransaksie is uiteraard vir die funksionering van die handel onontbeerlik. In werklikheid handel die hele ekonomiese aktiwiteit oor die verplasing van goedere, dienste en geleenthede van die ondernemers na die afnemers daarvan. Sodra vergeet word dat die ekonomie daar is om die individu én die gemeenskap te dien, begin dinge skeef trek en word magsmisbruik en eensydigheid die vernaamste eienskap van die kontraksbedinge wat aangetref word. Daardie instrument word dan gebruik om die risiko verbonde aan deelname aan die handelsverkeer meer as wat die prys waarteen die diens aangebied word regverdig, na die ontvanger van die diens te verplaas. Die ondernemer poog dan uiteraard om geen of so min moontlik van die risiko wat die wese van enige handelsaktiwiteit vorm, op hom te neem, terwyl hy meer as sy regmatige deel van die opbrengs nietemin vir hom opeis. In 'n gesentraliseerde of gemonopoliseerde marksituasie, gesteun deur die traagheid van die reg om by veranderde omstandighede aan te pas (veral in 'n presedentestelsel) gee dit *carte blanche* aan die ondernemer wat vir hom of vir sy bedryf buitengewone voordele deur middel van sy standaardbedinge wil bekom. Dat dit hierdie resultaat aan die nodige juridies-etiese grondslag ontbreek, word bevestig deur die verkeerde mens- en gemeenskapsienings wat daaraan ten grondslag lê, soos hierbo aangetoon is. Hierteen kom wêreldwyd toenemend reaksie in die vorm van wetgewing om oor die billikheid van kontraksbedinge en die gebruik en inhoud van standaardbedinge regstreekse beheer uit te oefen.

9 Die verbruikersbeweging, verantwoordelike handelsleiers en die owerheid as vennote

Vooraan in die reaksie teen die bogenoemde skeeftrekkings, staan tradisioneel verantwoordelike ondernemers en verskillende verbruikersliggame, maar ook die owerheid. In wese raak dit meteen die stryd rondom die mate waarin die owerheid by die aktiwiteite en ewewig van mag op die handelsgebied betrokke is of behoort te wees. (Die mededingingsaspekte van hierdie betrokkenheid bly hier ter syde, nie omdat dit nie belangrike invloed op die kontrakspraktyk sou uitoefen nie, maar eenvoudig vanweë die anderse vrae wat in daardie verband ter sprake is. Dit geniet reeds die aandag van die wetgewer en die Raad op Mededinging. Daarbenewens het daardie funksie van die owerheid meer met die vraag na kontraktuele regverdigheid, in die sin van die globale verspreiding en verdeling of herverdeling van skaars middele en geleenthede, as met die enger kontraktuele billikheidsvraag te make.)

Die kontraktereg poog nog altyd om met die tradisionele middele die probleme wat deur al hierdie nuwe benaderings meegebring is, aan te spreek. Die wetgewer het egter reeds herhaaldelik getoon dat partye se verreikende kontrakteervryheid

in gegewe gevalle ten beste deur gepaste wetgewing beperk kan word. (Vir 'n lys van wette wat reeds perke op partye se kontrakteervryheid plaas, sien Aronstam *Consumer protection, freedom of contract and the law* (1979) hfst 3.) Ingrype op kontrakteervryheid is as sodanig dus niks vreemds nie. Die verantwoordelike taak is egter om toe te sien dat sodanige ingrype nie die fyn balans in die handels- en regsverkeer onnodig versteur nie.

10 Enkele samevattende stellings

a In beginsel is daar niks verkeerd met uitgangspunte soos *pacta sunt servanda* en "kontrakteervryheid" of met die vraag-en-aanbodetiek van die handelsverkeer nie, maar daar kan nie toegelaat word dat onbillikheid agter die mom van daardie kontrakteoretiese ideale geskied, en dat die geregtelike prosedure vir die afdwing van onbillike kontraksbedinge ingespan word nie.

b Die toenemende gebruik van standaardbedinge is begryplik, sinvol en hoogs wenslik. Nietemin moet verstaan word dat dit eise aan die klassieke kontrakteregteorie stel waaraan dit nie sonder meer kan voldoen nie.

c Die deurslaggewende rol wat die wilsbenadering ten opsigte van die totstandkoming van kontrakte speel, en die verreikende mate waartoe die reg deur eensydige beklemtoning van een party se kontrakteervryheid verander of uitgesluit kan word, bring mee dat die gemeenregtelike metodes wat nog vir die inhoudelike toetsing van kontrakte en bedinge aan die goeie trou ruimte sou kon gebied het, hulle nut en aanpasbaarheid as sodanig grootliks verloor het. (Hierdie standpunt is volledig uiteengesit deur Van der Walt 1986 *SALJ* 646.)

d Die Suid-Afrikaanse reg is vasgevang in die oorgeërfde neiging om die vraag na die onbillikheid al dan nie van kontrakte en bedinge op 'n onregstreekse wyse te benader (*ibid*).

e Verbruikersopvoeding en -inligting as metode om geskille te voorkom, behoort baie meer doelgerigte aandag en geld van alle belanghebbendes by die sosio-ekonomiese welsyn van die gemeenskap te ontvang. Ingeligte kontraktante is in enige onderhandelingsituasie weerbaarder teenpartye.

f Die vrywillige samewerking van soveel moontlik groepe en persone moet verkry word om sélf hulle standaardbedinge aan te pas en om selfkontrole deur die aanvaarding en afdwinging van modelstandaardbedinge deur professionele, werkgewers-, werknemers- en ander geskikte liggame met die nodige dissiplinêre bevoegdhede bewerkstellig te kry.

g Wedersydse kontrakteervryheid, wat die juridies-etiese grondslag vir die toepassing van die geykte beginsels van die klassieke kontrakteregteorie verskaf, ontbreek geheel en al of wesenlik by onbillike kontraksbedinge. Daardie gebrek kan weer aangevul word deur die breë geoorloofdheidsgedagte ingevolge die goeie trou-vereiste sy regmatige rol te laat speel.

h Wat gedoen sal moet word, is om ingevolge gepaste wetgewing vir regstreekse inhoudelike toetsing en wysiging van kontraktuele verhoudinge deur daartoe bevoegde organe of liggame, aan die hand van die goeie trou voorsiening te maak. Die nodige riglyne vir duidelike en konsekwente toepassing daarvan sal ook verskaf moet word. Dit is waarop projek 47 van die Suid-Afrikaanse Regskommissie uiteindelik moet uitloop.

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THE INTESTATE SUCCESSION ACT 81 OF 1987

1 Historical background

Prior to the promulgation of Act 81 of 1987, the law relating to intestate succession in South Africa was based largely on the *Nieuwe Schependomserfrecht* that prevailed in the southern part of the Province of Holland and West Friesland, as set out in the Political Ordinance of 1 April 1580, elucidated by the *Interpretatie* of 13 May 1594, and amended by the States-General in the *Octrooi* of 10 January 1661. This was known as the common-law system of intestate succession, the characteristic feature of which was the fact that it was based entirely on consanguinity (blood relationship) between the deceased and his intestate heirs.

In addition, the common-law system of intestate succession was extended by legislation to cover two exceptional cases where there was no consanguinity between the deceased and his beneficiaries. The Succession Act 13 of 1934, as amended, conferred rights of succession *ab intestato* upon a surviving spouse, and section 20 of the Child Care Act 74 of 1983 laid down from whom an adopted child could and could not inherit upon intestacy.

This situation has now changed, primarily as a result of the work of the South African Law Commission. The hotchpotch of common-law and statutory provisions has been consolidated, amended and simplified by the Intestate Succession Act 81 of 1987. The preamble to the act states that its purpose is "to regulate anew the law relating to intestate succession" and it may be regarded as a codification of the previous provisions, most of which have been expressly repealed in section 2.

The act was assented to on 30 September 1987 and came into operation on 18 March 1988 (*Gazette* 11188, Proc 42/1988). The provisions of this legislation will be considered in some detail below.

2 Amendments effected by the act

The main changes to the rules of intestate succession brought by the act may be summarised briefly:

2 1 The surviving spouse no longer inherits in competition with second *parentela* relatives in certain circumstances, but only in competition with descendants of the deceased (s 1(1)(c)). This prevents more remote relatives, with whom the deceased may have had little or no contact, from sharing the estate with the surviving spouse.

2 2 The method of calculating the minimum share which the surviving spouse will inherit, has been simplified and made uniform in all instances (s 1(1)(c)(i)).

2 3 Illegitimacy no longer affects the capacity of one blood relation to inherit the intestate estate of another blood relation (s 1(2)).

2 4 The principle of representation *per stirpes* is no longer limited to the fourth degree in the case of collaterals in the second *parentela*, but takes place *ad infinitum* (s 1(4)(a)).

2 5 The rules applicable to the third *parentela* and more remote ascendant orders have been greatly simplified (s 1(1)(f)).

3 The order of intestate succession

To be more specific, the order of succession on intestacy in South Africa is now as follows:

3 1 The first parentela

The first order of succession or *parentela* consists of the surviving spouse, the deceased's children and their descendants by representation *per stirpes, ad infinitum* (s 1(1)(a), (b), (c) and 1(4)(a)).

a If the deceased is survived by a spouse, but not by a descendant, then the surviving spouse inherits the whole estate (s 1(1)(a)).

b If the deceased is survived by one or more descendants, but not by a spouse, then the descendants inherit the intestate estate (s 1(1)(b)). Division of the estate takes place *per stirpes* and representation is allowed *ad infinitum* (s 1(4)(a)).

c If the deceased is survived by a spouse and descendants, then

i the spouse inherits a child's share of the intestate estate or so much as does not exceed in value the amount fixed from time to time by the minister of justice by notice in the *Gazette*, whichever is the greater; and

ii the descendants inherit the residue (if any) of the estate (s 1(1)(c)).

The initial amount fixed by the minister for the purposes of this section is the sum of R125 000 (*Gazette* 11188, GN 483/1988 of 1988–03–18). If this amount is increased by the minister at some future date, the notice in the *Gazette* will not apply to the intestate estates of persons who die before the date of such notice (s 1(3)).

In calculating a child's share of the intestate estate for the purposes of section 1(1)(c)(i) it is essential that the surviving spouse be counted as one of the children. This was the position under the "old" law, and it is expressly confirmed by section 1(4)(f) of the act.

Where the spouses were married in community of property, the survivor takes a half-share of the joint estate by virtue of the marriage and not by way of succession. Thus in section 1(1)(c)(i) the survivor's half share must be deducted before the calculation is made.

Similarly, where the spouses were married out of community of property and the accrual system applies (see ch 1 of the Matrimonial Property Act 88 of 1984), any claim by the survivor against, or payment due by the survivor to, the deceased estate in respect of the accrual must be dealt with before the calculation is made, that is the distributable estate must be determined before section 1(1)(c)(i) is applied.

3 1 1 Illegitimacy

Previously, an illegitimate child could not inherit *ab intestato* from his father or his father's relations, but only from his mother and her relations – the relevant maxim being "een moeder maakt geen bastaard". The act has changed this situation and provides that "illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation" (s (1)(2)). Thus illegitimate children now have the same rights as legitimate children to inherit *ab intestato*. The position regarding *incestuosi* is, however, uncertain.

It is to be noted that the rule enunciated in section 1(2) does not apply as between donor and child in situations where the gametes of an "outsider" have been used for the purposes of an artificial insemination (s 5(2) of the Child Status Act 82 of 1987).

3 1 2 Adoption

The rights of an adopted child to inherit *ab intestato* are governed by section 1(4)(e) and 1(5) of the act. The effect of these provisions is that an adopted child is entitled to inherit from his adoptive parents and their relatives but not from his natural parents and their relatives. An exception is made in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of that child. In such instances the adopted child retains his right to inherit from his natural parent and his or her relatives. These provisions, although differently stated, are very similar to those set out in section 20(1) and (2) of the Child Care Act 74 of 1983.

3 2 The second parentela

If there are no relations in the first *parentela*, the estate climbs to the second *parentela* which consists of the deceased's parents and their descendants by representation *per stirpes, ad infinitum* (s 1(1)(d), (e) and 1 (4)(a)).

a If both parents are alive, they inherit the estate in equal shares (s 1(1)(d)(i)).

b If one parent only is alive, but there are descendants of the deceased parent, that is brothers and sisters of the intestate, whether of the full or the half blood, or their descendants by representation, then the surviving parent takes one half of the estate and the descendants of the deceased parent the other half (s 1(1)(d)(ii)). Half-brothers or half-sisters on the side of the surviving parent do not share in the inheritance.

c If one parent only is alive, and there are no descendants related to the deceased through the predeceased parent, then the surviving parent inherits the whole estate (s 1(1)(d)(ii)).

d If both parents are dead, but there are descendants of the deceased parents who are related to the deceased, whether of the full or the half blood, then half of the estate goes to the descendants of the deceased father and the other half to the descendants of the deceased mother (s 1(1)(e)(i)). In the result, full brothers and sisters of the deceased share in both halves of the estate (take with the whole hand), while half-brothers and half-sisters share in their respective halves only (take with the half hand).

e If both parents are dead, and there are no collaterals other than descendants of the half blood on one side of the family only, whether paternal or maternal, then such descendants inherit the whole estate (s 1(1)(e)(ii)). Previously they were entitled only to half the estate, while the other half ascended to the third *parentela.*

It is to be noted that representation *per stirpes* is now permitted *ad infinitum* in the second *parentela* (s 1(4)(a)). Prior to the passsing of the act, as mentioned above, it was permitted only up to the fourth degree in the case of collaterals.

3 3 The third parentela

If there are no relations in the first and second *parentelae*, the estate climbs to the third *parentela* which now consists of the deceased's grandparents and their descendants, and failing such relatives, the more remote blood relations of the deceased.

The rules governing the third *parentela* have been greatly simplified. The "nothing comes from one who lives" rule has been abolished, and the blood relation(s) of the deceased who are related to him nearest in degree inherit the estate in equal shares; that is, they take *per capita*, the nearer ones excluding those more remote (s 1(1)(f)).

3 4 Total failure of all relations

If the deceased is not survived by a spouse or any blood relation whatsoever, the state is entitled to claim the intestate estate as *bona vacantia* after 30 years. The act is silent on this point, but it is submitted that the common-law rule will apply.

4 Miscellaneous provisions

a The term "intestate estate" includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 38 of 1927 does not apply (s 1(4)(b)).

Under the "old" law, in the case of *In re MacGillivray's Will* 1943 WLD 29, the court held that should the deceased die partly testate and partly intestate, the amount which the survivor takes in terms of the will is ignored in calculating the amount to which he or she is entitled in terms of the Succession Act of 1934. It seems clear that the same rule will obtain in regard to beneficiaries who inherit under the Intestate Succession Act of 1987.

b Any person who is disqualified from being an heir of the intestate estate of the deceased, or who has renounced his right to be such an heir, or any person who, by representing such first-mentioned person, would have been entitled to inherit had such person not been so disqualified or had he not renounced his right, shall be deemed not to have survived the deceased (s 1(4)(c)).

In such instances, the share which would have devolved upon that stirps will accrue to the co-heir(s) of the disqualified person. If there are no such co-heirs, the inheritance will ascend to the next *parentela.*

c The degree of relationship between blood relations and the deceased --

(i) in the direct line, shall be equal to the number of generations between the ancestor and the deceased or the descendant and the deceased (as the case may be); and

(ii) in the collateral line, shall be equal to the number of generations between the blood relations and the nearest common ancestor, plus the number of generations between such ancestor and the deceased (s 1(4)(d)). This restates the common-law position.

5 Conclusion

Although it is doubtless not possible to frame a set of rules governing the division of an intestate estate which produces a fair and equitable result in every instance, the Intestate Succession Act of 1987 has eliminated many of the glaring anomalies and inequalities of the common-law system of intestate succession. The lot of the surviving spouse has also been considerably improved. The South African Law Commission is to be commended for the recommendations which have contributed to the process of reform in this area of our law.

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AANSPREEKLIKHEID VAN DIE VENNOOTSKAP VIR SKULDE *PRAE SOCIETATE*

1 Probleemstelling

Met die eerste oogopslag skyn die antwoord op die vraag of 'n vennootskap aanspreeklik kan wees vir skuld wat 'n vennoot aangegaan het voordat hy tot die vennootskap toegetree het, voor-die-hand-liggend te wees; van naderby beskou, is dit egter moeiliker om 'n antwoord te gee, veral as bykomend die vraag gestel word of 'n privaatskuldeiser van 'n vennoot die reg het om op vennootskapsbates beslag te lê.

Hierdie en ander vrae was die onderwerp van bespreking in twee opinies wat opgeneem is in Barels se *Advysen over den koophandel en zeevaart* (2 62 en 2 86 onderskeidelik in 1707 deur J en A van den Ende en in 1716 deur A van den Ende gegee). Dit volg na aanleiding van 'n handelaar wat, nadat by 'n vorige geleentheid op sy bates beslag gelê is om sy skuldeisers te betaal, 'n vennootskap sluit met 'n ander handelaar en daar dan uit eersgenoemde se verlede 'n onbetaalde skuldeiser opdaag. Die vraag of die vennootskap aanspreeklik kan wees vir skuld wat 'n persoon aangegaan het voordat hy tot die vennootskap toegetree het, word ontkennend beantwoord (advies 2 62 par 1). As redes word aangevoer dat die betrokke skuldeiser nie die reg het om die vennoot in 'n ander land aan te spreek as waar die skuld aangegaan is nie, en dat die skuldenaar nie aangespreek kan word as hy na die uitwinning reeds nuwe bates opgebou het nie. Verder word gesê dat die vennootskap 'n *corpus mysticum* is, wat apart van die vennote gesien moet word.

> "Als zynde in Rechten en Practycque notoir dat eene Compagnie is een *corpus mysticum* (een verbeeld lichaem) of een lichaem op zich zelven, geheel en al verschillende van de Compagnons in hun particulier .... De Compagnieschap en het lichaem van de Compagnieschap is verschillend van den persoon en zo ook van het eigen goed van de Compagnons...."

Daar kan dus geen eise teen die vennootskap op grond van die persoonlike skuld van 'n vennoot ingebring word nie (sien ook advies 2 86 waar gesê word dat die skuld wat 'n vennoot in sy private of persoonlike lewe aangaan, nie uit die fondse van die vennootskap teruggeëis kan word nie). In moderne terminologie beteken dit dat die vennootskap met regspersoonlikheid beklee word.

Die vraag ontstaan voorts wat die posisie sal wees as 'n vennoot tydens oprigting reeds beswaarde bates tot die vennootskap bydra en nie die beswaring aan sy vennoot(e) openbaar nie.

Die doel van hierdie aantekening is om die posisie in die gemenereg na aanleiding van bogenoemde probleemvrae en die twee opinies te ondersoek. Die ondersoek word tot die belangrikste Romeins-Hollandse skrywers beperk. Verder word die posisie in die Suid-Afrikaanse reg ondersoek, veral in die lig van die feit dat die vennootskap, met 'n aantal uitsonderings, tans nie as 'n regspersoon of afsonderlike entiteit beskou word nie (*Silbert & Co v Evans & Co* 1912 TPD 425 434 444; *Muller v Pienaar* 1968 3 SA 195 (A) 202–203; *Standard Bank of SA Ltd v Lombard* 1977 2 SA 808 (W) 813; *Strydom v Protea Eiendomsagente* 1976 2 SA 206 (T) 209).

2 Soorte vennootskappe

Verskéie soorte vennootskappe word in die Romeins-Hollandse reg onderskei met spesifieke verwysing na byvoorbeeld die duur van die vennootskap, die wyse van totstandkoming en die vennootskapskontrak (Henning en Delport *Partnership* (1984) 247 par 365). Ter illustrasie hiervan kan gekyk word na Voet (17 2 1, 5, 45); De Groot (3 21 3, 4, 9 en 3 22 1); Huber (*HR* 3 11 2, 6); Van Leeuwen (*CF* 1 4 23 2, 3, 31) en Van der Keessel (*Praelectiones* 3 22 1; *Dicta* 3 26 2–3 en *Th* 707–710). Voorop staan egter Pothier (*Société* 2 1 28) en Van der Linden (*Koopmans handboek* 4 1 2) se onderskeid tussen universele en buitengewone vennootskappe. Onder eersgenoemde val die *societas universorum bonorum* en die *societas universorum quae ex quaestu veniunt*, terwyl onder laasgenoemde die sogenaamde kommanditêre en stille vennootskappe en vennootskappe ten opsigte van 'n bepaalde besigheid of professie ingedeel word (Henning en Delport 247 par 365). Die onderhawige ondersoek word beperk tot die *societas universorum bonorum* en die *societas universorum quae ex quaestu veniunt*.

3 *Societas universorum bonorum*

Die *societas universorum bonorum* word gedefinieer as

> "[o]ne 'by which the contracting parties agree to put in common all their property, both present and future. It covers all their acquisitions whether from commercial undertakings or otherwise' " (*Isaacs v Isaacs* 1949 1 SA 952 (K) 955).

(Sien ook Bamford *The law of partnership and voluntary association in South Africa* (1982) 18; Henning en Delport 250 par 366; Maasdorp *The introduction to Dutch jurisprudence of Hugo Grotius* (1903) 277; Huber *HR* 3 11 2–3; Tudor *Pothier on partnership* (1854) 24.)

3 1 Romeins-Hollandse reg

Die belangrikste Romeins-Hollandse juriste verskaf weining of geen inligting oor die vraag na die aanspreeklikheid van die vennootskap vir skuld wat 'n vennoot aangegaan het voordat hy tot die vennootskap toegetree het nie. Vanweë die feit dat die vennote alle eiendom (hetsy in die verlede, hede of toekoms verkry) gemeenskaplik besit, kan 'n mens egter geredelik aanneem dat dit ook skuld insluit waarmee die eiendom beswaar was of is.

De Groot (3 21 3) verklaar dat hierdie tipe vennootskap, behalwe tussen gades, verbied was in Holland. Hy (3 21 6) verklaar verder dat gemeenskaplike besit

van alle eiendom alle vorme van wins en verlies insluit behalwe dit wat oneerlik by wyse van delik, growwe nalatigheid of deur dobbelary verkry is. Hieruit kan moontlik die afleiding gemaak word dat as 'n eggenoot eiendom op enige van bogenoemde wyses verkry het, die gemeenskaplike boedel nie vir skuld daaruit aanspreeklik gehou kan word nie.

Van Leeuwen (*RHR* 4 3 2) is van mening dat partye wat 'n vennootskap aangaan waar alle eiendom gemeenskaplik besit word, uitdruklik so moes gekontrakteer het. Hy verskil egter met De Groot deurdat hy hierdie tipe van vennootskap nie net tot getroude gades beperk nie. By die posisie van getroudes ten opsigte van skulde wat voor die huwelik aangegaan is, onderskei hy tussen die geval waar 'n huweliksvoorwaardekontrak bestaan en die geval waar die huwelik binne gemeenskap van goed was. In eersgenoemde geval word die skuld by ontbinding van die huwelik van die gade wat die skuld aangegaan het se gedeelte van die boedel afgetrek. In laasgenoemde geval nie, omdat die betrokke gade nie die bevoegdheid gehad het om sy toekomstige gade voor sluiting van die huwelik te bind nie (*RHR* 4 3 6).

Huber (*HR* 3 11 4) onderskei by die algemene vennootskap, wat alle eiendom insluit, tussen 'n vennootskap wat aangegaan word sonder om te spesifiseer watter eiendom ingesluit word en 'n vennootskap waar eiendom uitdruklik gespesifiseer word (*HR* 3 11 3). Wanneer die vennootskap uitdruklik algemeen is, word alles ingesluit, selfs erfgoed en skuld. Wanneer dit stilswyend algemeen is, is slegs die wins en verlies van die vennootskapsbates gemeenskaplik terwyl die eiendomsreg van die eiendom steeds in die vennote afsonderlik gevestig bly (*HR* 3 11 5). Na aanleiding hiervan kan geargumenteer word dat 'n skuldeiser van een van die vennote nie op die bates van die ander vennoot beslag kan lê nie, omdat die skuldenaar nie eiendomsreg daaroor het nie. Bogenoemde onderskeiding van Huber tussen die tipes algemene vennootskappe is egter baie vaag en verskil met latere skrywers van die agtiende eeu.

Voet (17 24) verskil met Huber (*HR* 3 11 4) wanneer hy aantoon dat by die universele of algemene vennootskap die uitdruklike of stilswyende in- of uitsluiting van spesifieke eiendom geen invloed op die gemeenskaplike besit of wins- en verlies ten opsigte van die eiendom het nie. In aansluiting by De Groot (3 21 6) wys hy daarop dat nòg wins nòg verlies wat 'n vennoot verkry of gely het as gevolg van sy eie bedrog, nalatigheid of skuldigbevinding aan diefstal of owerspel of deur 'n ongeluk, binne die universele vennootskap val. Dit bevestig waarskynlik die afleiding dat die vennootskap ook nie vir vorige skuld van 'n vennoot aanspreeklik sal wees nie. Verder stem hy met De Groot (3 21 3) saam dat hierdie tipe universele vennootskap, behalwe dié tussen gades, lank reeds in Holland verbied is.

Van der Keessel is die eerste Romeins-Hollandse skrywer wat duidelik aantoon dat – soos die posisie tans ook in die Suid-Afrikaanse reg daar uitsien (sien *infra*) – die vennootskap van die huwelik onderskei moet word. (Hy verklaar nietemin dat De Groot reeds sodanige verskille ingesien het (*Praelectiones* 3 22 10 en veral 2 11 7). Ook verklaar hy (*Th* 3 21 1) dat elke gemeenskap van wins nie noodwendig 'n vennootskap daarstel of die gevolge van 'n vennootskap het nie (sien ook die *Advysen over den koophandel* 2 65 soos aangehaal deur Van der Keessel *Th* 3 21 1).) 'n Belangrike verskil wat hy aantoon, is dat die vennootskap die skade moet vergoed wat deur die nalatigheid van 'n vennoot berokken is, terwyl dit in die geval van die gemeenregtelike huweliksgemeenskap onnodig is

om rekening te hou met die nalatigheid van die man. Hoe dit ook al sy, hieruit kan nie afgelei word dat die vennootskap vir 'n vennoot se vorige skuld aanspreeklik kan wees nie.

Van der Linden (*Koopmans handboek* 4 1 12; vgl Henning en Delport 252 par 366 vn 7), een van die gesaghebbendste skrywers op die gebied van die vennootskapsreg, verklaar met verwysing na Pothier (*Société* 2 1 29) dat alle eiendom, hetsy by wyse van erflating, geskenk of wetgewing verkry, deel van dié vennootskap vorm. Daar is geen uitsondering op die reël nie, behalwe vir sover eiendom uitdruklik uitgesluit is. So 'n vennootskap is dan ook aanspreeklik vir alle skulde van enige van die vennote wat voor die ontstaan van die vennootskap aangegaan is, asook vir skulde wat die vennote aangegaan het tydens die bestaan van die vennootskap. Hierdie aanspreeklikheid moet egter nie uitgebrei word na onoordeelkundige besteding, dobbelskuld of boetes vir misdade nie.

Uit bostaande blyk duidelik dat die beskouings van die belangrikste Romeins-Hollandse skrywers oor die onderhawige regsvraag baie vaag is of glad nie met mekaar ooreenstem nie. In die lig van die feit dat daar tussen De Groot en Van der Linden byna drie eeue van regsontwikkeling lê, sou mens met veiligheid kon aanneem dat Van der Linden se standpunt, naamlik dat die *societas universorum bonorum* ook aanspreeklik is vir skulde van vennote wat aangegaan is voor toetreding tot die vennootskap, die meer korrekte is.

3 2 Suid-Afrikaanse reg

In die Suid-Afrikaanse reg heers daar groot meningsverskil oor die bestaanbaarheid al dan nie van die *societas universorum bonorum* en dan veral met betrekking tot die huwelik (vgl Henning "Die leuevennootskap" 1980 *MB* 147). Dit is 'n ongelukkige toedrag van sake aangesien gesaghebbende skrywers soos Van der Linden (*Koopmans handboek* 4 1 12) en Pothier (*Société* 2 1 29–42 4 2 79–81 6 3 106) dié kwessie breedvoerig behandel.

3 2 1 Regspraak en skrywers

Ons regspraak gee geen duidelike antwoord op bogenoemde probleem nie (*Isaacs v Isaacs supra* 955; *L v De Wet* 1953 1 SA 612 (O); *Bester v Van Niekerk* 1960 2 SA 799 (A) 784; *Ex Parte Sutherland* 1968 3 SA 511 (W) 512; *Mühlmann v Mühlmann* 1981 4 SA 632 (W); *Chiromo v Katsidzira* 1981 4 SA 746 (ZA)); teenstrydige uitsprake bestaan ten opsigte van die bestaanbaarheid van die *societas* met betrekking tot die huwelik. (Vgl *Fink v Fink* 1945 WLD 226, *Horne v Hine* 1947 4 SA 760 (SR), *Katzenstein v African Tours* 1962 2 SA 204 (D) en *Ex Parte Sutherland supra* wat bedoelde bestaanbaarheid m b t die huwelik erken, met *Ex Parte Nathan Woolf* 1944 OPD 266 271 273, *Estate Sayle v CIR* 1945 AD 388 394–395, *Oberholtzer v Oberholtzer* 1947 3 SA 294 (O) 296–297 en *Hare v Hare and Hare* 1961 1PH G3 (W) wat dit ontken.)

Dit is ook die geval met die Suid-Afrikaanse handboekskrywers, wat selfs dieselfde hofuitsprake verskillend interpreteer. Bamford (*Law of partnership and voluntary association* (1987) 19) bespreek die Romeins-Hollandse skrywers De Groot en Voet en kom tot die gevolgtrekking dat 'n huwelik binne gemeenskap van goed nie 'n ware universele vennootskap daarstel nie. Verder verklaar hy ook dat die posisie in die Suid-Afrikaanse reg ten aansien van die *societas universorum bonorum* 'n ope vraag is. Hy maak dan die aanname dat so 'n vennootskap onwettig is en dat die putatiewe huwelik wel as uitsondering hierop

as universele vennootskap beskou word. De Wet en Yeats verklaar dat die *societas universorum bonorum* waarskynlik nie meer in ons reg bestaan nie, maar dat dit wel moontlik by 'n putatiewe huwelik bestaan (*Kontraktereg en handelsreg* (1978) 381).

Hierteenoor verklaar Hahlo (*The South African law of husband and wife* (1985) 290) uitdruklik dat gades wat buite gemeenskap van goed getroud is 'n universele vennootskap met mekaar kan sluit, maar dat 'n aansienlike finansiële bydrae of gereelde dienste gelewer moet word wat verder strek as wat gewoonweg van gades verwag word, anders sal die howe nie geredelik 'n vennootskapskontrak aanvaar nie (sien ook die regspraak daar vermeld).

Henning en Delport (251 par 366) toon gesaghebbend aan dat huwelike binne gemeenskap van goed nie sonder meer met die *societas universorum bonorum* gelykgestel kan word nie, juis vanweë die feit dat 'n huwelik – en nie 'n vennootskap nie – beoog word en daarmee een van die onderskeidende kenmerke van 'n vennootskap ontbreek. Hulle toon ook duidelik aan dat De Groot se opmerking, waarop De Wet en Yeats *supra* steun, naamlik dat die universele vennootskap "van ouden tijden" in Holland verbied was, foutief is. Alhoewel dié tipe universele vennootskap nie algemeen voorgekom het nie, is dit nie voor kodifikasie uitdruklik in Holland of Frankryk verbied nie. Dit was egter deur beide die Franse *Code Civil* en die *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* tot alle bestaande bates beperk (kyk ook Henning 1980 *MB* 147 vn 59). Die *societas universorum bonorum* kan volgens die skrywers ook in die Suid-Afrikaanse reg steeds stilswyend gesluit word (Henning en Delport 251 par 366).

Gibson (*Wille's principles of South African law* (1977) 473) toon aan dat 'n universele vennootskap dikwels stilswyend tussen 'n man en vrou, getroud of nie, gesluit word waar 'n gemeenskaplike besigheid bedryf word. In 'n ander handboek (*Mercantile and company law* (1988) 282) verklaar dieselfde skrywer egter dat die vennootskap *universorum bonorum* in onbruik verval het en vandag van geen waarde meer is nie, maar dat die vennootskap *universorum quae ex quaestu veniunt* wel bestaan en dat gades by implikasie so 'n vennootskap kan sluit.

Wille en Millin (*Wille and Millin's mercantile law of South Africa* (1975) 417) steun Hahlo (*supra*) wanneer hulle verklaar dat gades 'n universele vennootskap kan sluit wanneer hulle buite gemeenskap van goed getroud is.

Te midde van al hierdie teenstrydighede in die geledere van die handboekskrywers, is die beslissings in *Ally v Dinath* 1984 2 SA 451 (T) en *Mühlmann v Mühlmann* 1981 4 SA 632 (W) (1984 1 SA 97 (A); 1984 1 SA 413 (W)) duidelike rigtingwysers. In eersgenoemde saak gee die hof Henning en Delport *supra* implisiet gelyk. Die hof aanvaar dat waar 'n man en vrou in 'n saamblyverhouding (konkubinaat) gewikkel is, 'n vennootskap *universorum bonorum* stilswyend tot stand kan kom. Ook in laasgenoemde sake word die bestaan van so 'n vennootskap tussen 'n man en vrou getroud buite gemeenskap van goed aanvaar.

Wat dié vennootskap se aanspreeklikheid vir vennote se vorige skulde betref, word in oorweging gegee dat Van der Linden en Pothier se standpunte, soos hierbo uiteengesit, aanvaar word.

4 *Societas universorum quae ex quaestu veniunt*

Hierdie vorm van universele vennootskap word gedefinieer as

> "a partnership of all that they may acquire during its continuance, through every kind of commerce. They are considered to enter into this kind of partnership where they declare that they contract together a partnership without any further explanation" (*Isaacs v Isaacs supra* 955).

(Sien ook De Groot 3 21 3; Voet 17 2 5; Van der Linden *Koopmans handboek* 4 1 12; Pothier 2 2 43; Bamford (1987) 19; Henning en Delport 251 par 366; Gibson *Mercantile and company law* 290.) Hierdie vennootskap moet duidelik van die *societas universorum bonorum* onderskei word in soverre dit tot winste alleen beperk is. Eiendom wat verkry is by wyse van erflatings, skenkings of wetgewing val nie binne die vermoë van die vennootskap nie (Pothier 2 2 43; Van der Linden *Koopmans handboek* 4 1 12; Voet 17 2 15). Elke vennoot moet dus 'n bepaalde bydrae, hetsy kapitaal, roerende eiendom, arbeid of iets dergeliks tot die vennootskap maak (Van der Keessel *Th* 705; Van der Linden *Koopmans handboek* 4 1 11; Pothier 1 3 8; Bamford (1987) 3; Gibson *Mercantile and company law* 286; Wille en Millin 412; Henning en Delport 260 par 370; De Wet en Yeats 385). Hierdie bydraes, tesame met die winste wat gemaak word, vorm dan die vennootskapbates (Pothier 7 2 120; *Fortune v Versluis* 1962 1 SA 343 (A); *Fink v Fink supra*; Wille en Millin 422; De Wet en Yeats 388–389; Henning en Delport 288 par 392; Scamell *Lindley on partnership* (1962) 357–359). Die verhouding tussen vennote is dié van *uberrimae fides* (Bamford 31; Wille en Millin 424; De Wet en Yeats 397; Henning en Delport 293 par 400; *Wegner v Surgeson* 1910 TPD 571 579; *Truter v Hancke* 1923 CPD 43 49; *Purdon v Muller* 1961 2 SA 211 (A) 231).

4 1 Romeins-Hollandse reg

Soos by die *societas universorum bonorum* handhaaf die belangrikste Romeins-Hollandse skrywers die spreekwoordelike stilswye ten opsigte van die vraag of dié vennootskap aanspreeklik kan wees vir 'n vennoot se vorige skulde. Ondersoek mens die vraag vanuit 'n ander hoek, naamlik met betrekking tot die vennootskapsbates, word meer lig op die saak gewerp.

Volgens De Groot (De Bruyn *The opinions of Grotius* (1894) opinie 81) mag 'n vennoot nie die vennootskapsbates in pand gee as versekering vir sy eie persoonlike skulde nie en het 'n pandhouer geen eis op grond van die pand teen die vennootskap nie. Dit is belangrik dat hy in dieselfde opinie verklaar dat geen ooreenkoms tussen vennote hulle aanspreeklikheid teenoor derdes kan beïnvloed nie en dat sodanige ooreenkoms geensins skulde wat voor die datum van die ooreenkoms aangegaan is, beïnvloed nie. Hieruit kan die afleiding gemaak word dat die vennootskap nie aanspreeklik sal wees vir die persoonlike skuld van 'n vennoot nie. Andersyds stel hy dit weer dat vennote en hul erfgename onderling teen mekaar 'n verhaalsreg het vir skade en verlies wat deur kwade trou of nalatigheid veroorsaak is (*Inl* 3 21 7). As 'n vennoot dus reeds beswaarde kapitaal of ander eiendom as bydrae tot die vennootskap gelewer het en die feit nie aan sy mede-vennote openbaar nie, het hulle 'n verhaalsreg teen hom as dit skade of verlies vir die vennootskap meebring.

Huber (*HR* 3 11 9) verklaar dat die grondbeginsel van dié vennootskap gelyke aanspreeklikheid vir wins en verlies is, behalwe as ongelykheid by wyse van

verdere ooreenkoms gereël word. As vennote dus ooreenkom dat die vennootskap aanspreeklik sal wees vir vroeëre skuld van 'n vennoot, is so 'n ooreenkoms geldig maar dan het mens te doen met 'n beding ten behoewe van 'n derde. Die vennootskap word volgens Huber (*HR* 3 11 24) ook beëindig as 'n vennoot al sy persoonlike eiendom verloor, hetsy by wyse van persoonlike skuldverpligting of konfiskering deur die staat.

Ten aansien van die *societas universorum quae ex quaestu veniunt* toon Voet (17 2 5) aan dat wanneer hierdie vennootskap gesluit word ten opsigte van spesifieke eiendom, 'n spesifieke ondernemingsvorm of 'n spesifieke versameling van eiendom, geen wins of verlies, anders as wat daarmee verband hou, binne die vennootskap val nie. Elke vennoot behou winste en verliese wat hy uit ander bronne verkry het. Mens kan hieruit aflei enersyds dat die beswaarde bydraes van vennote tot die vennootskapskapitaal die vennootskap se las bly, en andersyds dat vennote se persoonlike verliese hul eie bly.

'n Skuldeiser van 'n vennoot kan volgens Voet (2 4 45) ook beslag lê op 'n spesifieke bate in 'n vennootskap ten spyte van die feit dat dit gemeenskaplik besit word. Die ander vennote sal dan 'n vennootskapsaksie, waarin verdeling van die gemeenskaplike eiendom geëis word, teen so 'n vennoot hê om hulle skade te verhaal. 'n Vennoot is ook verplig om verliese as gevolg van sy bedrog en/of growwe nalatigheid te vergoed (Voet 17 2 12). Versuim die vennoot dus opsetlik om wesenlike feite aan sy mede-vennote te openbaar, veral ten opsigte van 'n beswaarde bydrae, sal hy 'n verlies wat die vennootskap as gevolg daarvan ly, moet vergoed.

In aansluiting by wat hierbo oor die beslaglegging van 'n vennootskapsbate deur 'n skuldeiser gesê is, verklaar Van der Keessel (*Praelectiones* 3 21 7) — in sy behandeling van die Antwerpse reg — dat die bates van 'n vennootskap nie vir geregtelike beslaglegging vir privaatskulde van 'n vennoot vatbaar is nie. Hy erken egter dat daar verskeie regsgeleerdes van sy tyd is wat hiermee verskil het, hoewel dit in sy eie woorde "by ons geen geringe gesag geniet het nie" (*Th* 703).

Van der Linden (*Koopmans handboek* 4 1 13) gee weinig inligting in dié verband. Hy is van mening, net soos De Groot (*supra*), dat 'n vennoot nie vennootskapsbates mag vervreem of beswaar nie, behalwe vir sover hy 'n aandeel daarin het. Pothier (2 1 5 8), hoewel hy nie deur Van der Linden op hierdie punt gesteun word nie, dui aan dat volgens die Romeinse reg die vennootskap nie aanspreeklik sal wees vir 'n vennoot se skuld waarmee sy bydrae tot die vennootskap beswaar is nie. Ingevolge die Franse reg is die vennootskap egter wel aanspreeklik vir beswaarde roerende eiendom wat die vennote in die vennootskap ingebring het.

Die slotsom is dat hoewel daar punte van ooreenstemming is, die belangrikste Romeins-Hollandse skrywers mekaar weerspreek oor verskeie aspekte; geen duidelike afleidings kan dus gemaak word nie.

4 2 Suid-Afrikaanse reg

Die posisie in Suid-Afrika rakende die gemeenskaplike besit van vennootskapsbates en die effek daarvan *inter se* teenoor derdes, is onseker (Henning en Delport 290 par 394). Dit is noodsaaklik om die begrippe vennootskapsbates en kapitaalbydrae van mekaar te onderskei. Die vennootskapskapitaal is slegs deel van die vennootskapsbates in soverre dit nog bestaan en het niks te doen met die

vennoot se aandeel in die vennootskapsbates nie (Henning en Delport 289 par 393; Lindley 357; Wille en Millin 422; sien ook Gibson *Mercantile and company law* 287). Die vraag of die vennootskap aanspreeklik sal wees vir skuld wat 'n vennoot voor toetrede aangaan om sodanige bydrae tot die vennootskapskapitaal en/of bates te maak, moet egter met verwysing na sulke bates en kapitaal beantwoord word. Dit kom dus daarop neer dat die vraag gestel moet word of 'n privaatskuldeiser van 'n vennoot op die gemeenskaplike bates van die vennootskap of die kapitaal beslag kan lê. By oplossing van die probleem of die vennootskap vir skulde voor toetreding aanspreeklik is, moet die vertrouensverhouding wat daar tussen die vennote bestaan, ook nie uit die oog verloor word nie.

4 2 1 Regspraak

In *Standard Bank v Wentzel & Lombard* 1904 TS 828 838 het 'n geskil ontstaan oor die vraag welke skuldeisers preferent en welke konkurrent is nadat op die vennootskapsbates beslag gelê is weens die beswaring daarvan met 'n verband. Regter Mason verklaar met verwysing na die vennootskap dat:

> "[t]his property they cannot alienate or mortgage or use except for the purposes of partnership nor is it subject to attachment by creditors of the individual partners".

In *Grassis & Shrewe v Lewis* 1910 TPD 533 539 wys regter Bristowe daarop dat die opmerking hierbo in die *Standard Bank*-saak 'n *obiter dictum* is wat die Engelse reg weergee en wat met die Suid-Afrikaanse reg verskil. Verder wys hy ook daarop dat wanneer vonnis teen 'n vennoot as individu verkry is, op die onverdeelde aandeel van die vennoot in die vennootskapsbates beslag gelê kan word. Waar dit nie moontlik is nie, kan op die bates self beslag gelê word, maar net die vennoot se aandeel daarin kan verkoop word. Dit skyn egter net die posisie te wees as vonnis in die hooggeregshof verkry is (De Wet en Yeats 408; Bamford 66; Wille en Millin 431).

Die beginsel wat in die *Grassis*-saak neergelê is, is in *Spaeth v Schneider* 1960 2 SA 629 (SWD) 613F bevestig waar regter Hofmeyer, alhoewel hy die beslissing kritiseer, hom daaraan gebonde ag aangesien dit nog nie deur die appèlhof omvergewerp is nie.

Regter Lindley bevraagteken in *Liquidators of the Durban Roodepoort Mynpacht Syndicate v Blandfield* 1922 TPD 173 176–177 bogenoemde beginsel. Hy verwys na artikel 57(6) van die Wet op Landdroshowe 32 van 1944 wat bepaal dat die hof, nadat aan die vennoot en die vennootskap kennis gegee is, die geregsbode kan aansê om enige geld wat die vennoot ten opsigte van sy belang in die vennootskap toekom, ten bate van die skuldeisers te ontvang; en dat waar vonnis gegee is teen 'n individuele vennoot, sy belang in die vennootskap in eksekusie verkoop kan word.

4 2 2 Landdroshofprosedure

Tans is daar ook 'n lynregte botsing tussen reël 40 (1) ingevolge die Landdroshofreëls en artikel 68 (6) ingevolge die Wet op Landdroshowe 32 van 1944. Reël 40 (1) bepaal dat indien vonnis teen 'n individuele vennoot verkry is, die hof na voldoende kennisgewing aan die vennote, die geregsbode kan aansê om geld wat ingevolge die vennoot se belang in die vennootskap aan hom betaalbaar is, in ontvangs te neem. Ingevolge artikel 68 (6) egter kan 'n persoonlike skuldeiser,

na verkryging van vonnis teen 'n individuele vennoot, beslag lê op 'n vennoot se belang in die vennootskap en dit verkoop.

Volgens Pretorius (*Burgerlike prosesreg in die landdroshowe* vol 2 (1986) 1056) is die standpunt wat in die *Roodepoort Mynpacht*-saak ingeneem is, naamlik dat net reël 40 (1) se prosedure die korrekte is, nie houdbaar nie. Die prosedure in reël 40 (1) is volgens hom "'n alternatiewe prosedure waarvan daar in gepaste gevalle van gebruik gemaak kan word" (1056–1057; kyk ook De Wet en Yeats 408).

Wat ook al die posisie mag wees, staan dit vas dat 'n vennoot se belang in die vennootskap in beslag geneem en verkoop kan word. Of 'n vennootskapsbate in beslag geneem kan word, is onseker. In die lig van die *Grassis*-saak (*supra* 539) lyk dit egter wel moontlik.

4 2 3 Vertrouensplig

Vennote is regtens verplig om teenoor mekaar die hoogste goeie trou te handhaaf (Henning 1980 *MB* 145; Lee *Introduction to Roman Dutch law* (1953) 229). Hierdie plig rus nie alleen op vennote in 'n bestaande vennootskap nie, maar ook op persone wat onderhandel om 'n vennootskap op te rig (Henning en Delport 293 par 400; *Bell v Lever Bros Ltd* (1932) AC 161 227). Hunt (1965 *Annual survey of South African law* 93) spreek hom soos volg in die verband uit:

> "Secondly there may well be situations in which . . . a new partner has a duty to disclose his past. If he knows that others are dependant on him for information, that a failure to disclose is likely to affect vitally their reputations and business and that knowing the truth they are most unlikely to associate themselves with him, he should make disclosure. There seems no inflexible practical or logical reason for making existing partners but not incoming ones disclose."

Miller (1957 *SALJ* 189) verklaar dat die openbaarmakingsplig bestaan wanneer

> "[i]nvoluntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other [is] such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances".

4 2 4 Afleiding

In aansluiting hierby asook by De Groot (3 21 7) en Voet (7 2 12) kan aangevoer word dat, sou 'n vennoot opsetlik of nalatig versuim om te openbaar dat sy bydrae tot die vennootskap op enige wyse beswaar of belas is met die gevolg dat skade vir die vennootskap daaruit kan voortvloei, hy verplig sal wees om sulke skade te vergoed indien dit intree, of dit sal die vennootskapskontrak vernietigbaar maak deur die ander vennote.

4 2 5 Engelse reg

Interessantheidshalwe kan hier net gewys word op die posisie in die Engelse reg waar die vennootskap nie aanspreeklik sal wees vir 'n vennoot se skuld wat aangegaan is om hom in staat stel om 'n bydrae te lewer nie. Lindley (245) stel dit soos volg:

> "[I]t follows that the firm is not liable for what may be done by any partner before he becomes member thereof. So that if several persons agree to become partners, and contribute each a certain quantity of money or goods for the joint benefit of all, each one

is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him; and the fact that the money or goods so supplied have been brought in by him as agreed will not render the firm liable."

5 Gevolgtrekking

Om die aanspreeklikheid van die vennootskap vir skuld wat 'n vennoot aangegaan het voor toetreding tot die vennootskap te bepaal, is dit noodsaaklik om in die eerste plek tussen die verskillende tipes vennootskappe te onderskei.

Tweedens moet ook 'n duidelike onderskeid gemaak word tussen skuld wat 'n vennoot ten opsigte van sy persoonlike bates aangaan en skuld wat hy aangaan ten einde 'n bydrae tot die vennootskap te lewer. In laasgenoemde geval lyk dit of die vennootskap aanspreeklik sal wees vir die skuld, hetsy deur beslaglegging op 'n vennoot se belang in die vennootskap of deur beslaglegging op vennootskapsbates. Indien 'n vennoot egter opsetlik versuim om te openbaar dat sy bydrae tot die vennootskap belas is, lyk dit of so 'n vennoot sowel in die Romeins-Hollandse as die Suid-Afrikaanse reg verplig sal wees om sy medevennote te vergoed vir skade wat daaruit voortvloei. Die vennootskapskontrak is ook vernietigbaar ter keuse van die ander vennote vanweë die verbreking van die vertrouensplig.

Sowel in die Romeins-Hollandse as in die Suid-Afrikaanse reg word die beginsel aanvaar dat vennote se persoonlike winste en verliese hul eie is en dat dit van die winste en verliese van die vennootskap geskei moet word. Die beginsel word ook aanvaar dat 'n vennoot nie vennootskapsbates mag beswaar ter versekering van sy eie skuld nie.

6 Slot

Ten slotte is dit interessant om die skynbare botsing tussen die twee opinies hierbo genoem en die Romeins-Hollandse skrywers se siening van die regsaard van die vennootskap aan te merk. Dit is algemeen bekend dat in die Romeins-Hollandse reg die vennootskap nie met regspersoonlikheid beklee is nie, terwyl die opinies dit duidelik stel dat die vennootskap 'n *corpus mysticum* is wat geskei van die vennote gesien moet word (kyk ook Henning en Delport 280 par 387). Hierdie opinies is gepubliseer in die laaste tydvak van die ontwikkeling van die Romeins-Hollandse reg voor kodifikasie. Dit sou moontlik nie te vergesog wees nie om te verklaar dat, vanweë die verhoogde handelsverkeer en snelle ontwikkeling wat plaasgevind het, die algemene Romeins-Hollandse standpunt uit pas geraak het met die werklikhede van die praktyk.

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VONNISSE

DIE AANSPREEKLIKHEID VAN 'N ONTSLANE EKSEKUTEUR *EX LEGE AQUILIA* TEENOOR SY AMPSOPVOLGER EN DIE MIDDELLIKE AANSPREEKLIKHEID VAN SY VENNOTE

Lindsay v Stofberg 1988 2 SA 462 (K)

Ten einde oor die geldigheid van 'n eksepsie te beslis (naamlik dat die eiser se eisbesonderhede nie 'n gedingsgrond openbaar nie) moes die hof (r Van den Heever en wn r Van Schalkwyk) sekere regsvrae, wat soos volg saamgevat kan word, beantwoord:

a Is 'n persoon, A, wat, terwyl hy die eksekuteur van 'n bestorwe boedel was, op 'n ongeoorloofde wyse bates van die betrokke boedel vir sy persoonlike doeleindes aangewend het, na sy ontslag *ex lege Aquilia* aanspreeklik teenoor B wat in sy plek as eksekuteur van daardie boedel aangestel is?

b Is die verweerders, C, D en E, onder die volgende omstandighede middellik teenoor B aanspreeklik weens A se bogemelde optrede:

i A, C, D en E het bedoel om in vennootskap met mekaar sake te doen;

ii hulle het ook bedoel dat die vennote eksekuteurswerk ten behoewe van die vennootskap sou verrig; en

iii die vennootskap is na bogemelde optrede van A ontbind?

Die betoog van die verweerders se advokaat het daarop neergekom dat albei hierdie vrae ontkennend beantwoord moet word. Die hof (per wn r Van Schalkwyk) het egter albei bevestigend beantwoord en die eksepsie van die hand gewys.

Die verweerders se advokaat het in die eerste plek aangevoer dat B se eis teen A (indien enige) gebaseer is op die skending van 'n fidusiêre plig, welke skending nie tot die *actio legis Aquiliae* aanleiding gee nie en gevolglik ook nie tot die middellike aanspreeklikheid van C, D en E nie. In die tweede plek het hy aangevoer dat die fidusiêre plig van 'n eksekuteur van 'n persoonlike aard is, dat die nakoming daarvan dus nie regtens tot 'n vennootskap se aktiwiteite kan behoort nie en dat die skending daarvan gevolglik nie tot middellike aanspreeklikheid kan lei nie. Daar word eers kortliks aandag geskenk aan die hof se antwoord op laasgemelde argument waarna eersgenoemde argument vollediger bespreek sal word.

Die hof wys daarop dat

> "*[e]x facie* the averments in the particulars of claim in the instant case, the erstwhile partners, *inter se*, considered the activities of [A], *qua* executor, to be in the nature of partnership business" (467).

Die hof stel dit weliswaar nie in soveel woorde nie, maar dit blyk nogtans dat die hof van mening was dat hoewel A onbevoeg was om ingevolge artikel 52 van die Boedelwet 66 van 1965 deur substitusie of surrogasie 'n ander persoon as eksekuteur in sy plek te laat optree, die blote feit dat die vennote A, C, D en E onderling A se eksekuteurswerksaamhede as behorende tot die vennootskapsaktiwiteite beskou het, voldoende was om daardie werksaamhede regtens vennootskapsaktiwiteite te maak. Derhalwe is sy vennote middellik aanspreeklik vir onregmatige dade wat hy in die bestek van die vennootskapsaktiwiteite gepleeg het. Hierdie standpunt kom my korrek voor.

Vervolgens word aandag geskenk aan die verweerders se eersgenoemde argument. Die kern hiervan *is dat B nie die* actio legis Aquiliae *teen A kan instel nie* (en dat daar derhalwe nie ruimte vir die middellike aanspreeklikheid van A se vorige vennote, C, D en E, is nie). Ter ondersteuning hiervan het hulle advokaat na die volgende *dictum* van regter Coetzee in *Clarkson v Gelb* 1981 1 SA 288 (W) 295 verwys:

> "It seems therefore clear that in our common law an action exists against an executor at the suit of the heirs to recover the loss which they have suffered as a result of his maladministration of the estate. This is not the Aquilian action but it is an incident of the special fiduciary position which the executor holds, having 'taken in charge the affairs of others'. These 'others' are the heirs in whom the right to obtain ownership of their inheritances vested at the time of the deceased's death. This type of action is one for the rendering of accounts, debatement thereof, payment of balances found to be due and payment of damages for maladministration. In view of the statutory provisions which relate to the administration of a deceased's estate, it is probably now limited in modern times to simply an action for damages" (464–465).

In sy kommentaar wys die hof daarop dat hierdie *dictum* gesag is vir slegs die stelling dat *die erfgename* 'n gemeenregtelike aksie teen 'n eksekuteur weens wanbeheer het, dat daardie aksie nie die *actio legis Aquiliae* is nie en dat dit 'n aksie vir die verhaal van skadevergoeding is. Daardie *dictum* is egter nie gesag vir die stelling dat in 'n geval waar *'n eksekuteur* 'n aksie onder die omstandighede van die onderhawige geval teen sy ampsvoorganger instel, daardie aksie ook op die skending van 'n fidusiêre plig gebaseer sou wees en nie die *actio legis Aquiliae* sou wees nie.

Hierna skenk die hof (465) aandag aan 'n tweede *dictum* in die *Clarkson*-uitspraak (*supra* 295) waarin regter Coetzee dit betwyfel dat 'n eksekuteur enige aksie hoegenaamd weens wanbeheer teen sy ampsvoorganger kan instel. Hierdie *dictum* lui soos volg:

> "The contention that only an executor can institute an action against any wrongdoer is therefore not well founded in my view as it ignores the well-developed action of the heirs against the executor to recover damages for his maladministration. The executor is the only person who can sue on behalf of the estate to recover damages for harm caused to estate assets or for their vindication (see Meyerowitz *The Law and Practice of the Administration of Estates* 5th ed at 124; *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 855–6; *Lockhat's* case *supra* at 302G). However in respect of his own maladministration he is directly answerable to the heirs. Indeed it is doubtful whether his successor has an action against him at all on this score. The estate is not the separate entity which is postulated in counsel's argument, certainly is it not a *persona* to whom duties can be owed so as to found an Aquilian action which such action will have to be as there does not seem to be an action at common law which is analogous to the *actio tutelea directa* and which the executor can institute *eo nomine*."

Die hof (465) meen dat hierdie *dictum* 'n weerspreking skyn te bevat:

> "The above-quoted passage appears, with respect, to contain a contradiction. On the one hand, it is stated that an executor may sue on behalf of the estate to recover damages

> for harm caused to the estate assets (presumably including harm caused in circumstances giving rise to Aquilian liability). On the other hand, it is stated that an estate is not a *persona* to whom duties can be owed so as to found an Aquilian action. (Cf *Estate Bazley v Estate Arnott* 1931 NPD 489–90; *Peffers NO and Another v Attorneys, Notaries and Conveyancers Guarantee Fund Board of Control* 1965 (2) SA 33 (C).)"

Vervolgens verklaar die hof dat wat die ware juridiese aard van 'n bestorwe boedel ook al mag wees, dit as gevestigde reg aanvaar moet word dat 'n eksekuteur skadevergoeding kan eis weens skade wat aan boedelbates na die erflater se dood veroorsaak is onder omstandighede wat gewoonlik ("ordinarily") aanleiding tot aanspreeklikheid *ex lege Aquilia* gee. (Die hof verwys in hierdie verband na Meyerowitz *The law and practice of administration of estates* (5e uitg) 124–125; *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 302G; *Du Toit v Vermeulen* 1972 3 SA 848 (A) 855–856; en *Clarkson v Gelb* 1981 1 SA 288 (W).) Die teenoorgestelde standpunt sou tot absurde resultate lei, meen die hof. So kan 'n boedel uit een hoofbate bestaan en dié kan deur die nalatigheid van 'n derde vernietig word. Die eksekuteur behoort immers bevoeg te wees om die derde aan te spreek, al is dit ook net om hom in staat te stel om die boedelskuldeisers te betaal. Dit sou tot allerlei anomalieë aanleiding gee indien slegs die erfgename bevoeg sou wees om 'n aksie in te stel, aldus die hof.

Nou volg 'n belangrike *dictum* (466):

> "Once it is accepted that an executor may institute an action against third persons for damages arising from harm caused to estate assets after death in circumstances which would ordinarily give rise to Aquilian liability, the question arises whether he may do so in those instances where the harm in question was caused by his predecessor. Logically, there would appear to be no reason why he should not be able to do so. The mere fact that the heirs have an action against an executor for maladministration cannot be a reason for not according an executor an action against his predecessor for harm caused to estate assets."

Hierna verklaar die hof dat dit te betwyfel is dat die *erfgename* die *actio tutela directa* (waarna in die *Clarkson*-uitspraak *supra* verwys word), teen 'n eksekuteur wat uit sy amp ontslaan is, kan instel. (Die doel van hierdie gedeelte van die hof se argument is waarskynlik om aan te dui dat aangesien die *erfgename* nie die *actio tutela directa* teen 'n eksekuteur wat wanbeheer gepleeg het en wat reeds van sy amp onthef is, kan instel nie, dit logies volg dat die ontslane eksekuteur deur sy *ampsopvolger* aangespreek kan word.)

Die hof kom dan "[i]n the light of the aforegoing and in the absence of direct authority" (466) tot die gevolgtrekking dat 'n eksekuteur bevoeg is om 'n aksie teen sy ampsvoorganger in te stel weens skade wat die boedel gely het as gevolg van die onregmatige optrede van sodanige voorganger. Die vraag is egter, verklaar die hof, of dit die *actio legis Aquiliae* is dan wel 'n aksie wat op die skending van 'n fidusiêre plig gebaseer is.

Hierdie vraag word aan die hand van die volgende redenasie deur die hof beantwoord: Daar bestaan geen rede om te onderskei tussen die aksie wat 'n eksekuteur op grond van onregmatige beskadiging van boedelbates teen derdes het en die aksie wat hy weens sodanige beskadiging teen sy ampsvoorganger kan instel nie. Dié standpunt word ondersteun deur die feit dat dit onlogies sou wees om te aanvaar dat 'n eksekuteur 'n fidusiêre plig teenoor 'n moontlike ampsopvolger het. Sodanige plig het die eksekuteur teenoor die erfgename – nie teenoor sy ampsopvolger nie. In 'n geval waar hy onregmatig boedelgoedere beskadig en uit sy amp ontslaan word, is sy ampsopvolger se aksie dus nie op

die skending van 'n fidusiêre plig gebaseer nie, want 'n eksekuteur het geen sodanige plig teenoor sy ampsopvolger nie. Die aksie wat sy "successors" (*sic*) mag instel, is "the settled action which an executor has against third persons who wrongfully cause damage to an estate" (466). (Met "the settled action" bedoel die hof klaarblyklik die *actio legis Aquiliae*.) Ten slotte bevind die hof dat, wat die onderhawige argument betref, hoewel daar nie direkte gesag bestaan nie, die logika vereis dat hierdie aanspreeklikheid aanleiding tot middellike aanspreeklikheid kan gee.

Teen die voorgaande agtergrond word die aandag op die volgende gevestig: Regter Coetzee verklaar in die *Clarkson*-uitspraak *supra* dat dit twyfelagtig is of 'n eksekuteur wat wanbeheer gepleeg het, deur sy ampsopvolger aangespreek kan word. As rede vir sy twyfel voer hy aan dat 'n boedel

> "is not the separate entity which is postulated in counsel's argument, certainly is it not a *persona* to whom duties can be owed so as to found an Aquilian action" (sien *dictum supra*).

Ook wil dit voorkom, aldus regter Coetzee, of daar nie 'n gemeenregtelike aksie analoog aan die *actio tutela directa* tot 'n eksekuteur se beskikking staan nie. Aan die ander kant bevind die hof in die onderhawige (*Lindsay*-) uitspraak dat 'n eksekuteur wat wanbeheer gepleeg het, wél deur sy ampsopvolger met die *actio legis Aquiliae* aangespreek kan word. Die vraag is nou hoe die hof in die *Lindsay*-uitspraak sy standpunt in die lig van regter Coetzee se mening in die *Clarkson*-uitspraak motiveer.

Soos blyk uit die uiteensetting hierbo, kan die hof se argument soos volg saamgevat word: (i) Vir die beantwoording van die vraag of 'n eksekuteur 'n *derde* wat skade aan boedelbates veroorsaak het onder omstandighede wat gewoonlik tot aanspreeklikheid *ex lege Aquilia* aanleiding gee, vir skadevergoeding kan aanspreek, *is die ware juridiese aard van 'n bestorwe boedel irrelevant*. (Vgl: "whatever the true juridical nature of an estate may be . . ." (465).) Die antwoord op dié vraag is immers in elk geval bevestigend. (ii) Daar bestaan geen logiese rede waarom 'n eksekuteur nie op dieselfde wyse teen sy ampsvoorganger kan optree nie – *wat die ware juridiese aard van 'n bestorwe boedel ook al mag wees*. (iii) Daar bestaan geen logiese rede waarom onderskei moet word tussen die aksie wat 'n eksekuteur kan instel teen 'n derde wat boedelbates beskadig het en die aksie wat hy teen sy ampsvoorganger weens sodanige beskadiging het nie: in albei gevalle is dit die *actio legis Aquiliae*.

Dit kom my voor of daar 'n vraagteken agter die logika van die tweede stap van hierdie argument geplaas kan word. As 'n mens hierdie stap in die lig van die eerste en derde stappe ontleed, blyk dit dat die hof die volgende standpunt inneem: dit maak nie saak wat die ware juridiese aard van 'n bestorwe boedel is nie – die eksekuteur kan *in elk geval* sy ampsvoorganger wat boedelbates beskadig het, soos 'n derde, met die *actio legis Aquiliae* aanspreek. Maar is dit waar? Speel die aard van 'n bestorwe boedel werklik geen rol in hierdie verband nie? Gestel dat regter Coetzee se standpunt in die *Clarkson*-uitspraak *supra* korrek is, naamlik dat "[t]he estate is not the separate entity which is postulated in counsel's argument, certainly is it not a *persona*" (sien *dictum supra*), en gestel verder dat dié stelling inhou dat 'n bestorwe boedel *nie 'n afsonderlike vermoë met 'n eie subjek is nie maar dat dit 'n onderdeel van die eksekuteur se persoonlike vermoë vorm*; dan sou 'n eksekuteur, A, wat boedelgoedere beskadig, sy eie,

persoonlike bates beskadig en sou daardeur geen bestaande reg van sy toekomstige ampsopvolger, B, aangetas word nie. Wanneer B as eksekuteur aangestel word nadat A van sy amp onthef is, sou hy (B) weliswaar minder bates ontvang as wat hy sou ontvang het as A nie sy eie bates beskadig het nie, maar dit is *uiters twyfelagtig* of ons howe B se "nadeel" as relevant vir doeleindes van die *actio legis Aquiliae* sal beskou. (Net so is dit te betwyfel – indien nie geheel en al ondenkbaar nie – dat 'n persoon wat voor die sekwestrasie van sy boedel sy eie bates vernietig, na sodanige sekwestrasie met die *actio legis Aquiliae* deur die kurator van sy boedel aangespreek kan word weens die "nadeel" wat die kurator as gevolg van die batevernietiging gely het.)

Indien egter aanvaar sou word dat 'n eksekuteur *in sy amptelike hoedanigheid* die subjek van die vermoë onder sy beheer is (vgl bv *De Wet v Attie Badenhorst Edms Bpk* 1963 SA 117 (T) 119; *Ex parte Puppli* 1975 3 SA 461 (D) 466) en dat dit beteken dat 'n eksekuteur 'n afsonderlike regsubjektiwiteit as eksekuteur het (naas sy "persoonlike" regsubjektiwiteit), dan sou 'n mens soos volg kan redeneer in 'n geval waar 'n eksekuteur boedelbates beskadig:

(i) Wanneer die eksekuteur boedelgoedere beskadig of op 'n ander wyse wanbeheer pleeg, pleeg hy in sy persoonlike hoedanigheid 'n delik teenoor homself in sy amptelike hoedanigheid. (ii) Hy verkry in sy amptelike hoedanigheid 'n vorderingsreg teenoor homself in sy persoonlike hoedanigheid. (iii) Hierdie vorderingsreg is 'n bate van die bestorwe boedel. (iv) Wanneer die eksekuteur weens wanbeheer ontslaan en 'n nuwe eksekuteur aangestel word, gaan hierdie vorderingsreg saam met die ander boedelbates en -laste op die nuwe eksekuteur oor. (v) Die nuwe eksekuteur is dan bevoeg om op grond van hierdie vorderingsreg wat op hom oorgegaan het, die oud-eksekuteur in sy persoonlike hoedanigheid aan te spreek. (Dit wil voorkom of die uitspraak van die Natalse hof in *Estate Bazley v Estate Arnott* 1931 NPD 481 op 'n redenasie gebaseer is wat hiermee 'n ooreenkoms vertoon. Vgl ook *Strachan v The Master* 1963 2 SA 620 (N) 625 waar die hof beslis het dat die ampsopvolgers van twee oud-eksekuteurs wat wanbeheer gepleeg het "have no more than a claim against Chinniah and Satya [die oud-eksekuteurs] for damages for the loss sustained to the estate through their improper administration". Die teoretiese verklaring vir sodanige eis blyk egter nie uit die uitspraak nie.)

Sou 'n mens hierteenoor aanvoer dat 'n bestorwe boedel aan 'n regspersoon behoort, sou soos volg geredeneer kon word: (i) Die eksekuteur wat wanbeheer pleeg, pleeg in sy persoonlike hoedanigheid 'n delik teenoor die regspersoon waarvan hy die orgaan is. (ii) Die vorderingsreg wat uit hierdie delik voortvloei, vorm deel van die regspersoon se bates en wanneer die onregpleger ontslaan word en 'n nuwe eksekuteur aangestel word, vind daar geen oorgang van bates en laste op die nuwe eksekuteur plaas nie; daar vind slegs 'n vervanging van regspersoon-organe plaas. (iii) Die nuwe eksekuteur dwing dan as nuwe orgaan van die regspersoon laasgenoemde se vorderingsreg teenoor die oud-eksekuteur af.

Indien, ten slotte, 'n oorledene se regsubjektiwiteit na sy dood gekontinueer word en 'n bestorwe boedel dus steeds aan die oorledene behoort, sou 'n eksekuteur wat wanbeheer pleeg 'n delik teenoor die oorledene pleeg. 'n Vorderingsreg vir die betaling van skadevergoeding sou deur die oorledene verwerf word en deel van sy boedel word. Na die aanstelling van die onregpleger se

ampsopvolger sou die ontslane eksekuteur deur die nuwe eksekuteur wat namens die oorledene optree, *ex lege Aquilia* aangespreek kon word.

Dit blyk uit die voorgaande dat die ware juridiese aard van 'n bestorwe boedel wél relevant is vir die beantwoording van die vraag of 'n eksekuteur *ex lege Aquilia* sy ampsvoorganger kan aanspreek – na gelang die vraag wie of wat die subjek van 'n bestorwe boedel is, verskillend beantwoord word, kan verskillende antwoorde ten opsigte van sodanige ampsvoorganger se aanspreeklikheid verkry word.

Die volgende teenargument kan miskien aangevoer word: (i) Die *enigste* teoretiese "konstruksie" van 'n bestorwe boedel wat tot die gevolgtrekking lei dat 'n oud-eksekuteur (waarskynlik) *nie* deur sy ampsopvolger *ex lege Aquilia* aangespreek kan word nie, is dié waarby aanvaar word dat 'n bestorwe boedel aan die eksekuteur in sy *persoonlike* hoedanigheid behoort. (ii) *Alle* ander teoretiese "konstruksies" van 'n bestorwe boedel (byvoorbeeld dat dit aan die eksekuteur in sy amptelike hoedanigheid of aan 'n regspersoon behoort) lei wél tot die gevolgtrekking dat 'n oud-eksekuteur onder bepaalde omstandighede aldus deur sy ampsopvolger aangespreek kan word. (iii) Die opvatting dat 'n bestorwe boedel aan die eksekuteur in sy persoonlike hoedanigheid behoort, is egter so vergesog dat 'n mens nie redelikerwys daarmee rekening hoef te hou nie. Regter Coetzee kon onmoontlik bedoel het om in die *Clarkson*-uitspraak te kenne te gee dat hy dié opvatting huldig. (iv) Dus is dit logies verantwoordbaar om by die beantwoording van die vraag of 'n oud-eksekuteur onder bepaalde omstandighede deur sy ampsopvolger *ex lege Aquilia* aangespreek kan word, van die uitgangspunt uit te gaan dat dit *nie* saak maak wat die ware juridiese aard van 'n bestorwe boedel is nie: *alle* teoretiese "konstruksies" van 'n bestorwe boedel *waarmee redelikerwys rekening gehou moet word*, lei immers tot die gevolgtrekking in stap (ii) van hierdie argument (hierbo) vermeld.

Dit kom my egter voor of hierdie argument gebrekkig is, vanuit 'n logiese oogpunt gesien, selfs al word aanvaar dat die stellings vervat in die derde stap daarvan feitelik korrek is. Die logiese fout lê in die eerste stap van die argument opgesluit. 'n Mens kan naamlik nie die stelling maak dat teoretiese "konstruksie" A die *enigste* is wat tot gevolgtrekking X lei, alvorens *alle* ander "konstruksies" waarmee redelikerwys rekening gehou moet word, nie "getoets" is om vas te stel of hulle nie ook tot gevolgtrekking X lei nie. En dit het die hof nie gedoen nie – altans nie *in sy uitspraak* nie. Dit is egter moontlik dat die hof in sy nie-op-skrif-gestelde oorweging van die aangeleentheid wél alle teoretiese "konstruksies" van 'n bestorwe boedel, waarmee redelikerwys rekening gehou moet word, "getoets" het en gevind het dat almal tot die gevolgtrekking lei dat 'n oud-eksekuteur onder bepaalde omstandighede met die *actio legis Aquiliae* deur sy ampsopvolger aangespreek kan word. Maar al is dit die geval, het die hof nie *in sy uitspraak gedemonstreer* dat sy redenasie geldig is nie. Veral gesien in die lig van regter Coetzee se opmerkings in die *Clarkson*-uitspraak *supra* oor die aard van 'n bestorwe boedel en die hof (in die *Lindsay*-uitspraak) se bedenkinge oor die antwoord op die vraag of regter Coetzee homself nie weerspreek het nie, sou die oortuigingskrag van die onderhawige uitspraak verhoog gewees het as die hof die vraag na die aanspreeklikheid van 'n oud-eksekuteur (wat wanbeheer gepleeg het) teenoor sy ampsopvolger, beantwoord het aan die hand van 'n grondige ondersoek *in die uitspraak* na die ware juridiese aard van 'n bestorwe boedel. Die hof het egter nie sodanige ondersoek ingestel nie.

In die lig van die voorgaande kan gevra word: wat is die ware juridiese aard van 'n bestorwe boedel? Het dit 'n subjek en indien wel, wie of wat is dit? By die beantwoording van hierdie vraag beperk ek my tot die bestorwe boedel van 'n persoon wat ongetroud was of van 'n persoon wat buite gemeenskap van goedere getroud was. Die juridiese aard van die sogenaamde gemeenskaplike bestorwe boedel word dus buite rekening gelaat. Die standpunte wat hierna gestel word, kan egter nie in hierdie vonnisbespreking gemotiveer word nie. Die leser wat meer hiervan wil weet, word aanbeveel om my proefskrif *Universele opvolging in die Suid-Afrikaanse erfreg* (Annale van die Universiteit van Stellenbosch vol 5 reeks B nr 1 1983) te raadpleeg. Na my mening is die posisie soos volg:

'n Bestorwe boedel, synde 'n eenheid van bates en laste, is nie 'n subjeklose vermoë nie (a w 229 e v); behoort nie aan die erfgename nie (a w hfst XI); het nie die erflater as subjek nie (a w 233 e v); behoort nie aan die meester van die hooggeregshof nie (a w 239 e v); behoort nie aan die eksekuteur in sy persoonlike of amptelike hoedanigheid nie (a w 242 e v); behoort ook nie aan 'n regspersoon, bestaande uit die "boedel" in die sin van 'n eenheid van bates en laste nie (a w 268 e v); maar behoort wél aan 'n regspersoon wat in die regsverkeer "boedel" of "estate" *genoem* word, maar wat in werklikheid uit 'n *bestuursliggaam met regspersoonlikheid* bestaan (a w 268 e v).

Hierdie bestuursliggaam is saamgestel uit die *juridiese eenheid* van die volgende persone en instansies wat by die bereddering van 'n bestorwe boedel betrokke is: die hof wat in belangrike opsigte oor die bereddering van bestorwe boedels toesig hou (vgl a 11(1)(b) 30(b) 36 43(6) 54(1)(a) 95 van die Boedelwet van 1965) en as *opperbestuurder* regshandelinge deur bestuurders van laer rang kan magtig (vgl bv *Ex parte Battenhausen* 1936 KPA 94); die meester van die hooggeregshof en adjunk- en assistent-meesters wat enersyds hulle funksie onder toesig van die hof vervul en andersyds, *as bestuurders van die tweede rang*, toesig oor die bewaring en bereddering van die betrokke nalatenskap hou (vgl bv a 27–30 32 34–36 38 40 43 45 47–49 51–53 van die Boedelwet van 1965); en verder uit een of meer van die volgende *bestuurders van die laagste rang* en hulle ampsopvolgers (afhangende daarvan of hulle in 'n bepaalde geval aangestel is): een of meer tussentydse kurators (vgl a 12 van die Boedelwet van 1965); een of meer eksekuteurs (vgl a 13–29 32–36 39–56 van die Boedelwet van 1965) en een of meer boedelberedderaars (anders as eksekuteurs) wat ingevolge subartikels 18(3) of 25(1) van die Boedelwet van 1965 aangestel is.

'n Bestuursliggaam met regspersoonlikheid is geensins 'n vreemde of geheimsinnige regsfiguur nie. Bestuursliggame met regspersoonlikheid is 'n alledaagse regsverskynsel, byvoorbeeld beheerrade ingestel kragtens die Bemarkingswet 59 van 1968; Besproeiings- en waterrade (vgl a 79 108 van die Waterwet 54 van 1956); nywerheidsrade (vgl a 20 van die Wet op Arbeidsverhoudinge 28 van 1956) en beroepsrade soos die Suid-Afrikaanse Raad op Verpleging (vgl a 2 van die Wet op Verpleging 50 van 1978), die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad (vgl a 2 van die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe 56 van 1974) en die Suid-Afrikaanse Aptekersraad (vgl a 2 van die Wet op Aptekers 53 van 1974).

Waarom sou ons reg nie ten aansien van elke bestorwe boedel voorsiening kan maak vir 'n bestuursliggaam met regspersoonlikheid met die administratiefregtelike taak om dit te beredder nie?

Hierbo is gesê dat die regspersoon waaraan 'n bestorwe boedel behoort, in die regsverkeer "boedel" of "estate" genoem word. Hier volg enkele voorbeelde van gevalle waarin die terme "boedel" en "estate" gebesig word in die sin van *subjek* van die boedel:

- "The movable assets are now in the possession of the estate . . ." (*Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 348).
- "The estate is only the payee of what the deceased has earned . . ." (*CIR v Estate Hersov* 1952 2 SA 559 (A) 564).
- "[T]he estate can only act through the executor and so while the executor is in charge of it, it can only do what he can do" (*Henderson v Bartlett* 1950 3 SA 109 (W) 116).
- "Die koste in beide Howe moet deur die boedel betaal word" (*Grobbelaar v Grobbelaar* 1959 4 SA 719 (A) 725).

Om, ten slotte, na die *Lindsay*-uitspraak terug te keer: op grond van die standpunt dat 'n bestorwe boedel in werklikheid aan 'n regspersoon behoort, meen ek dat die hof tot die korrekte slotsom gekom het in verband met die vraag of 'n eksekuteur sy ampsvoorganger met die *actio legis Aquiliae* kan aanspreek. Daar kan egter na my mening kritiek gelewer word op die wyse waarop die hof geredeneer het ten einde daardie slotsom te bereik; dit wil sê deur van die uitgangspunt uit te gaan dat dit by die beantwoording van dié vraag nie saak maak wat die ware juridiese aard van 'n bestorwe boedel is nie.

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DIE ROL VAN OPSET EN DIE *BONI MORES* BY ONREGMATIGE MEDEDINGING

Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd
(1) 1988 2 SA 350 (W)

Beide partye tot hierdie geding is vervaardigers van tandepasta. In Junie 1986 het die verweerder (applikant) met 'n advertensiekampanje begin waarin onder andere beweer is dat sy tandepasta ("Mentadent P") die vorming van tandsteen inhibeer of verhoed en dat daar wetenskaplik aanvaarbare kliniese bewys hiervan bestaan. Die eiser (respondent), wat in Julie van dieselfde jaar 'n nuwe produk ("New Colgate Tartar Control Formula") begin bemark het, het aangevoer dat die verweerder se bewerings vals is en dat die maak daarvan sy werfkrag aangetas het as gevolg waarvan hy ernstige skade gely het. Op grond hiervan het hy 'n interdik aangevra waarvolgens die verweerder verbied word om die betrokke advertensies te publiseer of te versprei. Die verweerder het op verskeie gronde eksepsie aangeteken, waarvan slegs een uiteindelik beslis moes word. Dié eksepsie word soos volg deur die hof weergegee:

> "That the plaintiff had failed to allege facts which, if proved, would establish the element of wrongfulness necessary to sustain an action for an interdict based upon the delict of

unlawful competition. In particular it was contended that it was necessary for the plaintiff to allege *dolus* on the part of the defendant" (353C).

Die hof bevind dat *dolus* nie 'n rol speel by die bepaling van onregmatigheid in die mededingingsfeer nie en wys die eksepsie van die hand. Die hele vraagstuk rondom die verwantskap tussen skuld en onregmatigheid in die deliktereg wat deur hierdie saak na vore gebring word, is een waaroor daar nog nie volkome duidelikheid bestaan nie en dié uitspraak verg dus nadere ontleding. Alhoewel die afsonderlikheid van onregmatigheid en skuld natuurlik deesdae nie meer 'n teoretiese vraagstuk is nie, is daar nog lank geen eenstemmigheid oor die vraag of skuld 'n invloed op die bepaling van onregmatigheid het of behoort te hê nie.

Ten eerste is dit myns insiens moeilik om die feitlike rol van skuld by ten minste sommige gevalle van wederregtelikheidsbepaling deur ons howe te ontken, want, soos Boberg (*The law of delict vol 1: Aquilian liability* (1984) 32 39) tereg verduidelik, word wederregtelikheid dikwels sonder moeite aanvaar indien die skade opsetlik veroorsaak is, terwyl daar meer versigtig te werk gegaan word indien dieselfde skade deur nalatige gedrag veroorsaak is. Die veroorsaking van suiwer ekonomiese verlies deur 'n wanvoorstelling is die skoolvoorbeeld van hierdie verskynsel.

In die onderhawige saak is dan ook namens die verweerder aangevoer dat uit ons regspraak blyk dat mededinging (behalwe waar dit binne een van die geykte kategorieë van onregmatige mededinging val) slegs as onregmatig aangemerk kan word indien die verweerder met opset gehandel het. Die verweerder steun op 'n groot aantal beslissings, waarvan slegs sommige ernstige oorweging regverdig. Die argumente van die verweerder gebaseer op *Barclays Bank (DC and O) v Volkskas Bpk* 1951 4 SA 630 (T) 356B–G; *The Mogul Steamship Company Ltd v McGregor and Gow* 1889 QBD 598 (CA) 357I–358E en *Post Newspapers (Pty) Ltd v World Printing and Publishing Co Ltd* 1970 1 SA 454 (W) 359B–I het weinig om die lyf en die hof maak tereg korte mette daarmee. 'n Groep gewysdes verskaf egter meer gesag vir die standpunt van die verweerder en moet van nader bekyk word.

Regter van Schalkwyk behandel heel eerste *Geary and Son (Pty) Ltd v Gove* 1964 1 SA 434 (A) en beslis dat die formulering van die vereistes in daardie saak nie geïnterpreteer behoort te word as sou dit die beginsel meerlê dat *dolus* 'n onontbeerlike element van 'n onregmatige mededingingsaksie is nie. Hy wys daarop dat die eiser in die saak spesifiek in sy pleitstukke beweer het dat die verweerder die gewraakte wanvoorstellings opsetlik gemaak het en dat die volgende *dictum* (waarop die verweerder onder andere gesteun het) in die lig van die vorm van die pleitstukke gelees moet word:

> "The plaintiff does not base its case upon a misrepresentation negligently made, but upon wilful falsehood, i.e. an intentional wrongful act on the part of the defendant. What it has to allege and prove, therefore, is that the defendant has, by word or conduct or both, made a false representation, that it knew the representation to be false, that the plaintiff has lost or will lose customers, that the false representation is the cause thereof, and that the defendant intended to cause the plaintiff that loss by the false representation" (441C).

In *Stellenbosch Wine Trust Ltd v Oude Meester Group; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd* 1972 3 SA 152 (K) het regter Theron egter, met verwysing na die *Geary*-saak, as 'n positiewe vereiste vir die verkryging van 'n interdik gestel

> "[that] the defendant intended to cause the plaintiff that loss by the false representation".

Hierdie vereiste is weer met 'n beroep op laasgenoemde saak deur waarnemende regter Kriegler in *Escherich Development (Pty) Ltd v Andrew Mentis Steel Sales (Pty) Ltd* 1983 3 SA 810 (W) aanvaar.

In die onderhawige saak beslis regter Van Schalkwyk dat opset in beide hierdie sake *per incuriam* as vereiste gestel is (335E–I). Hy verklaar dat die hof in die *Stellenbosch Wine Trust*-saak buite rekening gelaat het dat die formulering van die vereistes in die *Geary*-saak deur die vorm van die pleitstukke bepaal is en dat waarnemende regter Kriegler in die *Escherich*-saak die formulering van regter Theron in die *Stellenbosch Wine Trust*-saak sonder verdere oorweging oorgeneem het. Die hof steun op Van Heerden en Neethling (*Onregmatige mededinging* (1983) 89) wat in die loop van hul kritiese bespreking van laasgenoemde saak verklaar dat regter Theron verkeerdelik aangeneem het dat die vereistes vir 'n interdik en dié van die Aquiliese aksie dieselfde is en dat 'n interdik

> "bloot op grond van die onregmatigheid van die gewraakte handeling verleen [behoort] te word. Die vraag of die dader ook skuld (hetsy opset of nalatigheid) gehad het, is hier volkome irrelevant."

Maar is dit werklik irrelevant? Boberg (*op cit* 152) sal nie saamstem nie en die volgende kritiese opmerking moet ook vir hierdie saak geld:

> "The availability of an interdict – a very important remedy in this field [onregmatige mededinging] – is not dependent upon fault (see Neethling (1980) 43 *THRHR* 437 at 439). On the other hand it does require wrongfulness, and the interference of which the plaintiff complains may not be wrongful unless it was culpable. This point seems to have been overlooked by Naude *Competition* [in *LAWSA* II] §509 n18 in his criticism of Nicholas J's judgment in *Post Newspapers (Pty) Ltd v Word Printing and Publishing Co Ltd* 1970 (1) SA 454 (W)."

En ietwat vroeër op dieselfde bladsy verklaar hy:

> "[T]he gravity of the defendant's fault (ie whether he acted intentionally or only negligently) must remain a relevant policy factor in determining whether his competition is unreasonable and hence unlawful."

Maar waarom is skuld en ook die besondere verskyningsvorm van die skuld relevante beleidsoorwegings? Boberg (*op cit* 149) wys onder andere daarop (sonder om dit as 'n noodwendige vereiste te stel) dat opset 'n belangrike funksie kan vervul om die gevaar van oewerlose aanspreeklikheid in hierdie tipe geval teë te werk, terwyl dit natuurlik ook moontlik is om te argumenteer dat die gemeenskap nie nalatige mededingingshandelinge wil sensureer nie omdat dit gesonde mededinging te veel aan bande sal lê. Alhoewel dit nie ontken kan word nie dat die hof in beide die *Stellenbosch Wine Trust*- en die *Escherich*-saak moontlik uit onagsaamheid opset as 'n vereiste gestel het (soos regter Van Schalkwyk in die onderhawige saak te kenne wil gee), is dit in die lig van bogenoemde dus ook moontlik dat daar 'n definitiewe, dog onverklaarde, doel aan die stel van *dolus* as vereiste ten grondslag gelê het. (En natuurlik dui die gebruik van opset op hierdie manier nie op 'n verwarring tussen skuld en onregmatigheid nie, maar eerder op die noodwendige verweefdheid van die verskillende elemente van 'n delik.)

Indien aanvaar word dat opset wel 'n rol *kan* speel by onregmatigheidsbepaling, is die volgende vraag uiteraard of dit 'n rol *behoort* te speel. Ter ondersteuning van sy argument dat gedrag wat volgens die *boni mores* onhoudbaar is, wederregtelik is of dit nou opsetlik geskied het of nie, gebruik regter Van Schalkwyk die volgende voorbeeld: As 'n handelaar 'n boereraat (waarin hy absoluut glo) begin bemark teen 'n veel goedkoper prys as die soortgelyke produk

van 'n gevestigde mededinger, maar dié middel blyk later nie een van die attribute te hê wat daaraan toegedig is nie, kan die handelaar nie hoop om 'n aansoek om 'n interdik suksesvol teen te staan bloot op grond van die feit dat hy 'n onwrikbare geloof gehad het dat sy middel wel oor die beweerde kwaliteite beskik het nie. Hierdie voorbeeld skyn met die eerste oogopslag duidelik te maak dat opset nie redelikerwys as 'n vereiste gestel behoort te word nie. Tog is daar ook 'n teenargument. Daar moet naamlik onthou word dat 'n interdik nie alleen verleen word op grond van 'n reeds gepleegde en voortgesette onregmatige handeling nie, maar ook op grond van 'n slegs dreigende onregmatige handeling. Dit is dan moontlik om ten aansien van bogenoemde voorbeeld te argumenteer dat die handeling van die boereraatvervaardiger slegs as onregmatig beskou sal word indien dit opsetlik verrig is en dan nogtans die interdik toe te staan as dit blyk dat hy steeds in die toekoms sy produk gaan versprei, omdat sodanige verspreiding *dan* natuurlik opsetlik (en dus onregmatig) sal wees.

Myns insiens sou dit egter onnodig beperkend wees om opset as 'n noodwendige deel van die onregmatigheidsbeslissing ten aansien van 'n mededingingshandeling te beskou.

In die eerste plek sou dit daarop neerkom dat opset ook die enigste moontlike skuldvorm by hierdie tipe onregmatige daad sal wees – en dit is onaanvaarbaar. Alhoewel die onregmatige mededingingsake wat voor ons howe gedien het nog altyd met opset gepaard gegaan het, is die belangrikste skrywers op hierdie gebied (Van Heerden en Neethling *op cit* 26–27 en Boberg *op cit* 152) dit eens dat onregmatige mededinging wat nalatig geskied ook in beginsel ageerbaar behoort te wees. Enige poging om opset effektief as die enigste skuldvorm by onregmatige mededinging te vestig, sou verder ook indruis teen die feit dat die regspraak aanspreeklikheid in hierdie verband reeds herhaaldelik en duidelik op 'n Aquiliese grondslag geplaas het (sien *Schulz v Butt* 1986 3 SA 667 (A)). (In hierdie verband kan ook net terloops vermeld word dat nalatige onregmatige mededinging nie so onwaarskynlik is as wat dit met die eerste oogopslag mag blyk te wees nie. Alhoewel alle aksies van mededingers noodwendig gerig is op die benadeling van die ander se werfkrag, sal opset nie by 'n mededinger teenwoordig wees tensy hy wederregtelikheidsbewussyn het nie: indien hy egter iets doen om 'n mededinger se werfkrag te benadeel sonder dat hy wederregtelikheidsbewussyn het, maar die redelike man sou wel die onregmatigheid van die handeling voorsien het, moet daardie handeling noodwendig as 'n gedingsvatbare geval van onregmatige mededinging aangemerk word. Vergelyk oor wederregtelikheidsbewussyn as 'n element van 'n onregmatige daad, Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1985) 122–125; Boberg *op cit* 271 en, spesifiek met betrekking tot onregmatige mededinging, Van Heerden en Neethling *op cit* 27.)

Tweedens sou die stel van opset as 'n noodwendige vereiste die howe grootliks aan bande lê in hul interpretasie van die *boni mores* op hierdie gebied. My standpunt in hierdie verband kan soos volg verduidelik word: Onregmatigheid is 'n relatiewe begrip (*Shell & BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); Boberg *op cit* 134). Dit beteken dat 'n handeling tegelykertyd onregmatig teenoor verbruikers maar regmatig teenoor mededingers kan wees. As 'n mens verder in gedagte hou dat onregmatige mededingingsaksies gegrond op misleiding ten aansien van eie ware gebruik kan word as 'n wapen om potensiële mededingers uit die mark te hou en sodoende

die verbruiker as gevolg van die verminderde mededinging kan benadeel, is dit duidelik dat 'n aksie van dié aard *tussen mededingers* onderling nie sonder kwalifikasie erken kan word nie. (In die *Butt*-saak *supra* 679E word dan ook uitdruklik verklaar dat die belang van 'n vrye mark en kompetisie in ons ekonomiese sisteem relevante oorwegings by die bepaling van onregmatigheid in die mededingingsfeer is.) Hierdie oorweging (tesame met die moontlikheid van oewerlose aanspreeklikheid) dui natuurlik sterk op die wenslikheid van opset as 'n vereiste ten einde aksies te ontmoedig. Dit is dan ook interessant om daarop te let dat alhoewel 'n aksie op grond van die toedigting van fiktiewe kwaliteite aan 'n produk in die VSA deur beide die gemenereg en artikel 43(a) van die Lanham Act (15 USCA §1125 (a)) moontlik gemaak word (*American Brands, Inc v R J Reynolds Tobacco Co* (1976) 413 F Supp 1352 1355–1356), Jordan en Rubin ("An economic analysis of the law of false advertising" 1979 *The Journal of Legal Studies* 527) selfs argumenteer dat daar uit 'n makro-ekonomiese perspektief geen noodsaak is om so 'n aksie aan mededingers beskikbaar te stel nie. Die stel van sowel opset as 'n noodwendige vereiste as die algehele ontkenning van 'n aksie tussen mededingers is myns insiens egter te drasties. Ek meen dat skuld – en die vorm daarvan – kreatief gebruik kan word om die grense van onregmatigheid te bepaal. Jordan en Rubin *op cit* 531 maak byvoorbeeld die volgende indeling van bewerings omtrent goedere of dienste:

> "With respect to advertising . . . the characteristics of goods and services form a continuum, from those in which it is very easy to detect the truth or falsity of advertising claims (search goods: the truth can be ascertained before purchase) through experience goods (where the truth of the claim can be detected only after purchase and use) through credence goods (where the validity of advertisements may never be determined)."

Dit is nou moontlik om te sê dat 'n hof na gelang van die feit of hy te make het met sogenaamde "search goods" (soos 'n elektriese tandeborsel wat beweer word geruisloos te wees), of "experience goods" (soos 'n tandepasta wat beweer word 'n sekere smaak te hê), of "credence goods" (soos 'n tandepasta wat beweer word tandsteen te inhibeer) òf opset, òf opset en nalatigheid, òf geeneen 'n rol by die onregmatigheidsbepaling kan laat speel. Om in beginsel (waar dit om aksies tussen mededingers onderling gaan) slegs opsetlike misleiding af te keur in gevalle waar die verbruiker in staat is om maklik vooraf vas te stel of die bewering waar is al dan nie, maar beide opsetlike en nalatige misleiding te verbied waar die produk nie te duur is nie en die bewering met een gebruikslag getoets kan word, en laastens selfs onskuldige misleiding as onregmatig aan te merk waar die verbruiker die akkuraatheid van die bewering glad nie of slegs baie moeilik sal kan toets, sou 'n heel nuttige beleidsfaktor daarstel wat, natuurlik nie alleenstaande nie, maar in samewerking met ander beleidsfaktore, 'n balans tussen die belange van die gemeenskap enersyds en mededingers andersyds kan bewerkstellig. Dit skyn my in ooreenstemming te wees met die benadering ten aansien van onregmatigheid in die mededingingsfeer soos uiteengesit in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 188H:

> "What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play . . . In determining and applying this norm [te wete die *boni mores*] in a particular case, the interests of the competing parties have to be weighed, bearing in mind also the interests of society, the public weal."

Maar as dit eenmaal aanvaar is, bring dit onmiddellik 'n verdere aangeleentheid na vore: hoe moet nou bepaal word of die aanwending van skuld as beleidsfaktor

op bostaande wyse wel deel van die regsgevoel van die gemeenskap vorm? Die antwoord op hierdie vraag moet natuurlik gesoek word in die algemene benadering van die howe ten aansien van die bepaling van die *boni mores* op hierdie gebied. Die volgende verklaring van regter Van Dijkhorst in die *Pikkewyn Ghwano*-saak *supra* met betrekking tot die vasstelling van die *boni mores* by onregmatige mededinging het reeds algemene aanvaarding (ook in die onderhawige saak) gevind:

> "As this norm cannot exist *in vacuo*, the morals of the market place, the business ethics of that section of the community where the norm is to be applied, are of major importance in its determination" (188 *in fine*–189A).

Sedert die appèlhof se eerste wankelrige treë in *Union Government v Ocean Accident and Guarantee Corporation* 1956 1 SA 577 (A) op die pad na die openlike gebruik van beleidsfaktore (deur in daardie saak die "duty of care"-beginsel as kunsmatig te beskryf en inderdaad 'n verskeidenheid van beleidsfaktore aan te wend), het die howe gevorder tot waar die gebruik van beleidsfaktore by onregmatigheidsbepaling vandag sonder skroom erken word, welke gebruik dan gelegitimeer word deur die tipering daarvan as deel van die regsgevoel van die gemeenskap (sien *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A–B; die *Butt*-saak *supra* 679C–E; Dendy 1986 *Annual Survey* 187). Dié openlike erkenning van die regskeppende funksie van die regter (hoeseer dit dan ook al deur sistemiese faktore aan bande gelê word) is uiteraard 'n gesonde ontwikkeling, maar net soos die "duty of care"-beginsel (wat oënskynlik slegs op voorsienbaarheid berus het) vroeër as 'n rookskerm vir die *gebruik* van beleidsfaktore gedien het, dien "die regsgevoel van die gemeenskap" tans as 'n rookskerm vir die *grondslag van die gebruik* van beleidsfaktore. Die aanwending van hierdie term skep naamlik die indruk dat die beslissing van die hof regverdig word op grond van die feit dat dit die waardes van die gemeenskap (in hierdie geval die besigheidsgemeenskap) reflekteer.

Hierdie regverdiging vir die regskeppende rol van die hof – die sogenaamde "consensus model" – is volgens Bell (*Policy arguments in judicial decisions* (1983) 10) die gewildste onder Engelse regters en word ook spesifiek hier te lande deur appèlregter Corbett aangehang (Corbett "Aspects of the role of policy in the evolution of our common law" 1987 *SALJ* 67–68). Dit is natuurlik nie moontlik om hier op al die argumente vir en teen hierdie regverdiging in te gaan nie, maar ek meen dat ten minste die volgende sonder meer aanvaar kan word: die klem wat hierdeur op die hof as spiëel van die gemeenskap geplaas word, neig om die funksie van die regter voor te stel as synde "die beskerming van die fundamentele struktuur van die samelewing eerder as rigtinggewing by die verandering daarvan" (Bell *op cit* 189). Tog is daar aanduidings in die regspraak – en dan ook spesifiek op die gebied van onregmatige mededinging – dat ons howe vatbaar is vir 'n meer "aktivistiese" houding, dit wil sê om nie slegs die *boni mores* van die besigheidsgemeenskap te interpreteer nie, maar om dit te ontwikkel deur die regsgevoel van die "regsbeleidmakers". In die *Butt*-saak haal die hof naamlik die volgende stelling van Van der Merwe en Olivier *op cit* 58 n 95 met uitdruklike goedkeuring aan:

> "[D]ie regsgevoel van die gemeenskap [moet] opgevat word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter."

Hiermee bedoel die hof natuurlik nie om die ongebonde regsgevoel van die regter in die plek van die regsgevoel van die gemeenskap te stel nie. Meer waarskynlik moet hierdie *dictum* van die appèlhof interpreteer word om te

beteken dat die regsbeleidmakers se regsgevoel gevorm behoort te word met inagneming van soveel as moontlik van die fundamentele waardes van die gemeenskap. Maar selfs al word die *dictum* so uitgelê, doen dit nie afbreuk nie aan die feit dat dit veel duideliker erkenning gee aan die "aktivistiese" rol van die regter as die formulering in sowel die *Pikkewyn Ghwano*-saak as die saak tans onder bespreking. En hierdie erkenning deur ons hoogste hof laat dan ook heel duidelik ruimte vir die aanwending van skuld as 'n beleidsfaktor op die hierbo-vermelde wyse, want al vorm dit nie deel van die *mores* van die besigheidsgemeenskap nie, kan die hof (as "regsbeleidmaker") rigting gee deur dit as sodanig in te voer.

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WYSIGING VAN VERKEERDE REG

Du Plessis v Strauss 1988 2 SA 105 (A); Horowitz v Brock 1988 2 SA 160 (A)

In die April 1988-uitgawe van *Die Suid-Afrikaanse hofverslae* verskyn twee beslissings van die appèlhof oor die erfreg. In die een was die hof bereid om af te wyk van verkeerde beslissings wat laer howe oor 'n tydperk van ongeveer tagtig jaar gegee het. In die ander was die hof nie bereid om te oorweeg of uitsprake wat oor ongeveer dieselfde tydperk gelewer is, verkeerd is nie.

Du Plessis v Strauss 1988 2 SA 105 (A) het te doen gehad met die *si sine liberis decesserit*-klousule. Die vraag was naamlik of sodanige klousule 'n *fideicommissum tacitum* skep ten gunste van die kinders wat in die klousule genoem word waar hulle afstammelinge van die testateur is. Sedert die uitspraak in *Steenkamp v Marais* (1908) 25 SC 483 is die standpunt in ons howe ingeneem dat die kinders nie fidusiêre regte verkry nie (sien bv ook *Ex parte Richter Visser* 1945 OPD 297; *Engelbrecht v Engelbrecht* 1958 3 SA 571 (O); *Ex parte Van Tonder* 1978 3 SA 369 (OK)). Sommige skrywers het egter die appèlhofbeslissing in *Estate Cato v Estate Cato* 1915 AD 290 as gesag beskou vir die standpunt dat die kinders wel fidusiêre regte verkry waar hulle afstammelinge van die erflater is (sien bv Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1987) 310–311; Murray 1968 *Annual Survey* 238–239 en Cronjé 1978 *THRHR* 445). In die *Du Plessis*-saak het beide appèlregters Van Heerden en Corbett bevind dat die *Cato*-saak nie gesag is vir die standpunt dat die *si sine liberis*-klousule van regsweë aanleiding gee tot 'n vermoede dat die testateur 'n stilswyende fideikommis ten gunste van die kinders skep nie (132C 148B). Na 'n grondige ondersoek van sowel die gemenereg as vorige Suid-Afrikaanse uitsprake, kom vermelde appèlregters nietemin tot die slotsom dat 'n *si sine liberis*-bepaling, gekoppel aan 'n voorwaardelike fideikommis, inderdaad 'n stilswyende fideikommis ten gunste van die kinders skep waar hulle afstammelinge van die testateur is.

Die appellant se advokaat het onder andere aangevoer dat al sou die beslissings van die laer howe op 'n verkeerde vertolking van die gemenereg berus het, die

appèlhof nie daarvan moet afwyk nie weens die uniformiteit oor 'n tydperk van bykans tagtig jaar, met ander woorde *communis error facit ius*. Met verwysing na *Webster v Ellison* 1911 AD 73 kom appèlregter Van Heerden tot die gevolgtrekking dat daar geen gewysde van die appèlhof is waarin pertinent beslis is dat aan verkeerde beslissings van laer howe bloot weens uniformiteit oor 'n lang tydperk gevolg gegee moet word nie (142E–F). Hy gee egter toe dat die appèlhof nie maklik van 'n verkeerde siening sal afwyk as landsburgers waarskynlik hulle sake ingeklee het in die veronderstelling dat die betrokke beslissings die reg juis weergee nie. Volgens die appèlregter sal die hof desnietemin van sodanige beslissings afwyk tensy buitengewone omstandighede aanwesig is. Wat die onderhawige saak betref, meen appèlregter Van Heerden egter nie dat daar sodanige buitengewone omstandighede aanwesig is nie. Eerstens was daar in die gemenereg geen meningsverskil oor die aangeleentheid nie. Tweedens was daar nie werklik van volslae uniformiteit in die regspraak sprake nie. Derdens geld die oorweging dat die uitspraak in die *Cato*-saak, en die mening van skrywers soos Van der Merwe en Rowland omtrent hierdie beslissing, waarskynlik wel bekend was aan sommige adviseurs wat testateurs in verband met die bewoording van hulle testamente van raad bedien het. Testateurs was dus waarskynlik bewus daarvan dat daar ook 'n ander standpunt in die verband gehuldig word. In die vierde plek was daar geen ander dwingende rede om van die gemeenregtelike standpunt af te wyk nie. (Sien oor die *Du Plessis*-saak verder Theron 1988 *THRHR* 398.)

In *Horowitz v Brock* 1988 2 SA 160 (A) het die vraag ter sprake gekom of die woord "kinders" in 'n testament net verwys na kinders van die eerste geslag en of verdere desendente ook by die begrip ingesluit word. As 'n testateur byvoorbeeld sy boedel aan sy kinders bemaak en een kind is vooroorlede, kan sodanige kind se kinders dan in sy plek erf?

In die Romeins-Hollandse reg het die woord "kinders" in die geval van direkte bemakings, byvoorbeeld by 'n direkte substitusie, kleinkinders en verdere desendente ingesluit wat dan deur hulle vooroorlede ouer kon erf, tensy die testament 'n teenstrydige bedoeling geopenbaar het (Kersteman *Hollandsch rechtsgeleert woordenboek* 229 *sv* "Kindskinderen"; De Groot 2 18 6; Van der Keessel *Theses* 2 18 6). Met ander woorde as 'n testateur sy boedel aan sy kinders bemaak het en een kind voor hom oorlede is, het daardie kind se kinders sy deel geërf.

In die geval van fideikommissêre substitusie daarenteen het die woord "kinders" net na kinders van die eerste geslag verwys, tensy die testament 'n teenstrydige bedoeling geopenbaar het (Voet 36 1 22; Groenewegen *De legibus abrogatis ad D* 50 16 220; Van Leeuwen *Het Roomsch-Hollandsch recht* 3 8 11).

In *Galliers v Rycroft* (1900) 17 SC 569 is die aangeleentheid egter verwar. In die saak het sir Henry de Villiers in sy uitspraak namens die Geheime Raad die vermoede waarna Voet verwys verkeerdelik toegepas op 'n geval wat hy as 'n direkte substitusie beskou het. Hy was met ander woorde van mening dat die vermoede in Voet 36 1 22 op alle bemakings ten gunste van 'n testateur se kinders van toepassing was en nie net op fideikommissêre bemakings nie.

Ten spyte daarvan dat dié beslissing heftig gekritiseer is, is dit as 'n beslissing van die Geheime Raad in ons howe gevolg (sien bv *Estate Welsford v Estate Wright* 1930 OPD 162; *Cannon v Norris* 1947 4 SA 811 (A); *Ex parte Wessels* 1949 2 SA 99 (O)).

Hierna het die wetgewer ingegryp en artikel 24 van Wet 32 van 1952 op die wetboek geplaas. Die artikel lui soos volg:

> "Wanneer volgens die bepalings van die testament van 'n testateur wat na die datum van inwerkingtreding van hierdie Wet sterwe, 'n vooroorlede kind van daardie testateur op 'n bemaking onder daardie testament geregtig sou geword het as hy die testateur oorlewe het, dan is die wettige afstammelinge van daardie kind *per stirpes* geregtig op daardie bemaking tensy die bepalings van die testament 'n daarmee strydige bedoeling aantoon."

Afgesien daarvan dat die wet 'n baie beperkter toepassing as die gemenereg het, kon dit in elk geval nie in die *Horowitz*-saak toepassing geniet nie aangesien die testateur voor 1952 oorlede is.

In laasgenoemde saak is die hof ook nie bereid om sir Henry de Villiers se beslissing in *Galliers v Rycroft* te heroorweeg nie. Appèlregter Smalberger stel dit soos volg:

> "The rule has been consistently followed since 1900 (except, of course, in cases now covered by the provisions of s 24 of Act 32 of 1952). It is not inconceivable that over the years its growing acceptance led to a number of wills being drafted on the strength of it correctly stating the law. A departure from the rule now could conceivably frustrate the intentions of testators in such cases. Furthermore, the rule today can have only limited application, having been modified in 1952. In the circumstances the correct approach would seem to be to decline to reconsider the correctness of the rule despite the temptation to correct a possibly false conception of the Roman-Dutch law" (186–187).

Die appèlhof volg dus ook die verkeerde beslissing wat nie in die *Du Plessis*-saak die geval was nie.

'n Mens kan nie juis fout vind met appèlregter Smalberger se motivering vir sy standpunt nie. Dit is so dat die verkeerde beslissing oor 'n lang tydperk toegepas is en dat "persone regte kon verkry en verpligtinge aangegaan het in vertroue op die finaliteit" daarvan (*Tuckers Land and Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A) 16–17; *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A); sien ook De Waal 1988 *THRHR* 100 e v). Aan die ander kant, soos appèlregter Smalberger trouens self aandui (186F), is die werking van artikel 24 van Wet 32 van 1952 baie beperk. Die bewoording van die artikel is dan ook al by verskillende geleenthede gekritiseer (sien Corbett, Hahlo, Hofmeyr en Kahn *The law of succession in South Africa* (1980) 213 e v; Van der Merwe en Rowland 247; Rogers 1953 *SALJ* 418; Joubert 1954 *THRHR* 41 e v; *Reek v Registrateur van Aktes, Transvaal* 1969 1 SA 589 (T)). So is die artikel net van toepassing waar die vooroorlede erfgenaam 'n vooroorlede *kind* van die erflater is. Dit reël nie die posisie met betrekking tot broers-, susters- en kleinkinders nie. In die gemenereg kon byvoorbeeld ook 'n vooroorlede broerskind deur sy afstammelinge gerepresenteer word waar sodanige broerskinders in die algemeen sonder name of getal as erfgename ingestel was (Joubert 1954 *THRHR* 22). In die *Horowitz*-saak was dit juis kleinkinders wat as erfgename ingestel was (187C) sodat dit in elk geval twyfelagtig is of artikel 24 van toepassing kon wees. Verder is dit nie duidelik nie of die artikel net geld as die kinders in die algemeen sonder vermelding van naam en getal ingestel is en of dit ook toepassing vind waar die kinders spesifiek by naam ingestel word. Dit is ook onseker of die artikel van toepassing is op testamentêre bepalings wat in 'n huweliksvoorwaardeskontrak vervat is (Joubert 1954 *THRHR* 42). Daar heers voorts onsekerheid oor die vraag of die artikel van toepassing is as die kinders as fideikommissarisse ingestel word en 'n kind

voor die testateur sterf en desendente nalaat (sien *Reek v Registrateur van Aktes, Transvaal* 1969 1 SA 589 (T); Corbett, Hahlo, Hofmeyr en Kahn 213 e v).

Om hierdie redes wonder 'n mens of dit nie tog beter sou gewees het as die gemeenregtelike posisie ook in die *Horowitz*-saak herstel kon gewees het soos wat in die *Du Plessis*-saak gebeur het nie. Per slot van sake geld die oorwegings waarom appèlregter Smalberger nie van die vorige uitsprake wou afwyk nie tog seker ook vir die *Du Plessis*-saak. Terloops kan daarop gewys word dat die appèlhof kort vantevore in *Harris v Assumed Administrator, Estate MacGregor* 1987 3 SA 563 (A) ook bereid was om af te wyk van verkeerde beslissings wat oor 'n lang periode gegee is. Die saak het te doen gehad met die tydstip waarop intestate erfgename vasgestel moet word en ook in hierdie geval is die gemeenregtelike posisie herstel (sien oor die saak De Waal 1988 *THRHR* 97 e v).

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THE LESSEE'S RIGHT TO *COMMODUS USUS*

Fourie v Potgietersrusse Stadsraad 1987 2 SA 921 (A); Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk 1987 2 SA 931 (A)

According to common law the lessee has a right to *commodus usus* of the leased object. However, the content of *commodus usus* is nowhere defined. The rule is usually stated in the negative, namely that the lessor has the duty to provide the lessee with the use and enjoyment of the leased object and to refrain from doing anything which would deprive the lessee of or interfere with his use.

Roman law (cf *D* 50 17 202 *Iavolenus libro undecimo epistularum*) does not define the content of the lessee's right or the lessor's duty. Moreover, the term *commodus usus* does not appear in the Roman sources. On the other hand, the rich and varied casuistry of *D* 19 2 *Locati Conducti* offers the possibility of providing content to the term *frui*, which is used by the Roman lawyers to denote the right of the lessee (*D* 19 2 9 *pr*; 19 2 9 1; 19 2 15 1; 19 2 15 8; 19 2 24 4; 19 2 24 5; 19 2 25 1; 19 2 33; 19 2 35 *pr*). The lessor had a duty to provide the lessee with the enjoyment of the leased object (*ibid*).

It is clear from the texts that *frui* was not limited to direct and actual use of the leased object, but could also include indirect benefits from it. It appears, for example, from *D* 19 2 15 *Ulpianus libro trigesimo secundo ad edictum* that where the lessee's crops were destroyed by either *vis maior* or *casus fortuitus*, he was entitled to remission of rent even though he still had the actual use of the leased object, but had lost the profits in view of which he had entered into the lease. (See *D* 19 2 25 2 *Gaius libro decimo ad edictum provinciale* for a further illustration.) Another indication that *frui* had a wider meaning is found in the texts relative to *ususfructus* and *usus* (see *D* 7 1 1 *Paulus libro tertio ad Vitellium*).

On the other hand, *D* 7 8 1 *Gaius libro septimo ad edictum provinciale* and *D* 7 8 2 *pr Ulpianus libro septimo decimo ad Sabinum* do not support this conclusion.

The extent of the lessee's relief depended on the presence or absence of fault on the lessor's part. If the lessor was guilty of preventing or infringing on the lessee's *frui* (which may include the making of profits) of the leased object the lessor was liable for damages (*D* 19 2 15 8; 19 2 19 1; 19 2 30 *pr*; 19 2 33).

However, where the *frui* was infringed by *vis maior* or *casus fortuitus*, the lessor was liable for remission of rent only (*D* 19 2 15 7; 19 2 19 1; 19 2 30 *pr*; 19 2 33).

The institutional authors consulted (De Groot 3 19 12; Van Leeuwen *CF* 1 4 22 10; *RHR* 4 21 1, 2; Huber *HR* 3 8; Voet 19 2 1, 14, 19, 23, 24; Loenius *Decisien en observatien casus* 34; Van der Keessel *Praelectiones on Gr* 3 19 12; Van der Linden *Koopmans handboek* 1 15 11, 12; *Holl cons* 2 185) do not add to Roman law, but rather limit the right of the lessee, since the term *frui* was gradually abandoned and replaced by the term *usus* or *commodus usus* (or as De Groot 3 19 12 stated, the "recht tot het gebruick van de zaeck . . .").

No attempt is made to provide any explanation regarding the meaning of *usus*. However, it appears that all the Roman-Dutch lawyers mentioned adhered to the Roman law principle regarding the remission of rent. The examples provided to illustrate *vis maior* and *casus fortuitus* concur with those used in the Digest (De Groot 3 19 12; Van Leeuwen 1 4 22 17; Voet 19 2 24; Van der Linden 1 15 12).

The cases in which remission of rent was granted (described by Loenius in *casus* 34) are examples of instances where the lessee had the actual use of the leased object but had for some reason suffered a loss of profit. Moreover, Huber (*HR* 3 8 27) states that the rent generally corresponds in value to the profit which may accrue from the leased object. Thus, although the term *usus* used in Roman-Dutch law is in principle narrower than the Roman law *frui*, it becomes clear that it was not necessarily limited to the direct and actual use of the leased object, but could also include the profit which a lessee could gain from the lease. Whether the lessee was entitled to an action for damages or remission of rent would, as in Roman law, depend on the presence of fault on the part of the lessor.

Although Pothier's *Traités* deal with French private law, these works enjoyed such popularity amongst Dutch jurists that several were translated into Dutch (Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 222 *et seq*). Moreover, it is generally held that the nature of these *Traités* is such that they complément Roman-Dutch Law and can thus be consulted for comparative purposes.

In his *Traité du contrat de louage* (par 53) Pothier describes the lessor's obligation to the lessee as follows:

> "L'engagement que le locateur contracte envers le conducteur par la nature même du contrat, est de le faire jouir ou user de la chose qu'il lui a louee, *praestare frui licere, uti licere*."

He continues (par 75):

> "C'est une suite de l'obligation que le locateur contracte envers le conducteur par le contrat de louage, *praestare ei frui licere*, qu'il ne puisse apporter aucun trouble a la jouissance du conducteur, pendant tout le temps que le bail doit durer."

He explains this rule by way of examples. The most pertinent of these is (par 76) where he discusses the case of the lessor who diminished the lessee's enjoyment of the leased house by making a window in the wall between the leased house and his neighbouring house with the result that the latter looked out on

the leased house. The inconvenience caused by this is considered to be a disturbance of the enjoyment of the lessee.

Pothier par 139 *et seq* also discusses the principles governing remission of rent. The application of these principles coincides with the cases described in Roman law. The inference seems justified that *la jouissance ou l'usage* has the same content as *frui et uti* and encompasses more than just direct and actual use of the leased thing.

French common law based the lessor's liability on fault. Where the lessor is guilty of non-fulfilment of his contractual obligations the lessee is entitled to a discharge of the rent and damages (*ibid* par 67 68 80 90; cf *D* 19 2 33).

In their discussion of the lessee's use and enjoyment South African authors deal only with the lessor's obligation to ensure the lessee's undisturbed use and enjoyment of the leased object without defining or providing content to these terms (De Wet and Van Wyk *Kontraktereg en handelsreg* 4th ed 317; Cooper *The South African law of landlord and tenant* (1973) 107; 14 *LAWSA* par 147). The obligation is described in such a way that the corresponding right clearly entails only the direct actual use of the leased thing, rather than right to indirect benefits from it.

However, the idea that the terms "use and enjoyment" could extend further than direct use of the leased thing appears in Kerr (*The law of sale and lease* (1984) 196) where he states that

> "the lessor is obliged to refrain from doing anything which would deprive the lessee of *the benefits* for which he contracted" (my emphasis).

However, he does not develop the idea any further.

South African case law also adheres to the view that the lessor's duty to provide *commodus usus* should be construed as meaning the duty to provide the actual direct use and enjoyment of the leased thing (e g *Watson v Geard* 1884 3 EDC 417; *Hansen Schräder & Co v Kopelowitz* 1903 TS 707; *Baum v Rode* 1905 TS 66; *Starfield and Starfield v Randles Bros & Hudson* 1911 WLD 175; *Soffianti v Mould* 1956 4 SA 150 (E); *Wireless & General (Pty) Ltd v Arjay Investments (Pty) Ltd* 1971 4 SA 174 (R); *Enter Centre Enterprise (Pty) Ltd v Brogneri* 1972 1 SA 117 (C)).

The amazing lack of interest in the right of the lessee may perhaps be attributed to the fact that the lessee has, through the ages, played the role of the underdog. It is thus to be welcomed that the content of *commodus usus* was twice brought to the attention of the appellate division during 1987.

In *Fourie v Potgietersrusse Stadsraad* 1987 2 SA 921 (A) the question was whether the respondents had breached their duty to provide *commodus usus* to the appellants. Briefly the facts of this case are as follows: The appellants concluded a contract of lease for certain land for a period of 5 years from the respondent for the purpose of grazing cattle. Adjacent to the leased land the respondents had a rubbish dump. Prior to the conclusion of the lease, the appellants inspected the camp and became aware of this fact and of the fact that plastic bags were blown from the rubbish dump onto the leased camp. Plastic bags constitute a serious danger to cattle who tend to eat them. The resulting veterinary costs to save the animal usually constitute more than half of its value. However, one of the respondent's employees assured the appellants that the respondent would see to it that proper control would be exercised over the

rubbish dump and that pollution of the leased property would stop. However, despite complaints the pollution continued with the result that the appellants were never able to use the leased camp. The lessees withheld payment of rent. In the court *a quo* the respondents successfully claimed the outstanding rental plus interest.

On appeal Joubert AJ correctly defined the applicable principle as follows:

> "As verhuurder was die Stadsraad volgens die gemenereg verplig om gedurende die huurtermyn die ongesteurde gebruik (*commodus usus*) van kamp 5 aan die huurders te verleen vir die doel waarvoor dit volgens klousule 6 van die huurkontrak verhuur is, nl 'vir doeleindes van beweiding' " (931B).

He concluded that:

> "Die huurkontrak het nie hierdie gemeenregtelike verpligting van die Stadsraad as verhuurder beperk of uitgesluit nie. In die lig van die voorgaande is dit duidelik dat die Stadsraad as verhuurder hierdie gemeenregtelike verpligting nie teenoor die huurders nagekom het nie aangesien kamp 5 gedurende die hele huurtermyn glad nie vir beweiding gebruik kon word nie deurdat die Stadsraad op sy aangrensende grond nie behoorlike beheer en administrasie oor die stortingsterrein uitgeoefen het nie" (931D–E).

The appeal therefore succeeded.

This case is a perfect example of *commodus usus* as it is generally understood and in that regard contrasts sharply with *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 2 SA 932 (A). Here the appellant as lessee and the respondent as lessor concluded a contract of lease for a hotel site for a period of twenty years. The hotel site was situated next to a national road and because of its situation the hotel attracted considerable custom. Approximately six years later the respondent decided to expand its mining operations in the area which necessitated the diversion of the national road. The Provincial Administration granted the respondent's application for the diversion of the national road which was completed at the respondent's expense eight years after the conclusion of the lease. As a result of this diversion the hotel was no longer situated next to a national road or even on a transit road and consequently attracted much less custom than before. Consequently the appellant's profits declined to such an extent that the hotel business was eventually conducted at a loss. The hotel was closed down about eleven years after the conclusion of the lease. The appellant instituted an action against the respondent for the payment of damages for breach of contract. This claim was dismissed by the court *a quo*.

The appellant contended that it was an implied term of the lease that the respondent would give free and undisturbed use of the hotel site to the lessee, and secondly to take no steps to deprive the latter of the said use or to interfere with the said use by having the national road closed, thereby (i) rendering access to the hotel site impractical, difficult or cumbersome; (ii) precluding the passage of traffic along the said road and thereby precluding the flow of custom to the hotel (946E–F). The respondent requested the appellant to explain the essential content of the implied term to which request the appellant answered that:

> "The defendant was obliged to furnish to the plaintiff *commodus usus* of the premises let by the defendant to the plaintiff" (946H).

The respondent denied having acted in contravention of his alleged obligations and pleaded

> "dat appellant te alle tye vrye en ongesteurde gebruik van die hotelperseel self gehad het. Die ingange tot die hotelperseel het dieselfde gebly en die hotelbesigheid self kon te

alle wesenlike tye voortgesit word. Appellant se klagte was egter dat hy die hotelbesigheid nie winsgewend kon voortsit nie" (950A–B).

With reference to the above the heads of argument continued as follows:

"Die vraag wat dan ontstaan, is of optrede aan die kant van die verhuurder wat nie enige invloed op die daadwerklike gebruik van die huurperseel self het nie, maar die winsgewindheid van 'n besigheid wat daarop bedryf word beïnvloed, beskou moet word as 'n verbreking van die verhuurder se verpligting om die *commodus usus* van die huursaak te laat toekom" (950B–C).

Botha AJ approached the case as follows:

"Die vermelding in die pleitstukke van 'n stilswyende beding ... is ietwat koddig ... Daar is slegs by wyse van alternatief aandag geskenk aan die gemeenregtelike verpligting van 'n verhuurder, wat saamhang met die *naturalia* van 'n huurkontrak. Na my mening is dit 'n aweregse manier om die saak te benader ... Die logiese aanvangspunt van 'n ondersoek na die respondent se beweerde aanspreeklikheid teenoor die appellant in hierdie saak ... is om vas te stel wat die respondent, as verhuurder, se gemeenregtelike verpligtings teenoor die appellant, as huurder, behels ..." (948E–949B).

Essentially the whole case revolved around the meaning of the term *commodus usus*.

After investigating the dictionary meaning of these words Botha AJ turned to the common law sources. He reached the conclusion (with reference to *Holl cons* 2 185 and Pothier par 75–80) that

"*commodus usus* die idee van winsgewindheid kan omvat, waar die huurder op die huurperseel 'n besigheid bedryf" (952F).

Applying the above to the facts of this case, he concluded that

"die sluiting van die pad die gevolg gehad het dat die appellant se *commodus usus* van die hotelperseel versteur is" (953B).

Nevertheless, this does not answer the question whether the lessor's action in having the road closed constituted a breach of his obligation in this regard. To obtain an answer the court referred to Pothier's work (par 75–76 80). Pothier (par 76) applies the general principle to the lease of houses and states that where the lessor does something which either diminishes or causes the leased thing to be less convenient, the lessee's action qualifies as a disturbance of the *commodus usus*. To illustrate the application of the general principle Pothier uses two examples. The first deals with a lessor who places a window in a wall which enables him to look into the lessee's home (see *supra*) and the second deals with a lessor who directs a gutter onto a neighbouring house which he owns and lets, causing water to drip onto the leased home which did not drip there prior to the conclusion of the lease contract. In both these examples Pothier considers the lessor's action an infringement of the lessee's *commodus usus* entitling the lessee to an action to prevent the infringement and damages if the lessee suffered any.

Botha AJ emphasised two points. The first was the unqualified description of the lessor's duty and the actions which could cause a breach of that duty:

"Die voorbeeld moet dus gesien word as 'n geval waar die verhuurder inbreuk maak op die huurder se *commodus usus* sonder dat sy optrede *'n daadwerklike of regstreekse fisiese uitwerking het* op die huurperseel self (my emphasis; 954C).

Secondly, he emphasised that in each case, after the lessor's conduct, the leased thing was no longer in the same condition as at the time of the conclusion of the contract (954C–D).

If one applies these two considerations to the facts of the case, then according to Botha AJ they can form the basis for the view that the respondent, by diverting the road did something which, although it had no direct physical bearing upon

the leased object, nevertheless indirectly affected the appellant's *commodus usus*. Whether such a view is justified, was decided with reference to Pothier (par 152) where he deals with an example of *casus fortuitus* which justifies remission of rent.

One of the principles formulated by Pothier in regard to remission of rent provides that where the lessee has not been entirely deprived of the enjoyment of the leased thing, but his enjoyment has been considerably impaired and diminished through the happening of some unforeseen accident, he can claim a proportionate reduction in the rent as from the time his enjoyment suffered this diminution (Pothier par 144).

This principle is illustrated by Pothier (par 152) with the following example. An inn situated on a main road is let and during the currency of the lease the main road is diverted to such an extent that the inn, which had previously been frequented greatly, was no longer on the main road and is no longer frequented. Although the lessee has the use of the whole inn, he is nevertheless entitled to claim a reduction of rent, because his enjoyment of the inn has been greatly impaired and diminished by the diversion of the main road.

The judge pointed out that

> "Pothier tref hier 'n onderskeid tussen die gebruik van die gebou as sodanig, en die voordelige benutting daarvan vir die doel waarvoor dit gehuur is, nl om te gebruik as 'n herberg" (955B–C).

He concluded:

> "Daar is na my mening egter geen twyfel nie dat die beginsel wat in sy [Pothier's] gedagtegang vervat is, by wyse van analogie ook toepaslik moet wees op 'n geval waar die verlegging van die pad deur die verhuurder self bewerkstellig is. As 'n mens in gedagte hou wat Pothier in para 76 sê in verband met die verhuurder se verpligting om nie inbreuk te maak op die huurder se *commodus usus* nie, . . . dan moet dit noodwendig volg dat die verhuurder wat self die pad verander . . . kontrakbreuk pleeg teenoor die huurder en aanspreeklik is vir al die gewone gevolge van kontrakbreuk" (955F–H).

and

> "My gevolgtrekking is dus dat die respondent kontrakbreuk gepleeg het ten opsigte van sy gemeenregtelike verpligting om die *commodus usus* van die huursaak aan die appellant te laat toekom, en dat hy op daardie grond aanspreeklik is om skadevergoeding aan die appellant te betaal" (959E).

The *Sishen* case is an important decision in more than one respect.

First of all, the appellate division rejected the implied-term approach and based the decision on the common-law obligation of the lessor to provide the lessee with *commodus usus*.

Secondly, the meaning of *commodus usus* was extended to include more than the direct use of the leased object. It was held that *commodus usus* can comprise profitability as well as the privacy of the lessee's use and enjoyment of the leased thing. Thus it is possible for a lessor to infringe the lessee's *commodus usus* in an indirect manner, in other words, his conduct need not have an actual or direct physical bearing on the leased thing.

Finally, it is submitted that the basis for this interpretation of *commodus usus* could have been found in Roman law rather than in French common law. Pothier's *jouissance* turned out to have the same content as the Roman law *frui*,

which is not surprising in view of the character of his work. However, Pothier has become an acceptable common law source, especially on the topic of lease.

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DIE VEREISTES VIR 'N GELDIGE ONTEIENINGSKENNISGEWING

Provinsiale Administrasie, Kaap die Goeie Hoop v Swart
1988 1 SA 375 (K)

1 Regsvraag

Hierdie beslissing handel oor die geldigheid al dan nie van 'n onteieningskennisgewing wat ingevolge artikel 27(1)(c) van die Ordonnansie op Paaie 19 van 1976 (hierna "die ordonnansie" genoem) deur die Kaapse Provinsiale Administrasie ten aansien van 'n gedeelte van 'n eienaar se onroerende eiendom uitgereik is (378I).

2 Feite

Die feite was kortliks soos volg: S was die geregistreerde eienaar van onroerende eiendom te Knysna. 'n Gedeelte van die eiendom, ongeveer 8 500 m², het sand bevat wat uiters geskik was vir padbou- en boudoeleindes. Gedurende 1981 het S en L, 'n maatskappy wat sake as leweransier van grond en ander boumateriaal doen, ooreengekom dat L sand teen vergoeding van S se eiendom kon verwyder. Die inwerkingtreding van die ooreenkoms was egter afhanklik van die verkryging van 'n permit van die departement van mineraal- en energiesake ingevolge die Wet op Fisiese Beplanning 88 van 1967 (378J–379B). Voordat 'n permit uitgereik is, het die administrateur op 7 September 1983 per aangetekende pos 'n onteieningskennisgewing vir die verkryging en verwydering van materiaal ingevolge artikel 27(1)(c) van die ordonnansie aan S gestuur (379C).

Artikel 27(1) van die ordonnansie maak vir drie kategorieë van onteiening voorsiening, naamlik: (a) permanente onteiening van eiendom (a 27(1)(a)); (b) tydelike gebruik van eiendom (a 27(1)(b)); en (c) die verkryging en verwydering van materiaal (a 27(1)(c)) (380D–E).

Wanneer die administrateur besluit om ingevolge artikel 27 op te tree, moet hy 'n toepaslike onteieningskennisgewing in ooreenstemming met artikel 29(2) van die ordonnansie aan die eienaar beteken. Die tersaaklike dele van artikel 29(2)(a) en (b) lui soos volg:

> "Die onteieningskennisgewing moet –
>
> (a) 'n beskrywing bevat wat duidelik genoeg is om die betrokke eiendom of materiaal te identifiseer . . .
>
> (b) die onteieningsdatum vermeld of, na gelang van die geval, die datum met ingang waarvan die eiendom gebruik of die materiaal verkry en verwyder word, welke datum nie later mag wees nie as 180 dae na die kennisgewingsdatum; met dien verstande dat die datum met ingang waarvan die eiendom gebruik kan word, nie vroeër mag wees nie

as 60 dae vanaf die kennisgewingsdatum tensy die padowerheid van mening is dat sodanige eiendom dringend nodig is vir enige doel waarvoor dit deur die padowerheid gebruik gaan word" (380F–G).

Die onderhawige onteieningskennisgewing, gedateer 6 September 1983, is in albei landstale opgestel en het só gelui:

"ONTEIENINGSKENNISGEWING
VERKRYGING OF VERWYDERING VAN MATERIAAL
AFDELING . . . OUTINIQUA . . .
GROOTPAD . . . 2/11 . . .

Kennis word hierby gegee dat die Administrateur ingevolge art 27 van die Ordonnansie op Paaie, 1976 (Ordonnansie 19 van 1969), materiaal sal verkry en verwyder op die volgende eiendom:

. . . 8500 . . . m²/van/of . . . Gedeelte 7 van Plaas 422-Knysna . . . Sketsplan nr . . . B.14 . . . aangeheg.

. . . 19 SEP 1983 . . ." (382J–383 B).

Dit tersaaklike dele van die Engelse weergawe het soos volg gelui:

"1. Notice is hereby given that the Administrator shall raise and remove material from the following property . . .

2. Date with effect from which materials will be raised and removed . . ." (383C–383D).

Ingevolge die kennisgewing is derhalwe 'n gedeelte van 8 500m² van S se onroerende eiendom aangewys as synde die eiendom waarvan die materiaal verkry en verwyder sou word (379C).

By die onteieningskennisgewing was 'n sketsplan aangeheg waarop die volgende woorde voorgekom het:

"Die gedeelte rooi gekleur dui die benaderde ligging aan van ongeveer 0,85 ha waarop materiaal verkry en verwyder sal word ('from which materials will be raised and removed')" (383D).

Dit was wesenlik dieselfde area as die waarop L sy sandgroef wou vestig (379D).

S en L het by wyse van kennisgewing in die hof *a quo* aansoek gedoen om tersydestelling van die administrateur se onteieningskennisgewing op grond van nie-nakoming van die sestig dae voorbehoudsbepaling van artikel 29(2)(b) van die ordonnansie. Die datum vir verkryging van die materiaal was naamlik net 13 dae na die kennisgewingdatum terwyl dringendheid vir verkryging van die materiaal na bewering ontbreek het. S en L het beweer dat op die datum van die onteieningskennisgewing die padboubedrywighede waaroor sand moontlik benodig sou word nog ongeveer 15 kilometer vanaf die sandgroef was en dat daar derhalwe op daardie datum geen noodsaaklikheid bestaan het om S se eiendom te gebruik nie (379D–H).

Die hof *a quo* het die onteieningskennisgewing ter syde gestel op grond daarvan dat die onteieningskennisgewing weens vaagheid nietig was. Gevolglik het die hof dit onnodig gevind om in te gaan op die vraag of die sestig dae na kennisgewing moes verloop ingevolge die voorbehoudsbepaling in artikel 29(2)(b) van die ordonnansie (380B–C).

In die onderhawige hoër beroep deur die administrateur teen hierdie beslissing, volg die Kaapse volbank 'n soortgelyke benadering ten aansien van die geldigheid van die onteieningskennisgewing as sodanig (ingevolge a 29(2)(a) van die ordonnansie). Daarbenewens word die voorbehoudsbepaling ingevolge artikel 29(2)(b) van die ordonnansie suiwer uitgelê.

Vervolgens word die hof se bevinding ten aansien van die toepaslike dele van artikel 29(2) van die ordonnansie *in seriatim* ondersoek.

3 Die geldigheid van die onteieningskennisgewing ingevolge artikel 29(2)(a) van die ordonnansie

Die hof bevind heeltemal tereg dat die betrokke onteieningskennisgewing nie voldoen aan die vereistes van artikel 29(2)(a) van die ordonnansie nie omrede die kennisgewing nie 'n beskrywing bevat wat duidelik genoeg is om "die materiaal" te identifiseer nie (384E 386F). (Die verwysing na a 29(2)(b) op 384E is foutief en behoort a 29(2)(a) te lui.) Ingevolge artikel 29(2)(a) is dit verpligtend dat die onteieningskennisgewing 'n beskrywing moet bevat wat duidelik genoeg is om die betrokke eiendom (vir doeleindes van a 27(1)(a) en (b) van die ordonnansie) of materiaal (vir doeleindes van a 27(1)(c)) te identifiseer (384B). Al wat in die betrokke kennisgewing vermeld word, is dat materiaal verkry en verwyder gaan word (384D–E). Ter motivering van sy standpunt voer regter Friedman die volgende aan:

a Die gebruik van die woord "moet" in a 29(2)(a) is 'n sterk aanduiding dat die artikel bedoel is om gebiedend te wees en gee gewoonlik uitdrukking aan 'n nietigheidsbedoeling by nie-nakoming (384C).

b Vir sover onteiening ernstig inbreuk maak op 'n grondeienaar se eiendomsreg, moet die vereistes van 'n wetsbepaling soos die onderhawige ordonnansie streng uitgelê word (384D).

Regter Friedman is heeltemal tereg daarteen gekant dat die padowerheid 'n gebrekkige onteieningskennisgewing *ex post facto* kan aanvul deur aan te voer dat sowel S as die padowerheid se amptenare ten tyde van die betekening van die onteieningskennisgewing geweet het dat die padowerheid net sand benodig het, en dat die onteieningskennisgewing daarom bedoel was om slegs na sand te verwys (384G; sien egter Gildenhuys *Onteieningsreg* (1976) 62). 'n Grondige beleidsoorweging teen so 'n benadering word deur die regter aangevoer:

> "Die klaarblyklike doelwit van die wetgewer met die verordening van die voorskrif in verband met die beskrywing van die eiendom en die materiaal, is om sekerheid met betrekking tot die beskrywing, wat skriftelik moet wees, daar te stel ten einde die noodsaaklikheid van mondelinge getuienis ter bepaling van die eiendom of die materiaal te vermy" (384F–G).

Regter Friedman wys voorts op die praktiese probleme waartoe so 'n benadering aanleiding sou kon gee, naamlik dat S se regsopvolgers in titel of nuwe amptenare van die administrateur nie noodwendig sou weet hoe S die kennisgewing vertolk het nie (sien verder 384G–I). Getuienis om vas te stel watter soort materiaal die owerhede in gedagte gehad het en wat die onteiende verstaan het die materiaal is waarop die kennisgewing van toepassing sou wees, sou dus nie toelaatbaar wees om die kennisgewing aan te vul nie (386E).

Die regter is van mening dat aangesien die woord "betrokke" in artikel 29(2)(a) van die ordonnansie op sowel "eiendom" as "materiaal" van toepassing is, dieselfde vereistes vir 'n duidelike beskrywing van materiaal geld as wat op eiendom van toepassing is (385A–B). Hy toon aan dat eiendom (vir doeleindes van a 27(1)(a) en (b)) geïdentifiseer kan word deur 'n beskrywing van die ligging en aangeduide grootte daarvan. Volgens die regter sou dit kon geskied deur verwysing na 'n plaasnommer en 'n sketsplan waarop die grootte daarvan aangedui word (385B). Dit sou myns insiens ook moontlik wees om onroerende

eiendom op ander aanvaarbare maniere te identifiseer (sien bv Van Rensburg en Treisman *The Practitioner's guide to the Alienation of Land Act* (1984) 45–47; Badenhorst *The consumer protection afforded to alienees of immovable property in South Africa* (LLM-verhandeling Wits 1985) 82–83). Daarenteen wys regter Friedman vir doeleindes van artikel 27(1)(c) van die ordonnansie daarop dat

> " 'n [b]eskrywing van die ligging en omvang van die materiaal . . . slegs die ligging en omvang van die materiaal identifiseer, nie die aard daarvan nie".

Vandag word algemeen aanvaar dat eiendomsreg nie 'n sogenaamde absolute subjektiewe reg is wat aan die eienaar onderdaan onbeperkte beskikkings bevoegdhede verleen nie (sien in die algemeen Cohen *New patterns of landownership: the transformation of the concept of ownership as plena in re potestas* (1984) 7–15 51–86; Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241 258–262; Van der Walt "The effect of environmental conservation measures on the concept of landownership" 1987 *SALJ* 474–479). Nietemin is die hof se benadering te verwelkom dat indien daar op eiendomsreg inbreuk gemaak word, die eienaar darem ten minste behoort te weet wat die omvang van die inbreuk op sy eiendomsreg behels. Aangesien die markwaarde en gevolglik die vergoeding waarop die onderdaan geregtig is, nou verband hou met die aard van die materiaal, behoort 'n onteieningskennisgewing wat nie eens duidelik genoeg is om die aard van die materiaal te identifiseer nie, ongeldig te wees. Dit is net jammer dat die hof nie riglyne neerlê of aantoon hoe "materiaal" vir doeleindes van artikel 29(2) van die ordonnansie in die toekoms deur die administrateur geïdentifiseer behoort te word nie.

Benewens die geldigheidsvereistes soos in artikel 29(2) van die ordonnansie neergelê en soos deur die hof toegepas, is dit wenslik dat 'n onteieningskennisgewing ook aan die volgende gemeenregtelike vereistes moet voldoen:

a Die onteiende behoort te weet uit hoofde waarvan die onteienaar beweer dat hy geregtig is om die onteieningshandeling uit te voer (Gildenhuys 64; sien egter Gildenhuys en Grobler "Expropriation" 10 *LAWSA* 21).

b Die onteieningskennisgewing behoort die doel van die onteiening te noem (Gildenhuys 64; sien egter Gildenhuys en Grobler 22; Jacobs *The law of expropriation in South Africa* (1982) 36).

c Aangesien 'n onteieningskennisgewing die regte van 'n eienaar beëindig en regte in die onteienaar vestig, moet dit duidelik uit die onteieningskennisgewing blyk dat 'n onteieningshandeling daarkragtens verrig word (vgl Gildenhuys 65; Gildenhuys en Grobler 22).

4 Die voorbehoudsbepaling ingevolge artikel 29(2)(b) van die ordonnansie

Regter Friedman beslis dat die voorbehoudsbepaling in artikel 29(2)(b) met betrekking tot die tydperk van sestig dae slegs van toepassing is op 'n kennisgewing ten opsigte van die tydelike gebruik van eiendom (ingevolge a 27(1)(b) van die ordonnansie). Die onteieningskennisgewing kon gevolglik nie op grond van die administrateur se versuim om dringendheid te bewys, ter syde gestel word nie (380H–382I).

Aangesien die administrateur in die geval van tydelike gebruik van grond (ingevolge a 27(1)(b)) oor 'n diskresie beskik om vergoeding te betaal terwyl in die geval van 'n onteiening van onroerende eiendom of materiaal (ingevolge

a 27(1)(a) en (b)) die betaling van vergoeding verpligtend is, beskou die hof die beperking van die "60 dae blaaskans" tot eersgenoemde geval as billik (382A–C).

Die doel van die "60 dae blaaskans" in die geval van die tydelike gebruik van grond is om die persoon aan wie so 'n onteieningskennisgewing beteken word,

> "tyd te vergun om sodanige stappe te neem om enige skade of verlies of ongerief wat daardeur aan hom berokken mag word te verminder of om sy sake te reël" (381J–382A).

Met ander woorde, indien 'n onderdaan nie op vergoeding geregtig is nie, behoort hy darem genoeg tyd gegun te word om sy skade te beperk terwyl so 'n vergunning nie gemaak hoef te word indien hy geregtig is om sy skade van die owerheid te verhaal nie.

5 Die voorwerp van onteiening

'n Interessante vraag wat op 'n indirekte wyse in hierdie beslissing ter sprake kom, is wat in werklikheid die voorwerp van onteiening is.

Dit is ongelukkig so dat die wetgewer by onteieningskennisgewing nie altyd die basiese beginsels van die sakereg (en hoegenaamd nie die leerstuk van subjektiewe regte) in gedagte hou nie. (Sien verder E van der Vyver *'n Teoretiese beskouing van die bepaling van markwaarde van mineraalregte as 'n komponent van die vergoeding betaalbaar ingevolge die Onteieningswet 63 van 1975* (LLM-verhandeling Wits 1986) 31.) Dit sou moontlik toegeskryf kon word aan die invloed van die Engelse "Lands Clauses Act" van 1845 op die Suid-Afrikaanse onteieningsreg (sien in die algemeen Gildenhuys 32–40). Gildenhuys verklaar byvoorbeeld:

> "Die Onteieningswet van 1975 magtig onder meer die onteiening van goed. Goed word omskryf as roerend sowel as onroerende goed. Onroerende goed sluit in 'n saaklike reg in of oor onroerende goed. Die begrip *goed* is nie beperk tot tasbare goed nie, en sluit ook onliggaamlike goed in soos regte, saaklik sowel as persoonlik. Dit is dus vir 'n onteienaar moontlik om nie alleen tasbare goed nie, maar ook regte te onteien" (51; sien verder Gildenhuys en Grobler 18).

Hiervolgens sou die voorwerp van onteiening kragtens die Onteieningswet 63 van 1975 nie alleen beperk wees tot die saak as regsobjek nie maar sou dit voorts saaklike en vorderingsregte, as subjektiewe regte, kon insluit (Gildenhuys 57). Gildenhuys (240) is voorts van mening dat immateriële goedere per definisie as goed beskou moet word aangesien "goed" ("property") sowel liggaamlike as onliggaamlike bates insluit. Dit wil voorkom of die outeur immaterieelgoedereregte as subjektiewe regte eerder as immaterieelgoedere as regsobjekte in gedagte gehad het, aangesien hy hierdie aspek bespreek in die hoofstuk oor "onteiening van 'n reg" (222 e v).

E van der Vyver (31–32) is van mening dat die wetgewer se omskrywing van die begrip "goed" as "roerend sowel as onroerende goed" gemeenregtelik vertolk moet word om nie alleen liggaamlike roerende en onroerende sake nie, maar ook onliggaamlike roerende en onroerende sake in te sluit. Hy wys daarop dat volgens Van Leeuwen en Huber alle saaklike regte op onroerende eiendom onroerend van aard was terwyl alle ander regte roerend van aard was. Dit bring Van der Vyver tot 'n enger beskouing van dit wat as voorwerp van onteiening kragtens die Onteieningswet beskou kan word:

> "Die wetgewer gaan egter verder en omskryf 'onroerende goed' as 'ook 'n saaklike reg in of oor onroerende goed'. So beskou, kan 'n onteienaar ingevolge die Onteieningswet

> slegs liggaamlik roerende en onroerende sake, synde regsobjekte, asook saaklike regte in of oor liggaamlike onroerende sake, synde subjektiewe regte, onteien" (32–33).

Om saam te vat sou die voorwerp van onteiening kragtens die Onteieningswet sowel 'n saak, as regsobjek, as saaklike regte, as subjektiewe regte ten aansien van onroerende sake, kon wees. Volgens Gildenhuys sou daarbenewens ook vorderingsregte en immaterieelgoedereregte as voorwerp van onteiening kragtens die Onteieningswet kon dien. Dit spreek vir sigself dat persoonlikheidsregte synde onlosmaaklik verbonde aan die persoonlikheid van die reghebbende nie vatbaar vir onteiening sou wees nie (sien verder Gildenhuys 57). Daar behoort geen teoretiese beswaar te bestaan teen die insluiting van vorderingsregte en immateriële goedereregte as voorwerpe van onteiening in onteieningswetgewing nie.

Die eiendomsreg ten aansien van die goed wat onteien is, gaan bevry van alle verbande op die onteieningsdatum op die onteienaar oor. Indien daardie goed egter grond is, bly dit onderworpe aan alle geregistreerde regte (uitgesonder verbande) waarmee dit ten gunste van derdes beswaar is (a 8(1) van die Onteieningswet; Gildenhuys 52). Indien 'n onroerende saak onteien word, is registrasie van eiendomsoorgang ten gunste van die owerheid nie noodsaaklik nie maar wenslik vir sover die owerheid op sy beurt nie eiendomsreg van die onroerende saak kan oordra alvorens die eiendomsoorgang ten gunste van die owerheid geregistreer is nie (Van der Merwe *The law of things* (1987) 146). Op die onteieningsdatum word alle ongeregistreerde regte ten aansien van die onteiende grond beëindig (a 22 van die Onteieningswet).

Die vraag wat die voorwerp van onteiening kragtens die Onteieningswet sou wees indien byvoorbeeld 'n "plaas" (as kadastrale eenheid) onteien sou word, bly egter grootliks onbeantwoord. Is dit die onroerende saak, as regsobjek, of is dit eiendomsreg, as subjektiewe reg wat deur die owerheid onteien word?

In *Estate Marks v Pretoria City Council* 1969 3 SA 227 (A) word daarop gewys dat:

> "The respondent expropriated, not the rights in respect of the erven in issue, but the erven themselves, ie the land, together with the improvements thereon, comprising the erven" (241E; sien ook Gildenhuys 52 67).

Aangesien die wetgewer beoog het om sover moontlik onbeperkte eiendomsreg van die grond te verkry wat onteien word (a 8(1) en 22 van die Onteieningswet), is in die Onteieningswet ook gebruik gemaak van die konstruksie van die onteiening van "goed". In watter mate die wetgewer suksesvol was en of dieselfde oogmerk met die voorgestelde subjektiefregtelike konstruksie, wat hieronder bespreek word, bereik sou kon word, word egter vir die huidige oopgelaat.

Daar word nietemin aan die hand gedoen dat die *dictum* in die *Estate Marks*-saak nie meer tred hou met die moderne sakereg indien die leerstuk van subjektiewe regte as korrekte vertrekpunt aanvaar word nie. In die gewone gang van sake, anders as wat die algemene spraakgebruik te kenne gee (bv die transport of oordrag van 'n "plaas"), gaan dit by die verkryging van eiendomsreg van 'n saak òf oor die oordrag van eiendomsreg as subjektiewe reg kragtens 'n saaklike ooreenkoms om eiendomsreg oor te dra en te ontvang (sien *Air Kel (Edms) Beperk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A)) (by die afgeleide wyses van eiendomsverkryging), òf oor die verkryging van eiendomsreg as subjektiewe reg (by die oorspronklike wyses van eiendomsverkryging). Daarbenewens word registrasie in die geval van onroerende sake of lewering in die geval van roerende sake by afgeleide wyses van eiendomsverkryging vereis.

Indien die leerstuk van subjektiewe regte as korrekte vertrekpunt aanvaar word, behoort onteiening eerder te fokus op die ontneming of beperking van die onderdaan se subjektiewe regte. Die gedagtegang dat onteiening sou neerkom op die ontneming van die onteiende se saak as regsobjek, behoort hiervolgens as regswetenskaplik onsuiwer beskou te word.

In die mate wat die onteienaar deur middel van die wet waarkragtens die onteiening plaasvind meer "regte" kan verkry as wat die onteiende gehad het, word onteiening as 'n oorspronklike wyse van eiendomsverkryging beskou (Gildenhuys 52; Van der Merwe *Sakereg* (1979) 194; vgl Yiannopoulos *Civil law property coursebook* (1987) 228–229). Die onteienaar is nie beperk tot die regstitel wat die onteiende gehad het of onderworpe aan enige gebreke wat kon bestaan het nie (Gildenhuys 67). Dit is egter nie heeltemal duidelik wat hierdie meerdere "regte" sou uitmaak nie. Vir sover artikels 8(1) en 22 van die Onteieningswet voorsiening maak vir respektiewelik die behoud van geregistreerde regte en die beëindiging van ongeregistreerde regte op die onteieningsdatum, sou die onteienaar in hierdie sin meer regte verkry. Byvoorbeeld: 'n saaklike reg met 'n relatiewe werking, soos 'n ongeregistreerde serwituut wat net *inter partes* afdwingbaar is (Van der Vyver en Joubert *Persone en familiereg* (1985) 19–20; vgl egter Van der Walt "Relatiewe saaklike regte?" 1986 *TSAR* 173), word op die onteieningsdatum beëindig en die onteienaar verkry in die opsig meer "regte" as wat die onteiende vroeër gehad het. In werklikheid beskik die onteienaar slegs oor wyer bevoegdhede uit hoofde van eiendomsreg wat van nuuts verkry is. Eiendomsverkryging is oorspronklik indien die verkryger nie sy reg ontleen aan dié van 'n voorganger nie terwyl dit afgeleid is wanneer die reg van die verkryger van 'n voorganger afgelei word (Van der Merwe *Things* 137). Yiannopoulos verklaar:

> "An original acquisition involves the creation of a new property right; it is independent of any pre-existing rights over the same thing. A derivative acquisition involves a transfer of a pre-existing right from one person to another" (228).

In *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (K) konstateer regter Van Winsen:

> "The expropriating authority accordingly does not derive its title from the previous owner, but obtain its title by reason of the consequences attached by law to the operation of a valid notice of expropriation" (423G).

Met ander woorde, vir sover onteiening 'n oorspronklike wyse van eiendomsverkryging is, ontleen die onteienaar nie sy subjektiewe regte aan die onteiende nie. As gevolg van die werking van die onteieningsreg word 'n nuwe subjektiewe reg met dieselfde of 'n wyer draagwydte deur die onteienaar verkry (vgl Van der Merwe *Things* 116).

In *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 2 SA 627 (T) was die gestelde regsvraag vir beslissing deur die hof ingevolge die bepalings van reël 33 van die Eenvormige Hofreëls onder andere of die "reg" tot laterale en oppervlaktestut en die reg op stut tot die onderliggende grondlaag vatbaar is vir onteiening of verkryging kragtens die magtigende wet indien die onteienaar nie die houer is van die betrokke mineraalregte of oppervlakteregte in die eiendom nie (631 H–J). Artikel 43 van die Elektrisiteitswet 40 van 1958 maak voorsiening vir die onteiening van "grond of 'n reg in, oor of ten opsigte van grond". Regter Kriegler huldig die standpunt dat die reg op laterale en oppervlaktestut, synde 'n hoedanigheid van eiendomsreg, nie los van die verhouding tussen die grondeienaar en mineraalreghebbende gesien kan word nie en dat die reg dus ook nie

aan iemand anders buite daardie verhouding vervreem kan word of deur iemand buite daardie verhouding onteien kan word nie (641C–643B; sien Van der Walt 1987 *THRHR* 469). Anders gestel, binne die konteks van die magtigende wet kon die reg op laterale en oppervlaktestut slegs onteien word indien dit gekwalifiseer het as 'n beperkte saaklike reg en nie bloot as 'n bevoegdheid van 'n subjektiewe reg nie (sien in die algemeen JD van der Vyver "Expropriations, rights, entitlements and surface support of land" 1988 *SALJ* 5–9).

JD van der Vyver (9) is tereg van mening dat daar geen rede bestaan waarom bevoegdhede van 'n eienaar nie deur die owerheid onteien kan word nie mits die onteienaar sodanige bevoegdhede onder die rubriek van 'n *ius in re aliena* verkry.

Ondanks die duidelike bewoording van die Onteieningswet en ander onteieningswetgewing word die volgende konstruksie van onteiening in die lig van die leer van subjektiewe regte aan die hand gedoen: *Onteiening is die beëindiging of beperking van 'n onderdaan se subjektiewe reg ten aansien van 'n regsobjek deur die owerheid en die verkryging van 'n subjektiewe reg ten aansien van 'n regsobjek deur die owerheid.*

Volgens Gildenhuys (51) sluit onteiening in onteieningswetgewing die volgende drie kategorië in: (a) die uitwissing van eiendomsreg; (b) die uitwissing van 'n bestaande reg ten aansien van goed; (c) die skepping van 'n nuwe reg ten aansien van goed.

Die werking van die voorgestelde subjektiefregtelike konstruksie van onteiening kan nou aan die hand van bogenoemde kategorieë geïllustreer word:

a Indien eiendomsreg van byvoorbeeld 'n onroerende saak onteien word, beteken dit eenvoudig dat die onderdaan se eiendomsreg *beëindig* word terwyl die owerheid op datum van onteiening eiendomsreg (as nuwe subjektiewe reg) ten aansien van die onroerende saak verkry. Die onderdaan se *ius in re sua* word derhalwe beëindig terwyl die owerheid van nuuts af 'n *ius in re sua* verkry met dieselfde of 'n ander draagwydte.

b Indien 'n bestaande serwituut byvoorbeeld onteien word, beteken dit eenvoudig dat die houer van die serwituut se beperkte saaklike reg ten aansien van onroerende saak *beëindig* word en dat die owerheid op datum van onteiening 'n beperkte saaklike reg oor die onroerende saak verkry. Die onderdaan se *ius in re aliena* word derhalwe beëindig terwyl die owerheid van nuuts af 'n *ius in re aliena* verkry.

c Indien 'n nuwe serwituut byvoorbeeld ten aansien van 'n onroerende saak onteien word, beteken dit eenvoudig dat die eienaar van die onroerende saak se eiendomsreg *beperk* word en dat die owerheid op datum van onteiening 'n beperkte saaklike reg oor die onroerende eiendom verkry. Die onderdaan se *ius in re sua* word derhalwe beperk terwyl die owerheid 'n *ius in re aliena* verkry.

In aansluiting by Gildenhuys se wyer benadering wat vorderingsregte en immaterieelgoedereregte as voorwerpe van onteiening insluit, kan 'n verdere kategorie tot sy indeling gevoeg word, naamlik die onteiening van vorderingsregte of immaterieelgoedereregte. Die werking van die voorgestelde subjektiefregtelike konstruksie by die onteiening van vorderingsregte en immaterieelgoedereregte sal identies wees aan die onteiening van eiendomsreg in kategorie (a) hierbo.

Die permanente onteiening van eiendom (ingevolge a 27(1)(a) van die ordonnansie) hoort tot kategorie (a) hierbo. Daar word aan die hand gedoen dat

indien die tydelike gebruik van eiendom (ingevolge a 27(1)(b) van die ordonnansie) en die verkryging en verwydering van materiaal (ingevolge a 27(1)(c) van die ordonnansie) as beperkte saaklike regte gekonstrueer kon word, ook hierdie gevalle onder kategorie (c) hierbo tuisgebring kan word.

Die voorgestelde subjektiefregtelike konstruksie van onteiening vind nie alleen aansluiting by die moderne sakereg nie; dit is ook in ooreenstemming met die klem wat die hof, anders as die magtigende wet, in die onderhawige saak laat val op die beskerming van die indiwidu se subjektiewe regte teen die ontneming of beperking daarvan deur die owerheid.

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DIE *NULLA BONA*-RELAAS INGEVOLGE ARTIKEL 8(b) VAN DIE INSOLVENSIEWET 24 VAN 1936

Nedbank Ltd v Norton 1987 3 SA 619 (N)

In 'n aansoek om finale sekwestrasie van die respondent (R) se boedel, beweer die applikant dat R 'n daad van insolvensie ingevolge artikel 8(b) van die Insolvensiewet 24 van 1936 (hierna "die wet") gepleeg het. Die applikant het vonnis teen R verkry op grond van 'n lening aan hom. R het die lening nie terugbetaal nie. 'n Lasbrief tot voldoening aan die vonnis en eksekusie van sy roerende goed is verkry. Na 'n besoek aan R het die adjunk-balju 'n *nulla bona*-relaas uitgereik. Volgens die relaas blyk dit dat die adjunk-balju die lasbrief op R gedien het en die aard en dringendheid daarvan aan hom verduidelik het. Dit blyk voorts dat geen vervreembare eiendom in beslag geneem kon word nie omdat al R se roerende goed aan 'n kollaterale notariële verband onderworpe was. Die bron van hierdie inligting word nie openbaar nie. Later blyk dit dat hierdie verband 'n algemene verband was wat al R se roerende bates in die algemeen (huidig en toekomstig), ongeag waar dit geleë is, gebind het. Die goedere was nie spesifiek beskryf en genommer nie en was steeds in R se besit. R beweer vervolgens dat die *nulla bona*-relaas foutief was en nie 'n daad van insolvensie, soos beskryf in artikel 8(b), daarstel nie. Die vraag voor die hof is gevolglik of 'n *bona fide*-vonnisskuldeiser geregtig is om die vonnisskuldenaar se roerende goed in beslag te neem en te verkoop indien hierdie goed ingevolge 'n behoorlik geregistreerde algemene notariële verband verhipotekeer is maar nie aan die houer van die verband gelewer is nie en steeds in besit van die skuldenaar gebly het. Indien die antwoord op hierdie vraag bevestigend is, is dit vervreembare eiendom ingevolge artikel 8(b). 'n *Nulla bona*-relaas sou nie in sodanige omstandighede uitgereik kon word nie.

Artikel 8(b) bepaal dat die skuldenaar 'n daad van insolvensie begaan

> "as 'n hof 'n vonnis teen hom gevel het en hy in gebreke bly om, op verlange van die beampte belas met die tenuitvoerlegging van die vonnis, aan die vonnis te voldoen of om aan daardie beampte vervreemdbare goed aan te wys wat voldoende is om aan die vonnis te voldoen of as uit die relaas van daardie beampte blyk dat hy nie genoeg vervreemdbare goed gevind het nie om aan die vonnis te voldoen".

(Waar in hierdie bespreking na die geregsbode of bode verwys word, word daarby ook 'n balju of adjunk-balju geïmpliseer.) Artikel 8(b) skep in werklikheid twee verskillende dade van insolvensie wat in 'n sekere sin nie geheel en al onafhanklik van mekaar is nie (sien 621G–I).

Die *eerste daad* word gepleeg wanneer 'n lasbrief op die skuldenaar persoonlik gedien word maar hy nie daaraan voldoen nie. Op sigself is dit nie 'n daad van insolvensie nie. Die skuldenaar moet ook, op navraag van die bode, versuim om *prima facie* voldoende vervreembare eiendom om aan die vonnisskuld te voldoen, aan te dui. Die skuldenaar kan nie, wanneer die lasbrief vir eksekusie op hom gedien word, aanbied om die skuld in paaiemente te betaal of om 'n verband op sy onroerende eiendom (soos erwe) te neem om sodoende aan die vonnisskuld te voldoen nie. Die skuldeiser is op onmiddellike betaling geregtig (sien bv *Risley and Co v Karapen* 15 NLR 16; *Paizes v Phitides* 1940 WLD 189).

Die *tweede daad* word gepleeg waar die skuldenaar nie persoonlik opgespoor kon word nie en die bode self nie voldoende vervreembare goed kon vind om aan die lasbrief te voldoen nie.

Die twee dade is afhanklik van mekaar in die sin dat slegs waar die eerste daad nie van toepassing is nie (omdat persoonlike diening van die lasbrief weens die afwesigheid van die skuldenaar nie kan plaasvind nie), die tweede daad gepleeg kan word. Die bode kan dus nie kies welke optrede hy wil volg nie. Hy moet eers poog om die skuldenaar op te spoor (sien bv *Moodley v Hedley* 1963 3 SA 453 (N)). In die onderhawige saak verklaar regter Thirion dan ook dat die skuldenaar beter kennis as enige ander persoon in verband met sy eiendom en die omstandighede daarvan het (622B). Sou die bode versuim om, wanneer dit vir hom moontlik is, die skuldenaar daaromtrent uit te vra, kan kwalik gesê word dat hy alle nodige of behoorlike stappe gedoen het om vas te stel welke eiendom die skuldenaar het.

As die skuldenaar versuim om voldoende eiendom aan te wys, hoef die bode nie self vas te stel of daar voldoende eiendom is nie. Daar is dan reeds 'n daad van insolvensie. Hy hoef nie verder 'n aktiewe soektog na eiendom te loods nie en kan staatmaak op wat die skuldenaar hom meedeel. Waar die skuldenaar eiendom op 'n ander plek as by sy woonplek het, moet hy dit aan die bode meld. Daardie goed moet voldoende na aard en omstandighede beskryf word om die bode in staat te stel om dit te vind en daarop beslag te lê. Die skuldenaar hoef nie die bode daarheen te neem nie. Dieselfde geld met betrekking tot roerende bates wat in 'n ander distrik geleë is. Dit is nie die plig van die bode of applikant om 'n soektog na sulke goed op tou te sit nie. In beide gevalle kan die bode egter nie 'n *nulla bona*-relaas uitreik sonder om die betrokke goed in ag te neem nie. Word die skuldenaar nie opgespoor nie, moet die bode self ondersoek na die vervreembare goed instel. Daar kan egter nie van hom verwag word om, as hy geen kennis van die skuldenaar se omstandighede het nie, 'n soektog na moontlike eiendom van die skuldenaar te loods nie (Smith *The law of insolvency* (1982) 32). Alhoewel dit prakties tydrowend kan wees, sal dit nie onmoontlik wees om onroerende eiendom op te spoor nie. 'n Navraag by die akteskantoor behoort voldoende te wees. Dit kan egter moeilik (indien nie feitlik onmoontlik nie) wees om roerende bates op te spoor.

Waar die skuldenaar wel oor voldoende eiendom beskik, sal die bode dit in beslag neem en op 'n eksekusieveiling verkoop. Die opbrengs sal ter delging van

die vonnisskuld aangewend word. Waar die aangewese eiendom egter klaarblyklik onvoldoende is, hoef die bode dit nie in beslag te neem nie. Die skuldeiser kan dan dadelik met die sekwestrasie voortgaan. Of daar 'n tekort is, is 'n feitevraag en die *onus* om dit te bewys, rus op die applikant (sien bv *Premier Finance Corporation (Pty) Ltd v B Grillanda t/a Auto Sales Centre* 1972 1 SA 347 (D) 349). Indien 'n spesifieke bate wat verkoop moet word in die lasbrief genoem is, hoef die skuldenaar nie daardie bate aan te wys nie. Die bode sal in so 'n geval vanselfsprekend daarvan bewus wees (sien bv *Van der Spoel v Langerman* 3 Menz 307; *Marsh v Makein* 2 SC 104). Insgelyks hoef die skuldenaar nie bates wat deur die eksekusieskuldeiser in pand gehou word, aan die bode uit te wys nie (*Dell v Caro* 1 HC 393).

Die *nulla bona*-relaas moet noukeurig ondersoek word. Indien dit gebrekkig of nie in orde blyk te wees nie, moet dit aan die bode teruggegee word vir verbetering vóórdat die sekwestrasie-aansoek gedoen word. In die saak onder bespreking beklemtoon regter Thirion dat dit uit die *nulla bona*-relaas moet blyk dat alle nodige en behoorlike stappe gedoen is om vas te stel welke eiendom die skuldenaar het. Indien dit nie die geval is nie, sal die sekwestrasieprosedure abortief wees (sien bv ook *Saber Motors (Pty) Ltd v Morophane* 1961 1 SA 759 (W) 762). Die relaas moet dus die volgende inhou: òf dat die bode beweer dat hy die aard en dringendheid van die eksekusielasbrief aan die skuldenaar verduidelik het, betaling geëis het, die verweerder nie aan die vonnis voldoen het nie en dat die verweerder ook nie op versoek van die bode voldoende vervreembare eiendom kon aanwys om aan die vonnisskuld te voldoen nie; òf dat die bode verklaar dat hy gepoog het om die skuldenaar op te spoor maar hom nie kon vind nie; dat hy gevolglik self ondersoek ingestel het en nie eiendom waarop hy beslag kon lê, kon vind nie (Smith *The law of insolvency* 36–37).

In die aansoek onder bespreking reflekteer die *nulla bona*-relaas nie dat die vereiste artikel 8(b)-versoek deur die bode gerig is nie. Die bode was bewus van die bestaan van roerende goed wat aan R behoort het, maar het dit nie in beslag geneem nie. Volgens hom was al die roerende goed ingevolge 'n algemene notariële verband verhipotekeer. Die bron van hierdie inligting word (soos reeds genoem) nie in die relaas openbaar nie. Dit is dan ook een van die redes waarom die hof beslis dat die *nulla bona*-relaas onvolledig en foutief is (622B).

Indien die bode se relaas die bestaan van vervreembare eiendom aantoon, maar die waarde daarvan nie uit die relaas blyk nie, kan nie tot die slotsom gekom word dat 'n daad van insolvensie gepleeg is nie (*In re Harpur* 2 EDC 103). By die relaas moet die oorspronklike of 'n gesertifiseerde afskrif van die eksekusielasbrief aangeheg word. Die *nulla bona*-relaas is dus in effek 'n verslag van die bode waarin te kenne gegee word dat die skuldenaar oor te min of geen uitwinbare bates beskik nie. Daar is gesag vir die standpunt dat sou die skuldenaar appèl aanteken teen die vonnis ingevolge waarvan die lasbrief vir eksekusie uitgereik is, die skuldeiser nie op die reeds uitgereikte relaas kan steun nie (*Duchen v Flax* 1938 WLD 119 127). Die hof sal in so 'n geval seker moet maak dat dié prosedure nie slegs deur die skuldenaar gebruik word om tyd te wen wanneer hy besef dat 'n aansoek vir die sekwestrasie van sy boedel voorhande is nie. Dat so 'n geleentheid misbruik kan word, is nie ondenkbaar nie.

Daar moet tussen 'n relaas wat op die oog af geldig is en 'n relaas wat reeds met die eerste oogopslag nie aan die gestelde vereistes voldoen nie onderskei word. In eersgenoemde geval rus die *onus* op die respondent om te bewys dat

die feite daarin nie korrek is nie. In laasgenoemde geval rus die *onus* op die applikant om te bewys dat die relaas wel aan die vereistes van artikel 8(b) voldoen (*Nathan and Co v Sheonandan* 1963 1 SA 179 (N) 180).

'n Interessante vraag is of een skuldeiser op 'n *nulla bona*-relaas wat deur 'n ander skuldeiser verkry is, mag staatmaak as 'n daad van insolvensie deur die betrokke skuldenaar. Volgens *Abell v Strauss* 1973 2 SA 611 (W) 613 en *Rodrew (Pty) Ltd v Rossouw* 1975 3 SA 137 (0) is die reël dat so 'n ander skuldeiser wel daarop kan staatmaak tensy die vonnisskuldenaar die vonnisskuldeiser betaal het of hulle die een of ander reëling met betrekking tot betaling getref het. In so 'n geval het daardie relaas geen werking nie. Daar is egter gesag vir die standpunt dat indien die hof (wat die vonnis gegee het na aanleiding waarvan die *nulla bona*-relaas uitgereik is) daarna betaling in paaiemente magtig, 'n ander skuldeiser wel op die relaas mag steun in 'n aansoek vir sekwestrasie (*Raw v Clark* 14 NLR 160; *Jacquelin v Saib* 28 NLR 291). Die skuldeiser wat op 'n ander se relaas staatmaak, moet egter meld dat die skuldenaar se posisie nog dieselfde is. Só 'n relaas moet verder redelik resent wees. Dit blyk uit *Abell v Strauss supra* dat sewe maande onlangs genoeg is. Ook in *Rodrew (Pty) Ltd v Rossouw supra* 139 word die volgende beslis:

> "That difficulty is occasioned by the fact that the return is two and a half years old. When it is sought to invoke the aid of so venerable a document there must at least be an allegation based on facts mentioned in the application that the debtor's position is unchanged."

Dit is belangrik dat die bode eers oor die skuldenaar se roerende goed navraag doen wanneer hy voldoening aan die lasbrief eis. Slegs indien die roerende goed nie voldoende is om die vonnisskuld te delg nie, kan die bode ook navraag na die onroerende goed doen (*Amalgamated Hardware and Timber (Pty) Ltd v Wimmers* 1964 2 SA 542 (T)). Die bode kan dus nie dadelik op die onroerende goed ter voldoening van die vonnisskuld beslag lê of net daardie goed in ag neem wanneer 'n *nulla bona*-relaas uitgereik word nie. Aan die ander kant kan die bode ook nie die onroerende goed ignoreer en slegs die roerende goed (selfs al is die lasbrief slegs teen die roerende goed van die skuldenaar gerig) in ag neem wanneer hy 'n relaas uitreik nie. Die regter wys dan ook in hierdie verband op die verdere gebrek in die relaas wat deur die applikant verkry is (622C–E). Hy beslis uitdruklik dat alhoewel die lasbrief slegs na die roerende goed verwys en geen melding van die onroerende goed gemaak word nie, "vervreembare goed" vir doeleindes van artikel 8(b) ook die onroerende goed insluit ongeag daarvan dat die lasbrief alleen teen die roerende eiendom gerig is (sien ook *Amalgamated Hardware and Timber (Pty) Ltd v Wimmers supra; Rodrew (Pty) Ltd v Rossouw supra*).

Onroerende goed wat met 'n verband beswaar is, is nie vervreembare goed nie. Dit kan nie vryelik deur die skuldenaar vervreem word nie, omdat toestemming van die verbandhouer eers verkry moet word alvorens die skuldenaar enigsins met daardie bates kan handel. Dié goed moet egter steeds in die bode se relaas genoem word (*Richard Goldman Finance (Pty) Ltd v Elmtree Finance and Investment Co (Pty) Ltd* 1977 2 SA 624 (W)). Indien die eerste verbandhouer egter die applikant of vonnisskuldeiser is (*Western Bank Ltd v Els* 1976 2 SA 797 (A)), of indien die hof die onroerende goed spesifiek vatbaar vir eksekusie verklaar (*Barclays Nasionale Bank Bpk v Badenhorst* 1973 1 SA 333 (N)), is die bates wel vervreembare eiendom kragtens artikel 8(b) van die wet. Dit is so al

is die oorskot, nadat die verbandskuld gedelg is, voldoende om aan die vonnisskuld te voldoen. Dieselfde geld vir roerende goed wat in die besit van die algemene notariële verbandhouer is (*Stern v Blond and Barren* 1907 TH 16).

In die saak onder bespreking word die vraag gevra (622I) of hierdie posisie ook geld vir roerende goed wat in die algemeen verhipotekeer is en nie in besit van die notariële verbandhouer is nie. Kwalifiseer hierdie goed as vervreembare eiendom vir doeleindes van artikel 8(b)? Die antwoord sal daarvan afhang of dieselfde mate van sekuriteit wat gebied word aan 'n notariële verbandhouer aan wie die goed gelewer is, ook vir 'n verbandhouer sal geld wat nie in besit van die goed is nie. Die hof verwys na *Mangold Brothers v Eskell* (1884) 3 SC 48 waarvolgens die posisie in die Kaapprovinsie is dat 'n geregistreerde notariële verband oor roerende goed (*pignus mobilium*) wat nie aan die pandhouer gelewer is nie, geen uitwerking teenoor 'n eksekusieskuldeiser het nie (623B; sien ook Van der Merwe *Sakereg* (1979) 474 e v). Die rede daarvoor is dat 'n geregtelike inbeslagneming 'n *pignus judiciale* skep wat voorkeur bo alle ouer verbande geniet wat nie deur lewering voltooi is nie (om sodoende 'n saaklike reg te skep). Die reël *mobila non habent sequelam* geld in sulke gevalle. Dit beteken dat 'n pand van roerende goed, voltooi deur lewering, sterker is as 'n ouer algemene hipoteek oor goed wat nie gelewer is nie ('n *pignus mobilium* word dus geskep); 'n geregtelike inbeslagneming het bowendien dieselfde krag as 'n verpanding van roerende goed voltooi deur lewering. 'n Verpanding van roerende goed sonder lewering bring nie juridies 'n sterker aanspraak as 'n stilswyende algemene hipoteek mee nie. Enige voordeel wat dit die pandhouer gee, word deur 'n geregtelike inbeslagneming deur 'n *bona fide* skuldeiser verydel (sien ook *International Shipping Ltd v Affinity Ltd* 1983 1 SA 79 (K) 84).

In navolging van *Keet v Dell* (1884) 1 Kotze 109 kan die posisie in Transvaal soos volg opgesom word: waar roerende goed wat deur 'n notariële verband verpand is, in besit van die skuldenaar gevind word (alhoewel hy verklaar dat hy die eiendom net ten behoewe van die pandhouer hou (*precario*)), moet die pand ten gunste van 'n *pignus judiciale* uitgestel word indien die eiendom ter voldoening van 'n vonnis in eksekusie geneem is. Laasgenoemde is ekwivalent aan lewering (623 e v).

Die posisie in die Kaapprovinsie en Transvaal, wat ook die gemeenregtelike stand van sake weergee, is dus (a) dat 'n *pignus mobilium* voltooi deur lewering voorkeur geniet bo 'n ouer stilswyende algemene hipoteek; en (b) dat 'n *pignus judiciale* (*praetorium*) wat deur inbeslagneming geskep is, dieselfde regskrag het as 'n *pignus mobilium* voltooi deur lewering (624A–B).

In Natal is die posisie anders as gevolg van 'n uitspraak van die hooggeregshof van Ceylon; hierdie uitspraak het 'n definitiewe uitwerking op die gestelde gemeenregtelike posisie gehad (624 e v; kyk ook *Pietersburg Cold Storage Ltd v Cacaburas* 1925 TPD 295; *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 4 SA 175 (N) 182). Aanvanklik is in 'n reeks sake (624F) beslis dat (besondere) goedere wat ingevolge 'n (geregistreerde) notariële verband verpand is – alhoewel dit nie gelewer is nie – aan die verbandhouer 'n voorkeur by insolvensie van die skuldenaar verleen (in dieselfde mate as wat 'n verband of pand dit sou doen; sien ook Van der Merwe 475; a 2 van die Insolvensiewet 24 van 1936 vir die omskrywing van "vrye oorskot", "sekuriteit" en "spesiale verband". Die verbandhouer behou sy voorkeurreg op die opbrengs van die saak wanneer die ander skuldeisers van die skuldenaar daarop beslag lê of wanneer

die skuldenaar insolvent raak). Na aanleiding hiervan is dan ook beslis (sien sake aangehaal op 624G) dat so 'n geregistreerde notariële verband gedurende die nog solvente toestand van die skuldenaar se boedel, 'n reg aan die houer van die verband verleen wat inbeslagneming van die goed deur 'n vonnisskuldeiser van die skuldenaar voorkom.

Na Unie-wording (en hoewel die posisie van dié in die ander provinsies verskil het), kon die Natalse afdeling van die hooggeregshof, weens die uitwerking wat dit op gevestigde regte kon hê, nie voldoende rede vind om die Natalse beslissings op hierdie punt te wysig nie (*SA and General Investment and Trust Co Ltd v Smith* 1913 CPD 142; *Durmalingan v Bruce* 1964 1 SA 807 (D); *Rosenbach & Co (Pty) Ltd v Dalmonte* 1964 2 SA 195 (N)).

Toe die Insolvensiewysigingswet 29 van 1926 aangeneem is, sou die effek van artikel 3 van daardie wet wees om 'n verbandhouer in Natal se posisie as 'n versekerde skuldeiser by insolvensie tot dié van 'n preferente skuldeiser ten opsigte van die vrye oorskot te verlaag. Om hierdie situasie te remedieer, is die Wet op Notariële Verbande (Natal) 18 van 1932 op die wetboek geplaas. Dit herstel weer die regsposisie soos dit voor die Insolvensiewysigingswet was. Artikel 1 daarvan bepaal dat die wet slegs geld ten aansien van verbande wat roerende goed, wat spesifiek beskryf en genommer word (d w s roerende goed in die besonder), verhipotekeer.

Regter Thirion (626 e v) vestig gevolglik sy aandag op die bepalings van Wet 18 van 1932. Hy bevestig (627A) dat die agtergrond waarteen 'n wet gemaak word en die doel wat die wetgewer wou bereik, van groot belang is. Hy is van mening dat (a) die doel van die wetgewer nie bloot was om die effektiwiteit van notariële verbande te herstel wat besondere roerende goed in Natal sonder lewering van die goed verhipotekeer nie, maar (b) om wetlike krag te verleen met betrekking tot die sekuriteit deur so 'n verband verskaf, en (c) terselfdertyd die reg in Natal in ooreenstemming met die gemenereg (soos in die res van die land) te bring, behalwe vir die aspekte waaroor spesifiek in die wet voorsiening gemaak word.

Artikels 2 en 3 Wet 18 van 1932 maak spesiaal voorsiening vir besondere roerende goed wat deur 'n notariële verband verhipotekeer word. Die late aan die kant van die wetgewer om soortgelyke bepalings met betrekking tot roerende goed te maak wat in die algemeen verhipotekeer is, kan dus alleen geïnterpreteer word as 'n bedoeling dat, behalwe vir genoemde uitsondering, die gemeenregtelike beginsels soos dit eenvormig *buite* Natal aangewend word, ook *in* Natal aanwending moet vind.

Opsommenderwys beslis die hof (628B–C) dus dat die uitwerking van die Wet op Notariële Verbande (Natal) is dat geen notariële verband in Natal (met die uitsondering van 'n notariële verband wat roerende goed in die besonder verhipotekeer) die krag of effek van 'n verpanding van roerende goed sal hê indien dit nie deur die skuldenaar gelewer is en die skuldeiser dit nie in sy besit hou nie.

In die gegewe feitestel gaan dit oor 'n notariële verband waarin roerende goed in die algemeen (dus nie spesifiek beskryf en genommer nie) verhipotekeer word. Daarom val dit nie in die uitsonderingsgeval soos beskryf in die eerste voorbehoud van artikel 1(1) Wet 18 van 1932 nie. Omdat die roerende goed nie gelewer is nie, het dit nie die krag of effek van 'n pand nie. Gevolglik skep dit

nie 'n saaklike reg wat sterker as die *pignus judiciale* is nie (628). Die skuldeiser verkry slegs 'n voorkeurreg bo konkurrente skuldeisers op die opbrengs van die goed wat by insolvensie van die skuldenaar in die vrye oorskot val (a 102 Insolvensiewet 24 van 1936; *Vrede Koöp Landboumaatskappy Bpk v Uys* 1964 2 SA 283 (0)).

Die resultaat van bogenoemde uiteensetting van die regsposisie met betrekking tot notariële verbande in die algemeen in Natal is gevolglik dat die roerende goed van R as vervreembare eiendom beskou moet word en gevolglik deur die applikant in beslag geneem kan word. Dit volg dus dat die adjunk-balju nie geregtig was om 'n *nulla bona*-relaas uit te reik nie. Die voorlopige sekwestrasiebevel is dienooreenkomstig opgehef.

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BOEKE

BIBLIOGRAFIE VAN HOOGLERAREN IN DE RECHTEN AAN DE LEIDSE UNIVERSITEIT TOT 1811

deur MARGREET AHSMANN en R FEENSTRA, met medewerking van R STARINK

BV Noord-Hollandsche Uitgevers Maatschappij Amsterdam Oxford New York 1984; 378 bl

Hierdie werk vorm 'n band (deel VII.I) in die reeks *Geschiedenis der Nederlandse Rechtswetenschap.* Hierdie reeks word saamgestel in opdrag van die "Commissie voor de uitgave van de geschiedenis der Nederlandse rechtswetenschap van de Koninklijke Nederlandse Akademie van Wetenschappen". Die eerste nommer daarvan het reeds in 1937 die lig gesien.

In die hoofstuk "Inleiding tot de bibliografie. Algemeen" (31–34) skets die samestellers kortliks hul benadering tot die geheel van deel VII van die reeks, te wete die omvattende bibliografie van die Nederlandse regswetenskap tot 1811. Hulle wys daarop dat daar 'n groot gebrek is aan omvattende bibliografiese werke oor die Nederlandse regswetenskap voor 1800. Buiten bibliografieë vir afsonderlike outeurs soos dié van Ter Meulen en Diermanse oor Hugo de Groot, bevredig die meer algemene werke geensins nie: Dekkers se *Bibliotheca Belgica juridica* (1951) is onvolledig en onnoukeurig, terwyl Roberts se *A South African legal bibliography* (1942) uiteraard afgestem is op materiaal wat hier te lande beskikbaar was.

Dit wil voorkom of faktore soos veral 'n gebrek aan tyd die samestellers genoop het om 'n middeweg te volg in hul benadering: 'n volledige werk soos die vermelde oor De Groot was nie te bereik nie, terwyl iets meer as Dekkers en Roberts moes verskyn. Die eindproduk is 'n uiters geslaagde bronnebundel wat berus op "outopsie", in die sin dat die gesiteerde bronne (of ten minste dan in 'n paar gevalle, enkele bladsye van getroue kopieë daarvan) self deur die samestellers geraadpleeg is. Die onnoukeurige en onwetenskaplike metode om gegewens uit sekondêre bronne soos lewensbeskrywings oor te neem, is geheel en al vermy.

Ten einde die bibliografie binne hanteerbare perke te hou, is die volgende sinvolle beperkinge deur die outeurs in die vooruitsig gestel:

a Slegs gedrukte werke word opgeneem.

b Hoewel nie slegs Nederlandsgebore juriste se werke weerspieël word nie, word Nederlanders wat hul loopbane buite die grense van hul moederland gevolg het, buite rekening gelaat. Spesifiek wat betref buitelandsgebore hooglerare, is alleen diegene opgeneem wat ten minste vyf jaar in Nederland doseer het.

c Geografiese begrensing was sodanig problematies dat praktiese oorwegings geen ander uitweg gelaat het as dat Suid-Nederlandse juriste as buitelanders beskou is, tensy hulle ten minste vyf jaar lank in die Noordelike Nederlande werksaam was.

d Die jaar 1811 word as afsnypunt geneem omdat dit die jaar van inlywing van die Nederlande by Frankryk was. Alle werke van juriste wat enigsins voor hierdie datum gepubliseer het, word opgeneem ten spyte daarvan dat sommige daarvan eers na 1811 in druk verskyn het.

e Slegs outeurs van regswetenskaplike literatuur word opgeneem, dit wil sê outeurs van Romanistiese, Kanonieke en natuurregtelike werke, asook van dié oor geldende inheemse reg. Waar 'n opgenome outeur byvoorbeeld die opsteller was van 'n wetsteks of -ontwerp en dies meer, word die relevante teks, op 'n paar uitsonderinge na, nie vermeld nie. Selfs *disputationes* en *dissertationes* word as algemene reël weerspieël.

Wat betref hierdie besondere eerste deel van die bibliografie, te wete dié met betrekking tot die Leidse universiteit (35–39), is alleen diegene opgeneem wat tussen 1575 (die stigtingsjaar van die universiteit) en 1811 die funksie van hoogleraar of "lector" beklee het. Enkele uitsonderinge is egter deur die samestellers gemaak, soos met betrekking tot A Thysius junior wat, ofskoon hy nie aan die gestelde kriteria beantwoord nie, tog vanweë sy *persoonlike* titel as professor ingesluit is; andere, soos Diederik van Egmond van den Nyenburg, Lubbertus Honradius en Justus Lipsius wat streng gesproke wel kwalifiseer, is uitgelaat vanweë die feit dat hulle òf nie werklik as dosente opgetree het nie, òf vir 'n baie kort tydsbestek aldus werksaam was, òf weens die feit dat hul gepubliseerde werke oorwegend op ander terreine as die regswetenskap lê.

Die bibliografiese gegewens word telkemale voorafgegaan deur 'n bondige, dog helder biografiese nota met 'n ewe bondige maar bruikbare verwysingsapparaat vir diegene wat meer lewensdetail sou wou naspeur.

Die skrywers wat opgeneem is (48 in getal) word – volgens die gebruiklike metode – in alfabetiese volgorde behandel. Onder elke outeur verskyn sy werke, sover moontlik in chronologiese volgorde in ooreenstemming met die datum van die eerste uitgawe van 'n gesiteerde werk. Van hierdie chronologiese groepering word egter soms om dringende redes van doelmatigheid afgewyk (sien 38).

Na elke werk word die naam van die biblioteek vermeld waar die besondere gesiteerde werk beskikbaar is. Die samestellers het gepoog om sover moontlik die eksemplare wat tans in die Leidse universiteitsbiblioteek aanwesig is, te beskrywe; indien hierdie uitmuntende biblioteek nie in besit is van 'n besondere werk van 'n outeur wat opgeneem is nie, word na 'n eksemplaar uit 'n ander Nederlandse openbare biblioteek verwys; slegs indien 'n werk glad nie in 'n Nederlandse biblioteek aangetref word nie, vind mens 'n verwysing na 'n buitelandse biblioteek. (Interessantheidshalwe kan vermeld word dat die enigste Suid-Afrikaanse biblioteek waarna verwys word, die Suid-Afrikaanse Biblioteek in Kaapstad is.)

Die bibliografie bevat verder 'n lys van verkorte aangehaalde literatuur, 'n lys van biblioteke en 'n lys van gebruikte afkortings. 'n Register van persoonsname verskyn gebruiklikerwys aan die einde.

Vir elkeen met 'n opregte belangstelling in die Romeins-Hollandse reg en sy geskiedenis in die algemeen, en vir die Suid-Afrikaanse histories-georiënteerde juris in die besonder, is hierdie werk beslis van meer as bloot "akademiese" nut. Menige praktyksjuris sal waarskynlik met nie veel meer nie as 'n moedelose sug en 'n gemompel van "*ars gratia artis*" die werk by hom laat verbygaan. Vir die historiese navorser is hier egter, in een band, 'n skatkis van verwysings na werke uit die tydvak en omgewing waaruit (toegegee, soms maar heel indirek) ons tans geldende Suid-Afrikaanse reg ontwikkel het. Hoewel name soos Böckelmann, Bronchorst, Donellus, Van der Keessel, Matthaeus (III), Neostadius, Noodt, Pijnacker, Scheltinga, Schultingh, Arnold Vinnius, Johannes Voet, Bavius Voorda en Westenberg heel bekend is onder Suid-Afrikaanse regshistorici (sommiges waarskynlik weiniger!) is die chronologiese uiteensetting van die skrywers se werke van groot waarde. Die besondere praktiese nut van die bibliografie lê daarin dat 'n eksemplaar wat in Suid-Afrika onverkrygbaar is, nou nagespoor kan word na 'n Nederlandse of ander openbare

biblioteek. Die moontlikheid vir 'n beter *ontsluiting* van bronne is dus vir ons te lande 'n pluspunt van hierdie werk.

Die verdere behandeling van werke van outeurs wat in Suid-Afrika minder bekend of selfs onbekend is, verbeter ook ons vermoë tot "*petere fontes*". Dit is dan ook met groot belangstelling dat ons die verskyning van die volgende bande van hierdie bibliografie afwag. Hulle sal gewy word aan die universiteite van Franeker, Groningen, Utrecht en Hardewijk, asook aan ander hoër onderwysinstansies soos die Athenaea van Amsterdam en Deventer en, les bes, aan outeurs wat nie as dosente werksaam was nie maar eerder as praktyksjuriste bekendheid verwerf het – soos deur die samestellers in die vooruitsig gestel word (34).

Die tipografiese afwerking van die bibliografie is voortreflik en die formaat en buiteblad is onderskeidelik dienlik en aanskoulik. Die samestellers verdien 'n pluimpie vir hul waardevolle bydrae.

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SATURA ROBERTO FEENSTRA OBLATA
redakteurs JA ANKUM, JE SPRUIT en FBJ WUBBE
Editions Universitaires Fribourg Suisse 1985; xxiv en 700 bl
Prys 154 fr

Op 5 Oktober 1985 het professor Robert Feenstra as hoogleraar aan die Universiteit van Leiden uitgetree. By daardie geleentheid is hierdie *Satura* (oftewel vrugteskaal), onder redakteurskap van drie van sy kollegas, aan hom gebied. Hierdie joviale, geniale Nederlandse regshistorikus behoef sekerlik geen bekendstelling in Suid-Afrika nie; daarvan getuig reeds die feit dat in die lys van 15 persone wat onder sy leiding gedoktoreer het (*Annexe* 693–696), nie minder nie as ses Suid-Afrikaners verskyn. Ook op talle ander wyses het professor Feenstra 'n belangrike rol in die Suid-Afrikaanse regswese gespeel; en terwyl daar tans hoopvolle tekens is van 'n heropbloei van die belangstelling in regsgeskiedenis ('n gebeurtenis waarin hy 'n nie-onaansienlike rol gespeel het), is dit 'n vreugde om hierdie passende huldeblyk bekend te stel. Sy onlangse besoek aan die land gee hopelik nuwe aktualiteit aan hierdie helaas laat resensie.

Die boek, volgens die *oblatio* betitel as 'n versameling pennevrugte of dan *fructus civiles*, bestaan eerstens uit 'n lys van outeurs en *subscriptores* wat lees soos 'n wêreldwye "Wie is Wie" op die gebied van die regsgeskiedenis, gevolg deur 'n lys van sy publikasies sedert 1974 ('n lys vir die voorafgaande tydperk het verskyn in *Fata iuris Romani, Etudes d'histoire de droit par Robert Feenstra* (*Leidse juridische reeks* XIII). Hierdie lys, meer as enige eerbetuiging, illustreer die jubilaris se amper ongelooflike veelsydigheid, wetenskaplike statuur en werkvermoë. Die hoofdis in die skaal, die bydraes deur 47 vakkollegas, is in drie afdelings verdeel wat 'n weerspieëling is van die drie tydperke in die regsgeskiedenis wat die voorwerp van professor Feenstra se studies en publikasies was: Romeinse reg en ander antieke regstelsels, die

"geleerde" Middeleeuse reg en ten slotte die humanisme en moderne tye. Om al die bydraes te bespreek of selfs te noem, is 'n onbegonne taak; die relatiewe belang van elk hang trouens saam met die leser se belangstellingsveld. Na enkeles kan hier verwys word – sy die seleksie dan gebaseer op die resensent se persoonlike belangstelling. Professor Alan Watson in sy "The prehistory of contracts with especial reference to Roman law" (37) vul sy bekende siening oor die evolusie van die Romeinse verbintenisreg op oorspronklike wyse aan met verwysing na sy persoonlike ervaringe in dié verband op 'n afgeleë Skotse eiland. Professor Wieacker werp in sy bydrae (71) nuwe lig op die omstrede *ius respondendi*. Professor Wubbe (95) probeer met enkele voorbeelde uit Javolenus se nadoodse uitgawe van Labeo se werke en sy kommentaar daarop, aantoon dat individuele siening eerder as streng tipering langs Sabiniaanse en Prokuliaanse lyne, vir verskille tussen die twee verantwoordelik is. Professor Paul van Warmelo, die enigste Suid-Afrikaanse verteenwoordiger, bekyk die reg ten aansien van *dos* as 'n uitvloeisel van sosiale opvattinge (201). Professor Tony Honoré, ten slotte, gebruik sy bekende styl-ontledings van die *Digesta* om aan te toon hoe die *Digesta* se opstellers Ulpianus se uiteensetting van die reg aangaande aanspreeklikheid vir diere "bederf" het (239).

Die tweede deel oor die Middeleeuse reg (of regstelsels?) sal lesers in Suid-Afrika, waar die belang van Middeleeuse ontwikkelinge in die *ius commune* veelal onderskat word, minder interesseer. Nogtans is daar hoogs interessante bydraes soos professor Weimar se bespreking van die betwiste outeurskap van Azo se *Summa Digestorum* (371) en uit Japan, ietwat verrassend, professor Sasaki se bydrae oor Bartolus se siening van die begrip *ius gentium* (431).

In die derde deel wat die tydperk na die Middeleeue dek, sal uiteraard bydraes wat ons ou skrywers raak, Suid-Afrikaanse lesers die meeste aanspreek. Hier kan verwys word na professor Gordon van Glasgow se bydrae waarin hy Grotius se invloed op Stair se *Institutions of the law of Scotland* en vandaar op die Skotse reg bespreek (571); professor Van Soest toon aan die hand van 'n aantal handgeskrewe aantekeninge van Willem Pauw wat in 1963 ontdek is, aan hoe laasgenoemde sy *Observationes tumultuariae novae* opgestel het (en hoe 'n betroubare weergawe hulle is van sy tyd se regspraak in die Hoge Raad van Holland en Zeeland) (585); en professor Donahue toon aan, na aanleiding van 'n Amerikaanse uitspraak nogal, hoe die benadering van Noodt en die natuurregskool ten opsigte van sekere aangeleenthede moontlik na Bartolus herleibaar is (609). Besonder interessant vir akademici in die algemeen en die resensent in besonder is die betreurde professor Gilissen se skets van die onderrig van Romeinse reg aan die Universiteit van Brussel in die vroeë negentiende eeu (659).

So indrukwekkend soos die bydraes self is die omvang van die boek, veral in ag genome die redakteurs se opmerking dat die aantal outeurs en die omvang van hul bydraes beperk moes word; en ook sy voorkoms, met 'n fraai linneband en 'n frappante foto van die jubilaris. Dat moeite ondervind is om die uitgawe van so 'n monumentale werk te finansier, is nie te verwonder nie en saam met die redakteurs is ons die universiteitsuitgewers van Freiburg, Switserland (professor Wubbe *gratia*?) dankbaar vir die verskyning hiervan. Die wêreld se regswetenskap is groot dank aan professor Feenstra verskuldig, en die *Satura* is 'n waardige blyk hiervan asook van die geneentheid wat die jubilaris se oudstudente, kollegas en vriende hom toedra. In die lig hiervan kan die prys, wat vir ons met ons nietige Rand skrikwekkend lyk, nie as prohibitief beskou word nie.

Ter afsluiting net 'n geringe suur noot. Die bydraes is geskryf in 'n verskeidenheid tale (Nederlands, Frans, Engels, Duits, Italiaans en Spaans) en daaroor kan geen regshistorikus wat die naam werd is, hom bekla nie. Maar was dit nodig om die *oblatio* aan 'n Nederlandse jubilaris deur Nederlandse kollegas in Frans te maak? Te dikwels en te maklik word van die inheemse Nederlands of Diets afstand gedoen ten voordele van 'n meer "internasionale" medium. Of is dit dalk 'n geval van "wiens brood men eet, diens woord men spreekt"?

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SKADEVERGOEDING AAN AFHANKLIKES BY DIE DOOD VAN 'N BROODWINNER

deur TRYNIE DAVEL

Digma Roodepoort 1987; xxxvi en 162 bl

Prys R39,95 + AVB (slegs sagteband)

Hierdie boek is gebaseer op die skryfster se doktorale proefskrif van 1984. In baie opsigte bevat dit 'n beknopte weergawe van die veld wat in haar proefskrif gedek is, maar in ander opsigte behels dit weer 'n bygehoue en kritiese optekening van die vele beduidende hofuitsprake wat sedertdien op hierdie uiters belangrike terrein die lig gesien het.

Om 'n werk oor 'n aspek van die Suid-Afrikaanse skadevergoedingsreg te bespreek, verskaf my groot vreugde. Dit is 'n regsgebied wat te lank sonder die toegewyde belangstelling van veral die akademici moes klaarkom. Die redes daarvoor is seker baie. Die swakste rede sou egter wees omdat skadevergoeding kwansuis 'n onderwerp sou wees wat min vir diegene met 'n meer teoretiese belangstelling bied. Diegene wat in die verlede gesê het – en dalk steeds onder daardie wanindruk verkeer – dat skadevergoeding 'n sogenaamde praktykskwessie is wat vir akademici ontoeganklik (of minstens oninteressant) is, se vooroordeel behoort met die lees van Davel se boek uit die weg geruim te word. Met hierdie boek toon sy op voortreflike wyse hoe teorie en praktyk mekaar op hierdie belangrike terrein aanvul.

Die onderwerp word in vier afdelings behandel. In 'n kort inleiding verduidelik Davel dat die boek handel oor die herkoms, ontwikkeling, grondslag en omvang van die eise van afhanklikes na die onregmatige, skuldige doodslag van hulle broodwinner omdat hulle van sy onderhoud of sy dienste ontneem is. Die herkoms en ontwikkeling van die afhanklikes se aksie word in 'n regshistoriese afdeling nagespeur. Die Aquiliese aksie van die Romeinse reg en die uitbreiding daarvan word deeglik nagegaan. Dit lei tot die slotsom dat die aksie van die afhanklike beslis nie daaruit ontstaan het nie. Die verdere ondersoek van die Germaanse volksregte toon aan dat die aksie van die afhanklike waarskynlik na analogie van die weergeldinstelling van die Germaanse volksreg ontwikkel het. Die oorgelewerde optekeninge van die wette van die Longobardiese konings (die *Lombarda*), wat in die twaalfde eeu kommentaar van die juriste ontlok het, slaan die brug tussen die Germaanse volksregte en die geleerde reg in die Middeleeue. Agtereenvolgens belig Davel dan die bydraes van die Glossatore, die skool van Orleans, die post-Glossatore, post-Accursiani en Kommentatore

tot die ontwikkeling van die aksie van die afhanklike. Haar slotsom is dat dit juis die ontwikkeling in hierdie tyd was wat verklaar hoe dit gekom het dat die aksie van die afhanklike in die Romeins-Hollandse reg erken is. In verskillende opsigte is die grondslae van die moderne aksie dus in hierdie fase gelê. Dit geld nie net die basis van die aksie en die aanklamping daarvan by die *actio legis Aquiliae* nie, maar ook die twee basiese berekeningsmetodes wat vandag nog gebruik word. Hierop kon in die volgende ontwikkelingsfase voortgebou word.

Davel wys in haar evaluering van die bydrae van die Hollandse skrywers van die sewentiende eeu daarop dat hulle grootliks deur die Spaanse laat-Skolastici, die moraalteoloog Thomas van Aquino en ander Europeërs beïnvloed is. Hierdie gevolgtrekking, wat ooreenstem met die moderne siening van ons gemenereg as die sewentiende eeuse *ius commune europeanum* eerder as net die reg van die provinsie Holland, moet verwelkom word. Die slotsom wat sy bereik, is dat die Nederlandse skrywers die brug geslaan het tussen die Germaansregtelike weergeldinstelling en die weiering van 'n aksie van afhanklikes in die Romeinse reg. Laasgenoemde aksie is in die sewentiende eeu as 'n uitgebreide *actio legis Aquiliae* bestempel. Ten spyte van meningsverskil hieroor, is in daardie tyd nie 'n gemeenregtelike onderhoudsplig as grondslag vir 'n geslaagde aksie vereis nie. Daarbenewens is twee berekeningsmetodes onderskei, te wete die berekening van 'n annuïteit en 'n soepeler, diskresionêre bepaling van 'n bedrag wat billik teenoor alle partye sou wees. Oor die kwessie van wie almal bevoegde eisers sou wees, het die menings in daardie tyd nog uiteengeloop.

In die derde afdeling word die moderne Suid-Afrikaanse reg bespreek. Ten aanvang probeer die skryfster die plek van die aksie van die afhanklike in die Suid-Afrikaanse privaatreg bepaal. Die siening dat dit 'n *sui generis*-aksie is, is nie vir haar aanvaarbaar nie. Sy skaar haar by diegene wat dit beskou as 'n aksie op grond van skade wat aan die afhanklike se vermoë toegebring is. Daarvolgens berus die afhanklike se skuldoorsaak dus nie op die bestaan van 'n deliktuele skuldoorsaak teenoor die broodwinner self nie. Hiermee kan nie fout gevind word nie. Waarom Davel egter oënskynlik steeds vereis dat die broodwinner "onregmatiglik" (51) gedood moet gewees het, is onduidelik. Miskien wou sy daarmee eintlik net beklemtoon dat 'n gedraging meer as een onregmatige gevolg kan hê. As dit nie die geval is nie, is dit moontlik dat daar tog 'n dieper verband tussen die aksie van die afhanklike en die *onregmatige* doding van die broodwinner bestaan as wat Davel te kenne wil gee. Hierop gaan sy egter nie verder in nie (kyk 50–51).

Reeds ten aanvang stel Davel dit duidelik dat dit vir haar oor sekere gevolge van die onregmatige, *skuldige* doodslag van 'n broodwinner gaan. Daarmee sluit sy die terrein van skuldlose en risiko-aanspreeklikheid by voorbaat uit. Dit laat 'n groot gedeelte van die gemeenregtelike en statutêre aanspreeklikheidsreg steeds onbespreek. Daaraan sal vorentoe aandag gegee moet word. Vir die debat oor die plek van die aksie van die afhanklike in die privaatreg is dit veral van belang dat daardie gevalle nie uit die oog verloor word nie. Soos Davel (1 n 2) tereg aandui, het die skadevergoedingsreg te make met alle terreine waar skadevergoedingsaansprake as die regsgevolg van 'n regsfeit ter sprake kom.

Die behandeling van die Suid-Afrikaanse reg bring al die belangrikste teoretiese en praktiese kwessies rakende die afhanklikes se eise weens die verlies aan onderhoud en dienste van hulle oorlede broodwinners na vore. Dit word op 'n wyse gestel wat nie net die wetgewing en regspraak krities en evaluerend weergee nie, maar ook aan die menings van ander skrywers reg laat geskied. Davel neem dikwels oor kontensieuse kwessies standpunt in en gee baie wenke vir die praktiese hantering van aspekte van pleitbesorging en bewysvoering in sodanige gevalle.

Moeilike kwessies in verband met verskeie skadevergoedingsregtelike vraagstukke word pertinent aangespreek. Dit dek aangeleenthede soos toekomstige skade; onderhoud uit onwettige inkomste; die regsplig-vereiste; die formele vereistes vir 'n

geslaagde aksie deur afhanklikes wat deelgenote in inheemsregtelike huwelike is; wie bevoegde eisers sou wees; potensiële verwere teen die afhanklike se aksie; die tydstip vir berekening van die skadevergoeding; voordeeltoerekening; die vraag of daar 'n "regte" of "enigste" formule vir die berekening van skadevergoeding bestaan; die plek en nut van aktuariële berekenings; die nadelige uitwerking van die "oordrewe eerbied waarmee die 'once and for all'-reël" gehanteer word; en besonderhede met betrekking tot die uiteindelike bewys van die verskillende moontlike skadeposte.

Hierdie dikwels tergende kwessies word nie slegs uitgewys nie; inteendeel, daar word werklik gepoog om verantwoorde praktiese oplossings uit die regspraak en uit skrywers se standpunte af te lei. In die proses word die gees en rigting van die appèlhofregspraak waarin hierdie belangrike kwessies veral in die afgelope dekade rigtinggewend aangespreek is, goed raakgevat en duidelik geformuleer.

Die kort slotgedeelte sluit die boek met 'n waardering van die resultate van die ondersoek af.

Die boek is bedoel om as stof vir 'n gedeelte van 'n LLB- of LLM-kursus oor die skadevergoedingsreg te dien. In hierdie doel is daar myns insiens goed geslaag. Daarbenewens wou Davel vir die regspraktisyn ook riglyne vir die hantering van sodanige sake na vore bring. Met talle verwysings en wenke slaag sy daarin om heelwat sake van groot nut vir diegene wat met die opstel van pleitstukke of skikkingsonderhandelings gemoeid is, weer te gee.

Die boek is seker nie heeltemal sonder foute nie. Dit bevat 'n paar stellings wat te absoluut is, soos die een op 99 dat ons howe "grootliks" op aktuariële getuienis en berekeninge steun (iets wat volgens haar eie weergawe, byvoorbeeld in die Voorwoord x en op 97, nie die geval is nie). 'n Ander voorbeeld is die stelling op 121 wat ten opsigte van die Wet op die Berekening van Skadevergoeding 1969 lui dat

> "Van der Walt ... enige kumulasie afwys en meen dat daar geen logiese grond bestaan vir die wetgewer se inmenging nie".

Elders uit Davel se weergawe is dit immers duidelik dat Van der Walt se standpunt is dat die voordeeltoerekeningskwessie 'n behorensvraagstuk is en dat daar dus beleidsredes (en nie (veral syfermatig-) logiese redes nie) agter daardie reël en wet gesoek moet word (kyk bv 118 by verwysing 839 e v, asook 118 vn 839–843). Waar dit om beleidsredes in orde is dat kumulasie plaasvind eerder as dat 'n voordeel die dader tot voordeel strek, twis Van der Walt beslis nie daarmee nie.

Die rede wat vir die skrale hantering van regsvergelykende stof verskaf word, naamlik dat die aksie elders meestal kragtens wetgewing hanteer word, oortuig nie (kyk Voorwoord xi). Die oorsprong en beslag van daardie bepalings word immers nie minder relevante vergelykende materiaal omdat dit in wetgewing vervat is nie. Ondanks Davel se verontskuldiging in hierdie verband, was sy nietemin miskien oorbeskeie. Die regsvergelykende verwysings wat sy wel in die voetnote opgeneem het, is insiggewend ten opsigte van die betrokke reëlings in die verskillende regstelsels.

Sou dit nie beter gewees het as Davel in haar hantering van die moeilike kwessie van die effek van die oorlede broodwinner se eie onagsame optrede wat tot die afhanklike se benadeling meegewerk het, terminologies helder tussen bydraende nalatigheid en mededaderskap onderskei het nie? Dit sou dit veel makliker gemaak het om te verstaan en te verklaar wat die effek van die invoeging van subartikels 1A en 1B by artikel 2 en die voorbehoudsbepaling by subartikel 6(a) van die Wet op Verdeling van Skadevergoeding 1956 deur Wet 58 van 1971 is.

Davel meld (Voorwoord x) dat die onderhawige gebied deur snelle ontwikkeling gekenmerk word. Dit is daarom ook nie haar skuld dat van die jongste regspraak net in die voorwoord gedek kon word nie. Dit is nou eenmaal die lot van enige skrywer op hierdie uiters dinamiese regsgebied.

Die enkele tik- en skryffoute is nie juis hinderlik of verwarrend nie. Die boek is in 'n gemaklike en aangename styl geskryf. Die lengte is sodanig dat dit gemaklik

as leerstof hanteer kan word. Die inhoudsopgawe, alfabetiese onderwerpsindeks en volledige bibliografie en lys van gewysdes verhoog die toeganklikheid van die stof vir alle gebruikers daarvan.

Alles in ag genome, kan die skryfster hartlik gelukgewens word met 'n bydrae wat die literatuur oor die skadevergoedingsreg verryk. Die vormende uitwerking daarvan op studente wat dit moet bestudeer, die leiding wat dit vir praktisyns kan verskaf en die stimulering van die gedagtes van almal wat met die aksie van die afhanklike en die skadevergoedingsreg te doen kry, sal welverdiende beloning vir die skryfster se moeite wees.

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ADMINISTRATIVE LAW

by MARINUS WIECHERS, translated from the Afrikaans by GRETCHEN CARPENTER

Butterworths Durban 1985; pp xl and 378

Price R60,00 + GST (hard cover) R45,00 + GST (soft cover)

The first edition of Professor Marinus Wiechers's *Administratiefreg* appeared in 1973 and rapidly established itself as a leader in its field in South Africa. The need for an English edition, particularly as a students' handbook, manifested itself over the years. It was therefore decided that, when a second edition became due, it should appear in both Afrikaans and English. The translation of the text of the second Afrikaans edition was entrusted to the competent hands of Professor Carpenter who, having had access to the text prior to publication, was able to bring it out in 1985 shortly after the appearance of the second Afrikaans edition in 1984. The quality of the translation is excellent, with the result that the substance of the two texts is virtually identical. Moreover, in view of the short time lapse between the appearance of the second Afrikaans edition and its translation, there was no need to update the text or decisions quoted, as is so frequently the case when a second or later edition of a book appears and it is subsequently translated, resulting in a further edition rather than a translation.

However, in view of the publication of *Administrative law* by Professor Lawrence Baxter in 1984, at virtually the same time as Wiechers's Afrikaans edition appeared, the question arises whether two handbooks on administrative law in English are necessary in South Africa. Most of the material and cases dealt with by the two writers are inevitably the same. Baxter observes in the preface to his book that it "constitutes an alternative or complementary way of looking at administrative law in South Africa; it does not presume to refute the model of administrative law which has been presented with such consistency, coherence, elegance and clarity in *Administratiefreg*".

The difference between the two works then, according to Baxter, is clearly one of approach. A brief comparison of the two works (it is not my intention to review the substance fully as this has already been done in this journal – see 1985 *THRHR* 372 and 1986 *THRHR* 118) supports this contention of Baxter.

As pointed out by Professor Henning Viljoen in the first of the above-mentioned reviews, Wiechers's *Administratiefreg* is clearly not an ideal handbook for the practitioner – though it has been used to good effect by some (see e g *Herstigte Nasionale Party van Suid-Afrika v Sekretaris van Binnelandse Sake en Immigrasie* 1979 4 SA 274 (T)). Based on Wiechers's unpublished doctoral thesis, *Die sistematiek van die administratiefreg* (UP 1965), it was a pioneering work seeking to bring some semblance of order to "the amorphous mass of rules to be culled from a multitude of sources" (see Hahlo & Kahn *South Africa: the development of its laws and constitution* (1960) 183 and Baxter *op cit* 48) which comprised South African administrative law two short decades ago. It is still the foundation of the theory of administrative law in South Africa, and deals critically with the abstract concepts which underlie or should underlie its application. The book is characterised, however, by the necessity of justifying the systematic framework the writer devised and it is, I think, this characteristic which makes it a "difficult" book (cf Henning Viljoen *op cit*). Translation has by no means eliminated this characteristic. Baxter, having accorded (*op cit* 48 – 49) lavish acknowledgement to the "fundamental contribution" of Wiechers, is able to accept the framework as established and adopt a far more pragmatic approach to the concepts which have manifested themselves within it. The advantageous position of Baxter is reflected, perhaps, by the manner in which the two writers deal with Dicey's views on the relationship between administrative law and the "rule of law" concept. Wiechers (*Administrative law* 11 – 15) is obliged to go to considerable pains to refute the views of Dicey in this regard. Riding, as it were, on the shoulders of Wiechers, Baxter, in dealing with this topic (*op cit* 31 46 – 47 79), needs do little more than place Dicey in historical perspective.

The distinction between the two books can perhaps best be illustrated by looking at the respective statements of intention of the writers themselves. Wiechers (*Administrative law* 27) states:

> "This work aims at providing a general introduction to the law governing administrative action and does no[t] [one of the few printing errors appears here!] profess to contain a comprehensive record of all existing rules relating to the powers and organization of the administration."

Baxter (*op cit* 55 – 56) professes to the following:

> "This book is mainly concerned with general administrative law; the more particular areas of administration are referred to only as a means of illustrating the general principles (or deviations from these principles)."

As far as the book as a whole is concerned, there are two major focal points: *administrative institutions and the administrative process*, including the procedures and safeguards which are or which ought to be employed within the administration; and the administrative law *as it is applied in the courts* – that aspect of administrative law traditionally dealt with under the rubric of "judicial review of administrative action".

In view of the divergent approaches and objectives, there seems to be a place in South African legal literature for each of these English texts on administrative law.

The author, translator and publisher of *Administrative law* (Wiechers) are to be congratulated on their impeccable presentation and packaging of this work.

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OPERA SELECTA HR HOETINK
STUDIA AMSTELODAMENSIA AD EPIGRAPHAM, JUS ANTIQUUM ET PAPYROLOGICAM PERTINENTIA VOL XXVII
edited by JA ANKUM and GCJJ VAN DEN BERGH
Terra Publishing Co Zuthpen Holland 1986; xviii and 283 pp
Price Dfl 95–

A criticism levelled against legal historians is that they are amateur historians. Although this implies that they pursue their study because they have a love for history, the more prominent association is that they are unaware of the theory and methodology of this science.

In South Africa this problem was compounded by the publication of DH van Zyl's inaugural lecture "Die regshistoriese metode" (1971). Since then a number of aspirant legal historians have followed this method under the impression of having solved the theoretical and methodological problems of legal history. Although Van Zyl must be credited with the identification of a problem and the creation of order in the thus far rather haphazard approach in this field, his method lacks scientific depth and appears more suited for an advocate with a penchant for historical argument than for an academic legal historian.

It is, therefore, of the utmost importance to South African legal history that Ankum and Van den Bergh have collected and published translations of some of Hoetink's essays.

Hoetink (1900–1963) studied law at Leiden under J van Kan and EM Meijers. He prepared most of his doctoral thesis, *Periculum est emptoris*, in Utrecht under JC Naber, but because of circumstances eventually promoted in Leiden under JC van Oven. Thus equipped and influenced by these eminent Romanists and legal historians he accepted the chair of civil law at the Law School of Batavia in 1929. In 1934 he became professor of Roman law and civil procedure at the University of Amsterdam, where he held the chair of Roman law until his demise.

In this collection of fourteen of his essays, eight deal with methodological problems of the science of (legal) history. In his inaugural lecture at Batavia "On understanding foreign law" (23–53) the young Hoetink scientifically expounded the problems which he identified as pivotal in the science of history and on which he would elaborate in his later work.

In the first place Hoetink stated his conviction that law has to be studied in relation to political, social, economic and cultural history – a theme elaborated in his inaugural lecture at Amsterdam ("L'arriere-plan du droit romain" (73–109)).

Secondly, Hoetink had the insight that objective knowledge of the past is an illusion, since the historical fact is not a *datum* but a *factum*. In other words, the historical fact is retrospectively made and selected by the historian who is not only influenced by the present, but also by his anticipations of the future. This theme is further set out in the essay "The concept of fact in history and legal science" (203–216). As a consequence of the second point, Hoetink came to the realization that the traditional distinction between historical interpretation and history of law as a science

aiming at objective knowledge of the past looses it's *raison d'etre* (cf "Law as an object of historical reflection" 133–169).

Finally, Hoetink discussed the inevitable use of anachronistic concepts which leads to further distortions. This topic is refined specifically in "Les notions anachroniques dans l'historiographie du droit" (216–238).

Although Hoetink questioned the prevailing methodology or rather the lack thereof, he did not lay down positive directives, which might explain his lack of followers in the field of legal history. It is, however, significant that he received acknowledgment in the fields of history as well as anthropology.

The other essays are interesting in their own right. "Les effets limitatifs de la bonne foi dans les conventions" (the addition *restrictifs* is an obvious typing error on xii and 1) and "Quelques remarques sur la vente dans le droit grec" were both published in 1929 in the *Tijdschrift voor Rechtsgeschiedenis*.

"The origin of the dual mode of Roman procedure" (1947), "Autour du 'Senatus Consulte Claudien' " (1959) and "Iustus titulus usucapionis et iusta causa tradendi" (1961) show Hoetink as a competent and original, though dating, Romanist. His studies on theoretical history are, however, dateless and deserve the undivided attention of our legal historians. A *caveat* concerning the sometimes uneven quality of the translations must be added, but consulting the original might solve this problem.

Stimulating thoughts on methodology are always welcome and this volume might open new avenues in legal historical research.

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The concepts "capital" and "revenue" are crucial to the application of the Income Tax Act of 1962. Neither concept is defined in the act, probably because the legislature here (as elsewhere) realised that it was impossible to formulate a definition which would deal with every possible eventuality. In order to determine whether a particular receipt or accrual is of a revenue or a capital nature, one is obliged to consider previous decisions of the supreme court and the special courts for hearing income tax appeals.

The author has collected the decisions relevant to land transactions and dealt with them under convenient headings, much along the lines proposed by Professor EB Broomberg in an article which appeared in the *South African Law Journal* and in his monograph, *Tax strategy*.

The work under review is divided into four chapters. The first chapter concerns "gross income" and the distinction between capital and revenue. The second chapter deals with change of intention while the third and fourth chapters deal with receipts and accruals relating to land transactions and the role of companies and shares in land transactions. It contains a good index which compliments the table of contents.

The principal difference between this monograph and sections in the standard textbooks regarding the same subject, is that the present work sets out the facts of the relevant decisions in greater detail. It also takes a more practical approach to the analysis of the decisions reflected in the classification used by the author.

The book has the virtue that it is unlikely to date very easily for in practice later decisions add to the body of tax law in this area. Previous decisions are seldom overruled although they may not be followed. The book's style reflects in a way the casuistic nature of the subject. The treatment of the topics range from detailed discussions to bald comments. It eschews footnotes and endnotes preferring to provide references in the text. It's style will not appeal to everyone although it limits production costs.

Practitioners will find the book a ready and convenient source of reference in their endeavours to find the positive law. Its value for students is more limited. They will benefit more by seeking to unravel the facts of the decisions and finding the *ratio decidendi* themselves.

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The jural credo: justice as the essence of legal ethics and a component of positive law*

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OPSOMMING

Die juridiese credo: geregtigheid as die wese van die regsetiek en 'n element van die positiewe reg

Die problematiek rondom die verhouding tussen reg en etiek sluit vraagstukke soos die volgende in: Is daar bepaalde etiese norme wat sonder meer as regsreëls geld? Moet die reg noodwendig aan bepaalde etiese maatstawwe beantwoord? Is dit 'n funksie van die staatsowerheid om etiese gedragsreëls *per se* af te dwing? Die natuurregsleer, 'n bepaalde variasie van Neo-Kantianisme en die positivisme, beantwoord hierdie vrae verskillend; en die Wysbegeerte van die Wetsidee, met sy beginsel van soewereiniteit in eie kring, het in hierdie verband 'n besondere boodskap: die regsbegrip hang nie in die lug nie maar veronderstel noodwendig sekere vóór-positiewe substrate; byvoorbeeld, die gelding van die reg is *territoriaal* begrens, het betrekking op *lewende* persone wat met mekaar *sosiaal* verkeer en veronderstel 'n *historiese* magsbasis. Eties-gefundeerde beginsels maak nie deel uit van hierdie juridiese substraat nie, maar bied 'n rigsnoer (in die vorm van die regsidee) van wat die reg behoort te wees. Hoewel die reg nie noodwendig aan die eise van die regsidee beantwoord nie, is die kanse op voortbestaan van 'n regs- en politieke bedeling wat nie rekening hou met die geregtigheidsgevoel van die gemeenskap nie, uiters gering.

In hierdie artikel word betoog dat die geregtigheidseise van die regsidee nie slegs 'n behorensbeginsel inhou wat deur die wetgewer en handhawers van wet en orde voor oë gehou behoort te word nie; dit vorm inderdaad in 'n besondere sin deel van die Suid-Afrikaanse positiewe reg. Vir sover die substantiewe en prosessuele norme wat algemeen en wêreldwyd as manifestasies van geregtigheid beskou word, nie uitdruklik of by noodwendige implikasie deur wetgewing uitgesluit is nie, *geld* daardie norme.

Teen die agtergrond van 'n kritiese analise van die uitlegteorieë van Suid-Afrikaanse kundiges op dié gebied en die teorie van konstruktiewe interpretasie van Ronald Dworkin, en met die oog op Romeins-Hollandse gesag, word voorbrand gemaak vir 'n basiese interpretasiebenadering wat soos volg saamgevat kan word: Die interpreteerder moet in elke statutêre bepaling, gemeenregtelike bron en hofuitspraak soveel as moontlik geregtigheid inlees as wat die woorde van die betrokke instrument toelaat.

The Philosophy of the Cosmonomic Idea of the Dutch jurist, Herman Dooyeweerd (1894–1977), added a compelling dimension to contemporary perceptions pertaining to the problem of IS and OUGHTS in the realm of the juridical aspect of reality.

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* Presidential address delivered at the National Congress of the Society of University Teachers of Law, Cape Town, January 1989.

Since the infancy of Western thought, the problem of law and morality has intrigued legal philosophers and ethicists alike. The history in jurisprudence of this debate remained focused upon several primary questions:[1]

a Does any particular moral principle enjoy legal validity *per se*; that is to say, are there certain ethical norms that must be enforced by a court of law even though the norms in question have not been formally promulgated by a competent law-creating agent?

b Must the law necessarily comply with certain minimum ethical standards; that is to say, is the validity of positive law dependent upon the incorporation into the legal system of particular moral values?

c Is it a function or the duty of depositories of state authority to enforce by means of legal compulsion the current code of good moral behaviour?

The answer to these questions would obviously depend on the philosophical presuppositions of one's concept of law. Traditional natural-law philosophies thus included the view that positive law must essentially comply with certain ethical demands. Neo-Kantianism of a certain brand was particularly noted for its moralisation of all norms that govern human relations within a community setting. And, reacting to the ethical bias of natural law thinking, positivism opted for the separation of law and morality into almost water-tight compartments.

The Philosophy of the Cosmonomic Idea in the present context advocates, above all and with vigour, the sphere sovereignty of respectively, the juridical and the ethical aspects of temporal reality. Its insight into the distinct and fundamentally different functions of juridical and ethical norms – that is, amidst, and in fact by virtue of, the complex intertwining of all the model aspects of concrete things, societal structures and events that constitute the substantive genre of our earthly existence – prompted the following response to the fundamental questions posed in the law and morality discourse: ethical norms do not without further ado obtain as valid and enforceable rules of law; the legality of sysems of law is not dependent upon their conforming to the accepted standards of ethical directives (although a legal system that altogether deviates from such ethical standards, by reason of its lack of legitimacy, would be extremely vulnerable and in any event clearly undesirable); and, finally, it is not a function of the state to enforce ethical norms as such, though state-imposed law ought always to comply with the (juridically qualified) dictates of the legal idea.

In this article I propose briefly to analyse in greater detail the above schools of thought regarding the relationship between law and morality, and I shall do so with a view to evaluating present-day disputes concerning the ethical focus of the South African system of law.

1 NATURAL LAW AND THE *PER SE* VALIDITY OF ETHICAL NORMS

The doctrine of natural law had its origin in the ancient Greek philosophy of nature and rested on the assumption that certain principles, legal in nature and with an ethical content, applied – like the laws of nature – of their own accord and without the need for any law-creating act or human intervention.

1 For an overview of this debate, see Van der Vyver "Law and morality" in Ellison Kahn (ed) *Fiat iustitia: essays in memory of Oliver Deneys Schreiner* (1983) 350; and also Van Zyl & Van der Vyver *Inleiding tot die regswetenskap* (1982) 110–165.

As to the incidental characteristics of natural law, the doctrine harboured amongst its leading proponents birds of profoundly diverse feather. However, it is fair to say that, as traditionally perceived, natural law was said to have universal validity and was believed to be detectable through reasonable perception.[2]

Differences in emphasis regarding the subsance of natural law provisions prompted Paton[3] to say: "The most diverse elements are gathered under the same label." Aristotle (384–322 BC) circumscribed natural law in terms of the concept of justice, which in state-subject relations entails the principle of geometrical equality and in that context requires all the subordinates of state authority to be treated according to merit by and before the law.[4] Ulpian (±300 AD) captured the gist of his own perception of natural law in the telling phrase: "Live honourably, do not injure others, and give to every person his due."[5] Grotius (1583–1645) reduced the norms of natural law to four basic principles: One should refrain from taking other people's property, and return that which belongs to someone else to its rightful owner; one should honour one's promises; one should compensate those who have suffered loss on account of one's fault; and punishment among persons is warranted.[6] Immanuel Kant (1724–1804) defined the gist of natural law, in the sense of a categorical imperative, as

> "the sum-total of conditions under which the arbitrary will (*Willkür*) of one person can have its way alongside the [equal] volition of all other persons under a general law of freedom".[7]

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2 See Van Zyl & Van der Vyver 50; and also Van Eikema Hommes *Een nieuwe herleving van het natuurrecht* (1961) 54, where he concluded that the pre-19th Century concept of natural law was that of "het natuurrecht als een werkelijk geldend recht onafhankelijk van het positieve recht . . ."; and 55, where he defined natural law, as traditionally perceived, as "het geheel van bovenpositieve (niet door menselijke rechtsvormende wilsverklaring tot stand gebrachte) onveranderlijke, universele en per se geldende rechtsnormen en eventueel subjectieve natuurlijke rechten met daarmee correlate plichten, die rusten in een al of niet op goddelijke oorsprong teruggevoerde natuurlijke orde en door de mens op apriorische wijze uit die natuurlijke orde met behulp van de natuurlijke rede kunnen worden afgeleid"; and see also Van Eikema Hommes "Iets over natuurrecht" in 1968 *Philosophia Reformata* 108–109 and *Hoofdlijnen van de geschiedenis der rechtsfilosofie* (1972) 21.

3 *A textbook of jurisprudence* (1972) (4th ed by Paton & Derham) 99.

4 In the *Ethica Nicomacheia* 5 3 6 Aristotle defined the principle of distributive justice as follows: "There must be the same equality between persons as there is between the objects: the relationship that exists between the objects must also be maintained between the persons. For, if the persons are not equal, their shares will not be equal; and this is the cause of disputes and accusations, namely if persons who are not equal were to receive equal shares." In *Ethica Nicomacheia* 5 3 7 Aristotle succinctly states that every person should receive his share "according to merit". Gustav Radbruch *Vorschule der Rechtsphilosophie* (1959) 26 paraphrased the Aristotelian concept of distributive justice as follows: "Sie bedeutet Gleichbehandlung Gleicher, Ungleichbehandlung Ungleicher nach gleichem Maszstab." See, in general, Salmon *Der Begriff der Gerechtigkeit bei Aristotelés* (1937); Trude *Der Begriff der Gerechtigkeit in der aristotelischen Rechts- und Staatsphilosophie* (1955); Dooyeweerd "Een nieuwe studie over het Aristotelisch begrip der gerechtigheid" 1958 *Rechtsgeleerd magazijn themis* 3; Van der Vyver "Die regsleer van Aristotelés (384–322): 'n probleemstelling" 1962 *Koers* 224; Van der Vyver *Seven lectures on human rights* (1976) 1–4; Van Zyl & Van der Vyver 151–161.

5 *Inst* 1 1 3; *D* 1 1 10 1: "Honeste vivere, alterum non laedere, suum cuique tribuere."

6 *De iure belli ac pacis* prol 8: "Quo pertinent alieni abstinentia, et, si quid alieni habeamus aut lucri inde fecerimus, restitutio; promissorum implendorum obligatio; damni culpa dati reparatio; et poenae inter homines meritum."

7 *Metaphysik der Sitten* (1907) 34–35: "Der Inbegriff der Bedingungen, unter denen die Willkür des einem mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann."

The ethical foundation of such formulae is emphasised in almost all interpretations of natural law. Wolfgang Friedmann thus depicted in every natural-law theory "the need of legal ideals",[8] while John Dugard designated "the one golden thread of thought" that runs through all natural-law theories to be "that there is an ideal standard of law and justice with which all man-made law ought to conform".[9] I hasten to add, though, that not all theories of law that afford prominence to legal ideals, or to ethically-based standards as a juridical *Sollensprinzip*, belong to the school of natural law.

The typical philosophies of natural law proclaim the validity, as actual rules of law, of ethical norms *an sich*, and often on the understanding that if state-imposed rules of law were to be in conflict with the dictates of natural law, the former provisions would be null and void. Cicero (106-43 BC) in a well-known passage in *De re publica* defined natural law as "the real law of true reason that corresponds with nature", and added that it would never be admissible to invalidate that law by means of legislation or to limit its operation, and that it would be impossible altogether to abrogate it.[10] In the same vein Aurelius Augustine (353–430) declared: "In my opinion a law cannot be present where there is no justice;"[11] and again: "[W]here true justice does not exist, the law also cannot be."[12] This view was subsequently endorsed by writers as diverse as Thomas Aquinas (1224/5–1274)[13] and Jean Calvin (1509–1564).[14] Chief Justice Edward Coke (1552–1634) – amongst the British judiciary admittedly a voice crying in the wilderness – likewise proclaimed the supremacy of ethical values in law when, in *Bonham's* case,[15] he asserted the competence of substantive review of English courts of law:

> "[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[16]

The Philosophy of the Cosmonomic Idea rejects such postulates of legally enforceable ethical norms. All the rules of positive law derive their validity from

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8 *Legal theory* (1970) 154.

9 "South African lawyers and the liberal heritage of the law" in Peter Randall (ed) *Law, justice and society: Report of the Spro-Cas legal commission* (1972) 20.

10 The complete text of this passage in *De re publica* 3 22 reads as follows: "Est quidem vera lex recta ratione, naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat, quae tamen neque probos frustra iubet aut vetat, nec improbos iubendo aut vetando movet. Huic legi nec abrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest. Nec vero aut per senatum aut per populum solvi hac lege possumus: neque est quaerendus explanator aut interpres eius alius: nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex, et sempiterna et emmutabilis, continebit, unusque erit communis quasi magister et imperator omnium Deus; ille legis huius inventor, disceptator, lator; cui qui non parebit, ipse se fugiet, ac, naturam hominis aspernatus, hoc ipso luet maximas poenas, etiam si cetera supplicia, quae putantur, effugerit."

11 *De libero arbitrio* 1 11: "Nam mihi lex esse non videtur, quae iusta non fuerit."

12 *De civitate Dei* 19 21 1: "ubi ergo iustitia vera non est, nec ius potest esse."

13 See *Summa theologica* 1 2q 96 a4.

14 See *Commentarius in Isaiem prophetam* 32 1; *Institutio* 4 20.

15 *Bonham v Atkins* (1610) 8 Co Rep 113b 118a (77 ER 646 652).

16 See also *Rowles v Mason* (1612) 2 Brownl 192 198 (123 ER 892 895): "[B]ut the common law corrects, allows and disallows, both statute law, and custom, for if there be repugnancy in statute, or unreasonableness in custom, the common law disallows and rejects it, as it appears by *Doctor Bonham*'s case . . ."

the law-creating act executed by a competent law-making authority. The principles embodied in the legal idea, furthermore, must essentially bear the stamp of the juridical aspect of reality as opposed to, *inter alia*, the ethical aspect. However, the ideal standards which constitute the legal idea do represent anticipatory analogies, within the juridical sphere, of the ethical and pistical modalities, and in this sense there is indeed an intimate relationship between the directives of an ideal system of law and ethical norms of morally becoming human conduct.

2 NEO-KANTIANISM AND THE MORALISATION OF THE JURIDICAL ASPECT OF REALITY

Perhaps the most significant basic premiss of Kantian philosophy was the clear dividing line, put forward by the master from Königsberg, between a person's theoretical and practical reason, and the corresponding distinction between, respectively, the *Sein* – the territory of epistemology – and the *Sollen* – the domain of normative laws that govern human behaviour.

Neo-Kantian philosophy represents an attempt consistently to apply Kant's theory of knowledge to the humanities; that is, in Kantian semantics, to the province of *Oughts*. Giorgio del Vecchio (1878–1970), for instance, sought to construct the concept of law by means of "purely reasonable reflection"[17] (*vis-à-vis* empirical or sensual perception), and in doing so he clearly postulated an intimate relationship between law and morality. The law, he said, regulates human conduct according to a basic moral norm, which determines its exercise and excludes its prevention.[18] According to Del Vecchio, morality thus constitutes an integral part of the law.

Whereas the Marburg school of Neo-Kantians concentrated on the area of *Sein*, representatives of its Baden and Freiburg counterparts focussed their attention on the realm of *Sollen*. The members of the Baden/Freiburg Neo-Kantians are known for their emphasis on the values that underlie the normative directives of human conduct and, in the area of jurisprudence, for subjecting the idea of natural law to relativism.

Friedmann captured the core of the relativistic approach, as expressed in the teaching of Gustav Radbruch, when he wrote:

> "This legal relativism is . . . concerned with the ultimate meaning of legal systems but does not see its task in suggesting a choice between opposite values. This choice is a matter for personal decisions; a matter not of science but of conscience. Relativism does not evade political decisions, but does not wish to give them a scientific cloak."[19]

In typical relativistic fashion, Joseph Kohler (1849–1919) declared: "There is no such thing as rigid law that is valid for all times, or a natural law with a fixed content;"[20] and along the same lines Rudolph Stammler (1856–1938) made

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17 *Lehbruch der Rechtsphilosophie* (übergesetzt von F Darmstaedter) (1951) 348: "eine reine Vernunftüberlegung".

18 *Idem* 371: "Das Recht ist die objektive Einordnung der unter einer Mehrzahl von Subjekten möglichen Handlungen nach einem etischen Grundsatz, der ihre Entfaltung bestimmt und ihre Behinderung ausschlieszt."

19 *Legal theory* (*supra* n 8) 192.

20 *Einführung in die Rechtswissenschaft* (1929) 4: "Es gibt kein starres, für alle Zeiten gültiges Recht, kein Naturrecht mit festem Inhalt."

mention of "natural law with a variable substance".[21] Gustav Radbruch (1878–1949), likewise, proceeded on the assumption that the provisions of natural law may differ at various times and places, depending on the "nature of things" (*die Natur der Sache*); that is to say, according to the natural, social and juridical circumstances that prevail at a certain time and place and of which the legislature must take note when enacting statutory law.[22]

The legal philosophy of Radbruch also clearly reflects the obsession of the Baden/Freiburg school of Neo-Kantians with the concept of values. In accordance with the basic approach of that school, Radbruch defined the province of jurisprudence in terms of the value structure comprising the legal idea:

> "It has to do with the values and purposes of the law, with the idea of law and with the ideal law, and it extends to legal politics, which has as its subject-matter the possibilities of implementing the ideal law."[23]

The legality of every legal system and rule of law, according to Radbruch, rests upon three fundamental values which together constitute the legal idea (ideal law), to wit justice, efficacy and legal certainty. The *form* of legal norms is determined by the idea of justice which, in his view, requires the equal treatment of equals and the unequal treatment of unequals.[24] The *material content* of the law, on the other hand, derives from the idea of efficacy, which entails three value systems, namely (i) the individualistic value system, which refers to whatever is of value to the singular person (*Einzelpersönlichkeit*); (ii) the super-individualistic system, which refers to whatever would be of value to collective persons (*Gesamtpersönlichkeiten*); and (iii) the transpersonal value system, which refers to the value of cultural objects. The law, finally, owes its *validity* to the idea of legal certainty.

In support of Neo-Kantian relativism, Radbruch refused to subject these (ethicised) substrata of the law to any kind of inflexibility. Justice, he said, is dependent on the temporal and local *Natur der Sache*;[25] the hierarchy of the three value systems included in the idea of efficacy cannot be fixed verifiably and with certainty,[26] and he made other similar observations.

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21 *Rechtsphilosophische Abhandlungen und Vorträge* (1925) vol I 122: "Naturrecht mit wechselndem Inhalt."

22 See *Vorschule der Rechtsphilosophie* (*supra* n 4) 21; and see *infra* n 25.

23 19: "Sie handelt also von dem Werten und Zielen des Rechts, von der Idee des Rechts und vom idealen Recht, und findet ihre Fortsetzung in der Rechtspolitik, welche die Verwirklichungsmöglichkeiten des idealen Recht zu ihrem Gegenstand hat."

24 See n 4 above.

25 See 23, where he said: "Jede Wertidee ist für einem bestimmten Stoff und deshalb auch *durch* diesen Stoff bestimmt" (every value-idea is destined to serve a particular matter, and therefore it is also determined by that matter); and see also 21, where he defined *die Natur der Sache* as "die natürlichen, sozialen und rechtlichen Zustände, welche der Gesetzgeber vorfindet und seiner Reglen unterwirft" (the natural, social and juridical circumstances that confront the legislator and to which he must subject his decrees).

26 See 28: "Die höchsten Zwecke und Werte des Rechts sind nicht nur verschieden nach Maszgabe der sozialen Zustände der verschiedenen Völker und Zeiten, sie werden auch subjektiv von Mensch zu Mensch vershieden beurteilt, je nach Rechtsgefühl, Staatsauffassung und Parteistandpunkt, Religion oder Weltanschauung" (The supreme purpose and value of the law does not only differ according to the social conditions of different peoples and times, but are also subjectively and differently evaluated by different people according to their (distinct) sense of justice, idea of the state, party-political conviction, religion or world view).

Legal certainty, in similar vein, may require the subordinates of a particular legal system to endure a certain degree of iniquity contained in the positive law of that system. Radbruch pointed out in this regard that the various value ideas of the law may in particular instances contradict one another. But in cases of excessive injustice, legal certainty would no longer be decisive and the provisions in question would then in fact forfeit their validity, leaving the subjects at large to arrange their conduct on the basis of *das übergesetzliche Recht* – a term used by Radbruch to denote natural law.[27]

Perhaps the most celebrated contemporary champion of an ethicised conception of the law along the lines of Neo-Kantian value-mindedness and relativism is the (late) Harvard professor of jurisprudence, Lon L Fuller (1902–1978). He initially developed the theme of the so-called "internal morality of the law" in response to a lecture delivered at Harvard by his Oxford colleague, HLA Hart, in which Hart advocated the positivistic premiss of a clear dividing line between law and morality.[28] Fuller professed, on the contrary, that there was indeed an intimate relationship between law and morality, and that this relationship finds expression in eight constituent elements of the law, which Fuller recapitulated under the heading of "the internal morality of the law".[29] They comprise the following supposed requirements of legality:[30]

a The law must be of a general nature and apply equally to all the subjects of a particular legal system.

b The law must be promulgated and be made known to all its subjects.

c Laws must not be introduced retroactively.

d The law must be clear and intelligible.

e There must be no contradiction in the law; that is, the law must not burden the subjects with conflicting obligations.

f The law must not require the impossible; that is, it must be practicable.

g The law should remain relatively static; that is, it should not be changed too frequently.

h Congruence between the law and official action (application and administration of the law by state authority) is of the utmost importance.

Fuller's legal theory also bears testimony to the relativism of Neo-Kantian philosophy. The eight conditions of legality, according to him, cannot be classified in a fixed order, may contradict one another, need not in all circumstances be applied with the same measure of exactitude, and must occasionally be sacrificed for the sake of other of those values.[31] Fuller concluded as follows:

> "[T]he Utopia of legality cannot be viewed as a situation in which each desideratum of the law's special morality is realized to perfection . . . In every human pursuit we shall

27 32–33 37; and also *Rechtsphilosophie* (8e Aufl von Erik Wolf und Hans-Peter Schneider) (1967) 345–346.

28 Hart "Positivism and the separation of law and morals" 1958 *Harv LR* 593; and also *The concept of law* (1961). As to the Hart-Fuller debate, Van der Vyver (*supra* n 1) 354–364; Van Zyl & Van der Vyver (*supra* n 1) 118–128.

29 Fuller "Positivism and fidelity to law – a reply to Professor Hart" in 1958 *Harv LR* 630, and see also *The morality of law* (1969) 133–145 187.

30 *The morality of law* 46–91.

31 *Idem* 41–45 91–94 104.

always encounter the problem of balance at some point as we traverse the long road that leads from the abyss of total failure to the height of human excellence."[32]

At first glance this concession to the imperfections of human society seems to constitute an anomaly in Fuller's teaching. The assumption that circumstances could arise in which a certain principle may be disregarded or would apply less stringently is apparently in conflict with the assertion that the same principle constitutes a condition of legality – that is, an essential precedent requirement for the validity of the law. However, Fuller resolved the ostensible anomaly on the basis of relativism:[33] one should not regard the law as an inflexible or rigid entity that either exists or does not exist; the existential being of the law may operate more or less, half-and-half or so-so. Fuller put it as follows: "[T]he existence of a legal system is a matter of degree";[34] and again: "[B]oth rules of law and legal systems can and do half exist."[35]

Neo-Kantian relativism thus proceeds on the assumption that there are no fixed values. This assumption is wrong. The doctrine of sphere sovereignty, which constitutes an important corner-stone of the Philosophy of the Cosmonomic Idea, rests upon the insight that morality, like all other aspects of reality, is centred upon an involuntary principle or meaning-kernel which in itself is immutable and of universal validity. The particular norms of laudable behaviour in the ethical sense, on the other hand, are indeed variable and dependent on a wide range of occasional and situation-orientated circumstances.

It should be noted in passing that the variability of specific ethical norms is no reason for discarding their pertinence in the practical sense (and juridically qualified) as a measure of legislative and executive constraint. One is reminded in this regard of the negativism in respect of human rights protection displayed for exactly that reason by the (former) President's Council[36] and Minister of Justice Kobie Coetzee[37] relating to a Bill of Rights for South Africa. In my view a Bill of Rights should address the special needs dictated by the domestic and current contingencies of the community it sets out to serve, and in South Africa one only needs to consider the actual causes, rooted in legislation and governmental practices, of the present unrest in the country in order to overcome the difficulties, envisaged by the President's Council and Mr Coetzee, of designating the rights and freedoms that would require constitutional entrenchment.[38]

Neo-Kantian jurisprudence must be commended for having perceived that the law does not function in isolation and in fact presupposes the existence of certain ajuridical substrata. However, those conditions of legality are not necessarily moral in character. In the legal theory of Radbruch, moralisation of the law is evidenced by the uncritical transformation of certain (non-ethical) conditions of legality (legal certainty and efficacy) into a specimen, on a par with justice, of the truly ethically-based, but juridically qualified, legal idea. The same

32 *Idem* 45–46.
33 *Idem* 122–123.
34 *Idem* 122.
35 *Ibid.*
36 Republic of South Africa, Constitutional Committee of the President's Council, Second Report, *The adaptation of constitutional structures in South Africa* PC 4/1982 par 9 10 2.
37 Coetzee "Hoekom nie 'n verklaring van menseregte nie?" 1984 *Journal for Juridical Science* 7–9.
38 See Van der Vyver "The Bill-of-Rights issue" 1985 *Journal for Juridical Science* 10.

misconception appears from Fuller's concept of law. He identified morality with all teleological (purposeful) activities (every human act aimed at achieving a particular purpose), and he consequently labelled various non-ethical elements of legality, such as the principle of legal certainty – which, incidentally, may be evident in morally untenable systems of law – as constituents of morality. Friedmann typified Fuller's eight principles of legality as no more than "the minimum components of an efficiently functioning modern legal system";[39] and it would in my opinion be fair to say that the Fuller-Hart polemic resulted in the Oxford professor's having the last say when he exposed Fuller's adulteration of the concept of morality:[40] "[T]he classification of these eight principles as a form of morality breeds confusion."[41]

Herman Dooyeweerd argued convincingly that the juridical aspect of reality – which includes, but embraces more than, "the law" – cannot be divorced from the entire spectrum of ajuridical modalities that *precede* the juridical sphere of legal principles and norms and of legal subjects and objects, relations and events in the (pre-determined and fixed) sequence of cosmic modalities, namely the aspects of number, space, physical motion, kinematic energy, organic life, feeling, logical distinction, cultural-historical formation, symbolic meaning (language), social relations, economic scarcity and harmony.[42] These ajuridical aspects of reality are all presupposed in the concept of law; that is to say, if certain aspects in the structure of reality were to be eliminated, a perception of law in the juridical sense simply would not be possible. Consider in this regard the following examples:

The law essentially obtains within certain *territorial* limits (South Africa cannot legislate for Zimbabwe); its operation presupposes a basic, *historical*, power structure to support its implementation mechanisms (laws without means of enforcement are useless) and a *social* setting (the law regulates human relations and would therefore be meaningless in a Robinson Crusoe situation); and the social foundation of the law in turn rests upon a *numerical* multiplicity of *living* persons. The principle of legal certainty likewise represents a *linguistic* retrocipation of the juridical aspect of reality; the notion of private-law rights would make no sense had it not been for a relative scarcity in the *economic* sense of the objects required by a person for the satisfaction of his juridical needs; the harmonising of conflicting interests, which constitutes a primary function of the

39 *Legal theory* (*supra* n 8) 18.

40 See Hart's review of Fuller's *The morality of law* 1965 *Harv LR* 1281, especially 1283–1288.

41 *Idem* 1284; and see also 1285: "[T]he author's insistence on classifying these principles of legality as a 'morality' is a source of confusion both for him and his readers."

42 Dooyeweerd classified the aspects of reality in a fixed sequence: later aspects cannot be perceived without knowledge of the earlier ones, but the opposite is not the case. E g, one can come to an understanding of number without considering the phenomenon of space, but the concept of space is inconceivable without a perception of number (space extends over a certain numerically defined distance); number and space, likewise, do not imply knowledge of movement, but movement cannot exist without number and space (movement occurs when an object is displaced from one point in space to another); and so on. The modal presuppositions of a concept of law in this sense comprise, in exactly that order, the aspects of number, space, movement, energy, organic life, feeling, logical thought, historical control, social intercourse, language, economic scarcity, and harmony. In this hierarchy of cosmic modalities, the aesthetical aspect of harmony is followed by, respectively, the juridical, the ethical and the pistical aspects. See, e g, Dooyeweerd *A new critique of theoretical thought* (1984) vol II 49–54.

law, refers back to the *aesthetic* aspect of reality, and so on. Analogies of such modalities, juridically qualified, constitute an integral part of the structural make-up of the juridical aspect of reality and should therefore be incorporated into one's concept of law.

The ethical aspect of reality does not form part, in that sense, of the basic substrata of a concept of law. Ethically-based principles, juridically qualified, on the contrary, constitute directives of what the law ought to be; they do not modify the concept of law, but comprise the essence of the legal idea. The law consequently does not necessarily correspond to the standards of legal ethics, though immoral legal provisions would be censurable – and I, for one, would not wager one cent on the chances of eventual survival of a legal system that deviates substantially from the community's perception of ethically-based pointers of the legal idea.

3 POSITIVISM AND THE SEPARATION OF LAW AND MORALITY

The universal intertwinement of all the aspects of reality, as evidenced by the dependence of a concept of law upon a host of retrocipatory analogies and the anticipation, within the juridical sphere, of ethically and religiously based principles of the legal idea, renders a *reine Rechtslehre*, as contemplated by Hans Kelsen (1881–1973), theoretically untenable.

A pure theory of law, said Kelsen,

> "guarantees only knowledge that is focussed upon the law and ... excludes from such knowledge everything that does not precisely belong to legally qualified subject-matters; that is to say, it wants to liberate legal science from all foreign elements".[43]

Kelsen, admittedly, did not deny a connection between legal science and other disciplines, and his attempt to construct a pure theory of law was prompted by the wish simply

> "to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter".[44]

However, a theory of law that loses track of the empirical state of affairs – in this instance the complicated intertwinement of all aspects of reality and in particular the founding function of the law's essential substrata in actual reality – cannot possibly uncover the true nature of the object of its enquiry.[45]

The Kelsenian approach was also conducive to isolating the law from all moral influences, and in this respect Kelsen clearly sided with the proponents of positivism. Auguste Comte (1798–1857) introduced the notion of positivism into Western thought with a view to developing a social science that would entirely

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43 Kelsen *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934) 1: "weil sie nur eine auf das Recht gerichtete Erkenntnis sicherstellen und weil sie aus dieser Erkenntnis alles ausscheiden möchte, was nicht zu dem exakt als Recht bestimmten Gegenstande gehört. Das heiszt: sie will die Rechtswissenschaft von allen ihr fremden Elementen befreien".

44 *Ibid*: "weil sie einen Methodesynkretismus zu vermeiden sucht, der das Wesen der Rechtswissenschaft verdunkelt und die Schranken verwischt, die ihr durch die Natur ihres Gegenstandes gezogen hat".

45 Derek van der Merwe's judgment that "Kelsen's greatest contribution to jurisprudence lies in *conceptual clarification*" is unacceptable for the same reason. See "Hans Kelsen – legal positivism's supreme champion" in Hugh Corder (ed) *Essays on law and social practice in South Africa* (1988) 114.

derive its objects of enquiry and sources of reference from sensorial perception.[46] Real knowledge, explained Comte, was only possible if it was bound to sense perception,[47] and *la philosophie positive*, he went on to say, is characterised by the method that subordinates the imagination to observation.[48]

In jurisprudence positivism culminated in the separation of law and morality, and this in turn meant the rejection of the basic premiss of natural-law thinking. Jeremy Bentham (1748–1832) thus discarded the notion of natural law as "nothing but a phrase",[49] and added:

> "All this talk about nature, natural rights, natural justice and injustice proves two things and two things only, the heat of the passion, and the darkness of the understanding."[50]

Leon Duguit (1859–1928), likewise, described the concept of rights as "obviously metaphysical in character";[51] John Austin (1790–1859) dismissed the traditional classification of law into positive law and natural law as "utterly unintelligible" and "senseless";[52] Hans Kelsen held the view that the social contract theory and the doctrine of human rights were nothing but a fiction,[53] and went on to explain:

> "[T]he natural law doctrine is based on the illusion that it is possible to obtain from our insight in nature, that is, from our knowledge of facts, a knowledge of what is right and wrong."[54]

It is interesting to note that, owing to its renunciation of natural law ideas, positivism found itself on the horns of a theoretical dilemma: the conventional metaphysical assumptions underlying the doctrine of natural law were no longer available to legal theoreticians as a source of reference for scientifically constructing a concept of law. A tradition consequently developed within the confines of positivism to define the law in terms of the one or other ajuridical aspect of reality. The personal expertise or subjective preference of a particular philosopher would prompt him, as it were, to regard the totality of cosmic modalities through the spectacles of the one to be absolutised as the supposed foundation of our earthly existence.

John Austin, a proponent of analytical positivism, thus assumed that juridical reality comprised a *logically* coherent set of norms and that its essence could be established in a process of rational reasoning whereby the so-called "ampler and maturer systems of law" are to be subjected to deductive analysis in order to uncover their common denominator – which would then supposedly constitute the essential characteristic of the law in general.[55] Friedrich Carl von Savigny

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46. Bavinck *Christelijke wijsbegeerte* (1904) 34 states that positivism attributes to an enquiry the status of "science" only if it exclusively relies on empirical facts and denies the existence of transcendental reality. As to the general characteristics of a positivistic philosophy, see Van Riessen *Filosofie en tegniek* (1949) 10–11.
47 Comte *Cours de la philosophie positive* (1830–42) (1907–1924) vol I 22.
48 *Idem* vol III 78: "La philosophie positive est caractérisée quant à la méthode, par la subordination de l'imagination à l'observation."
49 *A fragment on government* (1931) vol IV 19.
50 *The limits of jurisprudence defined* (Introduction by Everett) (1945) 84.
51 *Law in the modern state* (translated by F and L Laski) (1919) xl.
52 *The province of jurisprudence defined and the use of the study of jurisprudence* (introduction by Hart) (1954) 102.
53 *Principles of international law* (1952) 310–311.
54 *Idem* 310.
55 In *Lectures on jurisprudence or the philosophy of positive law* (5ed by R Campbell) (1885) vol II 1073 Austin defined the ultimate objective of general jurisprudence as follows: "I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction."

(1779–1861), the chief proponent of the historical school in jurisprudence, perceived the law to be a cultural product which, on the same footing as language, morals and public opinion, originated and developed from the *history* of a people[56] and simply represents a ramification of the *Volksgeist*.[57] As a representative of the *sociological* school, Rudolph von Jhering (1818–1892) defined the law substantially as the sum-total of the conditions for a social life in the broadest sense, such conditions being guaranteed by the power of the state through the medium of external compulsion;[58] the "living law" as perceived by the Austrian proponent of sociological positivism, Eugen Ehrlich (1862–1922), comprises "the law which dominates life itself even though it has not been posited in legal propositions"[59] and can be discovered by means of

> "direct observation of life, of commerce, of custom and usuage, and of all associations, not only of those that the law has recognised but also of those that it has overlooked and passed by, indeed even of those that it has disapproved";[60]

and Roscoe Pound (1870–1964) thought of jurisprudence as

> "a science of social engineering, having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society".[61]

Karl Marx (1818–1883) and Friedrich Engels (1820–1895) perceived the law to be a superstructure of *economic* relations,[62] while Herbert Spencer (1820–1903), the leading systematicist of the theory of evolution, applied the basic premiss of evolutionism to the humanities and accordingly defined the law as an instrument of *organic* growth of human society.[63]

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56 Von Savigny *Von Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1967) 11: "Das Recht wächst also mit dem Volke fort, bildet sich aus mit diesem, und stirbt endlich ab, so wie das Volk seine Eigenthümlichkeit verliert."

57 Von Savigny *System des heutigen römischen Rechts* (1840–51) vol I 14: "Vielmehr ist es der in allen Einzelnen gemeinschaftlich lebende und wirkende Volksgeist, der das positive Recht erzeugt . . ."

58 Von Jhering *Der Zweck im Recht* (1893) vol I 511: "Recht ist der Inbegriff der mittelst äusseren Zwanges durch die Staatsgewalt gesicherten Lebensbedingungen der Gesellschaft im weitesten Sinn des Worts."

59 Ehrlich *Fundamental principles of the sociology of law* (translated by WL Moll with an introduction by Roscoe Pound) (1962) 493.

60 *Ibid.*

61 Pound *Interpretation of legal history* (1930) 152.

62 In the well-known preface to *Zur Kritik der politischen Oekonomie*, Marx wrote: "In der gesellschaftlichen Produktion ihres Lebens gehen die Menschen bestimmte, nothwendige, von ihrem Willen unabhängige Verhältnisse ein, Produktionsverhältnisse, die einer bestimmten Entwicklungsstufe ihrer materiellen Produktivkräfte entsprechen. Die Gesammtheit dieser Produktionsverhältnisse bildet die ökonomische Struktur der Gesellschaft, die reale Basis, worauf sich ein juristischer und politischer Überbau erhebt, und welcher besimmte gesellschaftliche Bewusstseinsformen entsprechen. Die produktionsweise des materiellen Lebens bedingt den sozialen, politischen und geistigen Lebensprozess überhaupt. Es ist nicht das Bewusstsein der Menschen das ihr Sein, sondern umgekehrt ihr gesellschaftliches Sein, das ihr Bewusstsein bestimmt."

63 Spencer neatly described how a person in each successive generation finds himself in a social setting that requires of him certain adaptations, through which he acquires social attributes which are then passed on to a next generation in the form of innate instincts. The conditions for the evolutionary growth of human society, through this sequence of adaptation, acquired attributes and hereditary instinct, include the law, of which Spencer said: "It formulates certain regulative principles to which the conduct of citizens must conform that social activities may be harmoniously carried on" (*First principles* (1904) 101–102). Elsewhere he explained: "[L]aw will have no other justification than that gained by it as maintainer of the conditions to complete life in the associated state" (*The principles of sociology* (1893) vol II 537).

The -isms in the different varieties of jurisprudential positivism thus reflect a one-sided understanding of the universal intertwinement of all the modalities of cosmic reality. Each of the positivistic schools perceived something of the truth: the law does indeed rest upon a logical basis; it does reflect to some degree the cultural heritage of a nation and is subject to historical development; it most certainly regulates social relations and does influence the future development of human society; it does give expression to ramifications of the prevailing economic dispensation; it might facilitate or obstruct the organic growth of community structures, and so on. But *all* of this and more is true!

RWM Dias, in his criticism of Von Savigny's historicism, in simple terms touched upon the root of the problem with positivism:

> "There is undoubtedly an element of truth in it . . . Savigny, however, made too much of it."[64]

This can be said of all the above manifestations of positivism: there is truth in their assumptions, but they over-state that element of truth. By perceiving reality through blinkers that narrowed down their vision of reality to a one-sided perception from the perspective of the absolutised aspect of reality, positivism held out the pretence that the author's preferred modality is the over-riding or the decisive cornerstone of our existence. Kelsen's attempt at devising a pure theory of law represents an interesting response to the -isms in 19th Century positivism.[65] But, as we already know, isolation and compartmentalisation of the judicial aspect of reality is not the answer.

The truth, once again, is that the juridical aspect of reality is founded upon not one but an entire conglomeration of fundamental substrata, ranging from the numerical to the aesthetic aspects of reality. The ethical aspect of reality is not included among those modalities without which a concept of law would not be possible.

Hart, as we have seen, in his dispute with Lon Fuller[66] took a strong stand in favour of the separation of law and morality: the legality of juridical provisions, in his opinion, is not dependent upon their compliance with basic ethical standards.[67] He said:[68]

> "[T]here are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws."

It is interesting to note that Hart nevertheless conceded that systems of law must comply with certain (non-moral) minimum conditions of "survival", such as providing adequate protection of one's person and property in order that one may live and eat (including safeguards against murder, violence and theft) and a certain degree of equal protection and impartiality in the administration of

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64 Dias *Jurisprudence* (1976) 519.

65 Kelsen (*supra* n 43) 1, where he puts his own pure theory of law over against 19th and 20th Century positivism: "In völlig kritikloser Weise hat sich Jurisprudenz mit Psychologie und Soziologie, mit Ethik und politscher Theorie vermengt. Diese Vermengung mag sich daraus erklären, dass diese Wissenschaften sich auf Gegenstände beziehen, die zweifellos mit dem Recht in engem Zusammenhang stehen . . ."

66 See n 28 *supra*.

67 In "Positivism and the separation of law and morals" (*supra* n 28) 620 Hart asserted his own preference for the proposition: "laws may be law but too evil to be obeyed" over the proposition: "certain rules cannot be law because of their moral iniquity".

68 *Idem* 626.

justice.[69] In his famous essay, "Are there any natural rights?",[70] Hart furthermore maintained that there is at least one natural right, namely the right to equal personal freedom of each individual. And in *The concept of law*[71] he outlined several juridical substrata which, subject to certain reservations, may be regarded as "the minimum content of Natural Law". However, he persisted in the view that the moral untenability of a legal rule would not render that provision invalid.

The separation of law and morality also raises the question of the state's function in maintaining moral virtues within its area of jurisdiction. John Stuart Mill (1806–1873) was against the application of legal coercion as a means of enforcing moral values:

> "The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right."[72]

In the Hart-Devlin debate,[73] the Harvard professor, while strongly supporting this view,[74] opposed the proposition of the English judge, Patrick A (Lord) Devlin (1905–), that morality was the "cement of society" and that a community was consequently justified in protecting itself, through legal restraints, against moral debasement.[75]

Lord Devlin and others[76] who came out in support of the idea of state responsibility in matters of ethics, in my opinion was wrong in assuming that the juridical function, included in the notion of political authority, embraced an obligation to enforce ethical norms as such. The dominant function of the state is to establish and to maintain a legal order within the defined limits of a particular territory,[77] and a legal order is in the main destined to balance and

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69 *Idem* 262–264.

70 1955 *Philosophical Review* 175.

71 189–195.

72 "On liberty" in *Three essays by John Stuart Mill* (with an introduction by Fawcett) (1963) 15.

73 See Van der Vyver (*supra* n 1) 364–369; Van Zyl & Van der Vyver (*supra* n 1) 128–137.

74 See Hart *Law, liberty and morality* (1968).

75 The lecture that prompted the Hart-Devlin debate was delivered by Lord Devlin in 1959 and was subsequently elaborated upon and incorporated in Devlin *The enforcement of morals* (1965).

76 Views similar to those of Devlin were advanced earlier by James Fitzjames Stephen (1829–1894) *Liberty, equality and fraternity* (1873), in particular at 123–188, but in *The enforcement of morals* at vii, Devlin denied knowledge of Stephen's treatise at the time of his (Devlin's) 1959 lecture.

77 See Dooyeweerd *A new critique of theoretical thought* (*supra* n 42) vol III 438: "The integration of the citizens into the political unity of a people is in principle bound to the typical structure of the body politic, in which the leading function is that of a public legal community. This is an unparalleled, unique structural principle enabling the State to organize within its territory a truly universal legal communal bond transcending all non-juridically qualified legal societal relations." Dooyeweerd *op cit* vol III 414 defined the foundational function of the State as "an internal monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries". See also Du Plessis *Die juridiese relevansie van Christelike geregtigheid* (LLD-thesis PU for CHE, 1978) 812: "Die staat is 'n menslike instelling binne (of beter: oor) 'n bepaalde grondgebied wat deur 'n juridiese bestemming (die verwesenliking van die ampsgeborgenheid van alle mense binne daardie grondgebied) gekwalifiseer (of 'gelei') word"; and also "Menseregte in konfliksituasies" 1979 *Koers* 340: "Die staat se aard en struktuur word deur die feit dat dit op die handhawing van 'n openbare regsorde binne 'n bepaalde (gewoonlik grond-) gebied bedag is, bepaal."

harmonise conflicting interests of the subjects in a political community among themselves and of society and its members.[78] The *juridical* function of the state[79] is accordingly focussed upon arbitration and settlement of conflict situations in a legal community.[80] In view of the state's predestined design as arbitrator of inter-individual conflicts in human society, one must inevitably conclude that furtherance of moral virtues for the sake of morality *an sich* does not fall within the scope of the state's appropriate functions. The moral attribute of human behaviour rests on conviction, which may be animated by persuasion; morality, in a word, is not a matter of compulsion backed by sanction. There is, therefore, particular merit in Hart's argument that state-imposed constraints would deprive one's good conduct of its moral quality.[81]

This does not mean that state authority should deny its subjects the protection of the law in all instances that may involve moral behaviour. The state's primary juridical function and obligation is to resolve conflict situations, and whenever a *de facto* conflict of interests requiring arbitration arises, the state may and should intervene with a view to balancing and harmonising the competing interests. The fact that a particular conflict of interests may have a bearing on moral conduct should not preclude state intervention. The state legislature may in such instances find it expedient to proscribe immoral acts, but would do so in the process of regulating the conflict of interests and not as a supposed custodian of moral values.

Positivism appreciated the truism that positive law – that is, the rules of law with *de facto* validity and enforceability by means of judicial intervention[82] – requires an act of law-making to be executed by a human agent or institution;[83] it failed to recognise, however, that the concrete rules of empirical law are bound to pre-positive legal principles and is open to value-based scrutiny with a view to norms of the legal idea. Lourens du Plessis thus proclaimed:

> "The most destructive criticism that can be levelled at positivism, is that it is rather insensitive to issues involving justice."[84]

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78 According to Dooyeweerd *op cit* vol II 129 the distinguishing feature of the juridical aspect of reality finds expression in the modal aspect of retribution in the sense of "an irreducible mode of balancing and harmonizing individual and social interests".

79 The state also has cultural, social, economic and other functions, though its leading function is juridically qualified.

80 See Dooyeweerd *A Christian theory of social institutions* (translated by Verbrugge and edited with an introduction by Witte) (1986) 91: "The internal leading function [of the state] . . . demands a community of public law with authority and subjects within a given territory."

81 See *Law, liberty and morality* (*supra* n 74) 57: "[W]here there is no harm to be prevented and no potential victim to be protected . . . it is difficult to understand the assertion that conformity, even if motivated by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves. The attribution of value to mere conforming behaviour, in abstraction from both motive and consequence, belongs not to morality but to taboo."

82 That is, the law of which John Chipman Gray (1839–1915) spoke when he said: "The Law of a country or other organized body of men is composed of the rules for conduct that its courts follow and that it holds itself out as ready to enforce; no ideas, however just, that its courts refuse to follow are Law, and all rules which they follow and to which it enforces obedience are Law" (*The nature and sources of the law* (1972) 308–309).

83 See Raath "Die juridiese positivisme en steun vir die Freedom Charter" 1988 *De Jure* 350.

84 Du Plessis *The interpretation of statutes* (1986) 39.

4 THE COSMONOMIC IDEA AND SPHERE SOVEREIGNTY OF THE LEGAL IDEA

Although the state is not a custodian of moral values and ought not to concern itself with ethical demands as such (unless, of course, a conflict situation in human society involving moral scruples calls for state intervention), all positive law ought to comply with standards set by the legal idea. Being the criterion of what the law ought to be, the legal idea again cannot be equated to ethical norms *qua talis* but must be made serviceable to its typical juridical function; the ethical principle of neighbourly love[85] upon which norms of the ideal law is founded, in a word, must be qualified by the juridical meaning-kernel of the balancing and harmonising of conflicting legal interests[86] in order pertinently to bring it within the range of the legal idea. That is what the notion of sphere sovereignty, as propounded by the Philosophy of the Cosmonomic Idea, seeks to convey in the present context.[87]

The ethical command in its juridical application is centred upon the notion of justice in public-law and private-law relations.

Justice might be hard to define,[88] but is not at all difficult to perceive. I do not share the scepticism of someone like Paul van Warmelo, whose relativised definition of justice, as though it were a thinly concealed smoke-screen for radically individualised self-interest, reduced that concept, and indeed all the offshoots of the legal idea, to the level of a nomenalistic nonentity. He wrote:[89]

> "Justice is to my mind one of those concepts which you work out for yourself. It depends upon your view of religion, your creed or your world view . . . When we talk of justice we are talking about what is right for me but not for the other man. Justice often means 'just us'."

85 The exact nature of the essential characteristic of the ethical aspect of reality is in itself controversial. Dooyeweerd *A new critique of theoretical thought* (*supra* n 42) vol I 48–49 and vol II 159 in this context speaks of love in temporal relations; Troost *Casuïstiek en situatie-ethiek: een methodologische terreinverkenning* (1958) e g 40 48 110 116 345 *et seq* refers to neighbourly love; Stoker *Die grond van die sedelike* (1941) 27 designated the meaning-kernel of the ethical aspect as being personal love ("persoonsliefde"); Vollenhoven *Inleiding in die wysbegeerte* (unpublished class notes, translated by Taljaard) 14 23 and 49, and Taljaard "Die mens, die liefde en die sedelike" 1956 *Koers* 19 regarded "faithfulness in marriage and friendship" as of the essence of the ethical modality; Du Plessis *Die professionele gedrag van die juris* (1980) 2–4 (and see also *Die juridiese relevansie van Christelike geregtigheid* (*supra* n 77) 741–745) claimed that the ethical aspect was centred upon the notion of faithfulness (in general), and so on.

86 See n 78 *supra.*

87 In *A new critique of theoretical thought* (*supra* n 42) vol I 102 Dooyeweerd defined sphere sovereignty of the modal aspects of reality – he also applies the concept of sphere sovereignty to denote the differential uniqueness of different kinds of social entities such as the state, church, family unit, business corporation and the like – as follows: "Every modal aspect of temporal reality has its proper sphere of laws, irreducible to those of other modal aspects, and in this sense it is sovereign in its own orbit, because of its irreducible modality of meaning"; and making the point currently under consideration, he said (vol II 159): "Within the temporal order of modal aspects the fullness of the meaning of justice can express itself in a non-analogical manner in the relative modality of retribution alone; in the same way the fullness of the meaning of love is expressed unequivocally within the temporal order in its moral modality only."

88 See n 4 *supra.*

89 Van Warmelo "Law, ideology and justice" in John Hund (ed) *Law and justice in South Africa* Centre for Intergroup Studies (1988) 167–168.

And, in Machiavellian style, he went on to assert:[90]

> "[E]veryone realises (consciously or unconsciously) that if he or his group has the upperhand, he has to hang on to it for dear life, otherwise the justice of the other man will triumph and woe to the vanquished."

The Philosophy of the Cosmonomic Idea maintains, on the contrary, that the concept of justice carries within itself a nucleus of meaning that applies universally and is immutable. The essential purport of the notion of justice represents the principle of neighbourly love or humaneness, as moulded by the juridical meaning-kernel of retribution with a view to affording it pertinence in jural relations. Its manifestations in the concrete situations of empirical reality of a given time and place are indeed variable, but every ramification of justice, whetever the circumstances, continues to be conditioned by its core element of meaning.

In state-subject (public-law) relations the *essentialia* of justice are focussed on the equal treatment of all the citizens by and before the law, while in subject-subject (private-law) relations the notion of justice finds expression in the principle demanding the curtailment of the rights and competencies of one person by the equal rights and competencies of other persons in accordance with the adage: *sic utere tuo ut alienum non laedas.* The Kantian categorical imperative of jural relations on the inter-individual level reflects the gist of the matter:[91] The law, to be just, should lay down the conditions under which:

a every subject could enjoy the greatest possible freedom;

b the freedom of every person is to be curtailed by the freedom of others; and

c legally imposed limitations upon the freedom of an individual, designed to secure the peaceful co-existence of people within a defined territory, would apply equally to everyone.

Within the confines of internal public-law relations, the major directives of the legal idea aimed at safeguarding the freedoms of the subordinates of state authority crystallised, through the efforts of constitutional lawyers and political scientists in search of conditions most likely to secure a just society, in a number of (negative) constitutional strategies for the limitation of the executive and legislative powers of government. Those strategies include the principle of representative government in a democratic dispensation; decentralisation of the instruments of government in a federal structure with autonomous regional and local bureaucracies; distribution of state authority through the separation of powers; confining political competencies to a defined sovereign sphere of entitlements determined by the genuine destiny or leading function of the state; circumscribing and restricting the powers of government by legal provisions within the meaning of the rule of law; surveillance of administrative acts by an ombudsman; and shielding a defined enclave of fundamental freedoms against legislative and executive encroachment in a bill-of-rights régime.

The history of Western jurisprudence has similarly yielded a set of norms of procedure and evidence with a view to upholding the basic demands of fair play in the administration of justice. These so-called procedural human rights, commonly referred to as the conditions for the due process of law, were designed

90 168.
91 See n 7 *supra.*

to ensure that courts of law would remain impartial and could function independently of the executive branch of government; that conviction of the innocent can as far as humanly possible be prevented; that each person may be presumed innocent; that no one shall be charged more than once with the same offence; that no one can be compelled to testify against himself; that no decision would be taken that might adversely affect the interests of any person without that person having had an opportunity to state his case; that every party in judicial or quasi-judicial proceedings be afforded the right to legal representation; that no legislation which might adversely affect the rights or competencies of a legal subject be introduced with retroactive effect; that no person be subjected to any form of cruel or inhuman punishment or treatment; and that no one could arbitrarily be taken into custody or be detained without the prospect of a fair trial.

If the method *a posteriori* of Hugo Grotius for establishing the norms of justice is anything to go by,[92] it would be safe to say that through general and universal acceptance the *communis opinio populi* has endorsed these provisions of political power constraint and procedural equity as rules of propriety of the legal idea.

5 STANDARD-SETTING FUNCTION OF THE LEGAL IDEA

There seems to be a general misconception in South Africa that the doctrine of sphere sovereignty demands that agents of any particular discipline confine their opinions to the isolated subject-matter of their distinct fields of expertise. For instance, in the occasional disputes between government and certain theologians over the (im-)morality of apartheid and of absolutist powers of the authorities in matters of state security – of which disputes South Africa has experienced several outbursts in the recent past – it has often been said that the clergy should stick to preaching the gospel and "stay out of politics".

Minding one's own business in the sense of sphere sovereignty does not relate to the object of one's concern but to the mode of one's evaluation of any given situation. Confining one's value-judgments to one's particular area of proficiency relates to the perspective and emphasis of one's approach and not to the nature of the matter at hand.

The point I wish to make was lucidly illustrated by Dooyeweerd himself in the opening chapter of *Introduction to the encyclopedia of legal science* and with reference to probably the most common eventuality in the day-to-day life of the Netherlands.[93] He tells of a Dutchman who walked into a shop and purchased a box of cigars. Fourteen observers put in an appearance in the shop – each representing one of the particular disciplines that enquire into the different facets of reality. Although the fourteen scientists observed *one and the same* act, the emphases of their perception of the transaction in the cigar shop in each instance were quite distinct. While the lawyer among them would clearly consider the legality of the contract of purchase and sale that was being concluded, the economist focussed his attention on the monetary equivalent of a relatively scarce commodity as reflected in the transaction, the sociologist marvelled at the fellowship between buyer and seller, the linguist noted the communication between

92 See Van der Vyver "Die regsfilosofie van Hugo de Groot" 1983 *THRHR* 161–162.

93 *Inleiding tot de encyclopaedie der rechtswetenschap* (unpublished class notes) (1967) ch 1 par 2.

the contracting parties through words and gestures, the historian thought of the cigars as the product of formative human activity, the student of logic attempted to establish the rationality of the shopkeeper's response to the client's request, the mathematician calculated the numerical ratio of the number of cigars to the sum of money that exchanged hands, the ethicist weighed the vice of offering for sale items that might constitute a health hazard up against the freedom of consenting adults to embark upon such risky habits, and so on.

The law, too, constitutes an empirical phenomenon that may, and in fact must, be observed by all – in both the sensory and the legalistic sense; and within the confines of each one of the normative aspects of reality one would find scope for a value-judgment concerning the law and from the perspective of the focal point of that aspect. Theologians thus have the right, and indeed a duty, to evaluate in the light of their particular tenets any legal provision or political institution, and to speak out against those that would obstruct one's humane existence in pious fellowship with others or in one's pursuit of a life hereafter, or which reflect profanity on the part of persons in authority. Ethicists should likewise appraise the institutions of law and government with a view to the criterion of neighbourly love; economists should calculate the implication of such institutions in respect of the ideal economic order; sociologists ought to consider their impact on sound human relations; historians, in their evaluation of law and politics, are bound to be solicitous about the need to preserve the people's cultural heritage.

Lawyers, too, are cautioned from time to time by politicians – and by members of their own fraternity as well – not to "meddle in politics". In fact, within the Society of University Teachers of Law tension has been noticeable in the past because certain resolutions of the Society were said to be "political in nature". The principle of sphere sovereignty bears the message in this regard that it would be irresponsible for lawyers to avoid any particular subject-matter with legal implications simply because the issues involved have become controversial in the political arena. Mr Justice Johann Kriegler, in the closing address of a conference in Pretoria on "A Bill of Rights for South Africa", eloquently made the same point with regard to the topic of that conference:

> "I heard the suggestion made that a debate about a bill of rights is really misplaced amongst lawyers. The view was expressed in the modern idiom that it was for the politicians to get their act together and not for lawyers. I regard it as a heresy and I regard it as a particularly pernicious heresy . . . I want to express in the strongest possible terms my opposition to the heresy that it is not the function of lawyers to get involved in issues which may sound political. You cannot divorce an issue such as this from politics, nor can you divorce it from the role and the field of the responsibility of law."[94]

However, politicians and lawyers would approach and evaluate the contingencies of empirical reality from different angles and according to the distinct manner of their respective avocations. It is not, in a word, the WHAT of any particular subject-matter but the HOW of one's treatment of that topic that makes the difference. Political perspectives are essentially tied up in a particular ideology for the structuring of the social, economic and constitutional design of a territorially defined community; and the marketing of that ideology to obtain public support is the politician's primary objective. Political expediency often requires

94 Kriegler "Slotrede/Closing Address" in Van der Westhuizen & Viljoen (eds) *A bill of rights for South Africa/'n Menseregtehandves vir Suid-Afrika* (1988) 167.

that disclosures of factual truths or of the actual reality of a given situation and the virtue of unblemished honesty be subordinated to political manipulations of popular demand.

The primary task of academic lawyers, on the other hand, is to detect, analyse and describe to the best of their ability that aspect of laws, things, social institutions and events which come within the horizon of their particular expertise. The academic lawyer is furthermore also destined to undercover and proclaim the OUGHTS that apply to the subject-matter of his discipline; and he may never allow the directives of legal-ethical standards, or his own value judgments, to be obscured by the blinkers of personal interest, political loyalties, religious or sectional predilections, or mere existential subjectivity. The norms of justice must be his only guide.

6 JUSTICE AS A COMPONENT OF POSITIVE LAW

I would consequently take issue with Mr Justice MT Steyn for having caused, in *Bloem v State President of the RSA*,[95] judicial interpretation of the security regulations to be clouded by his own (subjective) perception of the "socio-political milieu" that prompted the state of emergency – instead of simply applying the rules of statutory interpretation and of subordinate legislation and administrative discretion. Steyn J, in a word, justified a particularly illiberal interpretation of a legal provision on the basis of extra-judicial considerations couched in the metaphor of political rhetoric, instead of seeking guidance from the ultimate objective of all law as manifested in norms of the legal idea.[96]

Understanding the norms of justice is not a matter of legal ethics only. *Fiat justitia* also constitutes an integral part of positive law in South Africa.

Ernest Lewis thus rightly proclaimed that the code of professional conduct applying to lawyers in the different walks of legal practice[97] "is as much part of the law as any other".[98] Positivistic sceptics might argue that this state of affairs does not really require the rank and file of legal practitioners to come to grips with the concept of justice as such, since the norms of professional conduct have already been posited into concrete rules of law. But that is not so. The law pertaining to professional conduct has not been codified and is subject to continuous evolution – perhaps more so than any other branch of the law. It is furthermore a branch of the law that essentially and deliberately seeks to uphold current perceptions of juridical virtue, and consequently new arrangements in respect of unprecedented problems of professional conduct clearly calls for insight into the demands of becoming standards in the legal-ethical sense.

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95 1986 4 SA 1064 (O) especially 1067–1068.

96 See Davis "Competing conceptions: pro-executive or pro-democratic – judges choose" 1987 *SAJHR* 98–101 and "The Chief Justice and the total onslaught" 1987 *SAJHR* 229; Cameron "Judicial endorsement of apartheid propaganda: an enquiry into an acute case" 1987 *SAJHR* 223 and "Nude monarchy; the case of South Africa's judges" 1987 *SAJHR* 340–341.

97 Lewis spoke of "the ethical code". Du Plessis *Die professionele gedrag van die juris* (1980) 4 pointed out that it is wrong to denote the "juridical facet" of the rules of professional conduct as "professional ethics". Although lawyers may (freely) choose to conduct themselves in conformity with the demands of morality as such, we are here concerned with (enforceable) rules of positive law which regulate the proper behaviour of legal practitioners in the exercise of their profession.

98 Lewis *Legal ethics: a guide to professional conduct for South African lawyers* (1982) 1.

In several other branches of the law, principles of the legal idea, centred upon the notion of individual freedom, reasonableness and justice, have been incorporated into positive law. Those branches of the law include the law that defines the scope of authority of subordinate legislators and of the powers included in discretionary administrative competencies, and international human rights law as part of the domestic body of South African law. Through the law regulating the interpretation of written legal instruments, the legal idea in fact seeks to infiltrate the entire spectrum of positive law.

Acts of parliament, as everyone knows, must be constructed *in favorem libertatis* and upon the understanding, *prima facie*, that enactments were not intended to promote unjust or inequitable results or to abridge vested rights, and subject to a score of other rules and presumptions founded upon libertarian and egalitarian ideals. Regrettably, these rules of interpretation have been greatly overshadowed in South Africa by a kind of linguistic absolutism and judicial executive-mindedness. They, in any event, have never been made the prime focus of any general theory of interpretation advanced by the leading South African experts in this field.

For many years now the task of statutory interpreters was thought to entail endeavours to uncover and give effect to the supposed "legislative intention", or – as stated by Friedrich von Savigny – to embark upon "reconstruction of the ideas embodied in an enactment".[99] The application of this theory of interpretation by its leading South African proponent, LC Steyn,[100] and in judgments of the supreme court,[101] has been exposed by several critics as nothing other than literalism in disguise.[102] And after intentionalism had fallen into disrepute in academic circles, Denis Cowen proclaimed:

> "[T]here has been insufficient examination of the theoretical foundations of the subject; and in consequence we lack an adequate, clearly articulated and consistently followed general theory of interpretation."[103]

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99 Von Savigny *System des heutigen römischen Rechts* (*supra* n 57) vol I 213.

100 Steyn *Die uitleg van wette* (4th ed by Van Tonder) (1974) 1 where, in response to the question: What is interpretation of statutes? he stated: "Dit is om die wils-, of gedagte-inhoud van die wetgewer vas te stel."

101 See, e g, *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501 508 (per Stratford J): "The governing rule of interpretation – overriding the so-called 'golden rule' – is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question, and there is no doubt that the literal grammatical meaning of the words must give way to that rule."

The "golden rule" here referred to is the one stated in *Venter v R* 1907 TS 910 913 (per Innes CJ): "By far the most important rule to guide the courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect."

102 Immediately after the statement quoted in n 100, Steyn goes on to say: "Om dit te doen [that is, to establish the intention of the legislature] is die uitlegger natuurlik in die eerste plek aangewese op die woorde wat die wetgewer gebruik het om daardie wils- óf gedagte-inhoud te openbaar." Cowen "The interpretation of statutes and the concept of 'the intention of the legislature' " 1980 *THRHR* 391, with this kind of reasoning in mind, referred to "[t]he way of the literalists to invoke the phrase 'the intention of the legislature' merely as a label to justify a decision reached without reference to any identifiable concept which the phrase may designate"; and Du Plessis *The interpretation of statutes* (1986) 32 typified Steyn's intention theory as "a textual or 'plain meaning' theory in an intentional disguise".

103 Cowen "Prolegomenon to a restatement of the principles of statutory interpretation" 1976 *TSAR* 137.

Cowen sought to remedy this shortcoming by proposing a teleological approach to the question of interpretation of statutes; that is, a strategy of construction in which the purpose or *ratio* of the instrument to be interpreted would reign supreme.[104] Later, however, when the influence of the judgment of Schreiner JA in *Jaga v Dönges*[105] filtered through,[106] Cowen assumed the position of contextualism.[107]

In certain Afrikaans academic circles a renewed faith in literalism has become the order of the day. Du Toit,[108] Lategan,[109] Klopper and Van den Bergh[110] all have this in common: an attempt to illustrate the importance and worth of hermeneutics[111] as a mode of linguistic analysis[112] to "explore and comprehensibly carry across the meaning concealed within the words of a statute".[113] Lategan said it all by appealing for the *ex visceribus actus* rule to be restored as the central focus of statutory interpretation.[114]

The contributions of Lourens du Plessis and JMT Labuschagne cannot exactly be called a theory of interpretation in the class of a standard-setting directive. I would place their thought on the subject in the category of descriptive analysis of the act of construction as such. Labuschagne thus simply defined the process

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104 *Idem* 162: "[T]he purpose or *ratio* of the legislation is, *logically*, *always* a very relevant factor – and it may be a determining factor – in establishing the meaning or *mens legis* of the legislative . . . provision chosen as a means to the end"; and see also 163: "[W]hen balanced against the thrust of manifest purpose, I suggest language should be given second place."

105 1950 4 SA 653 (A).

106 Cowen, in his contribution of 1976 (*supra* n 103) 145–146, referred to *Jaga*'s case but the influence upon him of Judge Schreiner's proposed method of construction did not then predominate in Cowen's own thinking.

107 See "The interpretation of statutes and the concept of 'The intention of the legislature' " (*supra* n 102). Schreiner JA proposed in *Jaga* that an interpreter should first give particular words or phrases in a statute a *prima facie* meaning, and in the second phase of the inquiry he should seek the true meaning of those words or phrases (which might or might not accord with their *prima facie* meaning) in view of the whole relevant "contextual scene". Cowen (396–397) in this sense succinctly referred to "the interpreter's *legal duty not to confine* attention to the grammatical meaning of words, but to *complete* the process of interpretation *in all cases*, by reference to contextual considerations".

108 Du Toit "The dimension of futurity in the law: towards a renewal of the theory of interpretation" 1977 *Journal for Juridical Science* 11, who set out to demonstrate "aspects of the meaning of important modern tendencies in general hermeneutics for juridical hermeneutics" (14).

109 Lategan "Die uitleg van wetgewing in hermeneutiese perspektief" 1980 *TSAR* 107, who sought guidance for the purposes of statutory interpretation in hermeneutics in theology.

110 Klopper & Van den Bergh "Die toepasbaarheid van die moderne linguistiese benadering op wetsuitleg" 1980 *Journal for Juridical Science* 1, who particularly emphasised the role of the linguistic science of syntax and semantics. See also Van den Bergh "Die gebruikswaarde van bepaalde struktuuranalitiese metodes vir wetsuitleg" 1981 *TSAR* 136; *Die God van die Grondwet en Presidentsraad van die Republiek van Suid Afrika: 'n regshermeneutiese benadering met gebruikmaking van struktuur-analitiese metodes* (*semioties en linguistïes*) (Univ of Zululand 1982); *Die betekenis van die strukturele hermeneutiek vir die uitleg van wette* (LLD-thesis UOFS, 1982).

111 Lategan 107 defined hermeneutics as "the science of understanding" or "the theory of the interpretation of written texts" (his own translation).

112 See Van den Bergh "Die gebruikswaarde van bepaalde struktuuranalitiese metodes vir wetsuitleg" (*supra* n 110) 137.

113 *Ibid*: "om die betekenis wat verskuil lê in die woorde van 'n wet te ontgin en verstaanbaar oor te dra".

114 (*Supra* n 109) 120–126.

of interpretation as a course of action whereby the structural norm contained in an enactment is converted into a functional norm.[115] Du Plessis, initially, in an attempt merely to stimulate debate, emphasised the importance of juridical coherence between all the agencies in the process of construction ("juridiese samehangrelasies"),[116] but subsequently developed a theory of statutory interpretation based on the concept of "normative transposition" within a particular contextual framework,[117] which on one occasion he defined as follows:

> "In short: interpretation is not first and foremost a search for an intention. It is rather the interpreter's normed or norm-subjected transposition – or 'translation' – of meaningful information outside the framework or 'borders' of the world of his own experience into (the language of) that world of experience in order to come to (the state or condition of) understanding."[118]

I sense in all of these theories of interpretation the lack of a central guiding principle, a jural sign-post that signifies the interpreter's primary pursuit. The band-aid attempt of Hahlo and Kahn – a compromise that seeks to patch up the anomalies amongst the rules of construction in South African law by affording prominence to all the headings one might find in a textbook on statutory interpretation – also remained essentially descriptive of the *status quo*. Hahlo and Kahn simply abide by the principle of literal interpretation and in a secondary sense bring in the contextual, teleological and historical setting of an enactment to foot the bill whenever "plain language" or "ordinary meaning" leaves one in the lurch.[119]

If Johannes Voet was right in asserting that legislation ought to be just and reasonable, that it prescribes what is reasonable and forbids what is base, and that it sets out to preserve egalitarian values,[120] then, surely, preservation of these norms of legal ethics should always remain the primary target of interpreters of the written law. I am suggesting that the interpretation of statutes, as a matter of positive law, requires that one should in every instance read as much justice into every act of parliament and the decrees of subordinate legislatures (as well as into judicial precedents and the common law) as the words of the written instrument in question would possibly permit.

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115 Labuschagne "Die uitlegvermoedens teen staatsgebondenheid" 1978 *Journal for Juridical Science* 61–64; "Op die voetspoor van die wetgewingsproses: subsecuta observatio en contemporanea exposito" 1979 *De Jure* 98; "Op die voetspoor van die wetgewingsproses: dwingende en aanwysende bepalings" in Joubert (ed) *Petere Fontes: LC Steyn-gedenkbundel* (1980) 97–98; "Die dinamiese aard van die wetgewingsproses en wetsuitleg" 1982 *THRHR* 404–405; "Regsdinamika: opmerkings oor die aard van die wetgewingsproses" 1983 *THRHR* 422; "Die leemtebegrip by wetsuitleg" 1985 *TSAR* 58; "Op die voetspoor van die wetgewingsproses: woord-, punktuasie- en struktuuraanwysende uitleg" 1986 *SA Public Law* 58.

116 Du Plessis "Die teoretiese grondslae van wetsuitleg" in Joubert (ed) *Petere Fontes: LC Steyn-gedenkbundel* (1980) 41: "By die reëls van wetsuitleg is, struktureel beskou, juridiese samehangrelasies markant in die gedrang."

117 *The interpretation of statutes* (1986) 47–49.

118 "Tentative reflections on the systematization of the rules and presumptions of statutory interpretation" 1981 *SALJ* 213.

119 Hahlo & Kahn *The South African legal system and its background* (1973) 180.

120 Voet 1 3 5: "Sunt autem varia legis requisita; etinem primo quidem iustam eam oportet esse ac rationalem; tam quantum ad materiam, dum honesta praecipit, turpia vetat; quam quantum ad fornam, dum aequalitatem servat et aequiliter vives tenet: neque enim iura in singulas personas sed generaliter constituenda sunt"; and see also (per Gaius) *D* 50 17 56: "Semper in dubiis benigniora praeferenda sunt."

In his plea for a realist-cum-natural-law approach to the judicial process and civil liberty, John Dugard came close to developing just such a theory.[121] However, he never elevated the guiding light of "legal values or policy"[122] or the judges' calling "to promote the prime legal values of our legal tradition"[123] to the level of concrete empirical law. By advocating a "creative role" of the judiciary in the interpretation of statutes,[124] he was in fact opting for a system of judicial activism along American lines and furthermore defeated the ends of a libertarian system of interpretation by conceding that in statutory law "the scope of judicial creativity is greatly reduced".[125]

"Judicial activism" signifies assumed powers of the judiciary to go beyond the words of a statute and the legally sanctioned rules of interpretation in order to uphold a particular judge's perception of "higher values".[126] Ronald Dworkin called it "a virulent form of legal pragmatism" and, with a view to judicial activism in American constitutional decisions, he went on to explain:[127]

> "An activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and longstanding traditions of our political culture. He would ignore all these in order to impose on other branches of government of his own view of what justice demands."

In the United States of America, judicial activism emanated from "[t]he tendency of the Court in the long run to conform to the major movements of public opinion . . .";[128] and in many instances it took on proportions in judicial law-making that belied every pretence of linguistic backing by the Constitution itself. A telling example of the occasional absence of judicial restraint in American case-law is to be found in the anti-abortion decisions of the US Supreme Court,[129] in which, ultimately, the Fourth Amendment's proscription of unreasonable searches and seizures, and the Fifth Amendment's rule against self-incrimination, were said to provide the constitutional basis – via, admittedly, a right to privacy – for constructing the so-called constitutional right of a woman, at least within the first trimester of gestation, to decide for herself whether or not to remain pregnant.[130]

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121 "The judicial process, positivism and civil liberty" 1971 *SALJ* 197–200; and see also "South African lawyers and the liberal heritage of the law" in Peter Randall (ed) *Law, justice and society* (*supra* n 9) 24–29; *Human rights and the South African legal order* (1978) 366–388.

122 "The judicial process, positivism and civil liberty" 196.

123 *Idem* 198.

124 *Human rights and the South African legal order* 382.

125 "South African lawyers and the liberal heritage of the law" 25.

126 I do not agree with the notion that "judicial activism" prevails "where the courts have been able to control the exercise of (executive) government power in order to protect individual rights and freedoms". See Basson "Judicial activism in a state of emergency: an examination of recent decisions of the South African courts" 1987 *SAJHR* 41 and "Die regbank en 'n menseregtehandves" in Van der Westhuizen & Viljoen (eds) *A bill of rights for South Africa/'n Menseregtehandves vir Suid Afrika* (1988) 86. *Positive law* requires a judge to protect individual rights and freedoms to the maximum extent which the wording of (repressive) statutory provisions that have a bearing on such rights and freedoms permits.

127 Dworkin *Laws's empire* (1986) 378.

128 Allen "Due process and state criminal procedures: another look" 1953 *Northwestern University LR* 31.

129 *Roe v Wade* 410 US 113 (1973); *Doe v Bolton* 410 US 179 (1973).

130 See Van der Vyver "Political power constraints and the American Constitution" 1987 *SALJ* 434–435.

There are many compelling reasons, over and above the absurdities exemplified by certain American precedents, why South Africa should avoid the practice of judicial activism: it goes against the grain of the South African tradition of adjudication as expressed in the maxim: *iudicis est ius dicere sed non dare*; it contradicts the principle of separation of powers by investing the judiciary with excessive law-creating competencies; and, considering the track-record of members of the South African judiciary who on occasions pronounced judgment in the style of activism, I personally doubt the wisdom of entrusting a court of law with the responsibility of unfolding and applying the prevailing trends in public morality. The judgments I have in mind, while purporting to pursue some "higher ideal" instead of simply applying the law *as it is*, actually intensified the hardship suffered by victims of the injustices embodied in our legal system. For example, in *Minister of the Interior v Lockhat*[131] Holmes JA brushed aside established rules of interpretation pertaining to the scope of delegated legislative authority to sanction racial discrimination in the allocation of land under the Group Areas Act[132] in order to uphold what, in flowery language of activist adjudication, was said to be "a colossal social experiment and a long term policy".[133] In *S v Meer*[134] the appellate division, relying on "common sense" rather than on clearly defined legal restraints pertaining to administrative decrees, refused to find that a banning order issued in terms of South Africa's repressive security legislation was "manifestly unjust" and for that reason invalid.[135] Again, in *Omar v Minister of Law and Order*; *Fani v Minister of Law and Order*; *State President v Bill*[136] Rabie ACJ, in one of the most glaring instances yet of executive-minded adjudication to emanate from South Africa's highest court of law, without any legal basis read into the regulations promulgated under the current states of emergency a "legislative intention" to deprive political detainees of the right of *audi alteram partem* and access to legal representation.[137]

There are, on the other hand, numerous judgments which bear testimony to the compelling requirement of positive law that acts of parliament ought to be

131 1961 2 SA 587 (A).
132 Act 77 of 1957, superseded by the Group Areas Act 36 of 1966.
133 602; and see also *S v Adams; S v Werner* 1981 1 SA 187 (A) and Van der Vyver "Qu'ils mangent de la brioche!" 1981 *SALJ* 135.
134 1981 4 SA 604 (A).
135 See Mathews "A Meer débâcle – the law of social gatherings" 1982 *SALJ* 1; Rudolph "Defining the indefinable; Q E D (Quite Easily Done)" 1982 *SALJ* 7.
136 1987 3 SA 859 (A).
137 See Dugard "*Omar*: Support for Wacks's ideas on the judicial process?" 1987 *SAJHR* 295; Rabie "Failure of the brakes of justice: *Omar v Minister of Law and Order* 1987 3 SA 859 (A)" 1987 *SAJHR* 300; Mathews "*Omar* v the Oumas" 1987 *SAJHR* 312; Baxter "A judicial declaration on martial law" 1987 *SAJHR* 317; McQuoid-Mason "Omar, Fani and Bill – judicial restraint restrained: a new dark age" 1987 *SAJHR* 323; Davis "*Omar*: a retreat to the Sixties" 1987 *SAJHR* 326; Van der Leeuw "The audi alteram partem rule and the validity of emergency regulation 3 (3)" 1987 *SAJHR* 331; Van der Vyver "Judicial self-sufficiency in Omar" 1987 *SAJHR* 335; and see further in general Davis & Corder "A long march: administrative law in the appellate division" 1988 *SAJHR* 281, and Haysom & Plasket "The war against law: judicial activism and the appellate division" 1988 *SAJHR* 303.

construed, as far as possible, in conformity with the norms of justice.[138] The most recent examples of such liberally inclined judgments include decisions of Mr Justice Goldstone[139] and Mr Justice Didcott[140] proclaiming the right of every person accused of a crime to legal representation, and the one of Chief Justice Corbett[141] endorsing the earlier opinion of Mr Justice Kumleben[142] that the *audi alteram partem* rule applied to decisions of the Attorney-General to issue an order in terms of the Internal Security Act 74 of 1982 prohibiting the release of an arrested person on bail.

What we need in South Africa is a bold statement of policy that would proclaim the ultimate aim of justice to be the central and overriding objective of every act of statutory construction, and I wish to invite those engaged in the theory of interpretation to scientifically develop this theme. The judgments of the kind just mentioned could constitute the empirical basis for a theory of interpretation along these lines.

Recently, Etienne Mureinik alerted South African lawyers to Ronald Dworkin's theory of constructive interpretation,[143] and colleagues who might wish to take up the challenge of developing a philosophy of interpretation in which the legal idea would feature as the critical focus of the interpreter's endeavours would be well advised to take note of Dworkin's jurisprudence. Stated succinctly, the Oxford professor advocates a doctrine of construction in which the interpreter of common-law rules, judicial precedents and statutory provisions would seek to bring out the meaning that, morally, would be as appealing as can be.[144] Dworkin is by no means in favour of judicial activism but, on the contrary, confines the interpreter's function of bringing out the best in every law to a peripheral mould of textual integrity – that is, "some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force"[145] – and political fairness in regard to public sentiments concerning the subject-matter of the rules to be interpreted.[146] The interpreter's pursuit must *fit* the confines of such restraints and would furthermore be conditioned by the *point* of all law, which in Dworkin's opinion is "to license and justify state coercion of individuals and groups".[147]

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138 See, e g, the speech delivered by Mr Justice AJ Milne at the Annual General Meeting of Lawyers for Human Rights, published in *Bulletin No 3* of Lawyers for Human Rights, January 1984, 43; and also Basson "Judicial activism in a state of emergency: an examination of recent decisions of the South African courts" (*supra* n 126) and "Die regbank en 'n menseregtehandves" (*supra* n 126) 76–86.

139 *S v Radebe*; *S v Mbonani* 1988 1 SA 191 (T).

140 *S v Khanyile* 1988 3 SA 795 (N).

141 *Attorney-General, Eastern Cape v Blom* 1988 4 SA 645 (A).

142 *Buthelezi v Attorney-General, Natal* 1986 4 SA 377 (D).

143 Mureinik "Dworkin and apartheid" in Corder (ed) *Essays on law and social practice in South Africa* (1988) 181.

144 See, e g, *Law's empire* (*supra* n 127) 90, where he identifies general theories of law with constructive interpretation and goes on to explain: "[T]hey try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice"; and 338 where Dworkin thus describes the objective of the interpreter of statutes: "He tries to show a piece of social history... in the best light overall..."

145 *Idem* 338.

146 *Idem* 337–341.

147 *Idem* 127.

Dworkin's jurisprudential framework indeed requires considerable theoretical refinement. For instance, although his perception of the "point" of interpretation resembles in principle the law's sovereign mode of functioning, he lacked insight into the true nature of the nucleus of meaning of the juridical aspect of reality. And regrettably so, because the emphasis in this regard on state-imposed coercion as a means of enforcing the law, and the "point" of statutory interpretation, could be utilised to defeat the very liberal objective which his theory sets out to promote. If the point of interpretation of the law were seen to be focussed upon the licensing and justification of coercion through the medium of state authority, interpreters seeking to realise that objective might tend to overlook the truism that effective implementation of the law ought always to be counterbalanced by rules of equity and fair play in the administration of justice. The Cosmonomic Idea indeed acknowledges the backing of the enforcement mechanisms of the law by the strong arm of government as an important (historically based) substratum of the juridical aspect of reality, but proclaims with equal force that the rules of the game in law confine the strategies of law enforcement and political power to those that can withstand the scrutiny of norms of the legal idea. To be law, a particular rule of human conduct must always be qualified by the characteristic essence of all law, but having thus been qualified, the rule should be given as liberal a meaning as possible. It is thus suggested that the meaning-kernel of all law – paraphrased in the metaphor of Dworkin's thinking – operates on the level of *fit*, while justice as such constitutes the *point* of the interpreter's trade.

A sysem of constructive interpretation founded upon such a balanced perspective would bring the rules of justice squarely within the ambit of positive law.

CONCLUSION

I have attempted to show that the legal idea of justice not only constitutes the criterion of what the law ought to be, but also forms part of positive law as such. Roman Dutch law – the common law of South Africa – contains ample authority to substantiate the proposition that statutes, as well as judicial precedents and the common law itself, must, *as a matter of binding law*, be interpreted with a view to upholding as much justice as the words used by the legislature, the judges and common-law authorities would permit. Theoreticians in the field of interpretation are invited to accommodate this approach within a scientifically accountable philosophy of construction.

The status of justice as the ideal objective of all legal provisions, and as a substantive component of positive law, also calls to mind the special responsibility of teachers of law not to neglect this most salient ingredient of the juridical aspect of reality in the teaching of their respective disciplines. Students ought to be encouraged to develop an understanding and appreciation of the jural credo of justice in all its ramifications, in order that they would be equipped to identify and to speak out against the shortcomings of our legal system and, as practitioners, to promote the actual reception of the norms of justice into the law as it is.

Die subjek van 'n bestorwe boedel: meester of eksekuteur?[1]

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SUMMARY

The subject of a deceased estate: Master or executor?

This is the first of two articles dealing with the question of who or what the subject or "owner" of a deceased estate is. This article deals with the question whether the Master of the Supreme Court or the executor is such subject. In his separate judgment in *Minister of the Interior v Confidence Property Trust (Pty) Ltd* 1956 2 SA 365 (A) Reynolds JA said that "[o]ne way in which, by operation of law, that estate vests in others is by death, when the estate would *ipso jure* vest in the Master and in the executors". While this is – to the best of the author's knowledge – the only case in which the proposition is found that a deceased estate vests in the Master, there are various cases in which it was either decided or said by way of *obiter dicta* that a deceased estate vests in the executor. On the other hand Jacobs JP in *Cilliers v Kuhn* 1975 3 SA 881 (NC) said that the notion that the Master and thereafter the executor becomes owner of the estate, was wholly unacceptable to him. On the basis of various arguments it is pointed out that the view of Jacobs JP is to be preferred to that of Reynolds JA.

1 INLEIDING

Artikel 9(1) van die Insolvensiewet 24 van 1936 (hierna die "Insolvensiewet 1936" genoem) bepaal dat 'n *skuldeiser* wat 'n gelikwideerde vordering van ten minste R100,00 het (of sy verteenwoordiger) of twee of meer skuldeisers wat gesamentlik gelikwideerde vorderings van ten minste R200,00 het (of hulle verteenwoordigers) onder sekere omstandighede aansoek om die sekwestrasie van 'n skuldenaar se boedel kan doen. Gestel daar is 'n boedelvordering van R150,00 ten aansien waarvan die skuldenaar insolvent is. Daar is twee mede-eksekuteurs ten opsigte van die boedel aangestel en die erflater het drie erfgename. Kan die eksekuteurs aansoek om die sekwestrasie van die skuldenaar se boedel doen? Het mens hier met *twee* of *drie* skuldeisers (die twee eksekuteurs of die drie erfgename soos deur die eksekuteurs verteenwoordig) te doen, in welke geval die vordering van R150,00 te klein is, of bestaan daar in hierdie geval slegs *een* skuldeiser, in welke geval die vordering van R150,00 groot genoeg is? Indien laasgenoemde die geval is: wie of wat is die skuldeiser? Of is die boedel subjekloos, sodat daar glad geen skuldeiser bestaan nie?

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1 Hierdie artikel is gebaseer op skrywer se LLD-proefskrif *Universele opvolging in die Suid-Afrikaanse reg* (Annale van die Universiteit van Stellenbosch vol 5, reeks B, nr 1, 1983). Na dié werk word hierna verwys as *Universele opvolging.*

Indien 'n mens hierdie probleemgebied van ons reg sou aandurf aan die hand van standpunte wat die appèlhof reeds ingeneem het (hetsy by wyse van beslissing hetsy by wyse van *obiter dicta*) of aan die hand van standpunte wat 'n appèlregter in 'n afsonderlike uitspraak ingeneem het, word die volgende resultate verkry:

a Die oorledene is nie self subjek van sy nalatenskap nie.[2]

b 'n Oorledene se nalatenskap is ook nie subjekloos nie.[3]

c Die erfgenaam is nie meer 'n universele opvolger van die oorledene nie. Hy verkry 'n vorderingsreg en word deur registrasie, lewering of sessie subjek van die geërfde bates.[4]

d Wat die posisie ook al voor die aanstelling van 'n eksekuteur mag wees, behoort 'n bestorwe boedel na sodanige aanstelling nie aan 'n regspersoon nie. As dit aan 'n regspersoon behoort het, sou dit 'n regspersoon "based on or consisting of things" gewees het.[5]

e Voor die aanstelling van 'n eksekuteur vestig 'n bestorwe boedel in die Meester van die Hooggeregshof.[6]

f Na die aanstelling van 'n eksekuteur vestig die betrokke boedel in hom.[7]

Ek is die mening toegedaan dat die eerste drie standpunte korrek is en laat hulle verder buite bespreking.[8] Die vierde standpunt sal in 'n volgende artikel aandag geniet. Dit laat 'n mens met die twee standpunte wat laaste vermeld word. Die doel van hierdie artikel is om hierdie twee standpunte onder die soeklig te plaas. In paragraaf 2 sal die meester se regsposisie bespreek word en in paragraaf 3 die eksekuteur se regsposisie.

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2 Vgl *CIR v Estate Garlick* 1934 AD 263 280; *Estate Smith v CIR* 1960 3 SA 375 (A) 381; *Universele opvolging* 233 e v.

3 Vgl *Estate Reynolds v CIR* 1937 AD 57: "Property, so to speak, cannot go into limbo after the disposition and after a period of time find an owner"; *Universele opvolging* 277 e v.

4 Vgl *Estate Smith v Estate Follett* 1942 AD 364; *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656; *Greenberg v Estate Greenberg* 1955 3 SA 361 (A); *Commissioner for Inland Revenue v Brooks* 1964 2 SA 566 (A); *Secretary for Inland Revenue v Estate Roadnight* 1974 1 SA 253 (A). Vgl verder *Universele opvolging* 5–11 i v m die verdwyning van die erfgenaam as universele opvolger in die Suid-Afrikaanse reg.

5 Vgl *Commissioner for Inland Revenue v Emary* 1961 2 SA 621 (A) 624: "A deceased estate is an aggregate of assets and liabilities. If it is a legal *persona* at all, it would belong to this less common class of juristic persons" [d w s "consisting of or based upon things and without membership of any natural persons" (623–624)] . . . Whatever the position may in particular circumstances be before the appointment of an executor, there can be little room for the legal personality of a deceased estate once as is the case here, an executor has been appointed." Die implikasie (opgesluit in die laas-aangehaalde sin) dat 'n bestorwe boedel *aan die eksekuteur behoort*, word egter weerspreek deur die volgende stelling wat verder aan in dieselfde uitspraak voorkom (625): "The totality of rights, obligations and powers vested in the executor and the heirs and other beneficiaries is such that it is difficult to conceive of any *residuum* left in the estate which could be said to require or to presuppose legal personality in the estate as holder of the *residuum* or as the real recipient of income in the estate." Hierdie sin hou in dat die *bevoordeeldes saam met die eksekuteur* in die nalatenskap opvolg en dat daar daarom nie 'n *residuum* bestaan wat aan die boedel, as regspersoon, kan behoort nie. Vgl verder die bespreking van hierdie gewysde in *Universele opvolging* 190 e v.

6 Vgl 2 hieronder.

7 Vgl 3 hieronder.

8 Vgl die verwysings na *Universele opvolging* in vne 2 3 en 4 hierbo.

2 DIE MEESTER VAN DIE HOOGGEREGSHOF AS MOONTLIKE SUBJEK VAN 'N BESTORWE BOEDEL

2 1 Inleiding

In *Minister of the Interior v Confidence Property Trust (Pty) Ltd*[9] is daar vier uitsprake gelewer. Vir doeleindes van hierdie artikel is twee *dicta* in die uitspraak van appèlregter Reynolds belangrik. Die eerste lui soos volg:[10]

> "The estate of a deceased person, in our system of law, vests in the executors. The alleged heir is really a residuary legatee and gets no right to vindicate this bequest from the person in whose possession it is (see *Krige and Others v Scoble and Others*, 1912 T.P.D. 814 at p. 820)."

In die tweede *dictum* word die volgende verklaar:[11]

> "One way in which, by operation of law, that estate vests in others is by death, when the estate would *ipso jure* vest in the Master and in the executors."

Met die woorde "the estate would vest in the Master and in the executors" is klaarblyklik bedoel dat 'n bestorwe boedel eers op die meester, en by die aanstelling van 'n eksekuteur, op hóm oorgaan. 'n Mens het hier, sover my kennis strek, met die enigste geval te doen waar 'n regter beweer het dat 'n bestorwe boedel op *die meester* oorgaan.[12] Dit spreek vanself dat as 'n regter vir die eerste keer 'n regsreël formuleer, hy sy standpunt moet staaf òf deur verwysing na bronne wat hom steun, òf deur die aanvoer van oortuigende argumente gebaseer op verskynsels wat in die regsverkeer voorkom. In hierdie geval is nòg die een, nòg die ander gedoen.

Daar bestaan geen aanduiding in die uitsprake van die ander appèlregters dat hulle met appèlregter Reynolds saamgestem het ten opsigte van die regsposisie van die meester (en die eksekuteur)[13] nie en derhalwe kan appèlregter Reynolds se standpunt nie as deel van die *ratio decidendi* van die betrokke uitspraak beskou word nie.

In teenstelling met die bovermelde mening ten opsigte van die meester se regsposisie, het regter-president Jacobs in *Cilliers v Kuhn*[14] verklaar dat die standpunt "dat die Meester en na hom die eksekuteur eienaar word" vir hom "heeltemal onaanneemlik" is.

Vir huidige doeleindes is dit belangrik om daarop te let dat appèlregter Reynolds en regter-president Jacobs verskillende standpunte ten opsigte van *die meester* se regsposisie daarop nahou. Daar sal hierna aangetoon word dat regter-president Jacobs se standpunt voorkeur bo dié van appèlregter Reynolds behoort te geniet.[15]

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9 1956 2 SA 365 (A).

10 382.

11 384.

12 Ook Wille *Principles of South African law* (1977) 254 en Lee, Honoré en Price *The South African law of property, family relations and succession* (1954) 150 neem hierdie standpunt in. In die 2e uitg van die lg werk deur Erasmus, Van der Merwe en Van Wyk (1983) 366–367 word hierdie standpunt nie meer onderskryf nie, maar ook nie verwerp nie hoewel daarna verwys word.

13 Ek kom in par 3 op die eksekuteur se regsposisie terug.

14 1975 3 SA 881 (NK) 886.

15 Reynolds AR het sy uitspraak in 1956 gelewer toe die Boedelwet 24 van 1913 (hierna die Boedelwet 1913) op die meester se regsposisie van toepassing was, terwyl Jacobs RP sy uitspraak in 1975 gelewer het toe die Boedelwet 66 van 1965 (hierna die Boedelwet 1965) die meester se regsposisie gereël het. Daar kan miskien aangevoer word dat 'n mens nie die genoemde regters se standpunte ten opsigte van die meester se regsposisie met mekaar kan vergelyk nie aangesien hulle menings nie op dieselfde voorwerp betrekking gehad het nie. M i beklee die meester ingevolge gemelde twee wette wesenlik dieselfde regsposisie en kan genoemde twee standpunte dus wel met mekaar vergelyk word.

Soos welbekend, is die amp "Meester van die Hooggeregshof" nie 'n gemeenregtelike instelling nie maar 'n skepping van die wetgewer. Dit volg hieruit dat 'n mens nie die standpunt dat die meester in 'n oorledene se nalatenskap opvolg, kan onderskryf nie, tensy aangetoon kan word dat òf die statutêre voorskrifte wat op die onderhawige amp betrekking het, òf gewoontereg wat na die instelling van die gemelde amp ontstaan het, hierdie posisie aan hom verleen.[16]

Eers sal ondersoek ingestel word of die meester ingevolge wettereg in 'n oorledene se nalatenskap opvolg en daarna of hy ingevolge gewoontereg aldus opvolg.

2 2 'n Beoordeling van die meester se wetteregtelike posisie

Terwyl die Insolvensiewet 1936 uitdruklik in artikel 20 bepaal dat 'n insolvent se boedel op die meester oorgaan, bevat die Boedelwet 1965, net soos sy voorgangers, Ordonnansie 104 van 1833 (Kaap) en die Boedelwet 1913, geen soortgelyke voorskrif in verband met die oorgang van die nalatenskap van 'n oorledene nie.[17] Die vraag is dus of die Boedelwet 1965 deur wetsduiding voorskryf dat die meester in die nalatenskap van 'n oorledene opvolg. Ten einde hierdie vraag te beantwoord, moet vasgestel word of 'n mens uit die regsposisie wat die meester ingevolge gemelde wet beklee, kan aflei dat die wetgewer bedoel het om voor te skryf dat die meester die subjek van dié bestorwe boedels, waaroor hy regsmag uitoefen, sal wees.

Die meester is met uitgebreide bevoegdhede en pligte met betrekking tot bestorwe boedels beklee waarvan die volgende die belangrikste is: In die eerste plek kan hy reëlings tref vir die bewaring van die bates van 'n bestorwe boedel voordat 'n eksekuteur aangestel is, onder andere deur die aanstelling van 'n "tussentydse kurator".[18] In die tweede plek moet hy persone aanstel wat die bestorwe boedel sal beredder. Hierdie persone is in die reël "eksekuteurs", maar in bepaalde uitsonderingsgevalle kan die meester 'n bestorwe boedel laat beredder deur 'n ander persoon, dit wil sê, deur iemand wat nie 'n eksekuteur is nie.[19] In die derde plek hou die meester oor die bereddering van bestorwe boedels toesig.[20] In die vierde plek kan die meester 'n ooreenkoms ten voordele van 'n "boedel" sluit, naamlik een waardeur voorsiening gemaak word vir sekerheidstelling, byvoorbeeld deur die tussentydse kurator, die eksekuteur en die natuurlike voog wat 'n bevoordeling aan sy of haar kind in ontvangs neem.[21] In die vyfde plek kan die meester bepaalde hofgedinge ten voordele van 'n "boedel" aanhangig maak.[22] In die sesde plek kan die meester 'n eksekuteur ontslaan nadat hy sy taak voltooi het[23] en kan onder bepaalde omstandighede 'n eksekuteur ontslaan

16 Met die moontlikheid dat die meester deur die werking van die presedentestelsel in die nalatenskap van 'n oorledene opvolg, hoef nie hier rekening gehou te word nie. Die enigste uitspraak dusver waarin die standpunt ingeneem is dat 'n bestorwe boedel op die meester oorgaan, is dié van Reynolds AR waarna so pas verwys is. Die meerderheid van die regters in die betrokke saak het egter nie hulle uitsprake op dié standpunt gebaseer nie.

17 Ook die Boedelwet 1965 se voorgangers wat voor die totstandkoming van die Boedelwet 1913 in die Tvl, OVS en Natal gegeld het (vgl *Universele opvolging* 61 vn 9; 113 e v), het nie 'n soorgelyke voorskrif bevat nie.

18 Vgl a 11 en 12.

19 Vgl a 13–22 i v m eksekuteurs en a 18 (3) en 25 (1) (a) (ii) i v m boedelberedderaars wat nie eksekuteurs is nie.

20 Vgl a 27–28 30 32 34–36 38 40 43 45 47–49 51 53.

21 Vgl a 12(2) 23 24 43 44.

22 Vgl a 12(7) 23(5).

23 Vgl a 56.

selfs voordat die bereddering voltooi is, byvoorbeeld in 'n geval waar die eksekuteur hom aan pligsversuim skuldig gemaak het.[24] Ten slotte is die meester bevoeg om in sekere gevalle geld wat uit 'n bestorwe boedel aan bepaalde persone toekom, in ontvangs te neem, dit in die Voogdyfonds te stort en later aan die bevoordeeldes persoonlik of aan ander persone wat bevoeg is om dit te ontvang, uit te betaal.[25]

Die meester oefen sy bevoegdhede onder toesig van die hof uit. Dit blyk uit artikel 95 wat, vir sover dit hier ter sake is, bepaal dat

> "[i]edere aanstelling deur die Meester van 'n eksekuteur . . . of tussentydse kurator, en iedere beslissing, beskikking, bevel, voorskrif of taksasie deur die Meester kragtens hierdie Wet . . . onderworpe [is] aan appèl na of hersiening deur die Hof by wyse van mosie deur enige persoon wat hom daardeur veronreg voel"

en dat die hof

> "by so 'n appèl of hersiening die aanstelling, beslissing, beskikking, bevel, voorskrif of taksasie . . . [kan] bevestig, ter syde stel of wysig".

Teen hierdie agtergrond kan die vraag gestel word of die bestaan van bogemelde bevoegdhede van die meester daarop dui dat hy *as subjek* van die betrokke nalatenskap handel wanneer hy genoemde bestuurshandelinge verrig. By die beantwoording van hierdie vraag moet met twee moontlikhede rekening gehou word, naamlik enersyds dat die meester in sy *persoonlike hoedanigheid* die subjek van die boedels onder sy toesig is, en andersyds dat hy in sy *amptelike hoedanigheid* sodanige subjek is. Laasgenoemde moontlikheid veronderstel dat dit juridies moontlik is dat 'n persoon naas sy "gewone" of "persoonlike" regsubjektiwiteit soveel "amptelike regsubjektiwiteite" het as die aantal boedels waaroor hy, as meester, gesag voer sodat een mens 'n onbeperkte aantal persone-in-die-reg kan wees. Oor die antwoord op die vraag of sodanige "amptelike regsubjektiwiteite" juridies bestaanbaar is, sou verskil van mening moontlik wees, maar vir doeleindes van hierdie artikel sal veronderstel word dat hulle wel bestaanbaar is.

By die eerste moontlikheid, naamlik dat die meester in sy persoonlike hoedanigheid die subjek van die boedels onder sy toesig is, hoef 'n mens nie lank stil te staan nie. Iemand wat so 'n standpunt wil inneem, sal vind dat hy nie die implikasies daarvan sal kan verdedig nie, byvoorbeeld dat die meester persoonlik aanspreeklik is vir boedelskulde, dat boedelgoedere in die meester se insolvente boedel val, dat alle bestorwe boedels wat onder die toesig van die meester is, één saamgesmelte boedel van die meester is met die gevolg dat die skuldverhoudinge wat tussen die onderskeie boedels mag bestaan, deur *confusio* uitgewis word, ensovoorts.

Dit laat 'n mens dus met die vraag of die meester in sy amptelike hoedanigheid die subjek van die boedel onder sy toesig is, dan wel of hy *bloot bestuursbevoegdhede* het.

Dat die meester nie *as subjek* van die betrokke boedel handel nie, blyk uit die feit dat ook die staat (handelende deur die hof) bevoeg is om bestuurshandelinge te verrig, naamlik in die geval van hersiening en appèl[26] en ook in sekere ander gevalle.[27] As die staat bevoeg is om bestuurshandelinge in verband met

24 Vgl a 54.
25 Vgl a 43(6) 44(1)(a) 45 89 90.
26 Vgl a 95.
27 Vgl a 11(1)(b) 30(b) 36 43(6) 54(1)(a).

'n bestorwe boedel te verrig sonder dat dit die subjek van daardie boedel is – dit word deur niemand betoog dat die staat (of die hof) die subjek van bestorwe boedels is nie – is dit nie in te sien waarom die meester die subjek daarvan moet wees as hy dieselfde soort handelinge verrig nie. 'n Verdere aanduiding dat die meester nie as subjek van die bestorwe boedels onder sy beheer handel nie, blyk uit die omstandigheid dat die meester in dieselfde wet met bepaalde bestuursbevoeghede beklee word ten opsigte van boedels waarvan hy beslis *nie* die subjek is nie, te wete dié van minderjariges, afwesiges en geestesongesteldes.[28] As die meester ten opsigte van hierdie boedels bestuurshandelinge kan verrig sonder om die subjek daarvan te wees, bestaan daar geen rede waarom aanvaar moet word dat hy in die geval van *bestorwe* boedels as *subjek* optree nie.

Die vraag kan egter gestel word welke argumente, indien enige, ten gunste van die opvatting dat 'n oorledene se nalatenskap ingevolge die Boedelwet 1965 op die meester oorgaan, aangevoer kan word.

Enersyds kan miskien betoog word dat 'n insolvente boedel ingevolge artikel 20 van die Insolvensiewet 1936 op die meester oorgaan[29] en dat die regsposisie van die meester ten opsigte van bestorwe boedels so 'n groot ooreenkoms met sy posisie ten opsigte van insolvente boedels vertoon, dat aanvaar moet word dat die wetgewer in die Boedelwet 1965 deur wetsduiding voorgeskryf het dat ook 'n bestorwe boedel op die meester oorgaan. Hierdie argument is egter nie oortuigend nie. Die omstandigheid dat die wetgewer in een wet *uitdruklik* voorgeskryf het dat die betrokke vermoë op die meester oorgaan, terwyl hy nagelaat het om in 'n jonger wet, wat in 'n groot mate *in pari materia* is, dieselfde voor te skryf, is so opvallend dat die afleiding geregverdig word – en wel op grond van die reël van wetsuitleg dat 'n verandering van woorde van die wetgewer 'n verandering van bedoeling aandui – dat die wetgewer *nie* bedoel het om voor te skryf dat 'n bestorwe boedel op die meester oorgaan nie.

Andersyds kan daar miskien beweer word dat daar in die geval van 'n bestorwe boedel geen ander subjek bestaan waarop 'n oorledene se nalatenskap kan oorgaan nie; dat die wetgewer bedoel het dat die oorledene se nalatenskap na sy dood sal voortbestaan; dat dit egter nie subjekloos *kan* voortbestaan nie; en dat die wetgewer dus *noodwendig* moes bedoel het dat dit op die meester sal oorgaan. Die antwoord op so 'n betoog sou wees dat die uitgangspunt waarop dit berus, naamlik dat daar geen ander subjek bestaan waarop 'n oorledene se nalatenskap kan oorgaan nie, ongegrond is. Dat daar wel 'n ander regsubjek bestaan waarop die nalatenskap kan oorgaan, sal in 'n volgende artikel aangetoon word.

Dit blyk uit die voorgaande dat die meester nie ingevolge die Boedelwet 1965 die subjek van die bestorwe boedels is waaroor hy regsmag uitoefen nie.

2 3 'n Beoordeling van die meester se gewoonteregtelike posisie

Ten einde aan te toon dat daar gewoontereg ontstaan het ingevolge waarvan die meester die subjek van die boedels onder sy toesig is, sal aangetoon moet word dat daar 'n regsgewoonte tot stand gekom het om die meester as die subjek van

28 Vgl hfst IV van die Boedelwet 1965.

29 Die aandag is reeds hierbo op a 20 van die Insolvensiewet 1936 gevestig. Vgl ook a 25(2) van dieselfde wet: "Wanneer 'n kurator sy amp ontruim het of afgesit is of afgetree het of oorlede is, dan gaan die boedel oor op die orige kurator, as daar een is; anders gaan dit op die Meester oor totdat 'n ander kurator aangestel is."

die bestorwe boedels onder sy toesig te *behandel*. Daar bestaan egter geen aanduiding dat daar so 'n regsgewoonte ontstaan het nie. Die meester oefen slegs *statutêre* bevoegdhede uit sodat daar geen plek vir die bestaan van *gewoonteregtelike* bevoegdhede is nie.[30] Bowendien sou die standpunt dat daar in die regsverkeer 'n reël nageleef word waarvolgens hy as die subjek van die bestorwe boedels onder sy toesig behandel word, tot 'n onhoudbare resultaat lei. Daar sou naamlik aanvaar moes word dat alle bestorwe boedels onder die toesig van 'n bepaalde meester uitgewis word sodra die meestersamp vakant word, byvoorbeeld deur die dood van die persoon wat die amp beklee. Die bestorwe boedels kan immers nie as "subjeklose vermoëns" voortbestaan totdat die amp weer gevul word nie.[31] [32]

2 4 Slotsom

Dit blyk uit die voorgaande dat die meester van die hooggeregshof nie die universele opvolger van 'n oorledene is nie en dat regter-president Jacobs se mening, waarna hierbo verwys is, onderskryf moet word.

Hierdie slotsom berus op argumente wat in verband met die Boedelwet 1965 aangevoer is en het dus betrekking op 'n meester wat ingevolge dié wet funksioneer. Die vraag kan gestel word of 'n mens tot dieselfde slotsom kan kom ten opsigte van 'n meester wat ingevolge die Boedelwet 1913 gefunksioneer het. (Laasgenoemde wet was van toepassing toe appèlregter Reynolds sy standpunt oor die meester se regsposisie gestel het.) Na my mening is die antwoord bevestigend. Ewe min as wat die Boedelwet 1965 'n bestorwe boedel op die meester laat oorgaan, het die Boedelwet 1913 daardie uitwerking gehad. Daar het ook geen gewoontereg ontstaan wat aan die meester die posisie van universele opvolger van die oorledene verleen het nie. Ek meen dus dat appèlregter Reynolds se standpunt nie oortuigend is nie.

3 DIE EKSEKUTEUR AS MOONTLIKE SUBJEK VAN 'N BESTORWE BOEDEL

3 1 Inleiding

Hierbo is reeds aangetoon dat appèlregter Reynolds in sy afsonderlike uitspraak in die *Confidence Property Trust*-gewysde die standpunt ingeneem het dat 'n bestorwe boedel by die aanstelling van die eksekuteur in hom vestig. Afgesien van ander afdelings van die hooggeregshof – waarop ek terugkom – het ook die appèlhof hom al op die standpunt gestel dat 'n bestorwe boedel op die eksekuteur oorgaan, naamlik by wyse van 'n *obiter dictum* in *Du Toit v Vermeulen*.[33] Die hof, *per* appèlregter Kotze, maak naamlik melding van

30 Vgl *Die Meester v Protea Assuransiemaatskappy Bpk* 1981 4 SA 685 (T) 689–690: "Die Meester is 'n skepping van die Wetgewer en het slegs die bevoegdhede wat deur die Wetgewer aan hom opgedra is. Daardie bevoegdhede moet te vind wees binne die vier hoeke van sy Wet, hetsy uitdruklik, hetsy by noodwendige implikasie." Die hof verwys na *The Master v Talmud* 1960 1 SA 236 (K) 237–238 en *The Master v Grace* 1963 1 SA 934 (T) 937.

31 Vgl vn 3 hierbo.

32 Vgl *Universele opvolging* 227 e v. Die moontlike argument dat die adjunk- of assistentmeester in so 'n geval die subjek van die betrokke boedels sou wees, sou nie oortuigend wees nie. Ook hierdie ampte kan op 'n bepaalde tydstip vakant wees.

33 1972 3 SA 848 (A).

> "die langgevestigde begrip dat 'n bestorwe boedel in die eksekuteur setel en dat die erfgename nie sonder tussenkoms van die eksekuteur hulle regte uit 'n boedel mag verkry nie".[34]

Uit die *dictum* blyk dat die hof van oordeel was dat dié "langgevestigde begrip" die stand van ons reg korrek weergee.[35]

Die opvatting dat 'n bestorwe boedel aan die eksekuteur behoort – 'n opvatting wat, sover ek kon vasstel, vir die eerste keer in 1860 in ons gepubliseerde regspraak te voorskyn gekom het in *Trustee of Webster v Weakley*[36] – is van Engelsregtelike oorsprong. Ten einde ons howe se standpunt beter te begryp wanneer hulle die standpunt stel dat 'n bestorwe boedel in die eksekuteur vestig, is dit nodig om kortliks aandag te skenk aan die Engelse reg in verband met die regsposisie van die *personal representative of the deceased* wat 'n *executor* of 'n *administrator* kan wees.[37] Hoewel hy as die subjek van die bestorwe boedel beskou word, word hy nie in sy persoonlike hoedanigheid as sodanige subjek beskou en behandel nie. Aldus verklaar Halsbury:[38]

> "The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right."

Verder word die uitdrukkings "in a representative capacity" en "in a fiduciary capacity" gebesig om die hoedanigheid aan te dui waarin die eksekuteur boedelbates ontvang en hou.[39]

Die omstandigheid dat die *personal representative of the deceased* die boedelbates nie "in his own right" hou nie, maar *in his representative* of *fiduciary capacity*, het belangrike implikasies: onder andere, dat indien sy persoonlike boedel gesekwestreer word, die boedelbates nie in die insolvente boedel val nie[40] en dat sy persoonlike skuldeisers nie op die boedelbates beslag kan laat lê nie.[41]

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34 856.

35 Terwyl Reynolds AR standpunt ingeneem het ten opsigte van sowel die meester as die eksekuteur se regsposisie, het die appèlhof in *Du Toit v Vermeulen* sy mening slegs t o v die eksekuteur se regsposisie gelug.

36 3 Searle 373.

37 Die Engelsregtelike *administrator* moet nie verwar word met die administrateur in die Romeins-Hollandse en Suid-Afrikaanse reg nie. Die *administrator* kan met die eksekuteur datief in die Suid-Afrikaanse reg vergelyk word, terwyl die *executor* 'n ooreenkoms vertoon met die testamentêre eksekuteur in die Suid-Afrikaanse reg. Vgl *Universele opvolging* 50 e v i v m die *personal representative of the deceased.*

38 *Laws of England* (1976) bd 17 561. Vgl ook Sunnucks *Williams and Mortimer on executors and administrators and probate* (1970) 458: "The interest which an executor or administrator has in the property of the deceased is different from the absolute and ordinary interest which everyone has in his own property; for an executor or administrator has his estate as such *in auter droit* merely, viz., as the minister or dispenser of the property of the dead."

39 Vgl Mellows *The law of succession* (1973) 329: "where the personal representative owns an interest in land in his personal capacity and he acquires a further interest in the same land in his representative capacity"; Halsbury a w 562: "as the representative holds the assets not in his own right, but in a fiduciary capacity".

40 Vgl bv Halsbury 561; Sunnucks 458. Hierdie skrywers verwys weliswaar na a 38 van die Bankruptcy Act 1914, maar dat hierdie artikel slegs die gemenereg bekragtig, blyk uit die omstandigheid dat Toller se werk *The law of executors and administrators* wat in 1818 verskyn het, 'n soortgelyke stelling bevat (134) sonder dat daar na 'n wetsartikel verwys word.

41 Toller 137; Sunnucks 459–460; Halsbury 561–562. Halsbury kwalifiseer dié stelling soos volg: "unless the representative has converted the assets to his own use or unless, from lapse of time and enjoyment of the assets inconsistent with the trusts of the will, an inference may be raised of a gift of the property by the deceased's creditors or beneficiaries to the representative".

Die ware verklaring vir hierdie regsverskynsels is na my mening dat die persoonlike boedel van die *personal representative* en die bestorwe boedel in werklikheid *twee afsonderlike boedels, elk met sy eie subjek is.* Dit volg dat wanneer die Engelse juriste verklaar dat die *personal representative* in sy *representative* of *fiduciary capacity* die boedelbates hou, hulle 'n besondere regsubjektiwiteit as eksekuteur, 'n amptelike regsubjektiwiteit, aan hom toeskryf.[42] [43]

Om terug te keer na *Trustee of Webster v Weakley*: in hierdie gewysde het die Kaapse hof, *per* regter Bell, sonder enige motivering gevind dat die uitreiking van "briewe van administrasie" – die dokument waardeur 'n eksekuteur deur die meester ingevolge die voorskrifte van Ordonnansie 104 van 1983 (Kaap) aangestel is – die uitwerking het dat die betrokke boedel in die eksekuteur vestig: Hy verklaar dat

> "they [die 'letters of administration'] vest the estate in the executors just as it was vested in the deceased, in the same way in which the insolvent (*sic*) Ordinance vests the estate in the trustee for the benefit of the creditors where it is insolvent".[44]

Dit is interessant om daarop te let dat die Kaapse hof 'n skamele drie jaar tevore tereg in *Dwyer v O'Flinn's Executors*[45] beslis het dat 'n erfgenaam 'n universele opvolger is – 'n beslissing wat die ruimte laat vir die opvolging van die *eksekuteur* in die nalatenskap nie.[46] Trouens, in een van die uitsprake, dié van regter Watermeyer, is selfs verklaar dat

> "[e]xecutors in modern days are, in *Van der Keessel's* words, *quasi procurators* of the heirs in the administration".[47]

In die *Weakley*-uitspraak het die hof egter, sonder verwysing na die *Dwyer*-uitspraak, die ordonnansie onder invloed van die Engelse reg geïnterpreteer op 'n wyse wat nie onderskryf kan word nie, want dit het geen voorskrif bevat wat uitdruklik of by implikasie bepaal het dat 'n bestorwe boedel op die eksekuteur oorgaan nie.

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42 Vgl die redenasie van Wolff *Grundriss des Österreichischen Bürgerlichen Rechts* (1948) 28: "Mit demselben Recht, mit dem man sonst von juristischen Personen spricht, müszte man auch, wenn ein einzelner mehrere Sondervermögen in seiner Hand vereinigt, ihm ebenso viele 'Persönlichkeiten' zuschreiben; gibt es doch sogar Verträge zwischen den einzelnen Vermögensmassen."

43 Hoewel ek vir doeleindes van hierdie artikel veronderstel dat 'n "amptelike regsubjektiwiteit" juridies bestaanbaar is, kan gevra word of die "personal representative" nie die orgaan van 'n regspersoon is nie. Vgl Mellows 328: "For most purposes the position of a person as personal representative is kept quite distinct from his position in his personal capacity, and it is almost as if the 'personal representative' is constituted by law as a separate legal entity ... It would perhaps be more correct to speak of the personal representatives for most purposes constituting a separate legal entity, with the entity unchanged despite alterations in the persons comprising them." Hoewel Mellows nie sover gaan as om te verklaar dat 'n oorledene se *personal representatives* 'n regspersoon vorm nie, kom sy stelling daarop neer dat hulle vir die meeste regsdoeleindes 'n "separate legal entity" is wat bestaan uit *'n liggaam van persone waarvan die lede kan wissel sonder dat die identiteit van daardie liggaam verander word.* As in gedagte gehou word dat dié liggaam bates en laste het (die bestorwe boedel), blyk dit dat al die wesenlike eienskappe van 'n liggaam met regspersoonlikheid aanwesig is.

44 380.

45 1857 3 Searle 16.

46 Bell R was een van die regters in die *Dwyer*-geding.

47 32.

Die opvatting dat 'n bestorwe boedel in die eksekuteur setel, het sedert 1860 van tyd tot tyd in ons regspraak opgeduik.[48] (In enkele gewysdes het die regters duidelik te kenne gegee dat die eksekuteur in sy hoedanigheid van eksekuteur – en nie in sy persoonlike hoedanigheid nie – in die nalatenskap opvolg.[49]) Daar het egter sedertdien ook 'n aantal gewysdes die lig gesien wat strydig is met die opvatting dat 'n bestorwe boedel op die eksekuteur oorgaan: in enkeles is beslis dat die erfgenaam 'n universele opvolger is,[50] terwyl in verskeie ander die standpunt ingeneem is dat die *boedelbates* op die erfgenaam oorgaan.[51] (In laasgenoemde gewysdes is daar geswyg oor die oorgang van die *boedelverpligtinge*.) Die reël van die Romeins-Hollandse reg dat 'n erfgenaam 'n universele opvolger is, het egter in onbruik verval[52] en tans verwerf 'n erfgenaam 'n vorderingsreg ter verkryging van daardie *residuum* van die boedel wat oor is na aflossing van die boedellaste en die uitkeer van legate.[53]

Alvorens die regsposisie van die eksekuteur bespreek word, moet daarop gewys word dat die appèlhof nog nie by wyse van *beslissing* die standpunt ingeneem het dat 'n bestorwe boedel op die eksekuteur oorgaan nie[54] en dat ons regters ook nie eenstemmig oor hierdie aangeleentheid is nie. Soos hierbo vermeld is, het regter-president Jacobs in *Cilliers v Kuhn*[55] verklaar dat die standpunt "dat die Meester en na hom die eksekuteur eienaar word" vir hom "heeltemal onaanneemlik" is.

Teen hierdie agtergrond moet die vraag of 'n bestorwe boedel in ons hedendaagse reg op die eksekuteur oorgaan, ondersoek word.

Die eksekuteurskap is nie 'n wetteregtelike instelling nie maar 'n gemeenregtelike, hoewel die eksekuteur se bevoegdhede en pligte in 'n groot mate statutêr gereël word.[56] Om die eksekuteur se regsposisie te bepaal, moet dus met sowel

48 Vgl bv *Fischer v Liquidators of the Union Bank* 1890 8 SC 46 (by implikasie); *Liquidators of the Union Bank v Watson's Executors* 1891 8 SC 300; *Ex parte Du Toit* 1911 CPD 713; *Krige v Scoble* 1912 TPD 814; *White v Landsberg's Executors* 1918 CPD 211; *Van der Merwe v Van der Merwe's Executrix* 1921 TPD 9; *Ex parte Grobler* 1924 OPD 65; *Van der Westhuizen v Van der Westhuizen* 1929 TPD 603; *De Wet v Attie Badenhorst (Edms) Bpk* 1963 3 SA 117 (T); *Du Toit v Vermeulen* 1972 3 SA 848 (A); *S v Reyneke* 1972 4 SA 366 (T); *Barker v Chadwick* 1974 1 SA 461 (D); *Ex parte Puppli* 1975 3 SA 461 (D); *Segal v Segal* 1976 2 SA 531 (K); *Nyati v Minister of Bantu Administration* 1978 3 SA 224 (OK); *SA General Electric Co (Pty) Ltd v Sharfman* 1981 SA 4 592 (W).

49 Vgl die afsonderlike uitspraak van Buchanan R in *Liquidators of the Union Bank v Watson's Executors* 1891 8 SC 300 311: "under the statute executors are vested in their executory capacity with the estate itself"; *De Wet v Attie Badenhorst (Edms) Bpk* 1963 3 SA 117 (T) 119: "The plaintiff is Andre Leon de Wet in a particular capacity and in that capacity he is vested with an estate"; *Ex parte Puppli* 1975 3 SA 461 (D) 466: "half share of the property which . . . vested in Jagarnath Singh in his capacity as executor of her estate".

50 Vgl *Eksteen v Eksteen's Executors* 1885 4 SC 13; *Cooper v Jocks* 1877–1881 Kotze 201; *Ex parte Lesar* 1885 2 SAR 20.

51 Vgl *Universele opvolging* 85–88 106–108 142–154.

52 *Universele opvolging* hfst 11.

53 Vgl vn 4 hierbo asook *Universele opvolging* 178 180 188–189 201.

54 Die appèlhof het weliswaar in *Commissioner for Inland Revenue v Emary* 1961 2 SA 621 (A) in 'n *dictum* wat deel van die *ratio decidendi* was, te kenne gegee dat 'n bestorwe boedel aan die eksekuteur behoort, maar het homself later in dieselfde uitspraak weerspreek. Vgl vn 5 hierbo.

55 1975 3 SA 881 (NK) 886.

56 Ord 104 van 1833 (Kaap) het nie 'n *nuwe* regsinstelling (die eksekuteur) ingevoer nie, maar het die *gemeenregtelike* eksekuteur se regsposisie gewysig. Vgl a 37: "[T]he law respecting the duties, powers, rights, relief and responsiblity of executors . . . in force within this Colony

gemenereg as wettereg rekening gehou word. Daarby moet die moontlikheid nie uit die oog verloor word nie dat daar gewoontereg in Suid-Afrika ontstaan het wat op die eksekuteur se regsposisie betrekking het en dat die eksekuteur se regsposisie deur die werking van die presedentestelsel beïnvloed is. In die lig hiervan sal soos volg te werk gegaan word om te bepaal of die eksekuteur tans die posisie van universele opvolger van die oorledene beklee: daar sal eers vasgestel word of die eksekuteur ingevolge die *Romeins-Hollandse reg* in 'n oorledene se nalatenskap opvolg; daarna sal ondersoek ingestel word of hy aldus ingevolge Suid-Afrikaanse *wettereg* opvolg; vervolgens sal die vraag beantwoord word of daar in Suid-Afrika *gewoontereg* ontstaan het ingevolge waarvan hy die posisie van universele opvolger beklee; en ten slotte sal oorweeg word of die presedentestelsel die uitwerking gehad het dat die eksekuteur die subjek van die vermoë onder sy beheer is.

3 2 'n Beoordeling van die eksekuteur se regsposisie ingevolge die Romeins-Hollandse reg

Die aanstelling van 'n eksekuteur het nie verhoed dat die erfgenaam 'n universele opvolger van die oorledene was nie.[57] Daar bestaan egter enkele Suid-Afrikaanse gewysdes waarin die standpunt ingeneem is dat die eksekuteur volgens die Romeins-Hollandse reg die subjek van 'n bestorwe boedel was gedurende die termyn wat die testamentêre erfgename nie kon opvolg nie, byvoorbeeld vanweë die omstandigheid dat hulle eers op 'n tydstip na die erflater se dood bepaalbaar word. (Dit is egter nie altyd duidelik of die hof met die uitdrukking "eksekuteur" werklik 'n *eksekuteur*, dan wel 'n *administrateur*, bedoel nie.) Daar kan miskien na aanleiding van hierdie standpunt ten opsigte van die Romeins-Hollandse reg betoog word dat die eksekuteur in die hedendaagse Suid-Afrikaanse reg in *alle* gevalle in die nalatenskap opvolg, aangesien die erfgenaam in *geen* geval meer in die nalatenskap opvolg nie. Die belangrikheid van hierdie gewysdes is dus voor-die-hand-liggend.

Die oorsprong van die gemelde opvatting is in die Kaapse gewysde *Black v Executor of Black and Black*[58] te vinde. Die feite was kortliks soos volg: 'n Testatrise het in haar testament bepaal dat sekere bates onder die beheer van die "Board of Executors" moes bly, dat die vrugte van die gemelde bates opgegaar moes word, dat daardie bates per openbare veiling te gelde gemaak moes

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vervolg van vorige bladsy

prior to the passing of this Ordinance, shall, except in so far as the same had been expressly repealed or altered by the provisions of this Ordinance, remain in full force and effect, in like manner as if this Ordinance had not been made." Die Boedelwet 1913 en die Boedelwet 1965 bevat nie 'n ooreenstemmende voorskrif nie. Nogtans het hulle na my mening nie die gemenereg m b t eksekuteurs afgeskaf nie, behalwe vir sover dit strydig met die betrokke statutêre voorskrifte was.

57 Voet 18 1 9: eksekuteurs is persone "qui aliena gerunt negotia"; Van der Keessel *Thes* 323: "cum sint quasi procuratores a testator constituti"; Van der Linden *Koopmans handboek* 1 9 10: die eksekuteur word onder die "waarneemers van een anders zaaken" gereken; Lybrechts *Redenerende practycq* 39: die eksekuteur was "een Dienaar der Erfgenaamen". Die omstandigheid dat die erfgenaam ook in die geval waar daar 'n eksekuteur aanwesig was, by die hof aansoek moes doen om die verlening van die voorreg van boedelbeskrywing as hy homself teen die boedelskuldeisers wou beskerm (Van Bynkershoek *Obs tum casus* 951 1126 1992 2217) dui daarop dat die aanstelling van 'n eksekuteur nie verhoed het dat die erfgenaam 'n universele opvolger was nie.

58 21 SC 555.

word wanneer haar jongste kleinkind een en twintig jaar oud sou wees en dat die boedel daarop gelykop verdeel moes word onder daardie kleinkinders van haar wat dan nog lewe. Die hof, *per* hoofregter De Villiers, het tereg bevind dat die boedelgoedere nie verdeel kon word solank daar nog verdere kleinkinders gebore kon word nie. Ongelukkig is die volgende *dictum* in die uitspraak opgeneem:[59]

> "[T]he question was asked: in whom is the *dominium*, if it is not in the grandchildren? The obvious answer is that the *dominium* is in the executors of the testator. They are the persons who will have to realise the property and pass transfer thereof, and in the meantime they hold it in trust for the grandchildren who shall, in due time, be found to be entitled to share in the distribution of the proceeds . . . Our law clearly recognises the capacity of executors and administrators to hold such property in trust for those who, although not yet born, are indicated by a testator as the object of his bounty. (See 1 Holl. Cons. 98; Voet 28,5,12 in fine.)"

Die bronne waarop hoofregter De Villiers hom beroep, is egter nie gesag vir die standpunt dat die betrokke bates aan die eksekuteur behoort nie.

Voet 28 5 12 bespreek die geval waar persone wat eers na die erflater se dood gebore sal word, as erfgename ingestel word. In so 'n geval, sê hy, is die intestate erfgename nie daarop geregtig om te eis dat die erfenis (teen die stel van sekerheid ingeval die gemelde persone gebore word) intussen aan hulle toevertrou word nie:

> "[S]ed potius bona hereditaria per executores aut tutores testamento datos, vel a magistratu dandos, administranda sunt, donec certum fuerit, posthumos nullos nascituros esse: eo quod, quamdiu speratur successio testamentaria, legitimae seccessioni non potest locus esse."

Uit Voet se standpunt dat die erfgoedere eerder deur eksekuteurs of voogde wat by wyse van testament of deur die hof aangestel word, *beheer moet word* (*administranda sunt*) totdat dit seker is dat geen *posthumi* gebore sal word nie, kan nie afgelei word dat hy die *executores aut tutores* as die eienaars van die betrokke goedere beskou het nie. (Die *executores* waarom dit hier gaan, was klaarblyklik *administrateurs* vir sover verwys word na die beheer van die nalatenskap na die bereddering van die boedel.)

Ook die gemelde advies vervat in die *Hollandsche consultatien* steun nie die opvatting dat die eksekuteur die subjek van die nalatenskap is solank die testamentêre bevoordeeldes nie kan opvolg nie. Die erflater het sy nalatenskap onder die beheer van *administrateurs* geplaas en ongeborenes as erfgename benoem. Op grond van die voorskrif dat die administrateurs die vrugte van die boedelbates by die nalatenskapbates moes voeg, is die regsmening gegee dat die intestate erfgename uitgesluit is. Dit blyk nêrens dat die adviseur ('n sekere Van Werven) die administrateurs as die eienaars van die boedelgoedere beskou het nie.

Indien egter aangevoer sou word dat, wat die Romeins-Hollandse reg betref, die eksekuteur of administrateur *noodwendig* die subjek van die nalatenskap moes gewees het in gevalle waar die nalatenskap vir 'n termyn nie op die bevoordeeldes kon oorgaan nie omdat daar geen ander moontlikheid sou bestaan het nie, moet daarop gewys word dat daar wél ander moontlikhede bestaan het. Die boedel kon byvoorbeeld aan 'n regspersoon behoort het.

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59 563.

Dit blyk uit die voorgaande dat die standpunt dat 'n bestorwe boedel op die eksekuteur oorgaan, nie met 'n beroep op die Romeins-Hollandse reg gestaaf kan word nie.[60]

3 3 'n Beoordeling van die eksekuteur se posisie ingevolge die Boedelwet 1965

'n Mens vind in ons regspraak die opvatting dat die eksekuteur ingevolge die statutêre voorskrifte wat op die betrokke geval van toepassing was, in die nalatenskap van 'n oorledene opgevolg het.[61] Daar moet in die lig hiervan aanvaar word dat 'n hof wat ten opsigte van 'n eksekuteur wat ingevolge die Boedelwet 1965 aangestel is, die standpunt inneem dat hy die subjek van die betrokke boedel is, bedoel om te kenne te gee dat hy daardie regsposisie kragtens die gemelde wet beklee.[62] Die vraag is egter of 'n mens met dié standpunt akkoord kan gaan.

Terwyl daar uitdruklik in artikel 20 van die Insolvensiewet 1936 voorgeskryf word dat 'n insolvente boedel op die kurator oorgaan, bevat nòg die Boedelwet 1965 nòg die ouer boedelwetgewing 'n soortgelyke voorskrif met betrekking tot die eksekuteur. Trouens, geen enkele voorskrif in gemelde wet – of in enige ander wet – regverdig die afleiding dat die wetgewer die posisie van universele opvolger aan die eksekuteur, hetsy in sy persoonlike, hetsy in sy amptelike hoedanigheid verleen het nie. Die posisie van die eksekuteur, soos dit tans in die Boedelwet 1965 gereël word en soos dit in die vorige wetgewing met betrekking tot die bereddering van bestorwe boedels gereël is, sluit nie die moontlikheid uit dat 'n ander persoon as die eksekuteur die universele opvolger van die oorledene is nie.[63]

Ondanks die voorgaande, kan daar miskien soos volg geredeneer word met betrekking tot die vraag of die Boedelwet 1965 by implikasie bepaal dat 'n bestorwe boedel op die eksekuteur oorgaan: (i) Daar bestaan 'n reël van wetsuitleg dat indien die wetgewer by die verordening van 'n wet die voorskrifte van 'n ouer wet daarin opneem en daar reeds 'n gesaghebbende interpretasie van die ouer wet bestaan, daar vermoed word dat die wetgewer die uitgelegde betekenis van die ouer wet wou bevestig.[64] (ii) Hofuitsprake wat gedurende die geldingsduur van die Boedelwet 1913 gegee is en waarin die standpunt ingeneem is dat 'n bestorwe boedel op die eksekuteur oorgaan, is in werklikheid interpretasie van die Boedelwet 1913.[65] (iii) Die bepalings van die Boedelwet 1913

60 I v m die invloed van die *Black*-uitspraak op ons regspraak raadpleeg o m *White v West* 1916 CPD 34; *Ex parte Light* 1917 TPD 19; *Ex parte Dell's Estate* 1939 CPD 309 en *In re Coope's Estate* 1939 CPD 309.

61 Vgl bv *Trustee of Webster v Weakley* 3 Searle 373; *Fischer v Liquidators of the Union Bank* 1890 8 SC 46 (by implikasie); *Krige v Scoble* 1912 TPD 814.

62 Vgl *SA General Electric Co (Pty) Ltd v Sharfman* 1981 1 SA 592 (W) 598. Die hof het hom egter nie direk op die Boedelwet 1965 beroep nie maar op *Krige v Scoble* 1912 TPD 814 waarin beslis is dat 'n eksekuteur ingevolge die voorskrifte van Wet 12 van 1870 (Tvl) die subjek van die boedel onder sy beheer is. Die hof het waarskynlik bedoel dat die Boedelwet 1965 dieselfde uitwerking op die eksekuteur se regsposisie as die genoemde Transvaalse wet het.

63 Uit dit wat hierna volg, sal blyk dat die omstandigheid dat die eksekuteur bevoeg is om *nomine officii* regshandelinge te verrig en gedinge te voer, nie 'n aanduiding is dat hy as subjek van die betrokke vermoë optree nie.

64 Vgl bv *Ex parte Minister of Justice: In re Rex v Bolon* 1941 AD 345 359–360.

65 Die gewysdes waarin *Black v Executor of Black and Black* 1904 21 SC 555 nagevolg is (vgl 3 2 en vn 60 hierbo), is nie in hierdie verband ter sake nie aangesien hulle voorgee om op Romeins-Hollandse reg te steun en dus nie as 'n interpretasie van die Boedelwet 1913 beskou kan word nie.

is in alle wesenlike opsigte in die Boedelwet 1965 opgeneem. (iv) Die wetgewer het dus die gemelde uitleg van die Boedelwet 1913 deur die verordening van die Boedelwet 1965 bevestig.

Na my mening sou so 'n argument nie oortuigend wees nie. 'n Vereiste vir die bevestiging deur die wetgewer van 'n interpretasie is dat daardie interpretasie "well settled and well recognised" moet wees.[66] Die vraag is of aan hierdie vereiste voldoen is.

Toe die Boedelwet 1965 verorden is, het daar enkele provinsiale gewysdes bestaan wat daarop neerkom dat 'n bestorwe boedel aan die eksekuteur behoort en wat as 'n interpretasie van die Boedelwet 1913 beskou kan word,[67] byvoorbeeld *Van der Westhuizen v Van der Westhuizen* (1929) en *De Wet v Attie Badenhorst (Edms) Bpk* (1963).[68] Verder het die appèlhof in *Commissioner for Inland Revenue v Emary* (1961)[69] enersyds geïmpliseer dat 'n bestorwe boedel aan die eksekuteur behoort maar homself daarna weerspreek deur te kenne te gee dat 'n bestorwe boedel aan die bevoordeeldes behoort.[70]

Daar kan miskien aangevoer word dat sommige van hierdie uitsprake nie gesaghebbend is nie – naamlik dié wat gelewer is voordat *Estate Smith v Estate Follett*[71] in 1942 beslis is – omdat hulle strydig was met die appèlhofuitspraak in *Cato v Estate Cato* (1915)[72] waarin die standpunt ingeneem is dat boedelbates *ipso jure* op die erfgename oorgaan. Die boedelbates kan immers nie gelyktydig op sowel die eksekuteur as die erfgename oorgaan nie. (Die gemelde standpunt was deel van die *ratio decidendi* van die *Cato*-uitspraak.) Die appèlhof het egter in die *Estate Follett*-uitspraak – en by verskeie geleenthede daarna – die standpunt ingeneem dat boedelbates nié *ipso jure* op die erfgename oorgaan nie[73] sodat daardie gewysdes, agterna gesien, nie strydig met die appèlhofstandpunt is nie.[74] Hou 'n mens egter in gedagte dat die appèlhofuitspraak in die *Emary*-gewysde onduidelik is in soverre dit die eksekuteur se regsposisie aangaan, kan daar twyfel bestaan oor die antwoord op die vraag of die betrokke interpretasie van die Boedelwet 1913 in 1965 so goed gevestig en algemeen erken was dat daar vermoed kan word dat die wetgewer dit wou bevestig.

Selfs al sou egter veronderstel word dat die interpretasie wél aan genoemde vereiste voldoen, meen ek dat die *vermoede* waarom dit hier gaan deur die feite

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66 *Ex parte Minister of Justice: In re Rex v Bolon* 1941 AD 345 360: "[O]ne of the requisites is that the judicial interpretation must be well settled and well recognised."

67 D w s afgesien van die *Goosen*- en *Hook*-uitsprake waarna hieronder in vn 82 verwys word en wat blykbaar impliseer dat 'n bestorwe boedel aan die eksekuteur behoort. Dit wil egter voorkom of hulle nie so 'n duidelike interpretasie van die Boedelwet 1913 met betrekking tot die vraag of die eksekuteur die subjek van die vermoë onder sy beheer is, behels dat hulle as grondslag vir 'n interpretasie-bevestiging deur die wetgewer kan dien nie.

68 1929 TPD 603 en 1963 3 SA 117 (T) onderskeidelik.

69 1961 2 SA 621 (A); vgl vn 5 hierbo.

70 Wat betref Reynolds AR se *dicta* in die *Confidence Property Trust*-gewysde wat hierbo bespreek is, meen ek dat hulle ook nie vir bevestiging deur die wetgewer gekwalifiseer het nie, aangesien hulle nie 'n *gesaghebbende* interpretasie van die Boedelwet 1913 behels het nie. Die ander appèlregters in die geding het nie laat blyk dat hulle die betrokke standpunte steun nie.

71 1942 AD 364.

72 1915 AD 290. Vir 'n ontleding van hierdie gewysde vgl *Universele opvolging* 142 e v.

73 Vgl vn 4 hierbo.

74 Die appèlhof het egter nie in die *Follett*-gewysde en in die ander gewysdes in vn 4 beslis dat 'n bestorwe boedel op die eksekuteur oorgaan nie.

van die geval weerlê word. As die wetgewer werklik bedoel het om 'n "statutêre antwoord" te verskaf op die vraag aan wie of waaraan 'n bestorwe boedel behoort, sou dit na alle waarskynlikheid die voorbeeld van die Insolvensiewet 1936 nagevolg het deur *uitdruklik* vir die oorgang van 'n bestorwe boedel op die meester, en by aanstelling van 'n eksekuteur op hom, voorsiening te maak, asook vir 'n terug-oorgang van die boedel op die meester as die eksekuteursamp vakant sou word.[75] Dit is onwaarskynlik dat die wetgewer by implikasie sou bepaal dat 'n bestorwe boedel op die *eksekuteur* oorgaan, maar geen reëling sou tref nie vir die geval waar die eksekuteursamp vakant is of waar die boedel deur 'n ander persoon as 'n eksekuteur beredder word.

Uit die feit dat die wetgewer nie die Insolvensiewet 1936 se voorbeeld nagevolg het nie, moet afgelei word dat die wetgewer geen reëling in verband met die onderhawige aangeleentheid wou tref nie.

Dit blyk uit die voorgaande dat die eksekuteur nie ingevolge die voorskrifte van die Boedelwet 1965 die universele opvolger van die oorledene is nie.

3 4 'n Beoordeling van die eksekuteur se posisie ingevolge gewoontereg wat miskien in Suid-Afrika ontstaan het

By 'n ondersoek na die vraag of daar in Suid-Afrika gewoontereg ontstaan het ingevolge waarvan die nalatenskap van 'n oorledene op die eksekuteur oorgaan, hoef daar, net soos in die geval van die meester, nie lank stilgestaan te word by die moontlikheid dat hy in sy *persoonlike* hoedanigheid in die nalatenskap waaroor hy beheer het, opvolg nie. Die standpunt dat die eksekuteur ingevolge gewoontereg in sy persoonlike hoedanigheid die subjek van die boedelbates en -laste is, het onverdedigbare implikasies, waarvan ek enkeles noem: saaklike regte wat 'n persoon voor sy aanstelling as eksekuteur op die erflater se goedere gehad het of wat die erflater op sodanige persoon se goedere gehad het, sou deur die aanstelling van daardie persoon as eksekuteur uitgewis word; in 'n geval waar een persoon eksekuteur ten opsigte van meerdere boedels is, sou skuldverhoudinge wat tussen sodanige boedels bestaan, deur *confusio* wegval; 'n persoon sou nie goedere van die boedel ten opsigte waarvan hy eksekuteur is, kon koop nie;[76] boedelgoedere sou in die insolvente boedel van die eksekuteur val, ensovoorts.

Vervolgens word aandag geskenk aan die vraag of die eksekuteur volgens gewoontereg in sy amptelike hoedanigheid in die nalatenskap opvolg. Op grond van die volgende argumente kan miskien aangevoer word dat die antwoord bevestigend is:

a 'n Bestorwe boedel word in die praktyk as 'n afsonderlike vermoë met 'n eie subjek behandel en daar bestaan geen ander persoon wat moontlik as die subjek van die nalatenskap beskou kan word nie.

b Die omstandigheid dat 'n eksekuteur bevoeg is om *nomine officii* regshandelinge te verrig en hofgedinge te voer in verband met die boedel ten opsigte waarvan hy aangestel is, dui daarop dat hy hierdie handelinge *as subjek* verrig en wel as 'n subjek met 'n amptelike regsubjektiwiteit.

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75 Vgl a 20(1) en 25(2) van die Insolvensiewet 1936.

76 Vgl a 49 van die Boedelwet 1965: die eksekuteur kan boedelgoedere met toestemming van die meester of die hof koop. Die meester of die hof kan die koop ook later bekragtig.

In verband met eersgenoemde argument moet daarop gewys word dat, soos uit 'n volgende artikel sal blyk, die eksekuteur *nie* die enigste moontlike subjek van 'n bestorwe boedel is nie en dat hierdie argument dus op 'n valse veronderstelling berus. Wat die tweede argument betref, word die aandag daarop gevestig dat in 'n geval waar die beheerder van 'n vermoë *nomine officii* regshandelinge verrig en hofgedinge voer, hy òf in amptelike hoedanigheid as subjek van die betrokke vermoë fungeer (mits veronderstel word dat 'n "amptelike regsubjektiwiteit" juridies bestaanbaar is) òf as 'n verteenwoordiger.[77] 'n Voorbeeld van so 'n persoon wat as verteenwoordiger optree, is die kurator van 'n geestesongestelde. Waar sodanige kurator byvoorbeeld 'n hofgeding *nomine officii* voer, is die werklike gedingvoerende party nie die kurator nie maar die geestesongestelde, soos tereg beslis is in *Minister of the Interior v Cowley*.[78]

Dat 'n eksekuteur nie as subjek van die vermoë onder sy beheer fungeer nie, maar as verteenwoordiger, blyk daaruit dat daar gevalle bestaan waarin persone, wat *nie* eksekuteurs is nie, bevoeg is om handelinge te verrig wat van gelyke aard as dié van die eksekuteur is. In die eerste plek kan die *tussentydse kurator* onder sekere omstandighede voordat 'n eksekuteur aangestel word, regshandelinge in verband met die bestorwe boedel verrig, byvoorbeeld skuld invorder en roerende goedere verkoop.[79] In die tweede plek kan 'n bestorwe boedel in sekere gevalle ingevolge 'n magtiging van die meester beredder word deur 'n ander persoon as 'n eksekuteur en wel in die gevalle waar die meester bevoeg is om van die aanstelling van 'n eksekuteur af te sien.[80] In die derde plek kan 'n "boedel" ten opsigte waarvan die eksekuteursamp vakant is, in 'n hofgeding verteenwoordig word deur 'n *curator ad litem* wat deur die hof aangestel is.[81] Die feit dat verskillende persone onder bepaalde omstandighede bevoeg is om regshandelinge in verband met 'n bestorwe boedel te verrig en hofgedinge te voer, is 'n betekenisvolle vingerwysing dat daar van regsweë voorsiening gemaak is vir *verskillende verteenwoordigers* van daardie entiteit wat in werklikheid die universele opvolger van die oorledene is.[82]

Die voorgaande regverdig die slotsom dat die eksekuteur nòg in sy persoonlike nòg in sy amptelike hoedanigheid ingevolge gewoontereg wat in Suid-Afrika ontstaan het, in die nalatenskap van 'n oorledene opvolg.

3 5 'n Beoordeling van die eksekuteur se regsposisie ingevolge die presedentestelsel

Ten slotte moet aandag geskenk word aan die vraag of die eksekuteur kragtens die presedentestelsel die subjek van die bestorwe boedel onder sy beheer is.

Hierbo is aangetoon dat ons howe op verskeie geleenthede die standpunt ingeneem het dat 'n bestorwe boedel op die eksekuteur oorgaan, hoewel die

77 Die term "verteenwoordiger" word hier en hierna in 'n wye betekenis gebruik sodat dit die orgaan van 'n regspersoon insluit.

78 1955 1 SA 307 (N) 311: "The position is that the patient must be regarded as the real defendant and he is outside the area of this Court's jurisdiction."

79 Vgl a 12 van die Boedelwet 1965.

80 A 18(3) en 25(1)(a)(ii) van die Boedelwet 1965.

81 Vgl *In re Scallen's Estate* 1954 3 SA 282 (K).

82 'n Mens tref in ons regspraak die standpunt aan dat 'n eksekuteur nie 'n verteenwoordiger is nie. Vgl *Goosen v Bosch and the Master* 1917 KPA 189 194 *per* Kotzé R: "an executor ... unlike an agent has no principal"; *Hook's Estate v Hook* 1927 EDL 88 91: "the seller is the executor and the contract is made with the executor". Aan die ander kant vind 'n mens uitdrukkings in ons hofuitsprake wat te kenne gee dat 'n eksekuteur wél 'n verteenwoordiger is. Vgl bv *Bikitsha v Bikitsha* 1917 AD 546 547: "the privilege was intended to be conferred upon natural persons, not upon estates suing through an executor or representative".

appèlhof hom nog nie op ondubbelsinnige wyse by wyse van beslissing hieroor uitgelaat het nie.[83] Indien veronderstel word dat 'n mens op grond van gemelde hofuitsprake die standpunt kan inneem dat daar in die jurisdiksiegebied(e) van een of meer afdelings van die hooggeregshof tans 'n presedenteregsreël bestaan ingevolge waarvan die eksekuteur die subjek van die bestorwe boedel onder sy beheer is, sou die ondersoek na die vraag op welke subjek die oorledene se nalatenskap oorgaan, egter nog nie voltooi wees nie. Dit is immers moontlik dat as 'n mens die ware inhoud en betekenis van so 'n presedenteregsreël ontleed, dit kan blyk dat die eksekuteur nie *werklik* die subjek van die vermoë onder sy beheer is nie maar dat die *ware regstoestand* iets anders is. Net so kan dit byvoorbeeld blyk dat, as die inhoud en betekenis van die bekende statutêre voorskrif dat die strandgebied aan die Staatspresident behoort[84] deeglik ondersoek word, die strandgebied in werklikheid aan die *staat* behoort.[85] Die vraag wat "die reg" ten aansien van 'n bepaalde aangeleentheid is, kan dus nie altyd beantwoord word bloot deur te vra wat die *woorde* van 'n regsreël, hetsy vervat in 'n wet, hetsy geformuleer in 'n hofuitspraak, ten opsigte van daardie aangeleentheid *voorgee* om te bepaal nie. Die antwoord word gevind deur te vra welke norm inderdaad in die regsverkeer op grond van daardie woorde – of miskien selfs ten spyte van daardie woorde – *nageleef word.*

In die lig hiervan kan gevra word of bogemelde presedenteregsreël – indien dit sou bestaan – sodanig in die regsverkeer nageleef sou word dat aanvaar moet word dat die eksekuteur *werklik* (en nie slegs skynbaar nie) as subjek van die betrokke nalatenskap sou funksioneer. *Ten einde hierdie vraag te beantwoord, moet die veronderstelde presedenteregsreël aan sy implikasies getoets word:* as die implikasies daarvan in stryd met algemeen voorkomende regsverskynsels sou wees of as hulle – indien hulle in die vorm van regsreëls toegepas sou word – tot absurditeite sou lei, kan 'n mens met genoegsame sekerheid weet dat die eksekuteur nie *werklik* as subjek van die nalatenskap sou funksioneer nie, maar dat die ware regstoestand iets anders sou wees. Een van die implikasies van die gemelde presedenteregsreël dat die bestorwe boedel aan die eksekuteur behoort, sou wees dat hy by sy aanstelling 'n "amptelike regsubjektiwiteit" verkry want soos hierbo aangetoon, kan die eksekuteur *onmoontlik* in sy persoonlike hoedanigheid in die nalatenskap opvolg. Indien die eksekuteur te sterwe kom of deur ontslag sy amp ontruim, sou hy *noodwendig* sy "amptelike regsubjektiwiteit" verloor.[86] Wat sou die regsposisie nou wees? Die boedel kan nie "subjekloos"

83 Die naaste wat die appèlhof aan 'n duidelike standpuntinname oor hierdie aangeleentheid gekom het, is die *obiter dictum* in *Du Toit v Vermeulen* 1972 3 SA 848 (A) waarna hierbo gewys is.

84 Vgl a 2 van die Strandwet 21 van 1935 soos gewysig deur a 2 Wet 60 van 1959.

85 Die betrokke voorskrif in die Strandwet 1935 wortel klaarblyklik in die Engelsregtelike beskouing dat 'n persoon naas sy "persoonlike" regsubjektiwiteit 'n amptelike regsubjektiwiteit kan hê. Die vraag kan gestel word of hierdie opvatting i v m die Staatspresident se regsposisie nie 'n onvermoë openbaar nie om in te sien dat die Staatspresident deel van 'n groter eenheid (die staat) vorm en dat hierdie eenheid in die regsverkeer as regsubjek optree. Dat die ware subjek van die strand nie die Staatspresident is nie maar die staat, blyk uit a 3, 4 en 5 waarin verskeie bevoegdhede oor die strand aan 'n *minister* verleen word.

86 Vgl Van Blerk AR se opmerking in *Grobbelaar v Grobbelaar* 1959 4 SA 719 (A) 725: "Deur die ontsetting van respondent uit sy amp verval sy bevoegdheid om met die bates van die boedel te handel." Net soos die eksekuteur se bevoegdheid om met die bates te handel deur sy ampverlies beëindig word, sal die ander bevoegdhede waaruit sy sg amptelike regsubjektiwiteit bestaan daardeur uitgewis word.

wees nie want 'n reg en 'n verpligting veronderstel iemand of iets wat die subjek daarvan is.[87] Ons het ook nie met 'n bloot teoretiese probleem te doen nie, soos blyk uit die volgende voorbeelde: Gestel dat 'n eksekuteur sterf en dat 'n dier wat tot die betrokke boedel behoort, op so 'n wyse skade veroorsaak terwyl die eksekuteursamp vakant is, dat die *actio de pauperie* of die *actio de pastu* met sukses ingestel sou kon word indien die dier tydens die skadeveroorsaking 'n eienaar gehad het: moet 'n mens aanvaar dat die betrokke dier 'n *res nullius* was en dat die benadeelde geen eis het nie? Of gestel dat 'n werknemer van 'n boedel in die uitvoering van sy diens 'n delik pleeg terwyl die eksekuteursamp vakant is: moet aanvaar word dat die werknemer tydens die pleeg van die delik geen werkgewer gehad het nie en dat die benadeelde dus geen eis, behalwe teen die werknemer, het nie?

Ten einde die absurde antwoord dat die bogemelde dier wél 'n *res nullius* was en dat die delikpleger inderdaad geen werkgewer gehad het nie, te vermy, sal 'n mens geneig wees om jou toevlug tot een of ander noodgreep te neem, byvoorbeeld dat "die eksekuteur" die subjek van die boedel is ondanks die feit dat die eksekuteursamp vakant is,[88] dat die meester (wie se amp self vakant kan wees!) daardie regsposisie beklee, dat die oorledene se regsubjektiwiteit tydelik herleef het of dat die volgende eksekuteur se aanstelling terugwerkend is.[89]

Sou 'n mens egter insien dat hy nou met 'n *noodgreep* besig is, sou die besef deurdring dat die veronderstelde presedenteregsreël implikasies het wat afdoende aantoon dat die ware inhoud van daardie reël iets anders sou wees as dat die bestorwe boedel *werklik* aan die eksekuteur behoort. Daar word beklemtoon dat die standpunt dat daar 'n presedenteregsreël sou bestaan ingevolge waarvan 'n bestorwe boedel aan die eksekuteur behoort, *geen antwoord bied nie op die vraag aan wie of waaraan 'n bestorwe boedel voor die eksekuteursaanstelling behoort of terwyl die amp om 'n ander rede vakant is of in die gevalle waar iemand anders as 'n eksekuteur deur die meester gemagtig word om die boedel te beredder.* As aangevoer sou word dat X die subjek van die nalatenskap in hierdie gevalle is, kan tereg gevra word waarom X dan nie ook die subjek van die nalatenskap kan wees in die geval waar daar wél 'n eksekuteur is nie. 'n Ketting is so sterk soos sy swakste skakel, lui die spreekwoord. Die swakste skakel van die standpunt dat 'n eksekuteur in sy amptelike hoedangheid die subjek van die vermoë onder sy beheer is, is die probleme wat ontstaan as die eksekuteuramp vakant is.

Dit blyk uit die voorgaande dat die eksekuteur nie *werklik* uit hoofde van die presedentereg in die nalatenskap van 'n oorledene opvolg nie.

3 6 Gevolgtrekking

Die voorafgaande ontleding van die eksekuteur se regsposisie regverdig die gevolgtrekking dat regter-president Jacobs se mening dat die standpunt dat 'n eksekuteur in die nalatenskap van 'n oorledene opvolg "onaanneemlik" is, ongetwyfeld juis is. Die standpunt dat 'n eksekuteur aldus opvolg, slaag nie daarin

87 Vgl par 1 hierbo asook vn 3.

88 Vgl bv die toonaangewende gewysde *Krige v Scoble* 1912 TPD 814: hoewel daar geen eksekuteur t o v die betrokke boedel aangestel is nie, bevind die hof dat die boedel in die eksekuteur vestig!

89 Dat 'n eksekuteur se aanstelling nie terugwerkend is nie, blyk uit *Klempman v Law Union and Rock Insurance Co Ltd* 1957 1 SA 506 (W).

om die werklike regstoestand in verband met universele opvolging in die erfreg te ontdek en sinvol te verklaar nie.

Indien daar ten slotte teruggekeer word na die probleem wat in paragraaf 1 hierbo gestel is, blyk dit dat daar in die betrokke geval nie *twee* skuldeisers (die twee eksekuteurs) aanwesig is nie en ook nie drie skuldeisers (die erfgename) nie. Dat daar slegs *een* skuldeiser aanwesig is en dat 'n vordering van R150 dus groot genoeg is om as grondslag vir 'n aansoek om die sekwestrasie van die boedel van die betrokke boedelskuldenaar te dien, sal in 'n volgende artikel aangetoon word.

Aquilian damages for personal injury and death

*(continued)**

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UTILITY

Van der Walt rejects the traditional *differenztheorie* of Mommsen[60] and redefines the differencing process as follows:

> "Na my mening moet daar vir doeleindes van vergelyking aangeknoop word by die eiser se individuele vermoënsbestanddele en hulle nuttigheid vir die bevrediging van sy erkende behoeftes volgens sy eie planmatige vermoënsgestalting. Die vergelyking moet onderneem word deur die pasgenoemde nuttigheid van die te ondersoeke vermoënsbestanddeel soos dit voor die plaasvind van die gewraakte gebeurtenis was, te vergelyk met die nuttigheid van daardie vermoënsbestanddeel soos dit na die plaasvind van die gewraakte gebeurtenis is. Wat *was* en wat *is* word dus met mekaar vergelyk."[61]

> "[D]ie nuttigheid van die betrokke goed vir bevrediging van die vermoënssubjek se behoeftes, en daardie behoeftes as sodanig, [moet] 'n verkeerswaarde ... hê. Só beskou is die vermoënswaarde van iets gelyk aan die verkeerswaarde van die nuttigheid van daardie goed vir bevrediging van die vermoënsubjek se erkende behoeftes in ooreenstemming met die wyse waarop hy sy vermoë vir daardie doel planmatig struktureer."[62]

We may here perceive some of the essential elements for patrimonial benefit in an economic sense as distinct from the more sterile emphasis by the *differenztheorie* upon rights and obligations.[63] Van der Walt uses key words such as "nuttigheid" (utility)[64] and "verkeerswaarde" (value in exchange).[65] The differences appear extraordinarily subtle, but they shift the emphasis from a problem in law to a problem in economics. The significance of this shift is easier to appreciate if one realises that the law, particularly in South Africa, is characterised by closed sets of arguments.[66] That gives our law stability but also hampers adaptation in times of change. Economics, on the other hand, is an actively

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* See 1989 *THRHR* 66–80.

60 *Beitrage zum Obligationenrecht* (1853) vol 2 3; Van der Walt *Die sommeskadeleer* 1–13 165 181.

61 *Die sommeskadeleer* 284.

62 *Ibid.*

63 Corbett & Buchanan *The quantum of damages* 5.

64 See Koch *Damages for lost income* 59 n 5 for references to utility in valuation theory.

65 *Todd v Administrator, Natal* 1972 2 SA 874 (A) 882A and the reference to multiple potential purchasers; Jonker *Property valuation in South Africa* (1984) 9–12.

66 Honoré *Select SA legal problems* (1984 eds Kahn & Zeffert) 84.

open set of arguments. The effect of the *Summers* appeal has been to shift the assessment of quantum increasingly into the economic sphere. Van der Walt is very much in tune with such developments.

The greatest single weakness in Van der Walt's thesis is his failure to come to grips with the problem of uncertainty. This stems to a large extent from the emphasis of his sources upon past loss. To Van der Walt past and future losses are all to be proved on the balance of probabilities. He would seem to object to making any deduction for contingencies, thereby limiting compensation to those items which may be established with near certainty, *all others being ignored.* This is a sorry state of affairs if one bears in mind his frequent exhortations to award "die volledigs moontlike vergoeding".[67]

Value derived from an application of the principle of valuation of a chance is, one may observe, *a measure of the present utility of an uncertain future event.*[68] Objectivisation of the percentage deduction is achieved by the use of actuarial tables, the opinion of medical experts or employers, or the presiding judicial officer. The plaintiff's personal perception of the percentage chance, the utility as perceived by himself, is generally ignored. Objectivisation, "verkeerswaarde", provides merely *prima facie* evidence of loss.[69] The final award may deviate from a strictly objective measure.[70]

LIVING EXPENSES

If a man suffers a reduction to his expectation of life, his compensation will be based, not upon his pre-injury mortality, but on the lesser lifespan that is now his lot after the injury.[71] The reason for limiting the damages in this manner is that if he suffers an early death he will then be spared his own living expenses and those of keeping his wife and children.

The same reasoning applies to a person who has been reduced to the condition of a living vegetable. Such person has no claim for loss of the present value of his expected income, only a claim for the living expenses which may now be needed.[72]

If the injuries are such as to prevent a man from marrying and incurring the expense of keeping a wife and children, then it would be proper to make a deduction from his damages on this account.[73] The appellate division has, however, indicated that it would be acceptable not to make such a deduction.[74]

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67 *Die sommeskadeleer* 8.
68 Or, for that matter, an uncertain past event.
69 There is a close relationship between mitigation and objectivisation. Both are withdrawals from the personal circumstances of the claimant.
70 Van der Walt *Die sommeskadeleer* 12 60–61 74 99–101 133 196 200 206–207.
71 *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 306F–G.
72 *Roberts v Northern Assurance Co Ltd* 1964 4 SA 531 (D) 537G–H; *Dyssel v Shield Insurance Co Ltd* 1982 3 SA 1084 (C) 1086A–G. In *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) the yearly costs of keeping the plaintiff in a suitable institution exceeded her expected earnings. In *Marine & Trade Insurance Co Ltd v Katz* 1979 4 SA 961 (A) 979 50% was deducted for general contingencies; this included allowance for savings in accommodation expenses owing to institutionalisation.
73 *Reid v SAR&H* 1965 2 SA 181 (D) 190F–H; *Carstens v Southern Insurance Co Ltd* 1985 3 SA 1010 (C) 1023–1024.
74 *Summers* appeal 617.

I have thusfar described the use which a person would have made of the money he earns as "living expenses". It is revealing to refer instead to "utility" – the utility of the expected income. I will now recast the above problems using the new vocabulary:

An uninjured person has a certain total utility over his lifetime for which a present value may be calculated, that being the present utility of his future expectations with due allowance for uncertainty. If his expected lifespan is reduced (that is the chance of death in each future year increased)[75] why, one may ask, should his compensation be reduced? Why should he not be compensated with the same total value of utility as he had prior to the injury? A short life but a merry one. The result of the *Lockhat* decision may be sustained only if utility is to be parcelled out in yearly packets with the limitation that total utility in any one year may not exceed the yearly utility in the uninjured condition. The same line of reasoning dictates that a man who is rendered a paraplegic will not be awarded the costs of a car if he would not have had a car had he been uninjured.[76] One may perhaps identify Van der Walt's notion of "planmatig" with the concept of "packets of utility".[77]

If the concept of packets of utility is applied to the problem of the man who may no longer marry, one may observe that while married his personal living expenses are limited to his two-parts share of the family income. However, from a utility point of view married life has a substantial utility value. A man who is deprived of that utility is surely entitled to apply his money differently with a view to achieving the same level of utility by other means. His yearly utility is still limited to his total expected income.[78]

Where a person is mentally dead and confined to an institution there is little or no prospect of that person finding the means to enhance personal utility and it seems correct to limit the damages to the present value of actual expected living expenses.

When a court makes an award for loss of buying power on past loss[79] it is basing compensation on the utility of what has been lost, as distinct from the rands which have been lost.

Emphasis upon "utility" makes it clear that account must be taken of taxation in the assessment of loss of earning capacity. The utility of a person's expected earnings must of necessity be its after-tax utility.[80] Tax money provides benefits to society as a whole, but these benefits will not be affected by the amount of tax which a claimant pays. If anything, the benefits from tax payments, namely public funds, are greater after injury than in the absence of injury.

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75 A man whose expectation of life is reduced from age 70 to age 50 still has a small but finite chance of attaining age 70 where previously the chance was some 50%.

76 *Dhlamini v Government of RSA* (Corbett & Buchanan vol 3 554 587).

77 What one might describe as "forensic quantum theory" by analogy with quantum theory in physics.

78 It has been held in a dependency claim that a single man with children should be apportioned three parts of family income (*Van Aardt v Southern Versekerings-Assosiasie Bpk* (unreported 1986-02-27 case no 523/82 (O)).

79 *Everson v Allianz Insurance Co Ltd* (unreported 1988-08-29 case no 6698/85 (C)).

80 See below concerning tax and "picking cherries from the fruit cake"; see too Boberg *Law of delict* 543–546.

GENERAL CONTINGENCIES

The relationship between the deductions applied to lump sums and the deductions applicable to compensation paid by instalments is stated by the Pearson Commission[81] as follows:

> "There should be a further scaling down for the advantage of a lump sum as compared with the prospect of a long series of future and therefore uncertain payments."

In order to arrive at present value (present utility) one first ascertains the "lifetime utility budget" for each and every possible year. Discounts are then applied one year at a time. There is a discount made for interest, a separate discount made for the chance of non-survival, and the yearly values then totalled. The globular figure is then reduced further for "general contingencies".

Such contingencies include not only the statistically measurable risks of non-employment, change of career, promotions, irregular salary increases and unexpected bonuses, but also an additional deduction for the utility of being provided with a lump sum in lieu of an income. The control of capital brings with it social status and buying opportunities which are closed to the average wage-earner. The accumulation of substantial capital from a regular salary is a formidable task that takes a lifetime. If capital is to be enjoyed at an early stage in life then some deduction needs to be made for the related increase in life utility. This is a valuation adjustment based on liquidity preference; the question is: do people prefer capital or income? The phenomenon is well documented in the texts on valuation theory.[82]

The deductions made by the courts are very high (10%, 20%, 30%) compared to the statistical data concerning unemployment, wage increases, etc.[83] The present average level of deductions for general contingencies is fairly accurately described by the formula of ½% for each year to retirement age.[84] Individual circumstances lead to variations around this norm. The norm has been established over the years by reference to previous judgments. Just as the awards for general damages for pain and suffering and loss of amenities are based on previous awards, so too are contingency deductions. The present level of contingency deductions may be traced back to the nineteenth century. Such deductions are clearly too high in relation to a highly insured Western-style economy with active labour unions and an industrial court. I would strongly advocate that the conventional deductions be cut by at least half, that is to 5%, 10% and 15% (¼%for each year to retirement). Courts have a tendency to favour round percentages and will therefore make a 5% deduction or no deduction when in fact a 2% or 3% deduction is desirable.

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81 *Royal commission of civil liability and compensation for personal injury* (Cmnd 7054 1978) vol 1 155 par 716.

82 See, e g, Levin *Statistics for management* 2ed 711–713; Weston & Brigham *Managerial finance* (1979) 260–264; Hicks *Value and capital* (1964) 17–18.

83 Cooper-Stephenson & Saunders *Personal injury damages in Canada* (1981) 255–259; Street *Principles of the law of damages* (1962) 120–125; Luntz *The assessment of damages* 295–306; Boberg 1964 *SALJ* 212. It would be wrong to take unemployment statistics as a guide, since this presumes that all unemployed persons are actively seeking employment (Hofmeyer *Labour market participation and unemployment* 1985 *HSRC RDS* 1). Unemployment is not the only risk to which earnings are subject; a change in career or opting out of the "rat race" may bring several years of lower earnings without there being unemployment.

84 For a summary of contingency deductions see Koch *Damages for lost income* 334–338; Newdigate & Honey *The MVA handbook* (1985) 295–301.

It has become common practice to assess contingencies separately for earning capacity[85] in the uninjured condition and in the injured condition.[86] This practice effectively recognises the present utility of expected income as an individual asset capable of independent objective valuation, or "verkeerswaarde", to use Van der Walt's terminology.

THE PATRIMONIUM

Just as one needs to distinguish between "earning capacity", the right of personality and "present value" (the present utility of the expected income from using earning capacity), so too one needs to distinguish between the content of a patrimonium and the value of the items in that patrimonium. Any inquiry into damages, if it is to be fair, must take the subjective position of the claimant as its starting point.[87] This means that account must be taken of all things, present and prospective, which form a part of the claimant's life plan.[88] Once a list of relevant items has been recorded, the next stage is to assess values, objectively based values, for the related utilities. Such values may be recorded one year at a time and then reduced to a present utility value, using a financial model which takes account of uncertainty and interest (the time value of money). For each major category of utility one may record a separate present value. It generally aids clarity of thought if the process is conducted first for the uninjured condition and then separately for the injured condition. A typical analysis of the present utility of the patrimonium but for the injury might be:

Financial Gains	*R*	*Liabilities*	*R*
Expected earnings	600 000	Taxation	120 000
Spes of inheritance	150 000	Support for	
Expected pension	80 000	dependants	250 000
Expected gratuity	20 000	self	150 000
Spes of sickness			
insurance benefits	15 000		
House	250 000	Bond on house	120 000
Car	40 000	Debt on car	25 000
		Present utility	
		of lifetime gain	490 000
Totals	*1 155 000*		*1 155 000*

85 "Earning capacity" is here used in Rumpff JA's sense of "the present utility of the expected income".

86 *Hutchings v General Accident Insurance of SA Ltd* (unreported 1987–10–09 case no 12872/85 (C)); *Venter v Mutual & Federal Versekeringsmpy Bpk* (unreported 1988–09–19 case no 5400/86 (T)); *Everson v Allianz Insurance Co Ltd* (unreported 1988–08–29 case no 6698/85 (C)). See Koch *Damages for lost income* 164–166.

87 Van der Walt *Die sommeskadeleer* 128–129.

88 Van der Walt's "planmatige bevrediging van die vermoënsubjek se erkende behoeftes". In reading Van der Walt one must remember that he is primarily concerned with accrued (past) loss. This follows from his thesis that we must award compensation for future loss only once it has crystallised as an accrued loss. Van der Walt is deeply concerned that there should be "die volledigs moontlike skadevergoeding". This means that when awarding compensation by a once-and-for-all lump sum, account must be taken of the claimant's subjective expectations as to his future life plan (Van der Walt *ibid* 86; *Union Government v Warneke* 1911 AD 657 665 "business and prospective gains").

A similar exercise conducted for the injured condition might reveal:

Financial Gains	*R*	*Liabilities*	*R*
Expected earnings	R140 000	Taxation	nil
Spes of inheritance	R150 000	Support for	
Expected pension	200 000	dependants	250 000
Gratuity awarded	45 000	self	450 000
Spes of sickness			
insurance benefits	nil		
House	250 000	Bond on house	120 000
Car	40 000	Debt on car	25 000
Present utility			
of lifetime loss	20 000		
Totals	*845 000*		*845 000*

The loss suffered is the difference between the present utility uninjured and the present utility now injured, that is R490 000 – (–R20 000) = R510 000. Note that the present utility of expected earnings has declined and so too has the value of expected tax liability. A disability pension has been awarded and thus the value of pension benefits has increased. The value of sickness insurance has dropped to nil (uninsurable). The value of support (living expenses) for claimant himself has increased owing to expected medical expenses.

As a general rule, damages are assessed by focusing upon the *res* damaged, for example earning capacity. For this reason there is a tendency to refer to an injury claim as a claim for "loss of earning capacity". The major danger with this manner of speaking is that it becomes elevated, without justification, to a rule of law. Typical of such erroneous thinking is the rule in Canada whereby expected tax on earnings is ignored when assessing loss of earning capacity.[89] The focus is placed upon the present utility of expected earnings and all other changed values (bar medical expenses) ignored. A strict application of such blinkered reasoning would require that traditional medical expenses are also ignored. This Canadian approach may be likened to plucking the glacé cherries from a fruit cake.

Focus upon an individual asset, the asset damaged, as distinct from the total picture, is a common phenomenon. Van der Walt uses the words "direct" and "concrete" damage to describe focus upon the *res* damaged.[90] The words "abstract" or "consequential" damages are used for the broader picture. I will touch on this topic again below in relation to collateral benefits.

The amenities of life contribute to a person's total utility and as such form a component in the patrimonium, as defined above. The primary objection to incorporating these in the overall picture is that there is no objective basis for valuing such benefits. This is not entirely true, however, for the decided cases awarding compensation for the loss of such amenities have in fact established a commercial frame of reference, a standard of value. It is my contention that once the courts have identified a means for placing a rand value upon a right of personality, that right becomes an entity in the patrimonium, a quantifiable

89 Cooper-Stephenson & Saunders *Personal injury damages in Canada* 181–195.
90 *Die sommeskadeleer* 49–50 69–70 85 89.

component of the person's utility.[91] In this sense it becomes valid to speak of "earning capacity" as a patrimonial asset.[92] The fact remains, however, that not everyone uses the expression "earning capacity" in this sense.

The question whether rights of personality are patrimonial or not has led to some conflicting decisions: in one matter a military pension has been awarded in terms of an act which expressly stated that the level of the pension was without regard to the earning capacity of the recipient.[93] The pension was labelled "non-patrimonial" by the court and ruled not deductible from compensation for loss of earning capacity.[94] In another matter the general damages were reduced by reason of the allowance for numerous and expensive aids for coping with the injured condition.[95] This latter ruling is consistent with a view that rights of personality do form part of the patrimonium.

One thing is clear: once a right of personality has been reduced to a money value, that money has the same utility as the money value of expected earnings or expected medical expenditure. I have discussed above the problem of the man who is prevented from marrying. The rationale for making no deduction for the saving in support for a wife and family is that he may obtain equivalent utility by spending his money in a different way. This same alternative utility consideration suggests that it is wrong to ignore a military pension which has undoubtedly increased the utility of the claimant's life plan.

RESTITUTIO IN INTEGRUM

Van der Walt points out that one must distinguish between "restitution" and "compensation".[96] "Restitution" is the ideal. It is only where "restitution" is not possible, which is the usual state of affairs, that a monetary equivalent is awarded as "compensation". This compensation reflects no more than a fair value for the utility which has been lost. The value of a chance, which I have discussed above, exemplifies the value nature of compensation as distinct from the restitution nature. The money awarded is but a pale shadow of the true subjective utility which has been lost. Money can at best top up the claimant's present lifetime utility to the level, largely objectively determined, that it would have had had the injury not been inflicted. Bloembergen likens this to topping up a bucket which has been emptied.[97]

COLLATERAL BENEFITS

Pension benefits

It has been ruled that where collateral benefits, such as pension or accident insurance, are payable in terms of a contract of employment, these compensating advantages must be brought into account when the damages are assessed.[98] The

91 The objective value of the amenities of life was recognised in *Gerke v Parity Insurance Co Ltd* 1966 3 SA 484 (W); see too Boberg *Law of delict* 567–570.
92 See, in particular, the words of Rumpff JA quoted above.
93 *Mutual & Federal Insurance Co Ltd v Swanepoel* 1988 2 SA 1 (A).
94 The same type of reasoning that led the Canadian courts to ignore taxation. I remain curious whether the pension was offset against the claimant's general damages.
95 *Administrator, SWA v Kriel* 1988 3 SA 275 (A).
96 *Die sommeskadeleer* 157–158.
97 *Schadevergoeding bij onrechmatige daad* (1965) 115.
98 *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A).

decision has been welcomed by actuaries[99] but condemned by academic writers.[100] Critics of the decision have argued, *inter alia*, that the decision to deduct pension benefits gives rise to a deduction of past savings from future earnings. This objection is entirely fallacious. The arithmetic of the *Dippenaar* case was such that the claimant was in no way prejudiced by the deduction of the pension. What happened was that his past savings were included as part of net lifetime utility in the uninjured condition. The same amount of savings was included in the corresponding value for the injured condition. The effect of deduction was merely to deduct savings from the same amount of savings, with a net nil effect on the compensation awarded.[101]

There are different ways of doing these calculations and a rule which is valid in one context may be invalid in another context. For example, it is common for future pension benefits to be valued on the basis of expected future contributions to the pension fund. The claimant, on leaving employment, will have been paid a lump sum by way of a refund of his contributions made in the past. It would be most unfair to deduct this lump sum when assessing the loss. It is my experience that litigating parties will readily admit this unfairness and refrain from deducting. I have every reason to believe that a judge would respond similarly.

The contract of employment

The emphasis by the *Dippenaar* case on the "contract of employment" gives rise to some searching questions as to just precisely what is a "contract of employment". On the one hand we have the contract *stricto iure*, the precise letter of the contract; on the other hand we have the equitable relationship between employer and employee, the working relationship between them based on reasonable expectations. This latter form of "contract of employment" is generally recognised in the industrial court in relation to unfair practices. The assessment of damages is based upon considerations of equity. One would thus expect the expression "contract of employment" to be interpreted in an equitable sense. If an employee has a reasonable expectation of receiving a benefit, such as increases to offset the effects of inflation, then it is proper that account be taken of such an expectation.[102] This is so notwithstanding the fact that in strict law the employee has no right to demand such an increase. The same may be said of other "equitable" benefits such as annual bonus and promotions. In general this has been the approach adopted.[103]

Accident insurance benefits

Accident insurance benefits privately purchased by a claimant with his discretionary income are not subject to the *Dippenaar* ruling and will be ignored when assessing compensation. The basis for this rule is that the purchase of such

99 Financial Mail 1986-05-02 45.
100 Boberg *Law of delict* 609-611.
101 Koch *Damages for lost income* 32.
102 *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 115-116.
103 See, e g, *Serumela v SA Eagle Insurance Co Ltd* 1981 1 SA 391 (T); *Krugell v Shield Versekeringsmpy Bpk* 1982 4 SA 95 (A); *Contra Gehring v UNSBIC* 1983 2 SA 266 (C). Correct in law, bad in equity, the *Gehring* case was, it seems, intended to attract attention as a protest against the unpopular ruling in *Dippenaar's* case.

insurance is the same as the purchase of an investment.[104] This is, with respect, a somewhat strained analogy: the economic realities of the situation are that the total lifetime utility of the claimant has been substantially enhanced by the insurance payment. Had the injury not occurred, the claimant would have been poorer by a premium.[105] There are no accumulated savings at the end of an accident insurance contract. The payment of the premium has, however, had a utility for the payer by way of peace of mind that he is covered. This is an important consideration for persons who are known as "risk aversive".[106] "Risk seeking" persons do not buy insurance. They have little fear of the contingencies of life and focus upon schemes with the prospect of large financial profit, without the discomfort of physical injury.[107]

The rule to ignore insurance payments has its origin in Victorian England.[108] In the *Bradburn* case the insurance was taken out from a vending machine on a station platform. The court, quite reasonably, treated it as the frolic, the casual flutter, that it was. Accident insurance was at the time a novelty, not a common feature of family security. Times have changed but the law has not. Today, through public funds, insurers and reinsurers, the financial risks that attach to living are minimised for the individual and spread as a cost to society as a whole.[109] It is also true that an overwhelming majority of claimants receive their compensation from some or other insurance fund and that judges have this in mind when making their decisions. The present rules governing insurance payments are a bad case of "robbing Peter but failing to pay Paul". The insurers, and the public whose premiums provide their funds, are expected to meet the bill for damages claimed but are not permitted to reduce their liability by the fact that payment has already been made by the insurance system in respect of the same injury.[110] The inequity of the prevailing attitude to insurance payments has not gone unnoticed by commentators.[111]

The equity of ignoring collateral benefits

There are a number of good reasons for treating certain collateral benefits as *res inter alios acta*. The existence of a right subrogation is one such consideration; the existence of an obligation, legal or moral, to reimburse the source of the collateral benefit is another.[112] Under the dependants' action there is a rule that no account shall be taken of support provided by others after the death.[113] This

104 *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 920–921.
105 *De Vos v SA Eagle Versekeringsmpy Bpk* 1985 3 SA 447 (A).
106 Levin *Statistics for management* 2ed 712–713.
107 *Ibid.*
108 *Bradburn v Great Western Railway Co* 1874–80 All ER 195 (Exch D).
109 The "whipping boys of the twentieth century": *Browning v War Office* 1962 3 All ER 1089 (CA) 1094; *Santam Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 168–176; *Dyssel v Shield Insurance Co Ltd* 1982 3 SA 1084 (C) 1087G.
110 In this system are included: state insurance funds, such as the MVA fund; statutory compensation benefits payable directly from general revenue funds (e g military pensions); and large organisations who as self-insurers spread the cost to the public through their pricing mechanisms. This is but a brief overview of the highly complex loss-spreading that takes place in an active modern economy.
111 Bloembergen *Schadevergoeding bij onrechmatige daad* 360–368 378–384 389; Luntz *The assessment of damages* 349–351.
112 Boberg *Law of delict* 492.
113 *Groenewald v Snyders* 1966 3 SA 237 (A) 247A–D.

is eminently fair, because such persons do not have a personal action for recovery of the financial loss they suffer by reason of providing support.[114]

The practical effect of the collateral benefit rule is to appoint the claimant as representative for his associates who are out of pocket by reason of the injury. This is an administratively convenient arrangement. To require that each individual should bring his own action[115] may be good in law but it creates procedural hurdles which render it all that more difficult to achieve fairness.[116] When a breadwinner is injured his right of action is effectively a class action for himself and his dependants.[117]

Rebuttable presumptions

There is a rule which requires the deduction of pension benefits provided in terms of the contract of employment.[118] It is my experience that the rule will be tempered on the basis of what is fair.[119] The *Summers* appeal[120] has urged that damages be assessed "in die lig van al die bekende feite en die werklikhede".

If the courts are to give full effect to this injunction, I would expect them to apply it to collateral benefits as well as the problems of inflation. The precedent as regards deductibility would then be no more than a rebuttable presumption in plaintiff's favour. It would remain open for the defendant to prove that the plaintiff is under no obligation, legal or moral, to reimburse the source of the collateral benefit. If the plaintiff is free of any such burden, the collateral benefit has served to increase present utility and may fairly be brought into account in assessing damages. Certain statements by Boberg[121] deserve comment:

> "[T]he law of delictual damages cannot concern itself [with pre-accident contractual stipulations]."

It is not clear why a court should be prevented from receiving evidence and taking account of pre-accident contractual stipulations. How otherwise is it to give effect to "al die bekende feite en die werklikhede"?

> "[I]n the absence of legislation entitling the true loser to sue, means that a loss to society goes uncompensated . . . [The plaintiff's action provides] a basis for the subsequent extrajudicial compensation of the true loser and the restoration of the economic equilibrium of society."

Boberg is here referring to collateral benefits paid in terms of contracts with third parties. Insurance contracts are part of the loss-spreading mechanism of modern society and thus the reimbursement of insurers, apart from subrogation, should not be a consideration. The cost to society is the injury to death, and the insurance system is the proper place for such loss to fall. Contracts of employment and employment legislation burden an employer with the cost of

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114 See my comments in this regard in 1986 *THRHR* 220–221.
115 *Schnellen v Rondalia Assurance Corp of SA Ltd* 1969 1 SA 517 (W).
116 The courts, it seems, will willingly condone a defective procedure: *Mhlawuli v SA Mutual Fire & General Insurance Co Ltd* (Corbett & Buchanan vol 2 597 598). In *Ncubu v National Employers' General Insurance Co Ltd* 1988 2 SA 190 (N) the court compensated the child directly for expected expenses during childhood. It was found that the mother had not sufficient financial resources to make the payments needed to suffer a loss.
117 *De Vaal v Messing* 1938 TPD 34 38.
118 *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A).
119 See above.
120 615C.
121 *Law of delict* 492.

accidents by way of sick pay.[122] Medical expenses are almost invariably met from an insurance scheme. Both the employer and the insurer are free to contract for reimbursement in the event of compensation being awarded,[123] thereby transferring the loss to the defendant's insurer and society as a whole. Boberg uses the word "society" in the rather select, and misleading, sense of "those associated with the claimant".

Gratuitous benefits

It does happen that the person who should be reimbursed declines to accept the money. That would be a gratuitous act subsequent to the action and is clearly *res inter alios acta*. When an employer continues to pay wages to an injured employee, this will seldom be a "donation" in the strict sense of the word.[124] The employer of a large workforce has much to gain in terms of worker contentment if he is perceived to be a caring and generous employer. In this sense his "liberality" is calculated and far from gratuitous. If the payments made are to be left out of account in assessing compensation, the soundest reason for doing so is that the plaintiff was subject to at least a moral obligation to effect reimbursement.[125]

Employers commonly retain a discretion as regards certain employment benefits, for example, bonus cheques, overtime, wage increases, sick pay and accident benefit payouts. The employee has every reason to expect the payment of such benefits in the normal course of events and the employer has every intention of paying. Bonuses, overtime and wage increases are kept discretionary to protect the financial solvency of the employer. Sick pay and accident benefits are kept discretionary to discourage abusive claims. One also finds accident benefits which are discretionary with the sole purpose of preventing their being deducted if damages are to be assessed.[126] It is the employer's intention that such benefits will be paid out and that the employee is under no obligation to reimburse. Bearing in mind that damages payments usually come from public funds, it seems that the interests of the public as a whole require the deduction of such benefits.

Life insurance benefits

Life insurances have a dual nature; they are savings plans and insurance plans all rolled into one contract. Part of the premium paid is used to meet the cost of current claims from other persons who have died or been injured during the relevant year, while the balance is accumulated as savings for the benefit of the policyholder. These savings are generally known as the "surrender value" of the policy.

Pension funds are but a variation on this general theme of a premium, savings, and claim costs met from the pooled premiums of contributors.[127]

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122 Boberg clearly has in mind the circumstances of *Union Government v Ocean Accident & Guarantee Corp Ltd* 1956 1 SA 577 (A).
123 Either before or after the injury.
124 *Van Blerck v Van Blerck* 1972 2 SA 799 (C).
125 *Santam Insurance Co Ltd v Byleveldt* 1973 2 SA 146 (A) 153C–D.
126 With the explicit intention of taking advantage of the ruling in *Gehring v UNSBIC* 1983 2 SA 266 (C).
127 *Parry v Cleaver* [1969] 1 All ER 555 (HL) 559–560.

The Assessment of Damages Act

In the past the courts have, with respect, dealt very sensibly with life insurance benefits.[128] The ability of the courts to maintain equity has been severely compromised by the passing of the Assessment of Damages Act.[129] One cannot discuss fairness within the framework of unfair legislation. The English legislation, on which the South African act is modelled, was introduced at the turn of the century at the behest of life offices anxious to promote the sale of their policies.[130] It is therefore nothing more than a sales gimmick which has become conventionalised. The South African act was introduced in a flurry of excitement after the crash of the Rietbok in the sea near Port Elizabeth.

The act is very much white man's legislation. It favours the widows of those with large incomes who can afford substantial life insurance and pension benefits. It ensures that widows can enjoy a standard of living which would have been closed to them had their husbands lived. The lower income groups who need their all merely to pay for food have no share in this bounty. The act introduces numerous anomalies:

- A man may prefer to accumulate his lifetimes savings in share market equities and fixed property. The widow who inherits such assets will have her damages reduced, while her neighbour whose husband preferred the more pedestrian medium of life insurance will receive her damages without reduction.
- A breadwinner dies one month before his endowment policy is due to mature. The payment must be ignored. The man dies one month after the policy matures. The proceeds must be brought into account.
- The Apportionment of Damages Act[131] permits a right of recourse against the estate of the deceased according to his contributory negligence in bringing about his own death. Recourse is confined to such assets as were not deducted when assessing the dependants' damages, that is, to life insurances paid directly to the estate.
- When a man retires, his accumulated savings in the pension fund are applied to providing a pension. If this pension is designed properly, it will be payable to himself during his own lifetime, and after his death to his widow should she survive him. The Assessment of Damages Act permits the widow of a pensioner to claim for the loss of a share of her husband's pension notwithstanding the fact that she continues to receive that pension.[132]
- When a man dies prior to retirement the pension benefits payable to his widow include the value of his accumulated savings in the fund. Such considerations notwithstanding, the widow is compensated as though such savings had been lost.
- If by reason of the death the widow has been deprived of future widow's pension benefits she is not entitled to compensation for this very real financial loss.[133]

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128 *Groenewald v Snyders* 1966 3 SA 237 (A) 247–248.
129 9 of 1969.
130 Boberg 1964 *SALJ* 354 n 30.
131 34 of 1956 s 2(1B) 2(6)(*a*); Boberg 1971 *SALJ* 441.
132 *Du Toit v General Accident Insurance Co SA Ltd* 1988 3 SA 75 (D).
133 *Burns v National Employers General Insurance Co Ltd* 1988 3 SA 355 (C) 364.

It would greatly enhance the quality of justice if the Assessment of Damages Act were to be removed from the statute books.

DEPENDANTS' *SOLATIUM*

The origins of our law have dictated that no compensation may be awarded for the emotional distress which a family may suffer when a member has been killed.[134] Compensation is limited to "financial loss". Such antiquarianism seems unnecessary and misplaced today and I would strongly urge that if and when the Assessment of Damages Act is repealed, it be replaced with legislation providing for a lump-sum award for emotional distress arising from death. Such legislation has already been introduced in England.[135] I shall not enlarge here upon the problems of who may claim and how much. It does deserve mention that when a child is killed the payment should be modest.[136] Impoverished parents have been known to stoop to unnatural acts.

APPORTIONMENT OF DAMAGES ACT[137]

The damages payable to dependants are not reduced by reason of the contributory negligence of the breadwinner.[138] The effect of this rule is to create *quasi*-no-fault liability for dependants. There has generally been dissatisfaction with the generous basis on which dependants are treated. After all, if the breadwinner is merely injured, his damages, and thus the value of his dependants' right to support, will be apportioned according to his contributory negligence. If he dies, no such apportionment takes place against the dependants. In response to the general dissatisfaction, the Apportionment of Damages Act was amended to include certain convoluted provisions.[139]

Those who are opposed to an apportionment of the dependants' damages rely on the argument that the dependants were not party to the incident in which the breadwinner was killed. In general one cannot dispute the fairness of this principle. Its application to the dependants' action is, however, seriously questionable. The right which the dependants have to support is integrally and inseparably entwined with the breadwinner's earning capacity. The value of their right can never be better than the right which their breadwinner has to his own earnings.[140] To ignore this consideration and to emphasise that the dependants were not party to the breadwinner's death has the air of a *petitio principii* which ignores the realities. If the breadwinner has won his earnings illegally, the same illegality taints the claim by his dependants.[141] In like manner, one would expect the deceased's contributory negligence to be brought into account against his dependants.[142]

I would strongly recommend that the Assessment of Damages Act be amended to permit the apportionment of a claim by dependants according to the contributory negligence of the deceased breadwinner.

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134 Corbett & Buchanan *The quantum of damages* 3.
135 Administration of Justice Act of 1982 s 3(1).
136 S 50 of the Insurance Act 27 of 1943 limits the amount of life cover which may be taken on the life of a child under the age of 14 years.
137 34 of 1956.
138 *Union Government v Lee* 1927 AD 202.
139 Boberg 1971 *SALJ* 441.
140 This is the basis of the dependants' action in England.
141 *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 851.
142 *Union Government v Lee* 1927 AD 202 was handed down over 60 years ago and would seem to be out of line with modern realism.

Die ruimtelike aspek van eiendomsreg op onroerende goed – die *cuius est solum*-beginsel*

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SUMMARY

The spatial aspect of ownership of immovable property – the *cuius est solum* principle

According to the *cuius est solum* principle a landowner obtains certain rights to the use of the airspace above his immovable property, although difference of opinion exists as to the nature of these rights.

In South African law the position is as follows: no common-law corroboration can be found that ownership of immovable property includes ownership of the airspace above the relevant piece of land. According to case law ownership of immovable property includes ownership of the airspace above the land to the extent that it can reasonably be exercised, subject to public-law restrictions; however, only *obiter* references to this matter could be found. Existing legislation offers no solution as no direct reference to ownership of airspace exists, although the rights of the landowner to the airspace above the land are acknowledged by inference.

Although some lawyers are of the opinion that according to common-law sources ownership of immovable property includes the airspace above the land, the most realistic point of view is that no common-law proof of this effect can be found, even though it is acknowledged by case law without reference to common-law sources. The horizontal division of immovable property will, therefore, only become possible by means of enabling legislation.

In die Suid-Afrikaanse reg word daar, benewens enkele verwysings in regsliteratuur, nie veel aandag aan die ruimtelike aspek van eiendomsreg op onroerende goed geskenk nie.[1] Hierdie aspek van eiendomsreg is om twee redes belangrik:

- Die bepaling van die soewereiniteit van die lugruim bokant 'n staat in staatsregtelike sin.
- Die bepaling van die omvang van 'n grondeienaar se eiendomsreg op onroerende goed in privaatregtelike sin.

* Navorsing afgehandel gedurende Julie 1988 by die Bodleian Library, Oxford en die Europa-Institut, Saarbrücken met finansiële steun van die Raad vir Geesteswetenskaplike Navorsing.

1 Cowen "The South African Sectional Titles Act in historical perspective" 1973 *CILSA* 15; Van der Merwe *Sakereg* (1979) 117 118 128; Cowen *New patterns of landownership* (1984) 45–50 54–57; Silberberg en Schoeman *The law of property* (1985) 185; *London and SA Exploration Co v Rouliot* 1891 SC 74 90; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Vanston v Frost* 1930 NPD 121 125.

Aangesien die eerste aspek reeds duidelik in die Suid-Afrikaanse en internasionale publiekreg omskryf is,[2] word daar uitsluitlik op die tweede aspek gekonsentreer.

Hoewel daar in Suid-Afrika teoreties genoegsame ruimte vir stedelike eiendomsontwikkeling bestaan, het die besef sedert die begin sestigerjare, en veral met die invoering van deeltitels, begin posvat dat ruimte vir die ontwikkeling van stedelike eiendomme ook in Suid-Afrika weens 'n verskeidenheid redes skaars en duur is.[3] Dit het gedurende 1986 daartoe aanleiding gegee dat die Suid-Afrikaanse Vervoerdienste die moontlikheid van die ontwikkeling van die ruimte bokant spoorlyne en rangeerwerwe in die middestad van verskeie stede in Suid-Afrika begin ondersoek het. 'n Soortgelyke ondersoek met betrekking tot die ontwikkeling van die ruimte bokant die beoogde oos-wes-snelweg deur die middestad van Pretoria is gedurende 1987 deur die munisipaliteit van Pretoria onderneem. In albei gevalle wou of kon hierdie instansies nie afstand doen van die eiendomsreg op die grondstukke nie en wil hulle ook nie die eiendomsontwikkeling self van stapel stuur nie. Eiendomsontwikkelaars is egter onwillig om ontwikkelingskemas aan te pak indien hulle nie genoegsame saaklike regte op die grondstuk verkry wat hulle as langtermynsekuriteit vir finansieringsdoeleindes kan gebruik nie.

Dit het daartoe aanleiding gegee dat albei hierdie instansies tans die moontlikheid oorweeg van lugruimontwikkeling, wat reeds sedert die begin van die eeu in die Verenigde State van Amerika (en die afgelope dekade of twee in lande soos Brittanje, Oostenryk, Israel, Japan en Australië) toegepas word.[4] In gemelde regstelsels hou lugruimontwikkeling in dat 'n grondeienaar eiendomsreg op sy grond behou, maar dat daar 'n horisontale verdeling van eiendomsreg op die grond plaasvind en 'n gedeelte van die lugruim bokant die grond 'n ander persoon in eiendomsreg toeval. Dit bring die stelreël *cuius est solum, eius est usque ad coelum*, wat inhou dat 'n grondeienaar bepaalde regte op die lugruim bokant sy grond tot 'n onbepaalde hoogte kan uitoefen, in gedrang. Maar wat is die presiese omvang en inhoud van hierdie beginsel?

1 ROMEINSE REG

Die beginsel *superficies solo cedit* (*omne quod inaedificatur solo, solo cedit*) (die grondeienaar word deur *accessio* eienaar van alle strukture wat permanent met sodanige bedoeling aan die grond vasgeheg word), is in die Suid-Afrikaanse reg goed bekend.[5] Die vraag ontstaan egter wat die regsposisie met betrekking tot die lugruim bokant 'n grondstuk wat nie ontwikkel is nie of die onontwikkelde gedeelte van die lugruim bokant 'n ontwikkelde grondstuk ingevolge gemeenregtelike beginsels is.

2 Vgl veral Goedhuis *Handboek voor het luchtrecht* (1943); Cooper *Explorations in aerospace law* (1968) 104–203; Margo en Conradie "Aviation and air transport" in Joubert (red) 1 *LAWSA* par 541–711 en die literatuur daar aangehaal.

3 Cowen 1973 *CILSA* 2–7; Van der Merwe "The Sectional Titles Act and the Wohnungseigentumsgesetz" 1974 *CILSA* 165–169; Van der Merwe *Sakereg* 275–277.

4 Pienaar "Legal aspects of private airspace development" 1987 *CILSA* 94–107.

5 Van der Merwe "Die Wet op Deeltitels in die lig van ons gemeenregtelike saak- en eiendomsbegrip" 1974 *THRHR* 116–117; Cowen *New patterns of landownership* 57–63.

Die *cuius est solum*-beginsel is nie uit die voor-klassieke of klassieke Romeinse reg afkomstig nie. Die begrip *aer* word wel in die *Institutiones* van Justinianus[6] tesame met vloeiende water, die see en die seestrand as *res communes omnium* omskryf. Daarenteen word die lugruim (*coelum*) of regte daarop nêrens in die Romeinsregtelike bronne voor Justinianus uitdruklik omskryf nie. Dat 'n grondeienaar wel bepaalde aksies in die voor-klassieke en klassieke Romeinse reg gehad het wat sy *dominium* ten opsigte van 'n grondstuk beskerm het en wat indirek op die lugruim bokant sy grond betrekking gehad het, blyk uit die volgende:[7]

- Takke van bome moet vyftien voet bokant die grond afgekap word sodat skaduwees van die takke nie 'n buurman benadeel nie.[8]
- Oorhangende bome gee aanleiding tot 'n aksie van die grondeienaar om die oorhangende takke of bome te laat verwyder.[9]
- Die feit dat 'n openbare grondstuk of 'n publieke pad daardeur geraak word, beperk nie die reg om 'n gebou op 'n aangrensende grondstuk deur verdere verdiepings te verhoog nie, maar dit verhoed wel dat 'n reg verkry word met betrekking tot 'n oorhangende balk of dak of ander struktuur of dat die vloei of afdrup van reënwater daardeur plaasvind, omdat die ruimte bokant sodanige grondstukke (die openbare grond) vrygelaat moet word.[10]
- 'n Persoon wie se gebou (op sy eie grond) volgens reg hoër as 'n ander se gebou opgerig is, mag onbeperk bokant sy eie gebou uitbrei, indien hy nie op die laer geboue 'n swaarder las (serwituut) plaas as wat hulle moet dra nie.[11]
- By die oprigting van nuwe strukture moet met sowel die grondstuk as die lugruim rekening gehou word.[12]
- Indien iemand 'n dak of geut oor 'n graf uitbrei, al raak dit nie aan die gedenksteen nie, kan die interdik *vi aut clam* steeds teen hom ingestel word omdat 'n graf nie net bestaan uit die grond waarin die lyk begrawe is nie, maar ook die lugruim daarbo.[13]

Uit die bogemelde gesag blyk dit dat, alhoewel daar geen direkte uitspraak ten opsigte van die lugruim bokant 'n grondstuk bestaan nie, daar tog in die Romeinse reg enkele voorbeelde bestaan van die beskerming van regte van 'n grondeienaar op die lugruim bokant sy grond. Om egter eenvoudig te verklaar dat die *cuius est solum*-beginsel inhou dat die grondeienaar eienaar van die

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6 *Inst* 2 1 1: "Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris."

7 McNair *The law of the air* (1964) 393–397.

8 *D* 43 27 1 8: "Lex duodecim tabularum efficere voluit ut quindecim pedes altius rami arboris circumcidantur: et hoc idcirco effectum est, ne umbra arboris vicino praedio noceret."

9 *D* 43 27 2: "Si arbor ex vicini fundo vento inclinata in tuum fundum sit, ex lege duodecim tabularum de adimenda ea recte agere potes ius ei non esse ita arborem habere."

10 *D* 8 2 1*pr*: "Si intercedat solum publicum vel via publica . . . neque altius tollendi servitutes impedit; sed immittendi protegendi prohibendi, item fluminum et stillicidiorum servitutem impedit; quia coelum, quod supra id solum intercedit, liberum esse debet."

11 *D* 8 2 24: "Cuius aedificium iure superius est, eius est in infinito supra suum aedificium imponere: dum inferiora aedificia non graviore servitute oneret, quam pati debent."

12 *D* 43 24 21 2: "In opere novo, tam soli quam coeli mensura facienda est."

13 *D* 43 24 22 4: "Si quis projectum aut stillicidium in sepulchrum immiserit, etiamsi ipsum monumentum non tangeret, recte cum eo agi, quod in sepulchro vi aut clam factum sit, quia sepulchri sit non solum is locus, qui recipiat humationem, sed omne etiam supra id coelum."

lugruim bokant sy grond is en dat dit uit die Romeinse reg afkomstig is, kan nie uit hierdie bronne afgelei word nie.[14]

2 MIDDELEEUSE ROMEINSE REG

Alhoewel daar nie met absolute sekerheid bepaal kan word waar en wanneer die *cuius est solum*-beginsel presies ontstaan het nie, is die vroegste bron waarin dit opgespoor kan word die *Glossa ordinaria* van Accursius. Dit dui egter nie noodwendig daarop dat Accursius die outeur van die glos was nie, aangesien die glosse deur verskeie outeurs saamgestel is.[15] Die glos ten opsigte van *coelum* in *Digesta* 8 2 1[16] lui: *cuius est solum, eius debet esse usque ad coelum* (die grondeienaar behoort ook eiendomsreg op die lugruim te hê). Ten opsigte van die woord *coelum* in hierdie glos is 'n latere glos aangebring: *cuius solum eius coelum* (die eienaar van die grond is die eienaar van die lugruim).[17]

Dit is nie so belangrik om te bepaal presies waar en wanneer hierdie beginsel ontstaan het nie as om te bepaal wat die presiese inhoud daarvan tydens die middeleeue was. Daar bestaan geen eenstemmigheid dat die grondeienaar wel na die oordeel van die Glossatore die *eienaar* van die lugruim bokant sy grond was nie, alhoewel dit duidelik is dat die grondeienaar se uitoefening van eiendomsbevoegdhede ten opsigte van sy grond wel beskerm is deurdat ander persone verbied is om inbreuk op die lugruim bokant die grond te maak.[18]

3 ROMEINS-HOLLANDSE REG

Grotius vergelyk die regsposisie van die lugruim met dié van die see.[19] Aangesien die see so omvangryk is en vir verskeie doeleindes deur verskillende persone aangewend kan word, is die see nie vir privaateiendomsreg vatbaar nie.[20] Na analogie hiervan is die lugruim ook nie vir privaateiendomsreg vatbaar nie, maar hou alle regte op die lugruim bokant 'n grondstuk verband met die eiendomsreg op die grondstuk. Grotius bevestig wel dat die grondeienaar bepaalde regte ten opsigte van die lugruim bokant sy grond het, byvoorbeeld dat hy iemand kan verbied om van sy grond af voëls te jag. Dit bly egter steeds die uitoefening van regte wat met sy eiendomsreg op die grond verband hou en

14 Die standpunt dat dit uit die Romeinse reg afkomstig is, word egter wel deur sommige juriste geheuldig (vgl bv Blackstone *Commentaries on the laws of England* (1889) 19; Roby *Roman law in the times of Cicero and of the Antonines I* (1902) 414; Buckland *Main institutions of Roman private law* (1931) 103–104; Kaser en Dannenbring *Roman private law* (1980) 121; vgl egter die standpunte van Van der Merwe *Sakereg* 128 vn 170 en Cowen *New patterns of landownership* 56 dat hierdie stelreël nie uit die Romeinse reg afkomstig is nie).

15 Cooper *Roman law and the maxim "cuius est solum"* (1952) 4–5; McNair *The law of the air* 395; Wright *The law of airspace* (1966) 13–14.

16 Sien vn 10 vir die oorspronklike teks.

17 McNair *op cit* 395; Wright *op cit* 13–14 vn 9.

18 Vgl die uiteensetting van die glosse op *D* 8 2 8, *D* 43 24 21 2 en *C* 3 34 8 deur McNair *op cit* 395–396, waaruit dit blyk dat daar nie eenparigheid bestaan oor die vraag of die grondeienaar eiendomsreg of ander regte op die lugruim verkry het nie. Sien ook Cooper *Roman law* 6–16; Cooper *Explorations in aerospace law* (1968) 58–73.

19 *De jure belli ac pacis* 2 2 3 1.

20 Wassenbergh "Parallels and differences in the development of air, sea and space law in the light of Grotius' heritage" in Matte (red) *Annals of air and space law* (1984) 9 163–175.

Grotius verklaar nêrens dat dit in hierdie omstandighede op eiendomsreg van die lugruim dui nie.[21]

Bevestiging van hierdie siening van Grotius blyk ook uit sy *Inleidinge*:[22]

> "[M]aar de lucht mag yder een tot betimmering ghebruicken recht boven sijn erff, in de hoogte oneiendelick, maer in de lengte ende breette niet buiten sijn erff."

Ook Voet gee by sy bespreking van eiendomsreg geen aanduiding dat die grondeienaar eienaar van die lugruim bokant sy grond word nie. Hy verklaar wel dat 'n grondeienaar kan bepaal op welke wyse en wanneer voëls van sy grond af gejag mag word.[23] Voorts bevestig Voet die reëls afkomstig uit die *Twaalf Tafels* dat oorhangende takke en bome wat die grens oorskry aan die grondeienaar 'n verwyderingsaksie verskaf, en dat die grondeienaar die reg het om geboue op sy grond te verhoog.[24]

Pufendorf[25] verklaar uitdruklik dat 'n grondeienaar nie eienaar van die lugruim bokant sy grond word nie, maar slegs bevoegdhede kan uitoefen tot op die hoogte wat hy die lugruim bokant sy grond gebruik. Hy knoop hierdie beginsel aan sy stelling dat die owerheid slegs soewereiniteit ten opsigte van die lugruim bokant grondstukke wat in privaateiendomsreg gehou word, kan uitoefen tot op die hoogte wat die grondeienaar die lugruim gebruik – 'n stelling wat natuurlik nie meer in die moderne lugvaartreg van toepassing is nie.[26]

4 ENGELSE EN AMERIKAANSE REG

Die vroegste beslissing waarin die *cuius est solum*-beginsel in die Engelse reg sy verskyning maak, is *Bury v Pope*.[27] In hierdie saak, waarin 'n grondeienaar se remedies in die geval van die bouwerk van 'n buurman wat sy lig afgekeer het, oorweeg word, word die spreuk aangehaal as *cuius est solum, eius est summitas usque ad coelum* en word weens die toepassing daarvan in die buurman se guns beslis. Die verwysing na *summitas* en *eius est* (in plaas van *eius debet esse*) is toevoegings wat nie van die Glossatore afkomstig is nie.[28] Dit is daarna deur veral Coke[29] en Blackstone[30] gebruik om aan te toon dat eiendomsreg op grond die lugruim daarbo insluit. Hoewel hierdie toepassing van die *cuius est solum*-beginsel in verskeie Engelse beslissings bevestig is,[31] het dit nie sonder kritiek geskied nie. McNair verklaar in hierdie verband:[32]

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21 Cooper *Explorations* 79.

22 *Inleidinge tot de Hollandsche rechts-geleerdheid* 2 1 23 ; 2 34 8; 2 34 21 en 2 34 29; vgl ook Van Leeuwen *Het Rooms-Hollands-regt* 2 1 2; 2 21 19 en 20.

23 *Commentarius ad pandectas* 41 1 6.

24 *Ibid* 43 27 en 8 2 5 onderskeidelik.

25 *De jure naturae et gentium* 4 5 5.

26 Cooper *Explorations* 81.

27 Cro Eliz 118, 78 Eng Rep 375 (1587).

28 Cooper *Roman law* 26; Wright *op cit* 15.

29 *Coke on Littleton* (1628) soos aangehaal deur Cooper *Roman law* 26 en Wright *op cit* 12.

30 *Commentaries on the laws of England* (1770) 2 18–19: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cuius est solum, eius est usque ad coelum* (whoever has the land possesses all the space upwards to an indefinite extent), is the maxim of the law; . . . So that the word 'land' includes not only the face of the earth, but everything under it, or over it."

31 Vgl bv *Penruddock's Case* Trin 40 Eliz, 5 Coke's Rep 100, 77 Eng Rep 210 (1598); *Rolf's Case* Pasch 25 Eliz (1583); *Baten's Case* 9 Coke's Rep 53, 77 Eng Rep 810 (1610); McNair *op cit* 32; Wright *op cit* 20.

32 *Op cit* 393.

> "The tyranny of this maxim, in England, at any rate, seems to be attributable in part to the traditional respect which English lawyers, while rejecting the whole *corpus juris civilis*, habitually show to what they conceive to be a rule of Roman law when it happens to accord with their own ideas, and in part to the grandiloquent manner adopted by English lawyers, notably Coke and Blackstone, in exalting the extent and importance of property in land. In the first place the maxim is not Roman."

Daar moet egter beklemtoon word dat bogemelde beslissings almal verband gehou het met hinder ("nuisance") en nie met 'n oorskryding of betreding ("trespass") nie. Ingevolge die Engelsregtelike onderskeid tussen die twee begrippe moet daar by "trespass" 'n werklike fisiese ingryp ten opsigte van die onroerende goed van die grondeienaar plaasgevind het, terwyl dit nie noodwendig 'n vereiste by "nuisance" is nie; die hinder kan geleë wees in die feit dat 'n persoon sy eie grondstuk sodanig gebruik dat dit op sy buurman se uitoefening van sy eiendomsbevoegdhede inbreuk maak sonder dat daar enige wesenlike oorskryding is.[33] Redelike gebruik van die grondstuk wat 'n nadeel vir die buureienaar inhou, word egter nie as "nuisance" beskou nie.

Hierdie onderskeid is bevestig in die beslissing *Pickering v Rudd*.[34] Die eiser se eis het ontstaan omdat 'n uithangbord van sy buurman die lugruim bokant sy grondstuk oorskry het. Hy baseer sy eis op die feit dat hy ingevolge die *cuius est solum*-beginsel eienaar van die lugruim bokant sy grond is. In sy uitspraak beperk lord Elenborough die aanwending van die *cuius est solum*-beginsel tot oorskryding wat werklik inbreuk maak op die uitoefening van die grondeienaar se eiendomsbevoegdhede ten opsigte van die *grondstuk en aanhegtings* daartoe, en nie die hele lugruim daarbo nie. As voorbeeld toon hy aan dat dit nie "trespass" is wanneer iemand 'n skoot afvuur en die patroon, sonder om enige skade aan te rig, die lugruim bokant die grond deurkruis nie. Indien die patroon egter skade aanrig aan enige aanhegting tot die grond, is dit wel "trespass". Die grondeienaar is dus nie eienaar van die lugruim nie, maar kan slegs eiendomsbevoegdhede ten opsigte van sy grond tot 'n onbeperkte hoogte uitoefen deur aanhegtings en bouwerk.

Die leemte in hierdie beslissing was egter dat lord Ellenborough nie onderskei het tussen 'n tydelike gebruik van of inbreuk op die lugruim (deur byvoorbeeld 'n koeël of 'n lugballon) en 'n permanente oorskryding of 'n oorskryding van nie-kortstondige aard (deur byvoorbeeld 'n uithangbord of 'n deel van 'n gebou) nie en dat hy ook nie die hoogte waarop die oorskryding plaasvind het, in ag geneem het nie. Dit het gelei tot kritiek op sy standpunt in verskeie latere beslissings.[35] Pollock[36] verklaar:

> "Clearly, it would be a trespass to sail over another man's land in a balloon (much more in a controllable aircraft) at a level within the height of ordinary buildings, and it might be a nuisance to keep a balloon hovering above the land even at a greater height."

Alhoewel daar in enkele latere beslissings direk of indirek verwys is na die toepassing van die *cuius est solum*-beginsel as sou die grondeienaar ook eienaar van die lugruim wees,[37] is die huidige toepassing van hierdie beginsel in die

33 Wright *op cit* 21.
34 4 Campb 219, 171 Eng Rep 70 (1815).
35 *Fay v Prentice* 1 CB 828, 135 Eng Rep 769 (1845); *Kenyon v Hart* 6 B&S 249, 122 Eng Rep 1188 (1865); Pollock *A treatise on the law of torts* (1894) 423; Wright *op cit* 23–25.
36 *The law of torts* (1923) 352.
37 Vgl bv *Wandsworth Board of Works v United Telephone Company* 13 QB 904 (1884); *Finchley Electric Light Company v Finchley Urban District Council* 1 Ch 437 (1903); *Kelsen v Imperial Tobacco Company* 2 QB 334 (1957).

Engelse reg beperk tot die uitoefening van eiendomsbevoegdhede op die grondstuk deur die grondeienaar tot die hoogte wat hy sy grond redelikerwys kan gebruik.[38] Hierdie standpunt hou veral rekening met die praktiese probleme wat lugvaart sou meebring indien die lugruim tot op 'n onbeperkte hoogte die grondeienaar in eiendomsreg sou toeval. Dit beteken egter nie dat dit net tot "nuisance" of "trespass" aanleiding kan gee indien daar werklike fisiese skade was nie, maar indien op enige wyse op die grondeienaar se uitoefening van die eiendomsbevoegdhede inbreuk gemaak word.[39]

In die Amerikaanse reg het die *cuius est solum*-beginsel ook 'n beduidende invloed uitgeoefen. Alhoewel die regsposisie van staat tot staat afsonderlik gereël is, het dit grootliks ooreengestem. Aanvanklik is die beginsel in die lig van Coke en Blackstone se uiteensetting daarvan so geïnterpreteer dat die eienaar van grond ook eienaar is van die lugruim daarbo tot op 'n onbeperkte hoogte en dat enige gebruik van die lugruim, ongeag die hoogte of duur daarvan, op die eienaar se eiendomsbevoeghede inbreuk maak.[40] Dit het aanleiding gegee tot die volgende beslissings: *Lyman v Hale*[41] (oorhangende takke mag deur 'n grondeienaar verwyder word); *Smith v Smith*[42] (oorhangende balke dui op oorskryding); *Hannabalson v Sessions*[43] (om 'n arm uit te steek oor die grens van 'n grondstuk dui op betreding ("trespass"), want "it is one of the oldest rules of property that the title of the owner of the soil extends, not only downward to the centre of the earth, but upward 'usque ad coelum' "); *Butler v Frontier Telephone Company*[44] ("The law regards the empty space as it if were a solid, inseparable from the soil, and protects it from hostile occupation accordingly, for ... within reasonable limitations land includes also the space above and the part beneath. 'Usque ad coelum' is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man").

Dat dit nie so 'n uitgemaakte saak is dat die standpunte van Coke en Blackstone tans nagevolg word nie, blyk uit die beslissing in *Hinman v Pacific Air Transport*:[45]

> "We own so much of the space above the ground as we can occupy or make use of, in connection with the use of our land. This right ... varies with our varying needs and is co-extensive with them. The owner of land owns so much of the airspace above him as he uses, but only so long as he uses it ... Any claim of the landowner beyond this cannot find a precedent in law, nor support in reason."

Hoewel daar uitdruklik vermeld word dat die grondeienaar ook eienaar van die lugruim bokant sy grond is, word dit beperk tot die deel van die lugruim wat hy in werklikheid okkupeer.[46]

Daar het sedert die begin van die eeu 'n toenemende behoefte aan die horisontale verdeling van eiendomsreg op onroerende goed in die VSA ontstaan.[47]

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38 Cooper *Roman law* 34–37; McNair *op cit* 41–50; Wright *op cit* 25–30; Landon *Pollock's law of torts* (1951) 262–265; Salmond en Heuston *The law of torts* (1987) 52–54.
39 Salmond en Heuston *op cit* 53–54.
40 Cooper *Roman law* 38; Wright *op cit* 31–34.
41 11 Con 177 (1836).
42 110 Mass 302 (1872).
43 116 Iowa 457 (1902).
44 186 NY 486 (1906).
45 84 F (2d) 755 (1936).
46 Cooper *Roman law* 39; McNair *op cit* 55; Wright *op cit* 213; vgl ook *US v Causby* 328 US 256 (1946).
47 Powell *Law of real property* 2A (1986) par 263 1.

Dit het ingehou dat die ruimte bokant spoorlyne en rangeerwerwe ander persone in eiendomsreg toeval as die eienaar van die grondoppervlakte.[48] Weens die onsekerheid in die Amerikaanse regspraak betreffende die toepassing van die *cuius est solum*-beginsel en eiendomsreg van grondeienaars op lugruim, was dit noodsaaklik dat daar in die verskillende state wetgewing aanvaar moes word om die horisontale verdeling van eiendomsreg en die gepaardgaande eiendomsreg op lugruimeenhede moontlik te maak.[49] Tans bestaan daar wetgewing in die meeste state wat horisontale verdeling van grondstukke en eiendomsreg op lugruimeenhede moontlik maak en die American Bar Association het selfs 'n Model Airspace Act geformuleer wat as riglyn vir toekomstige wetgewing kan dien.[50]

Powell[51] omskryf "airspace" soos volg:

> "Airspace, an independent unit of real property created through the horizontal subdivision of real estate, may be defined as the space above a specified plane over, on or beneath a designated tract of land; air rights may be defined as the right to occupy such airspace. The air itself is no real property and is not conveyed. Airspace, however, is real property when described in three dimensions with reference to a certain locus."

5 SUID-AFRIKAANSE REG

5 1 Regspraak

Die toepassing van die *cuius est solum*-beginsel blyk direk of indirek uit enkele hofbeslissings. In *De Villiers v O'Sullivan*,[52] 'n saak wat oor oorskryding van 'n grenslyn gehandel het, word op Grotius *Inleidinge* 2 34 21 en Van Leeuwen *Het Rooms-Hollands-regt* 2 21 19 en 20 gesteun. Al hierdie tekste handel oor oorskryding deur oorhangende takke en bome van 'n buureienaar se grond af. Sonder om uitdruklik na die *cuius est solum*-beginsel te verwys, word 'n grondeienaar se uitoefening van sy eiendomsbevoegdhede op die lugruim bokant sy grond bevestig, maar daar word in bogemelde beslissing geensins geïmpliseer dat die grondeienaar ook eienaar van die lugruim is nie. Sonder om op enige gemeenregtelike of ander gesag te steun, word egter in *London and SA Exploration Company v Rouliot*,[53] 'n uitspraak wat oor minerale regte handel, *obiter* bevind:

> "The theory of the law is that the owner of land owns upwards to the skies and downwards to the centre of the earth, but it is obvious that his exercise of the rights of ownership are practically confined to the surface and its neighbourhood above and below."

Hierdie standpunt dat die grondeienaar eienaar van die lugruim bokant sy grond is, word bevestig deur regter Mason in *Rocher v Registrar of Deeds*[54] (ook 'n

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48 Ball "Division into horizontal strata of the landspace above the surface" 1930 *Yale LJ* 661 e v; Wright *op cit* 223–227; Cowen *New patterns of landownership* 47–48; Pienaar 1987 *CILSA* 98–99.

49 Vgl bv die wetgewing m b t die gebied bokant die Grand Central Terminal in New York in 1903 en die wetgewing in Illinois in 1927. Sien ook Wright *op cit* 224–225; Pienaar *op cit* 94 98–99; *Phoenix Insurance Company of Hartford v New York and Harlem RR* 59 F 2d 962 (2d Cir 1932); *City of Chicago v Lord* 276 Ill 571, 115 NE 397 (1917); *City of Chicago v Sexton* 408 Ill 351, 97 NE 2d 287 (1951); *Hickey v Illinois Central RR* 35 Ill 2d 427, 220 NE 2d 415 (1966).

50 Wright *op cit* 211–260; Rohan en Reskin *Cooperative housing law and practice* (1985) 2A App 492; Powell *op cit* par 263 2.

51 *Op cit* par 263 1.

52 1883 SC 251 256.

53 1891 SC 74 90.

54 1911 TPD 311 315.

uitspraak wat oor minerale regte handel, weer eens *obiter* en sonder om na enige gemeenregtelike gesag te verwys):

> "As I understand our law, the owner of the surface of the land is the owner of the whole of the land and of all the minerals in it; he is the owner of what is above and what is below. It is unnecessary to determine how far, in these days of airships (which at present have not arrived in any numbers in South Africa), the *dominium* extends upwards."

In *Vanston v Frost*[55] bevestig regter Tatham dat oorskryding van die lugruim bokant 'n grondstuk in bepaalde omstandighede "trespass" daarstel, maar brei nie uit oor die aard en die omvang van die grondeienaar se reg op die lugruim bokant sy grond nie. Dit wil voorkom asof dieselfde onderskeid as in die Engelse reg gemaak word tussen "trespass", wat slegs 'n delik is indien daar werklike fisiese inbreukmaking is, en "nuisance" waar daar nie noodwendig fisiese inbreuk bewys hoef te word nie.[56]

Die slotsom waartoe op grond van die bogemelde beslissings gekom word, is dat daar sonder verwysing na gemeenregtelike gesag in die Suid-Afrikaanse regspraak *obiter* aanvaar word dat die grondeienaar wel eienaar van die lugruim bokant sy grond is, maar dat daar nie uitsluitsel gegee word tot op watter hoogte nie. Dit sal waarskynlik, soos in die Amerikaanse reg, tot op die hoogte wees wat die grondeienaar sy eiendomsbevoegdhede redelikerwys kan uitoefen.

5 2 Wetgewing

Ingevolge die voorskrifte van die Registrasie van Aktes Wet 47 van 1937 word geen horisontale verdeling van eiendomsreg op onroerende goed toegelaat nie (behalwe in die geval van deeltitels); ook word nie verklaar wat die grondeienaar se regte ten opsigte van die lugruim bokant sy grond is nie. Voorts word die landmeterskaarte wat ten opsigte van grondstukke geregistreer word, slegs aan die hand van vertikale grenslyne opgestel.[57] Aanhegtings tot grond val wel die grondeienar weens *accessio* en die toepassing van die *superficies solo cedit*-beginsel in eiendomsreg toe, maar dit word nie in die akteskantoor geregistreer nie.

In *Rosen v Rand Townships Registrar*[58] en *Kain v Kahn*[59] is beslis dat dit moontlik is om 'n langtermynhuurkontrak ten opsigte van 'n gedeelte van 'n gebou, welke gedeelte nie op grondvlak geleë is nie, in die akteskantoor te registreer. Dit dui egter nie op horisontale verdeling van eiendomsreg op die grond nie. Hierdie twee beslissings is voorts gekritiseer op grond van die feit dat daar geen diagramme ingevolge die voorskrifte van die Registrasie van Aktes Wet 47 van 1937[60] geregistreer kan word nie.[61]

Artikel 11 van die Lugvaartwet 74 van 1962 beperk (sonder om uitdruklik na lugregte te verwys) 'n grondeienaar se uitoefening van eiendomsbevoeghede soos volg:

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55 1930 NPD 121 125.
56 Sien teks by vn 33 hierbo.
57 Cowen *New patterns of landownership* 56; Jones *Conveyancing* (1985) 1–2.
58 1939 WLD 5.
59 1986 4 SA 251 (K).
60 Reg 73 (2).
61 Jones *Conveyancing* 409–410; Lewis "Real rights in land: a new look at an old subject" 1987 *SALJ* 599–615; Sonnekus "Herklassifikasie van die aard van die huurder se reg?" 1987 *TSAR* 223–228.

> "*Oortreding, stoornis en verantwoordelikheid vir skade.* (1) Daar kan geen aksie ingestel word nie ten opsigte van oortreding of stoornis slegs uit hoofde van die vlieg van lugvaartuie oor enige eiendom op 'n hoogte wat nie met inagneming van die wind, weer en al die omstandighede van die geval, redelik is, of die voorvalle wat gewoonlik met so 'n vliegtog gepaard gaan, mits die bepalings van hierdie Wet en van die Konvensie en die Transito-ooreenkoms behoorlik nagekom word."

Alhoewel hierdie bepaling indirekte gesag bied dat grondeienaars bepaalde regte op die lugruim bokant hulle grond kan uitoefen, bied dit geen direkte gesag dat grondeienaars *eiendomsreg* op sodanige lugruim verkry nie.

5 3 Regsliteratuur

In die Suid-Afrikaanse regsliteratuur het die toepassing van die *cuius est solum*-beginsel ook al aandag geniet, hoewel daar dikwels net kortweg daarna verwys word. Milton[62] vermeld dat die regte (sonder nadere omskrywing of dit eiendomsreg of inhoudsbevoegdhede is) van die grondeienaar ook die lugruim bokant die grondstuk insluit, maar verklaar dan:

> "It is no more than a theory and is merely a convenient point of departure for legal theorising, as in fact, it is clear that an owner has no rights over the air space above his land."

Hiermee kan nie akkoord gegaan word nie. Alhoewel dit miskien op grond van onduidelike gemeenregtelike gesag betwyfel kan word dat die grondeienaar *eiendomsreg* op die lugruim bokant sy grond verkry en die uitoefening van die grondeienaar se regte beperk word tot op die hoogte waarop hy dit redelikerwys kan benut, is dit teenstrydig met gemeenregtelike gesag en die Suid-Afrikaanse regspraak om te verklaar dat die grondeienaar in werklikheid geen regte bokant die grondstuk kan uitoefen nie. Dit sou die toepassing van die regsreëls met betrekking tot oorskryding deur middel van oorhangende takke, bome en geboue sinloos maak.

Hahlo en Kahn,[63] na wie Milton ter ondersteuning van sy standpunt verwys, ontken nie die regte van die grondeienaar op die lugruim bokant sy grond nie, maar beperk dit tot die redelike uitoefening van eiendomsbevoegdhede ten opsigte van die grond. Schoeman[64] stel 'n teenoorgestelde standpunt deur te verklaar dat, ingevolge die gemenereg, die grondeienaar eienaar van die lugruim bokant sy grond tot 'n onbeperkte hoogte is, onderhewig aan bepaalde publiekregtelike beperkings. Dit blyk uit die voorafgaande[65] dat daar in die gemeenregtelike bronne nêrens uitdruklik gestel word dat die grondeienaar ook *eienaar* van die lugruim bokant die grond is nie, hoewel bepaalde regte op die lugruim bokant die grond tot 'n beperkte hoogte wel erken word. In die Suid-Afrikaanse regspraak word by die erkenning van eiendomsreg op die lugruim bokant 'n grondstuk nêrens na gemeenregtelike gesag verwys nie.

Margo[66] interpreteer ook die *cuius est solum*-beginsel sodanig dat die grondeienaar eienaar van die lugruim bokant die grondstuk word – onderhewig aan bepaalde publiekregtelike beperkings – met verwysing na lugvaartwetgewing in

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62 "The law of neighbours in South Africa" 1969 *Acta Juridica* 123 234 vn 671, net verwysing na Hahlo en Kahn *South Africa: the development of its laws and constitution* (1968) 580.
63 *Op cit* 580.
64 Silberberg en Schoeman *op cit* 185 vn 127.
65 Vgl par 1–3 hierbo.
66 1 *LAWSA* par 553 vn 5: "The rule is cuius est solum eius est usque ad coelum et ad inferos (ownership of the ground extends to the heavens and to the depths of the earth)."

die besonder. Hy grond sy standpunt op die uiteensetting van Grotius en Voet, maar soos hierbo uiteengesit,[67] kan so 'n afleiding nie uit die gemeenregtelike bronne gemaak word nie.

Van der Merwe[68] dui tereg aan dat die *cuius est solum*-beginsel nie uit die Romeinse reg afkomstig is nie, maar gee geen aanduiding van die werklike trefwydte van die beginsel nie en laat hom ook nie uit of dit eiendomsreg op die lugruim bokant die grondstuk inhou of nie. Die feit dat dit nie van Romeinse oorsprong is nie, word bevestig deur Cowen[69] wat egter aantoon dat die beginsel wel inhou dat eiendomsreg op die lugruim deur die grondeienaar verkry word, maar dat die eiendomsreg nie horisontaal verdeelbaar is nie.

Die regsposisie in die Suid-Afrikaanse reg kan dus soos volg opgesom word:

- Daar bestaan geen gemeenregtelike gesag dat die grondeienaar eienaar van die lugruim bokant sy grond is nie. Tog word erken dat die grondeienaar bepaalde regte op die lugruim bokant sy grond het. Dié regte behels waarskynlik die uitoefening van eiendomsbevoegdhede voortvloeiend uit die eiendomsreg op die eienaar se grond.
- In die Suid-Afrikaanse regspraak word bevestig dat die grondeienaar eiendomsreg op die lugruim bokant sy grond verkry. Dit geld egter slegs tot op die hoogte waarop die eienaar sy eiendomsbevoegdhede redelikerwys kan uitoefen, en is boonop onderhewig aan publiekregtelike beperkings.
- In wetgewing word geen uitsluitsel gegee of die regte van die grondeienaar op die lugruim wel eiendomsreg is nie, maar die grondeienaar se uitoefening van regte op die lugruim bokant sy grond word wel indirek erken.
- Skrywers oor die onderwerp is verdeeld. Sommige erken die eiendomsreg van die grondeienaar op die lugruim; ander tipeer dit net as *regte*; en in een geval word dit selfs geheel en al ontken.

Die gemeenregtelike en statutêre gesag blyk nie voldoende te wees om met sekerheid te kan verklaar dat 'n grondeienaar eiendomsreg op die lugruim bokant sy grond het nie, en die enigste regspraak in hierdie verband is *obiter* menings. Voorts is dit geykte reg dat eiendomsreg op onroerende goed (met die uitsondering van deeltitels) nie horisontaal verdeelbaar is nie.

Myns insiens is bykomende wetgewing die enigste wyse waarop eiendomsreg op lugruimeenhede, afsonderlik van eiendomsreg op die onderliggende grondstuk, in die Suid-Afrikaanse reg erken kan word. Dit sal òf nodig wees om die Opmetingswet 9 van 1927 en die Registrasie van Aktes Wet 47 van 1937 te wysig, òf wetgewing soortgelyk aan die Wet op Deeltitels 95 van 1986 sal aanvaar moet word. Alhoewel dit ingevolge die Amerikaanse reg moontlik is om eienaar van 'n onbeboude lugruimeenheid te word (bloot deur die vasstelling van koördinate), kom dit neer op eiendomsreg op 'n onstoflike onroerende saak, 'n konstruksie wat verskeie praktiese probleme inhou.[70] Die mees praktiese oplossing is waarskynlik om wetgewing soortgelyk aan deeltitelwetgewing te aanvaar wat eiendomsreg op lugruimeenhede slegs moontlik maak indien 'n gebou opgerig en 'n lugruimontwikkelingskema geregistreer is. Die verskil is dan net dat die

67 Vgl par 3 hierbo.
68 *Sakereg* 128 vn 170.
69 1973 *CILSA* 15; *New patterns of landownership* 56.
70 Pienaar 1987 *CILSA* 102–107.

eienaar van 'n lugruimeenheid die geregistreerde eienaar van 'n deel van 'n gebou is sonder dat hy eiendomsreg op die grond verkry. Daar sal vanselfsprekend ook bykomende maatreëls ten opsigte van gebruiksregte, toegang, ondersteuning, die regsposisie by vernietiging van die gebou en verskeie ander aangeleenthede getref moet word wat nie in deeltitelwetgewing nodig is nie.

Consumer law: the need for reform

*(continued)**

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4 THE RIGHT TO KNOW

The right of consumers to know is mainly concerned with the question of fair advertising and information concerning the quality and quantity of products as well as proper labelling. According to our common law an advertisement is usually regarded as "an invitation to do business" rather than an offer to sell something at the price advertised.[106] This means that generally consumers cannot sue a shop which advertises goods at one price and then informs them that the price is wrong or the stock is no longer available. Reputable shops, however, would not do this. They would say in their advertisements that the product is available at that price "for as long as stocks last".

4 1 Puffing

The common law of "puffing" is really the cornerstone of the advertising industry which has been described by some writers as "institutionalised dishonesty".[107] Most legal systems accept the principle that the consumer of goods and services is entitled to protection under the law if the goods and services supplied are fraudulently described. "Puffs", however, are advertisements that are based on the seller's opinion or taste or some obvious exaggeration (for example "the best cigarette in the world"). The difference between "puffing" and misleading advertisements, however, is sometimes difficult to define.[108] If an advertisement is merely an opinion or obvious exaggeration it is "puffing", but if it appears to be factual and misleads, it may be a misleading advertisement. Where a person has been misled by an advertisement which constitutes a material misrepresentation of a warranty, he has a remedy in contract.

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* See 1989 *THRHR* 32–44.

106 *Crawley v Rex* 1909 TS 1105 1108.

107 Grunfeld "Reform in the law of contract" 1961 *Mod LR* 62 81; cf Roberts 1980–1 *NULR* 438.

108 Cf *Geldenhuys and Neethling v Beuthin* 1918 AD 426 435 "It is often difficult to draw the line between mere puffing which has no effect on the validity of a bargain and misrepresentation which justifies its repudiation."

4 2 False and misleading advertisements

The Trade Practices Act[109] now makes "false and misleading advertising" an offence.[110] In some respects the provisions are similar to those under the English Fair Trading Act,[111] the Australian Trade Practices Act[112] and the American Federal Trade Commission Act.[113] Once again, however, the Trade Practices Act does not provide for specific offences. The latter would make it easier for the state to prove the nature of the offence and at the same time give businessmen a clear idea of where they stand. Consumers would be afforded more protection if provision was made in the Trade Practices Act for a civil remedy in cases where false or misleading advertising has taken place.[114] Such a provision would encourage consumers to lay complaints under the act because successful prosecutions would be to their advantage. As regards advertisers, the threat of additional civil liability would alert them to the necessity of confining themselves to lawful advertising practices. Another useful provision would be to allow consumer organisations to obtain relief against advertisers who engage in illegal advertising practices. This approach has been adopted in West Germany which has legislation[115] that recognises that consumer organisations may, without proof of fault or negligence by defendants, bring an action if they can show that there is a danger of future injury, or if injury has already occurred, a danger of a repetition of that injury.[116] Another useful provision would be to include a clause in the Trade Practices Act that provides for compensation orders against advertisers who contravene the act. Such a clause exists in the Australian Trade Practices Act[117] in respect of any contravention of the act.[118]

In the United States the Federal Trade Commission regulations outlaw "bait and switch" advertising as well as advertisements for financial arrangements that are not generally available to consumers.[119] Similar provisions exist in Sweden and the European Community has drawn up a Draft Directive on Misleading and Unfair Advertising.[120]

4 3 Improving the quality of advertisements

A number of strategies have been adopted in the United States to improve the quality of advertising. For example, "claim substantiation" requires manufacturers to provide complete documentation for any scientific advertising claims

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109 Act 76 of 1976.
110 S 9 and 13.
111 Fair Trading Act of 1973.
112 Trade Practices Act of 1974.
113 The Federal Trade Commission Act 15 USCA par 14 *et seq.*
114 Cf Roberts 1980–1 *NULR* 451.
115 Act Prohibiting Unfair Competition of 1909; cf Cranston 55.
116 S 1 3 13; cf Reich and Micklitz *Consumer legislation in the Federal Republic of Germany* (1981) 112 *et seq.*
117 Trade Practices Act of 1974.
118 S 80 and 82.
119 Federal Trade Commission "Guides on bait advertising" 16 CSR 238 (1968); cf Epstein and Nickles 26.
120 Draft Directive on Misleading and Unfair Advertising (July 1979); see generally Lawson *Advertising and labelling laws in the Common Market* (1981); cf Cranston 47. See also Pitofsky "Beyond Nader: consumer protection and the regulations of advertising" 1977 *Harv LR* 661.

purporting to be scientifically based.[121] "Counter-advertising" obliges the media to carry free-of-charge advertising prepared by public interest groups which rebut misleading claims made by commercial interests.[122] "Corrective advertising" is used to counteract the residual effect of deceptive advertising and to deter businesses from using it in the first place.[123] The Federal Trade Commission may give an advertiser the option of ceasing to advertise for a year or devoting 25% of advertising expenditure to corrective advertisements.[124] The Australian Trade Practices Act provides for the issuing of injunctions[125] and it has recently been recommended that the Director General of Fair Trading in the United Kingdom should have the same power.[126] It is submitted that there is scope for the advertising provisions in the Trade Practices Act to be given more teeth in South Africa to bring them into line with those in Australia and the United States.

4 4 Labelling

In South Africa the consumer's right to know is also protected by statutes dealing with merchandise marks,[127] trade marks,[128] agricultural products,[129] dairy products[130] and weights and measures.[131] Some of these statutes deal with questions of labelling, but by and large South Africa's laws concerning labelling and

121 Cf *Firestone Tyre and Rubber Company v FTC* 481 2d 46 (1973), cert denied 414 US 112 (1973); *National Commission on Egg Nutrition v FTC* 570 F 2d 157 (1977), cert denied 439 US 821 (1978). See generally Weiner "The ad substantiation programme" 1981 *Am ULR* 429.

122 Counter-advertising has been used where public interest groups have taken advantage of the "fairness" doctrine applying to television and radio broadcasting to get their views broadcast (Comment "And now a word against a sponsor: extending the FTC's fairness doctrine to advertising" 1972 *Cal LR* 1416). The doctrine has been applied to cigarette advertising and commercials for large cars on the grounds that such advertisements raise controversial issues of public importance such as health and pollution (*Friends of the Earth v FTC* 449 F 2d 1164 (1971); *Banzhaf v FTC* (1968) 405 F 2d 1082 (1968) cert denied 396 US 842 (1969).

123 The residual effect continues however because: (a) subconsciously the advertisement lingers on in the minds of consumers after the advertisements have ceased; and (b) the advertisement generates false goodwill on later purchases (cf Cranston 58).

124 Cornfield "A new approach to an old remedy: corrective advertising in the Federal Trade Commission" 1976 *Iowa LR* 693. For example in *Warner-Lambert Co v FTC* 562 F 2d 749 (1977), cert denied 435 US 950 (1978), the advertisers had to include the following statements in advertisements for mouthwash for a period of two years: "Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats" (cf Spanogle and Rohner 62).

125 S 80 and 82 of the Trade Practices Act of 1974.

126 HMSO *Review of the Trade Descriptions Act 1968* Cmnd 6628 (1976) 58 *et seq.*

127 S 6 of the Merchandise Marks Act 17 of 1941 makes it an offence to forge or apply falsely a trade mark which has been registered as such, and to apply any false trade descriptions to goods. A "false trade description" is one that is false in a material respect as regards the goods to which it is applied (s 1).

128 S 16(1) of the Trade Marks Act 62 of 1963 prohibits the registration as a trade mark or part of a trade mark of any matter, the use of which would be likely to deceive or cause confusion or would be contrary to law or morality, or would be likely to give offence or cause annoyance to any person or class of persons or would otherwise be disentitled to protection in court. The registration of trade marks resembling each other is also prohibited (s 17). Offending trade marks can therefore not be used in advertisements.

129 The Agricultural Products Grading Act 9 of 1959.

130 The Dairy Industry Act 30 of 1961.

131 The Weights and Measures Act 13 of 1958.

the provision of adequate and useful information to consumers lag behind those in other countries. For example, in the United Kingdom the food labelling regulations provide that full and clear labels are compulsory for many foods.[132] Pre-packed foods must bear lists of ingredients set out in the order of how much of each ingredient there is in the food.[133] Where a particular ingredient is singled out for mention on the label, it is necessary to state the minimum quantity of this ingredient.[134] Likewise, foods that are advertised or labelled as good for slimmers, diabetics and others with special medical conditions have to set out an "energy statement" which shows the number of calories per gramme in the food. The name given to a food on a label must describe it. A trade mark, brand name or fancy name cannot be used instead. If the food has a legal name this must be used,[135] otherwise the name usually given to it in the area where it is sold must be used. It is also necessary to mark the food with a date. This tells consumers how long it can be kept at its best without losing its flavour or texture.[136] It is submitted that there is scope for such provisions to be included in the South African legislation dealing with foodstuffs. Unit pricing, and drained weight requirements should also be included.

5 RIGHT TO CHOOSE

The concept of a consumer's right to choose is based on the idea that consumers should not be subjected to monopolistic sellers who are able to band together to manipulate the selling price of their products or to restrict the supply of their products to the market place.

5 1 Competition

In most Western countries competition is seen as providing a role in protecting consumers. In many countries consumer protection and competition policy are incorporated in the same legislation and administered by the same department or agency.[137] Sometimes this leads to conflict, but in most cases the administering office is given an opportunity to protect consumers by controlling competition in the market-place. Competition policy is mainly concerned with preventing restrictive trade agreements and the controlling of mergers and take-overs.[138] In the United Kingdom the Competition Act[139] also provides for an investigation into whether public enterprises are efficient or abusing a monopoly position.[140] The major argument for the consumer in favour of competition is that it widens choice with the result that prices will be lower and industry will be more sensitive to consumer requirements. Sometimes, however, competition may work against the consumer. For example, where the choice becomes spurious because of product differentiation; where more competition might reduce the number of outlets and make access more difficult for consumers; where lower prices might be at

132 The Food and Labelling Regulations of 1980 for England and Wales and of 1981 for Scotland and Northern Ireland (cf National Federation of Consumer Groups 126).
133 *Ibid.*
134 *Ibid* 127.
135 *Ibid.*
136 *Ibid* 128.
137 Cranston 19.
138 *Ibid.*
139 Competition Act of 1980.
140 S 11 and 12.

the expense of quality; and other legal measures might be more effective in making business responsive to consumers.[141] One of the main reasons for government intervention to ensure competition is that a complete free market economy is not unbiased in its effects. Its result is often to treat unequals equally, for example, by putting businesses on the same footing as consumers. This allows the stronger to dominate the weaker.[142]

5 2 Monopolies

In South Africa the Maintenance and Promotion of Competition Act[143] was designed to prevent: (a) restrictive practices which lead to price fixing; (b) restrictions on production or distribution of commodities; (c) a limitation on the facilities available for the production or distribution of commodities; (d) the enhancement or maintenance of prices; (e) the prevention of production or distribution of commodities by the most efficient and economical means; (f) the prevention or retardation of the development or introduction of technical improvements or the expansion of existing markets, or new markets; (g) the prevention or restriction of the entry of new producers or distributors into the industry; or (h) the prevention or retardation of the adjustment of any branch of trade or industry to changing circumstances.[144] Many of these practices seem to fall within the ambit of the Trade Practices Act[145] which exercises control over activities that might "injure relations between businesses and consumers".[146] At present the Law Commission is investigating whether the two acts should be merged. A merger could give rise to a situation like that under the English Fair Trading Act[147] where the Director of Fair Trading not only deals with consumer affairs but is also responsible for administering the Competition Act.[148] This means that the Director of Fair Trading may make a recommendation concerning the desirability (in the interests of consumers), of particular businesses or industries merging.[149] Such an arrangement would give considerable teeth to the administrative officials responsible for administering the Trade Practices Act and the Competition Board.

6 THE RIGHT TO PRIVACY

The right to privacy is a person's "right to be let alone" or "to seclusion in his private life".[150] The concept of privacy refers to the individual's right to prevent or control intrusions into his private life as well as the collection and dissemination of information about himself.[151] The development of the computer and

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141 Cranston 20.

142 Cranston 27. See generally Seidman "Contract law, the free market and state intervention: a jurisprudential perspective" 1970 *J of Econ Issues* 533 571; Samuels "In defence of a positive approach as an economic variable" 1972 *J of Law and Econ* 453; Dworkin "Is wealth a value?" 1980 *J of Leg Stud* 191.

143 Act 96 of 1979.

144 S 1.

145 Act 76 of 1976.

146 S 15.

147 Fair Trading Act of 1973.

148 Parts I IV – IVXII of the Fair Trading Act of 1973. See generally Harvey 364 *et seq.*

149 S 76 of the Fair Trading Act of 1973.

150 See generally Neethling *Die reg op privaatheid* (1976) 287; McQuoid-Mason *The law of privacy in South Africa* (1978) 91 *et seq.*

151 *Ibid.*

the increasing use of data banks in particular have eroded the consumer's right to privacy. This is especially true of consumers who wish to apply for credit,[152] who are subject to intrusive debt collection practices, or who find themselves on mailing lists.[153]

6 1 Credit bureaux

Credit bureaux generally confine themselves to matters directly concerned with a person's creditworthiness.[154] Therefore they record judgment debts[155] and bankruptcies[156] rather than divorce and criminal records. Additional personal information may be obtained from firms selling on credit and other credit reference centres. Newspapers are also sometimes used, for example, to record deaths. Credit enquiries from data users are recorded in the subject's file and it is possible to build up a profile of his or her credit spending habits by observing the pattern of enquiries.[157] Most credit bureaux in South Africa would probably allow the subject of an enquiry to inspect his or her file, but usually the former will not disclose the identity of the latter to the subject.[158] This means that not only are subjects unaware that they may inspect their files, but they may also experience difficulty in locating the agency concerned. The problem for credit-seeking consumers, however, is that they have no control over the nature of the information gathered, the accuracy of such information or its accessibility, and may not even know that a particular agency has a dossier on them.[159] Without this knowledge, consumers do not know whether their right to privacy has been violated, for instance that private facts irrelevant to their creditworthiness have been disclosed or that they have been put in a false light.

It is submitted that data collection by credit bureaux poses a threat to privacy in South Africa and that the Credit Agreements Act,[160] like its English counterpart,[161] should include a number of safeguards. For instance, consumers should be: notified that an agency is holding their personal files; informed by any user of a credit agency as to the latter's name and address; given the right to inspect, correct and update their files; notified by the agency each time their data is released and to whom; and, given the right to enquire of any credit agency whether it holds a file on them.[162] Control of credit bureaux would be facilitated

152 Cf McQuoid-Mason *Privacy* 197; Neethling "Die kredietburowese en databeskerming" 1980 *THRHR* 141.

153 See generally McQuoid-Mason "Consumer protection and the right to privacy" 1982 *CILSA* 137 146 *et seq.* Cf Privacy Protection Study Commission *Personal privacy in an information society* (1977) 126; Ellis-Smith *Privacy: how to protect what is left of it* (1979) 120.

154 McQuoid-Mason 1982 *CILSA* 137.

155 Cf *Informa Confidential Reports (Pty) Ltd v Abro* 1975 2 SA 760 (T).

156 *Ibid.*

157 McQuoid-Mason *Privacy* 197 n 10.

158 *Ibid* 198. In most Canadian provinces such an agreement would be void (cf Manitoba Personal Investigations Act SN 1971 c23 s 6; Burns "The law and privacy: The Canadian experience" 1976 *Can Bar R* 40 *et seq.*

159 McQuoid-Mason *Privacy* 198.

160 Act 75 of 1980.

161 Consumer Credit Act of 1974.

162 McQuoid-Mason 1982 *CILSA* 140. Cf Neethling 1980 *THRHR* 152 *et seq.*

if they were subject to a system of licensing, and civil and criminal penalties were imposed for breaches of the relative statutory provisions.[163]

6 2 Debt collection

Debt collection is a major industry in South Africa and is probably one of the areas where there is the greatest exploitation of consumers. In 1985 812 661 summonses for debt were issued against private individuals, of which 293 674 were for open accounts, 47 000 for instalment sales agreements, 147 050 for professional services, 96 255 for other services, 41 832 for rent and 47 959 for monies lent.[164] Of these, 398 684 resulted in civil judgments against private individuals totalling R574 879 000, of which 163 046 totalling R89 699 000 were in respect of goods sold on open account, 13 435 totalling R64 563 000 in respect of instalment sales agreements, 69 573 totalling R16 697 000 were in respect of professional services, 41 412 totalling R27 596 000 were for other services, 18 314 totalling R797 000 were for rent, and 31 156 totalling R168 431 000 were for monies lent.[165] Probably at least half of the summonses issued for debt and those that resulted in civil judgments concerned black consumers.[166]

The vast majority of debtors cannot pay their debts, not because of fault, but because of loss of income.[167] Creditors are entitled to recover debts from consumers provided they use legitimate means. Problems arise, however, where illegitimate means are used because in many instances consumers do not know that the methods are illegal. Debtors for instance are often coerced by threats that they will be "blacklisted" by having their default reported to credit bureaux.[168]

In England the Younger Committèe recorded a number of undesirable debt-collecting practices such as "the blue frightener", the "red frightener", frequent calls at the home of the debtor leaving threatening cards, and informing local shopkeepers of the consumer's indebtedness under the guise of avoiding the need for the debtor to absent himself from work to attend court.[169] In English

163 McQuoid-Mason *Privacy* 199; Neethling 1980 *THRHR* 151 *et seq* 153 *et seq*. Cf also in general as regards the protection of personal data, Neethling "Databeskerming: motivering en riglyne vir wetgewing in Suid-Afrika" in *Huldigingsbundel vir WA Joubert* (1988) 105 *et seq*.

164 Department of Statistics *South African statistics* (1986) 15 23.

165 *Ibid*.

166 It has been estimated that in 1985 the white share of spending power would be overtaken by the black share for the first time (*South African Foundation News* June 1984; cf 1984 *Race Relations Survey* 228). Another estimate indicated that black spending would account for 47,4% of private consumption expenditure in 1985 as against the white share of 40,2% with "Coloureds" and Indians accounting for the rest (*Die Vaderland* 1984-09-20; cf 1984 *Race Relations Survey* 228). The Black Consumer Union has suggested that by the end of the century black buying power would constitute two-thirds of the total retail market in South Africa (*The Star* 1984-09-20; cf 1984 *Race Relations Survey* 229).

167 Cf Caplovitz 1971 *Bus Lawyer* 795, who made a sample study of 1 333 debtors in Chicago, New York and Philadelphia which revealed that 43% of debtors has suffered loss of income; 15% were victims of fraud; 7% had resulted from payment misunderstandings; 6% were due to "broken marriages"; 55 arose from an unexpected income demand; and 4% were due to fault on the part of the debtor.

168 Jones *Privacy* (1974) 156; Madgwick and Smythe *The invasion of privacy* (1974) 139 *et seq*.

169 HMSO *Report of the Committee on Privacy* (Cmnd 5012 1972); Jones 158 *et seq*; cf Madgwick and Smythe 138.

law, "harassment" of the debtor is a criminal offence,[170] and it is now an offence to deliver any document which has not been issued by the court but which by "its form or contents or both" gives that appearance.[171]

The Select Committee on Debt Collection in Zimbabwe[172] found a number of unseemly methods of debt collection used, particularly against black consumers. These included physical intimidation and harassment, debt collectors calling at night and taking away furniture on failure to pay, illegal repossession of goods not the subject of the sale, threatening to tell a debtor's employer so that the consumer may lose his job and threatening the debtor with arrest and imprisonment.[173] All of these threats are actionable invasion of privacy, and are probably also perpetrated against black consumers in South Africa. It was for this reason that it has been suggested that the Credit Agreements Act[174] be amended to outlaw repossessions without court orders where there is no consent by the owner.[175]

Black victims of unlawful repossessions are often remediless because they cannot afford the services of lawyers. Restitution applications are expensive and impracticable.[176] As has been pointed out, an unauthorised intrusion into the home to repossess goods may be an actionable invasion of privacy,[177] but such actions are excluded from the national legal aid scheme.[178] Furthermore, it is unlikely that criminal actions for trespassing, housebreaking and sometimes malicious injury to property, are thought of by victims of unlawful repossessions.[179] The Credit Agreements Act[180] should be amended not only to make unlawful repossessions an offence, but the Trade Practices Act[181] should be amended to make unlawful collection procedures as well as the use of simulated court processes a crime.[182]

6 3 Mail order

Mail order solicitations are another area where the privacy of consumers is invaded. Mail order advertisements are a reminder that there are agencies somewhere about which consumers know nothing, but which know something about them.[183] Consumers often find "junk mail" offensive. Their homes are invaded

170 Administration of Justice Act of 1970, but "harassment" is not defined (Madgwick and Smythe 137f *et seq*).
171 S 189 of the County Courts Act of 1959. It could, however, be argued that a "blue frightener" is a normal means of applying pressure to pay, and it was not intended to be construed in the wrong way (Madgwick and Smythe 142). See generally McQuoid-Mason 1982 *CILSA* 143.
172 Rhodesian Government Printer *Report of the Select Committee on the Recovery of Debts and related matters* (1976 sc3).
173 *Ibid* par 25–30; cf McQuoid-Mason 1982 *CILSA* 144 *et seq*.
174 Act 75 of 1980.
175 See above.
176 *Report of Recovery of Debts Committee* par 27.
177 See above.
178 Legal Aid Board *Consolidated legal aid guide* (2nd revision) par 13 1(c).
179 McQuoid-Mason 1982 *CILSA* 145.
180 Act 75 of 1980.
181 Act 76 of 1976.
182 See above.
183 Ellis-Smith 120.

by unwanted postal solicitations, and their names and addresses are bought and sold without their consent.[184] It is doubtful, however, whether a legal action for invasion of privacy could lie in these circumstances.[185]

Consumers should be on their guard with mail order sales. This applies particularly to those offering "free" items in exchange for subscriptions or membership. A consumer by mail order in South Africa enjoys the same common-law rights as a customer who buys from a shop.[186] Furthermore, an advertisement which states that money will be refunded if the buyer is not satisfied with the mail order goods is enforceable by law.[187] The receiver of unsolicited goods is not obliged to return them nor can he or she be made to pay for them. The sending of such goods, except as free samples or advertising material which become the property of the receiver on delivery, is prohibited by the ethical code of the South African Direct Mailing Association.[188] However, the receiver does not become owner of the goods and may not use them, give them away or damage them.[189] Nor must he or she unnecessarily prevent the sender from receiving the goods.

In the United Kingdom the recipient of unsolicited goods becomes the owner after 6 months, or a shorter period of 30 days if the seller is contacted but does not collect them.[190]

In the United States sellers must abide by the promises in their advertisements. If no date is set, consumers are entitled to have the goods delivered within 30 days. If the seller does not deliver within the time provided, or within 30 days if no time is stated, the consumer has the right to cancel the order. A consumer who cancels has a right to be refunded the total payments within seven business days after cancellation.[191] Complaints are enforced by the Federal Trade Commission.

It is submitted that there is scope in South Africa for similar protection for consumers. The Trade Practices Act[192] should provide that the receiver of unsolicited goods becomes owner after 6 months, or a shorter periods of 30 days if the seller is contacted to collect them and fails to do so. It should also provide that if a seller does not deliver the goods within the promised period, or 30 days

184 *Ibid* 220 *et seq.*
185 McQuoid-Mason 1982 *CILSA* 147.
186 The general principles governing the law of contract would seem to apply. The "cooling off" provisions of the Credit Agreements Act 75 of 1980 do not, however, apply to mail order sales (GN R2572 in *Government Gazette* 7328 1980-12-12 s 3).
187 Such an advertisement could be construed as an essential term of the contract which, if breached, would entitle the buyer to cancellation.
188 Cf Advertising Standards Authority of South Africa *Code of advertising, practice and constitution* (1987) 18 par 7 2: "Goods and/or services shall not be despatched or provided to a potential buyer unless an order has been received or the consignment is clearly shown to be 'free' and the recipient expressly informed of his unqualified right to treat it as an unconditional gift."
189 A receiver who uses the goods or treats them as his own could be construed as having shown an intention to keep them, and thereby as having accepted the offer to purchase made by the mail order seller.
190 Unsolicited Goods and Services Act of 1971, and the Unsolicited Goods and Services (NI) order of 1976 (cf National Federation of Consumer Groups *A handbook of consumer law* (1982) 42).
191 Federal Trade Commission Act 15 USCA.
192 Act 76 of 1976.

if no period is specified, the receiver may cancel the order and obtain a refund within 7 days.[193]

7 THE RIGHT TO CORRECT ABUSES

An important right of consumers is to have abuses in the market place corrected. For example, incorrect information held by credit bureaux should be corrected at the instance of consumers. Likewise, advertising that is misleading should be corrected for the benefit of the consuming public. As we have seen, provision is made for both of these in legislation in the United Kingdom,[194] the United States[195] and Australia.[196] One of the most effective ways of correcting abuses in the market place, however, is through administrative regulation of unfair trading and licensing.

7 1 Unfair trading

In the United Kingdom the Director General of Fair Trading acts as a kind of specialised attorney-general[197] in respect of persistent breaches of both the criminal law (for example false trade descriptions or food and drugs offences) and the civil law (for example goods).[198] In terms of the Fair Trading Act[199] he is required to use his "best endeavour" to obtain a satisfactory written assurance from traders that they will refrain from breaking the law. If a trader declines or fails to observe such an assurance he may be served with an interdict, even though his whole business closes down and he opens a new one.[200] The act also requires the Office of Fair Trading to encourage trade associations to prepare "codes of practice" to eliminate unfair trading for distribution to their members.[201] It has been suggested, however, that there should be more detailed codes prepared by the Office of Fair Trading in consultation with the relevant trade associations in order to set out what is "unfair".[202] For example, in Australia there is a general duty to "trade fairly" which is enforced by the Director of Consumer Affairs in Victoria who may seek an interdict to prevent a trader repeatedly engaging in conduct that is "unfair to consumers".[203] The South African Trade Practices Act gives the Minister of Trade and Industry the power to prohibit, after due notice, any trade practice which in his opinion may directly or indirectly "injure . . . the relations between business and consumers".[204] It is not clear, however, how often this provision has been invoked. The apparent inability of the Trade Practices Act seriously to engage in the protection of consumers is probably one of the reasons for the appointment of a Law Commission to investigate the matter.

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193 The present position is probably that the receiver has to keep the goods for 30 years before he or she will obtain ownership by prescription. This is very unsatisfactory.
194 See above.
195 *Ibid.*
196 *Ibid.*
197 Borrie *The development of consumer law and policy–bold spirits and timorous souls* (1984) 72.
198 *Ibid.*
199 Act of 1973.
200 Borrie 73.
201 *Ibid* 74.
202 *Ibid* 77.
203 Market Court Act of 1978.
204 S 15 of Act 76 of 1976.

7 2 Licensing

A very useful method of administratively controlled consumer protection in the United Kingdom is regulation through licensing. All businesses concerned with money lending or providing credit to consumers, including ancillary credit businesses, must hold a licence from the Office of Fair Trading.[205] Since 1976 the office has dealt with over 150 000 such applications.[206] These provisions were introduced because of the danger of allowing uncontrolled trading in the credit field and the inadequacy of civil and criminal remedies.[207] If this applies generally to the United Kingdom with its highly literate and sophisticated consumer population it applies even more so to South Africa. The provisions were introduced because the Crowther Committee on Consumer Credit[208] found that when licensing was left to local authorities there were very few instances of licences being refused in order to protect the interests of consumers.[209] Research has shown that the same has occurred in South Africa.[210] The Office of Fair Trading in England has the power to suspend or revoke licences but it would also like the power to impose fines for contraventions of the act as is the case with the South Australian Consumer Credit Act.[211] Sir Gordon Borrie, the Director General of Fair Trading in England, has said that "where competition works reasonably well, there is no need for administrative regulations".[212] He adds, however:

> "[I]t can only work well if the customers have sufficient knowledge and understanding to choose and to discriminate between those who provide safe and satisfactory service and those who do not."[213]

It is submitted that this statement is very apposite to South Africa where there is a large body of unsophisticated and uninformed consumers.

It is conceded that proponents of the "free market"[214] system would be horrified by the suggestion that there should be further administrative control in the market place.[215] Free enterprise, however, does not mean that "anything goes".[216] What is required is not a plethora of administrative bodies, but simply one co-ordinating umbrella body like the Office of Fair Trading in the United Kingdom.

8 THE RIGHT TO BE HEARD

Generally consumers are reluctant to resort to legal action, especially if the sums claimed are small in relation to the legal costs involved. The extent of consumer apathy is well illustrated by the fact that the majority of civil judgments for

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205 Borrie 78.
206 *Ibid* 79.
207 *Ibid* 80.
208 HMSO *Report of the Committee on Consumer Credit* (Cmnd 4596 1917).
209 Borrie 82.
210 Hill "Licensing ordinances: an unexplored means of consumer protection?" 1978 *NULR* 216.
211 S 36 of the 1972 act; cf Borrie 90.
212 Borrie 91.
213 *Ibid.*
214 E g, the "Chicago School" of economists. See generally Posner *Economic analysis of law* (1977) 85; Cranston 21 *et seq.*
215 See generally Wassenaar *The assault on private enterprise* (1977).
216 Cf *Martell v White* 185 Mass 255 260 (1904): "The trader has not a freelance. Fight he may, but as a soldier, not as a guerrilla."

debt in the South African courts are taken with default or consent on the part of debtors. For example, of the 812 661 private summonses issued during 1985, 398 684 resulted in default judgments.[217] This amounts to a considerable sum of money each year. In 1985 the sum involved was R574 879 000.[218] Furthermore, default and consent judgments are more administrative than judicial in that the clerk of the court, not the court itself, grants the judgment.[219] The failure, however, of a consumer to defend an action does not necessarily mean that he or she is at fault. As has been mentioned, a United States study showed that in the vast majority of cases the reason for default was loss of income, and the least recurring reason fault on the part of debtors.[220]

8 1 Small claims courts

The problem of consumer access to the courts has been partially overcome by the promulgation of the Small Claims Court Act.[221] This led to the establishment of small claims courts on an experimental basis in a number of major centres in South Africa during 1985.[222] The act allows people to sue for claims of up to R1 500[223] provided they have given the other side at least 14 days to reply to a letter of demand,[224] and 10 days to reply to a summons.[225] Litigants may not be legally represented in the small claims court[226] and the presiding officer is required to proceed inquisitorially to elicit the relevant facts.[227] Indications are that many cases heard in the small claims courts involve consumer matters although at present the courts are not being used as often by black consumers as by other race groups.[228]

By and large, however, the small claims courts have proved to be a great success and should be implemented in as many districts as possible. Small claims courts are used widely in the United States and Canada to enable consumers to enforce their right to be heard.[229]

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217 Department of Statistics 15 23.
218 *Ibid.*
219 R 11 and 12 of the Magistrates' Courts Rules.
220 Caplovitz 1971 *Bus Lawyer* 795.
221 Act 61 of 1984.
222 Pilot small claims courts were run at the Universities of the Orange Free State and Natal (Pietermaritzburg and Durban) as well as public buildings in Port Elizabeth, Pretoria, Rustenburg and Springs (Strauss *You in the small claims court: a practical guide* (1985) 105 *et seq*).
223 S 15 of Act 61 of 1984.
224 S 29(1).
225 R 9(1) of the Small Claims Court Rules.
226 S 7(2) of Act 61 of 1984.
227 S 26(3).
228 E g, the Durban small claims court had heard over 1 000 cases by November 1986. Of the cases that involved consumer matters only 26% were brought by black consumers and 74% by consumers of other races. An explanation for the low number of cases brought by Blacks may be that many Blacks live in townships outside the magisterial districts of Durban and there are no small claims courts for those magisterial districts. Furthermore, even though the majority of Blacks in the Durban area do their shopping in Durban, they probably do not realise that if the goods are defective, or consumer services unsatisfactory, they could bring an action in the Durban small claims court. (Information provided by clerk of the small claims court, Durban, 1987–03–25.)
229 See generally Cranston 88 *et seq.*

8 2 Class actions

An area of law that has not been developed in South Africa but which has been successful in the United States is the class action.[230] This enables a consumer as a member of a class of persons all of whom are likely to be affected, or have been affected, by the defendant's conduct to sue, not only on his behalf but on behalf of all the other members of that class. The judgment in a class action affects all members of the class if the representation by the plaintiff was fair and adequate and if proper notice was given.[231] Class actions are allowed where joinder of all class members is impractical.[232] They reduce the likelihood of multiple litigation by individual class members and achieve economies of time, effort and expense.[233]

At present there is no provision for class actions in South African law although a large body of persons may be joined as plaintiffs or defendants.[234] In the supreme court any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately, or in the alternative, may join as plaintiffs in one action against the same defendant – provided the right of relief claimed by such plaintiff depends upon substantially the same questions of law and fact.[235] The same applies *mutatis mutandis* to defendants.[236] It seems that the Legal Aid Board[237] is reluctant to grant legal aid "where the interests of more than one individual are concerned".[238] This view, however, could be challenged on the basis that the Legal Aid Board is required to render legal aid to "indigent persons" in terms of the Legal Aid Act.[239] Furthermore, the *Legal aid guide* states that the board shall render legal aid "in all cases where the assistance of a legal practitioner is normally required".[240] It has been pointed out therefore that any administrative rule that purports to exclude cases where the interests of more than one person are involved, could be *ultra vires* if such persons were indigent.[241]

The recognition of class actions in South Africa would enable large numbers of consumers with small claims to proceed against producers and sellers who consistently exploit people in the market place. In such cases it does not usually pay for individuals to bring claims because their individual claims are too small to justify the expense. The Magistrates Courts Act[242] and Supreme Court Act[243] should be amended to allow for the introduction of class actions.

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230 See generally Hotz in Cappelleti (ed) *Public interest litigation: a comparative survey* (1980) 102.
231 Cranston 95.
232 R 23(a) of the Federal Rules of Civil Procedure requires that: (a) there is a definable class of plaintiff; (b) the class is too numerous to permit joinder; (c) there are common questions of law and fact; and (d) the representatives fairly and adequately protect the interests of the class (Epstein and Nickles 10).
233 Cranston 95.
234 S 41 of the Magistrates' Courts Act 32 of 1942; r 10(1) of the Uniform Rules of Court.
235 R 10(1) of the Uniform Rules of Court.
236 R 10(3) of the Uniform Rules of Court.
237 See below.
238 Ladley "A guide to legal aid? Some issues arising from the refusal of legal aid in the *Mbekweni Community Council* case" 1982 *SALJ* 242.
239 S 3 of the Legal Aid Act 22 of 1969.
240 *Legal aid guide* par 11 1.
241 Ladley 243.
242 Act 32 of 1944.
243 Act 59 of 1959.

8 3 Legal aid

The legal aid scheme in terms of the Legal Aid Act[244] of 1969 can also assist consumers in bringing claims. At present, however, the Legal Aid Board is under severe financial pressure and in 1986 issued a circular stating that it would not assist with claims for less than R1 200. The reason for this was that people with small claims could use the small claims courts.[245] The Legal Aid Board, however, does not seem to have taken into account the fact that many magisterial districts do not yet have small claims courts. It may be that where small claims courts are available the limitation is justified, but the Legal Aid Board could probably be taken on review if it were to deny legal aid to a person for a claim of less than R1 200 in a magisterial district where there is no small claims court.

One problem with the legal aid scheme is that although Blacks make up the majority of South Africa's population[246] eligible for legal aid in terms of the "means test", the national legal aid scheme is underutilised by them. For instance, during the periods 1 April 1988 – 31 March 1984, of the 43 645 applications for legal aid in civil matters to the Legal Aid Board, only 11 342 or 26% were by Blacks.[247] The present "means test" is R400 per month for single or estranged persons plus an additional R100 for every dependent child, and R800 for married persons plus an additional R100 for every dependent child.[248] The fact that in 1986 the average monthly household income for Blacks in South Africa was estimated at R352 indicates that a large number of Blacks would fall within the means test.[249] A partial explanation for the underutilisation of the Legal Aid Board's services by Blacks is probably that many of them are unaware of its existence. The Legal Aid Board has frequently considered the question of advertising but has found it too costly.[250] In 1983 the Legal Aid Board decided to abandon a proposed advertising campaign on the basis that it would be too expensive.[251] An investigation by the Human Sciences Research Council to discover why the services of the Legal Aid Board were not used more widely concluded:

> "On the basis of the data obtained, it is not possible to explain why needy people from all population groups do not make freer use of the services of the Legal Aid Board."[252]

One obvious reason for the annual low utilisation of the Legal Aid Board's services by indigent people must be lack of publicity. An important role could be played by the attorneys' profession itself. For instance, attorneys could investigate at the first consultation whether certain clients qualify for legal aid,[253] rather than assuming that a person with sufficient funds for a deposit is necessarily excluded from the scheme. In many instances the money may have been

244 Act 22 of 1969.
245 Cf *Natal Mercury* 1987-03-05.
246 The preliminary 1985 census figures indicate that Blacks made up 72,9% of the population of South Africa (*Race Relations Survey* 1985 2).
247 Legal Aid Board *Annual report for the period ended 31st March 1984*. The Legal Aid Board no longer publishes a racial breakdown of applicants for legal aid.
248 Legal Aid Board *Annual report for the period ended 31st March 1984* 3.
249 Market Research Africa *Research in Action* no 77, December 1985; cf *Race Relations Survey* 1985 131.
250 Cf DJ McQuoid-Mason *An outline of legal aid in South Africa* (1982) 73 *et seq.*
251 Legal Aid Board *Annual report for the period ended 31st March 1984* 3.
252 *Ibid* 5.
253 *Ibid* 4.

borrowed. The law societies could, for example, make it unethical for a practitioner to charge a poor person a fee without establishing whether the indigent client qualifies for legal aid.[254]

8 4 Contingency and speculative fees

The South African legal profession regards the undercutting of fees as unethical[255] and particularly frowns upon the concept of "contingency fees".[256] It has often been said that contingency fees make the courts accessible to people who cannot afford lawyers but do not qualify for legal aid.[257] A contingency fee works on the basis that a lawyer's fee is calculated on a percentage of the money recovered by him or her on the basis that each party bears its own costs.[258] A lawyer only charges if he or she wins the case and enters into an agreement concerning the percentage of the monies that will be retained if the case is won. The basis for permitting contingency fees in the United States is *inter alia*:

> "They often provide the only practical means for individuals to obtain the services of a competent lawyer, and a successful prosecution of the claim provides *res* from which the costs can be paid."[259]

Recently the Natal Law Society has resolved in principle to allow members to make "speculative fee" arrangements with clients. This includes allowing attorneys to agree that the fee will only be payable if the attorney succeeds in the case. The speculative fee system is expected to be introduced countrywide by the end of 1989. According to the speculative fee arrangement an attorney does not charge, except for disbursement, if he or she is not successful. If the attorney succeeds the fee would be commensurate with the work done. The speculative fee arrangement is favoured over the contingency fee system to avoid the following possible abuses:

a an attorney negotiating an unrealistic percentage of the claim;

b the temptation that when attorneys have a direct financial interest in the outcome of a case there may be a temptation to induce witnesses to change their evidence;

c the danger that an attorney becomes party to his or her client's cause which might influence the attorney's independence.[260]

A speculative fee system would certainly make legal services much more accessible to poor consumer litigants who have claims exceeding R1 500 or who live in areas where there are no small claims courts. As has been mentioned,

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254 McQuoid-Mason *Outline of legal aid* 75 *et seq.*

255 Cf Lewis *Legal ethics: a guide to professional conduct for South African attorneys* (1982) 27; McQuoid-Mason "Ethics and the attorneys profession: fact or fiction? Some perspectives from the consumer's viewpoint" 1983 *Acta Juridica* 325 *et seq.*

256 Lewis 239: "A practitioner may not arrange with his client that the payment of his fees will be dependent on the result obtained; nor that the result will govern the amount of the fees by percentage or otherwise."

257 Cf *Financial Mail* 1983-08-05 31; Chaskalson "Charging fees on results" 1982 *De Rebus* 357.

258 Cf Hiles "Trends in assessing fees" in association of Law Societies *South African Law Conference Papers* (1981) 32.

259 American Bar Association *Proposed final draft: model rules of professional conduct* (1981) 36, commentary on rule 1 5. Cf Comment "Providing legal services for the middle class in civil matters: the problem, the duty and a solution" 1965 *U Pitt LR* 811.

260 *The Daily News* 1987-03-25.

black civil law litigants are not using the national Legal Aid Board scheme as widely as they should. If attorneys introduce the speculative fee system many more black litigants may have their day in court.

CONCLUSION

It is clear that consumers in South Africa are being short-changed concerning their rights to safety, honesty, fair agreements, knowledge, choice, privacy and a hearing. Their counterparts in the United Kingdom, Australia and the United States obtain a far better deal. If it is necessary to secure these rights for consumers in highly sophisticated societies like those, it is even more necessary in a country like South Africa with its large population of disadvantaged and semi-literate consumers.

The time has come for a radical reassessment of consumer protection law in South Africa. There is a need for an expanded and all-embracing Trade Practices Act with the scope and powers of the English Fair Trading Act[261] and the Australian Trade Practices Act.[262] There is also a need for a high-powered executive consumer administrator like the English Director of Fair Trading who has the authority to exercise control in respect of breaches of consumer laws. He or she should have the power to apply for interdicts, award civil remedies and impose criminal penalties as well as control business practices through licencing.[263]

These proposals are likely to upset proponents of "free enterprise". Nonetheless, it is essential that unfair and dishonest practices in the market place be eliminated as soon as possible. If this is not done, and South Africa's vast population of exploitable consumers is not protected against the excesses of unscrupulous business people, there will be little support for a capitalist or semi-capitalist economy once the balance of political power shifts.[264]

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261 Act of 1973.
262 Act of 1974.
263 See above.
264 Cf McQuoid-Mason 1978 *NULR* 210.

AANTEKENINGE

'N REGTERLIKE PERSPEKTIEF: SESSIE *IN SECURITATEM DEBITI – QUO VADIS?* *

Al die gepraat oor sessie tot dusver was darem nie verniet nie. Iets het ons wel bereik: die middag-sessie.

" 'n Regterlike perspektief " was nie my idee nie; dit was professor Susan Scott van Unisa s'n. Nie een van ons twee kon vir eers aan 'n tema dink waaroor ek moes uitwei nie. " 'n Regterlike perspektief " was haar inspirasie om my kans te gee om enigiets te sê – liefs oor sessie *in securitatem debiti*. 'n Geniale inspirasie, want "perspektief " impliseer die skyn van diepte op 'n plat vlak. Andersins is die titel weer misleidend want dit voorveronderstel 'n algemeen geldende regterlike perspektief. So iets soos 'n standaard regter bestaan egter nie. Wel sub-standaard regters. Daar is soveel regterlike perspektiewe as wat daar regters is – behalwe dat ek aan een of twee kan dink by wie perspektief af en toe ontbreek. 'n Mens se persepsies en perspektiewe is ook nie iets besonders net omdat jy 'n regter is nie. 'n Regter is per slot van rekening maar net 'n afgepensioneerde advokaat wat oor geen buitengewone bekwaamheid beskik nie, behalwe wye ervaring en 'n sensitiewe regsgevoel, om ewige waarhede oor gegewe (of selfs ongegewe) onderwerpe kwyt te raak – al word sodanige gesegdes ook met 'n tikkie Latyn verfraai en *obiter dicta* genoem.

Die regter se eerste en vernaamste taak is om dispute op te los en nie om dissertasies te lewer nie. As sodanig bestaan die primêre intellektuele aktiwiteit van die regter van eerste instansie normaalweg daarin om waarskynlikhede teen mekaar op te weeg en uit te kanselleer in 'n poging, soms ydel, soms verydel, om so na as moontlik aan die waarheid te kom. Anders as die akademikus het die regter selde 'n diepgaande studie van die omskrewe onderwerp gemaak waaroor hy uitspraak moet lewer. Hy is op sy voorgangers se geakkumuleerde wysheid en die vindingrykheid en navorsing van advokate en akademici aangewese, en as hy in die proses (afhangend van sy temperament, hervormingsdrif en selfvertroue) iets kan of wil of moet sê wat 'n nuwe gesigspunt opper of aan die reg 'n nuwe wending gee, is dit, alle sake in ag genome, die uitsondering eerder as die reël. Of dit die nuwe reël gaan word, gaan daarvan afhang of ander hom

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* Referaat gelewer by geleentheid van 'n seminaar oor sessie *in securitatem debiti* aangebied deur die Departement Privaatreg, Universiteit van Suid-Afrika op 1988–10–29.

VERENIGING HUGO DE GROOT

REGLEMENT

1 BESKRYWING

1 1 Die naam van die Vereniging is die *Vereniging Hugo de Groot* [hierna genoem die "Vereniging"].

1 2 Die Vereniging is 'n liggaam met regspersoonlikheid

a wat nie op winsbejag ingestel is nie;

b wat nie die bevoegdheid het om enige winste, wat hom mag toeval, aan enige persoon uit te keer nie;

c wat sy fondse uitsluitlik vir die doel waarvoor hy ingestel is, gebruik.

2 DOELSTELLINGS

2 1 Die doel van die Vereniging is

a om die kennis en die begrip van die reg van Suid-Afrika en die Romeins-Hollandse reg uit te brei en te verdiep;

b om die gebruik van Afrikaans as regstaal te bevorder en die gelykberegtiging daarvan ten volle uit te leef.

2 2 Die doel word nagestreef

a deur die publikasie van 'n tydskrif wat die naam dra *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* [hierna genoem die "Tydskrif"];

b deur die publikasie van ander geskrifte wat handel oor die reg van Suid-Afrika en sy geskiedenis;

c deur ondersteuning te verleen aan die optrede en aktiwiteite van persone, inrigtings of organisasies wat 'n soortgelyke doel nastreef;

d deur ander aktiwiteite wat in ooreenstemming met die gemelde doel is, te reël.

3 LIDMAATSKAP

3 1 Enige persoon wat intekenaar op die Tydskrif is, kan by die bestuur aansoek doen om lid van die Vereniging te word.

3 2 Verenigings en regspersone kan ook op hierdie wyse lidmaatskap van die Vereniging verkry, met dien verstande dat hulle daarop geregtig is om slegs een persoon as hul verteenwoordiger na die algemene jaarvergadering af te vaardig.

4 BESTUUR

4 1 Die bestuur van die Vereniging bestaan uit twaalf lede wat, sover doenlik, verteenwoordigend van die verskillende vertakkinge van die regsberoep moet wees.

4 2 Die bestuurslede word op die algemene jaarvergadering vir 'n tydperk van drie jaar verkies.

4 3 Elke jaar tree vier lede volgens 'n vasgestelde rooster af. Aftredende lede is herkiesbaar.

4 4 Met die oog op die vul van 'n vakature, lê die bestuur aan die algemene jaarvergadering een naam voor, terwyl elke lid in die vergadering bevoeg is om nog 'n naam voor te lê.

4 5 Tussentydse vakatures word deur die bestuur gevul tot die eersvolgende algemene jaarvergadering.

4 6 Die bestuur kies uit sy eie geledere 'n voorsitter, 'n sekretaris en 'n penningmeester.

4 7 Die bestuur is bevoeg om, as hulp vir die sekretaris en die penningmeester, uit die lede van die Vereniging een of meer persone as assistent-sekretaris of assistent-penningmeester aan te stel.

4 8 a Dit is die sekretaris se plig om 'n jaarverslag op te stel vir goedkeuring deur die bestuur met die oog op indiening by die algemene jaarvergadering.

b Dit is die plig van die penningmeester om die staat van inkomste en uitgawes op te stel vir goedkeuring deur die bestuur met die oog op indiening by die algemene jaarvergadering.

4 9 Vergaderings van die bestuur word deur die sekretaris belê wanneer die voorsitter of twee ander lede dit verlang.

a Drie lede vorm 'n kworum.

b Besluite word by meerderheid van stemme geneem.

c In die geval van 'n staking van stemme, het die voorsitter van die vergadering 'n beslissende stem.

d Die bestuur vergader minstens eenmaal per jaar en wel op 'n datum deur die voorsitter bepaal.

4 10 Die penningmeester neem gelde en ander inkomste van die Vereniging in ontvangs.

4 11 Alle gelde wat die penningmeester aldus ontvang, word deur hom op rekening van die Vereniging by 'n bank of bougenootskap inbetaal. Om oor die geld op so 'n rekening te beskik, is die handtekening van die penningmeester of 'n plaasvervanger voldoende.

5 ALGEMENE JAARVERGADERING

5 1 Elke jaar word 'n algemene jaarvergadering gehou.

5 2 Die tyd en plek van die algemene jaarvergadering word deur die voorsitter van die bestuur bepaal.

5 3 Op die algemene jaarvergadering word

a die jaarverslae aan die orde gestel;

b bestuurslede gekies;

c sodanige ander aangeleenthede in behandeling geneem as wat die bestuur goeddink.

5 4 Ere-lidmaatskap van die Vereniging kan, op voorstel van die bestuur, deur die algemene jaarvergadering toegeken word.

6 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG

6 1 Die bestuur vertrou die redaksie van die Tydskrif toe aan 'n redakteur wat bygestaan word deur een of meer assistent-redakteurs. Hulle word telkens vir 'n tydperk van drie jaar aangestel en is vir hul redaksionele werk aan die bestuur verantwoordelik. By aftrede is hulle herkiesbaar.

6 2 Die redakteur en die assistent-redakteur(s) behartig die redaksie met die bystand van 'n redaksiekomitee.

6 3 Die redaksiekomitee bestaan uit die redakteur en die assistent-redakteur(s) en soveel ander lede as wat die bestuur van tyd tot tyd bepaal. Die lede word telkens vir 'n tydperk van drie jaar aangestel. By aftrede is hulle herkiesbaar.

6 4 Die bestuur is bevoeg om persone in die buiteland uit te nooi om as lede van die redaksiekomitee te dien.

6 5 Die redakteur is die voorsitter en 'n assistent-redakteur, of sodanige ander persoon wat deur die redaksiekomitee aangewys word, dien as die sekretaris van die redaksiekomitee.

6 6 Aan die einde van elke kalenderjaar lê die redakteur 'n skriftelike verslag van die redaksionele werksaamhede gedurende die jaar aan die bestuur voor.

7 ONTBINDING

7 1 Die Vereniging kan by wyse van 'n twee-derde meerderheid van sy lede wat daartoe stem by 'n algemene jaarvergadering, ontbind word.

7 2 By ontbinding sal die Vereniging verplig wees om sy oorblywende bates, na voldoening van sy verpligtinge, te gee of oor te maak aan 'n ander vereniging of instelling met doelstellings soortgelyk aan dié van die Vereniging.

volg of onderskei. Hoe meer hy onderskei word, hoe minder onderskei hy hom. Dit klink beter in Engels:

"The more he is distinguished the less distinguished he is."

Die deursnee regter – die deursnee regter is my half-broer – kry dus maar selde die kans om nuwe dinge oor ander mense se navorsing en geleerdheid te sê, of om menings uit te spreek oor wat die regsposisie was, of is, of behoort te wees. Hy vind sy reg in die handboeke. "Where there's a *Wille* there's a way." En as hy tog iets nuuts sê, wie sê hy is reg? Sy siening is so goed of so sleg as ander mense se sienings oor syne. Hy's reg as die regsgemeenskap sy mening as oortuigend beskou en volg, anders nie. Dit geld eweseer vir die opinies wat akademici en ander kommentatore uitspreek. Die enigste objektiewe maatstaf is die subjektiewe oordeel van ander. Die regters is natuurlik nie altyd reg nie, anders was daar nie so iets soos 'n Appèlafdeling nie. En die appèlregters is ook nie altyd reg nie, anders was ons nie vandag hier nie. Statutêr mag die appèlhof finale seggenskap hê oor wat die heersende regsposisie is maar die finale seggenskap is nog lank nie die laaste woord nie. Iemand wat dit dink, het nog nie van akademici en van seminare en van die Suid-Afrikaanse Regskommissie gehoor nie. Die regters spreek reg, die akademici preek reg, die regskommissie neuk reg. Die eerste sê wat die reg is, die tweede sê wat die reg nie is nie, die derde máák reg. Sommige akademici doen sommer al drie dinge op een slag – selfs by sessie. So het elkeen maar sy eie perspektiewe. En dit bring my oplaas by 'n regterlike perspektief oor sessie *in securitatem debiti*. Weliswaar nie my eie nie.

Presies 'n week gelede het my ampsbroer Booysen in die Durban en Kus Plaaslike Afdeling 'n beslissing gelewer wat baie van die probleme wat ons vandag hier bespreek het, aanraak en illustreer. Dit is die saak van *Britz v Sniegocki* (saak no 1799/1987), 'n beslissing wat te gelegener tyd stellig gerapporteer sal word.

Ek vereenvoudig die feite so ietwat: 'n sekere maatskappy, Point-Smith Shareblock Limited, was die eienaar van 'n gebou in Durban. Ene Hawthorne, na wie ek voortaan as die skuldenaar sal verwys, was die reghebbende ten opsigte van 'n bepaalde aandeelblok in die maatskappy. Daarvoor het hy sertifikaat nommer 205 as bewys ontvang. Die aandeel het hom geregtig gemaak op die gebruik van 'n bepaalde woonstel in die gebou. Ook sy leningsrekening in die maatskappy was in krediet. Die skuldenaar het teenoor Sniegocki (noem haar die eerste skuldeiser) borg gestaan. Ter versekering van daardie skuld oorhandig hy sy aandeelsertifikaat aan haar. In die dokument wat die transaksie tussen die skuldenaar en die eerste skuldeiser beskryf, noem hulle dit 'n "pledge". Daar eindig dit natuurlik nie. 'n Rukkie later en in stryd met dié ooreenkoms, verkoop die skuldenaar sy aandeel asook sy leningsrekening in die maatskappy aan ene mevrou Hoffman (noem haar die tweede skuldeiser) wat in die transaksie deur haar man verteenwoordig word. Omdat die oorspronklike aandeelsertifikaat egter in besit van die eerste skuldeiser is, bekom die skuldenaar op bedrieglike wyse 'n duplikaat-sertifikaat van die maatskappy wat hy aan die tweede skuldeiser oorhandig. Laasgenoemde betaal die prys vir die aandele en leningsrekening aan die skuldenaar en word te gelegener tyd as houer van die aandeel, met die reg van gebruik van die woonstel, in die maatskappy se register aangeteken. Van al dié latere gebeure was die eerste skuldeiser, wat steeds in besit van die oorspronklike aandeelsertifikaat was, natuurlik salig onbewus. Dit was eers toe sy,

by die skuldenaar se wanbetaling en die daaropvolgende vonnis teen hom, haar sekuriteit te gelde probeer maak het, dat sy die ware toedrag van sake ontdek het.

Die vraag wat die hof moes beslis is: wie geniet voorkeur, die onskuldige "pandhouer" (dit wil sê die eerste skuldeiser) of die onskuldige koper (dit wil sê die tweede skuldeiser)?

Wat ek dadelik moet bysê, is dat 'n aandeel volgens die statute van die maatskappy alleen met toestemming van die direksie van die maatskappy oorgedra kon word. Die tweede skuldeiser, die koper, het sodanige toestemming verkry; die eerste skuldeiser, die "pandhouer", egter nie. Sy het dit stellig nie nodig geag nie. Sy was immers in besit van die oorspronklike sertifikaat en was nie soseer in die aandeel geïnteresseerd nie as in die delging van die skuldenaar se skuld teenoor haar. Slegs by wanbetaling sou die te gelde making van die sekuriteit vir haar 'n akute kwessie word.

Die skuldenaar en die eerste skuldeiser het hul transaksie self as 'n pand beskryf. Indien dit 'n egte pand was, moes die eerste skuldeiser slaag want aan al die vereistes van pandgewing is daar, wat die sertifikaat aan betref, voldoen. In so 'n geval sou die eerste skuldeiser 'n saaklike reg gevestig het wat sy teenoor die latere koper kon handhaaf. Dit is wat die eerste skuldeiser se advokaat dan ook onder meer betoog het. Regter Booysen beskou dit daarenteen nie as 'n ware verpanding van die sertifikaat of die aandeel nie maar, heel tereg, as 'n sessie *in securitatem debiti* – 'n siening wat die probleem egter net met een kerf uitstel. Die vraag bly steeds: hoe moet mens die sessie *in securitatem debiti* konstrueer, as 'n soort pand of as 'n soort sessie? Dit is die presiese vraag waaroor die hele debat woed. Regter Booysen hanteer dit as essensieel 'n sessie-geval. *In casu* was die gewaande verpanding aan die eerste skuldeiser *qua* sessie onvoltooid omdat die maatskappy se toestemming nie vooraf daarvoor verkry is nie. Die sessie aan die tweede skuldeiser was egter geldig en moet dus voorrang geniet. Was dit nie vir die bepaling in die reglemente van die maatskappy nie, sou die antwoord presies andersom gewees het want na die eerste sessie sou daar niks oorgebly het om aan die tweede skuldeiser te sedeer nie. Aan die hand van die elementêre beginsels van sessie, en sonder verwysing na pandreg, word die probleem dus opgelos. Dit, meen ek met eerbied, was die korrekte benadering.

En daarvan sal afgelei kan word dat ek ouderwets en yeats genoeg is om sessie *in securitatem debiti* as 'n doodgewone verskyningsvorm van sessie gekoppel met 'n *pactum fiduciae* te sien. Om in dié verband van pand en van *dominium* en van kwasiebesit te praat, is platweg sommer net beeldspraak. So ook die tese dat mens die bevoegdheid om die reg te realiseer, van die reg self kan afskilfer sodat die reg by die sedent bly vassteek maar die bevoegdheid om dit te realiseer op die sessionaris oorgaan, as sou daar 'n verskil bestaan tussen die reg op prestasie en die reg op invordering van die prestasie, tussen 'n vorderingsreg en 'n invorderingsreg. Sessie *in securitatem debiti* verskil in sy kern van pandreg want in die een geval is die sekuriteitsobjek 'n vorderingsreg – 'n idiële ding, 'n abstraksie – waarby 'n derde party, 'n skuldenaar, betrokke is, en in die ander geval is die sekuriteitsobjek 'n tasbare saak wat fisies oorgedra en bewaar kan word en waarby alleen die pandgewer en die pandnemer betrokke is. In sy jongste reeks beslissings, te wete *Leyds v Noordwestelike Kooperatiewe Landboumaatskappy* 1985 2 SA 769 (A), *Marais v Ruskin* 1985 4 SA 659 (A) en *Bank of Lisbon and South Africa Ltd v The Master* 1987 1 SA 276 (A), het die appèlhof

die bul ongelukkig nie by die horings gepak nie maar van die teenoorgestelde kant benader, èn nuwe lewe ingeblaas in 'n juridiese minotaurus, half-bul, half-mens, oftewel half-pand, half-sessie. Dat dit 'n wangeskape bul is, is stellig die rede vir vandag se seminaar.

Maar nou ja, voor die behoeftes van praktyk moet elegansie altyd wyk. Op grond van wat die appèlhof gesê het, op grond van die geskrifte en van wat ons vandag hier gehoor het, moet mens dit as 'n feit aanvaar dat daar, eerstens, in die handelslewe 'n behoefte bestaan om vorderingsregte as sekuriteitsobjekte aan te wend en, tweedens, dat die sessie *cum pactum fiduciae*-oplossing nie 'n allesins bevredigende praktiese oplossing bied nie. Aldus verklaar regter Booysen in die pasgenoemde uitspraak (9 van die getikte teks):

> "That a need exists for incorporeal property or rights *in personam* to be capable of furnishing security in a manner similar to corporeal property cannot be gainsaid. That in order to furnish security, incorporeal property has to be transferred and thus ceded *in securitatem debiti* is equally clear. It is furthermore clear that in order to be effective security, such a cession *in securitatem debiti* should be effective against all third parties even those without knowledge of it, i e it should be as effective as the real rights of a pledgee or mortgagee. Our law has as it were, risen to the occasion by recognising such a pledge of rights *in personam* in response to the needs of commerce. Such recognition has, however, had a stormy passage and has also had unfortunate results. This was due to the inherent difference between incorporeal and corporeal property and in particular also the difference between the methods of transfer *in securitatem debiti* of corporeal as opposed to incorporeal property. It is obviously desireable that if such a transfer is to be valid against third parties there should be some form of effective publication to them of the fact that such transfer has taken place. Hence the requirement of publication by registration of a Mortgage Bond and delivery of movable corporeal property. Registration and possession serves, *inter alia*, as notice to third parties who may consider extending credit to the mortgagor or pledgor that his patrimony has been diminished and reduced and reduces the risk of fraudulent conduct on the part of the pledgor or mortgagor in obtaining credit. In the absence of a similar form of publication or notice to third parties of a pledge of rights *in personam*, it is difficult to justify recognition of its validity against third parties without knowledge or the means of obtaining knowledge thereof."

Een van die redes waarom die suiwer sessie-gedagte nie volkome bevredig nie, is dat die vorderingsreg by suiwer sessie onmiddellik en in sy geheel op die sessionaris oorgaan, terwyl die partye in werklikheid beoog dat die sessionaris se aanspraak om mee te begin slegs sekondêr sal wees – sekondêr in die sin dat hy alleen maar op volle prestasie kan aandring indien dit later sal blyk dat die sedent nie die versekerde skuld gaan vereffen nie. Die suiwer sessie-idee, met die konsekwensie dat die vorderingsreg vanuit die staanspoor in die boedel van die sessionaris eerder as die sedent setel, gee dus nie uiting aan wat die partye eintlik in gedagte het nie.

Daarbenewens hou dit vir al drie die betrokke partye sekere potensiële gevare in: vir die skuldenaar wat vir betaling aangespreek word, of wil betaal, en nie weet aan wie nie; vir die sedent indien die sessionaris bankrot speel, of in stryd met die ooreenkoms betaling vorder of die vorderingsreg aan 'n vierde sedeer; en vir die sessionaris indien die sedent bankrot speel, of in stryd met die ooreenkoms betaling van die skuldenaar vorder of voorgee om die skuld aan 'n vierde te sedeer aan wie betaling gemaak word.

Dit is veral op die gevaar van dubbel-sessie, 'n probleem wat eweneens by die pand-konstruksie voorkom, wat regter Booysen in die gemelde uitspraak wys. Omdat sessie sonder publisiteit geskied en omdat die sedent gewoonlik desperaat na krediet soek, skep dit die geleentheid vir bedrog deur die sedent.

Teen die tyd dat die sessionaris agterkom dat die sedent die vorderingsreg op bedrieglike wyse aan 'n vierde gesedeer het, is die sedent gewoonlik sonder geld. Die moeilike vraag is nie wie van twee onskuldige partye (die eerste of die tweede sessionaris) vir die gelag moet betaal nie – dit los die erkende beginsels van sessie maklik genoeg op – maar hoe mens die gelag ten beste kan vermy. Dit is hierdie probleem wat regter Booysen (13 van sy uitspraak) soos volg toelig:

> "In the market place as it were, criticism of the lack of requirement of publication of cessions *in securitatem debiti* is widespread. No-one who has practised law has not experienced the dismay and indignation on the part of those to whom unscrupulous debtors have ceded rights *in personam in securitatem debiti* when informed that their "security" is non-existent due to a prior cession of those rights to someone else. I must confess that I find it quite unacceptable that this state of affairs in which this type of unscrupulous conduct occurs daily should be permitted to continue. This is after all basic to the problems in this case. The second claimant in this case was represented throughout by her husband, an Attorney. He, to my mind, took all the reasonable steps to ensure that the seller was entitled to sell the shares to his wife. Why should a previous pledge of which no notice or publication took place be valid against her? The other side of the coin is, however, why should a pledgee of shares who has had the shares pledged and the Share Certificate delivered to her in circumstances in which the law places no duty on her to publicise the pledge (if it does not) find that the law subsequently does not recognise the validity of the pledge against third parties?
>
> I am afraid that this is another one of those cases, which occur far too often, in which a Court has to decide which one of two honest and law-abiding persons has to suffer the consequences of the fraudulent conduct of a third person who has used the opportunities created by one of the defects in our legal system. The defect to which I refer is the fact that our law permits too great a difference between appearance and reality in certain areas. The greater the difference between appearance and reality recognised or permitted by the law, the greater the opportunity for the charlatan to exploit it to the detriment of the innocent.
>
> So, for example, a person may in all respects appear to be the owner of a car by virtue of his possession and use of the car, and the fact that it is licensed and registered in his name, but in reality the owner recognised by the law may be a finance house which took cession of the rights of the original owner, and has itself never had physical possession of the car. It seems to me that this is a problem which can only be resolved by legislation providing for a mechanism for registration of ownership of movable corporeal property, and also rights *in personam* and of transfer or cessions thereof whether it be *in securitatem debiti* or otherwise. Until the age of computers, a registry of movable and incorporeal property would perhaps not have been feasible but that could hardly be so at present.
>
> *Sonnekus*, (1979 *TSAR* 119 at 138) has, for example, suggested a computerised new vehicle registration system. It is a matter which deserves the attention of the Law Commission and the Legislature."

Regter Booysen was nie die eerste of die enigste wat, ten einde raad, wetgewing as 'n oplossing propageer nie (vlg bv Scott 1987 *THRHR* 175; en Clark en Van Heerden 1987 *SALJ* 238). Selfs die Suid-Afrikaanse Regskommissie het 'n werkstuk daaroor geproduseer (Working Paper 23; Project 46), kompleet met wetsontwerp, hoe tentatief ook al. Die gedagte dat die wetgewer moet ingryp, is iets wat mens noodgedwonge moet ondersteun. Afgesien van die reeds genoemde praktiese probleme wat vir hierdie vorm van sekerheidstelling geld – onder watter vaandel hy ook al vaar – verkeer die reg huidig in 'n toestand van tweespalt en onsekerheid want niemand kan met vertroue voorspel of nuwe probleemsituasies aan die hand van die beginsels van sessie dan wel van pand opgelos moet word nie. In die werkstuk van die regskommissie word die rekenaaroplossing wat regter Booysen aan die hand doen nie spesifiek ten opsigte van sessie *in securitatem debiti* genoem of bespreek nie. Daardie oplossing, sou ek meen, is 'n langtermynprojek met fasette wat veel wyer uitkring as bloot sessie

in securitatem debiti. Onteenseglik sal so 'n skema sommige van die ondeugde van die huidige stelsel neutraliseer. Maar dit beantwoord nie die fundamentele vraag of mens by die opstel van 'n nuwe wet van die sessie- of van die pand-model gebruik moet maak nie.

Die werkstuk beveel laasgenoemde aan. Ek sou, as ek hulle was, die ander paadjie bewandel. Omdat dit juis 'n vorderingsreg is wat as sekuriteitsobjek moet dien, en omdat sodanige sekuriteit noodwendig by wyse van die oordrag van die vorderingsreg moet geskied, en omdat 'n reg alleen deur middel van sessie oorgedra kan word, is sessie die aangewese uitgangspunt. Vir die redes reeds genoem, is die pand-analogie geforseerd. Afgesien van enigiets anders is daar die een faktor wat mens by pand nie aantref nie, naamlik 'n skuldenaar wat die skuld teenoor iemand anders moet vereffen. Hy kan dit selfs voor die bestemde tyd wil doen. Vir daardie geval maak die pand-model geen voorsiening nie. Die grondliggende regsfiguur bly dus steeds sessie en na my mening moet 'n mens, wanneer jy die statutêre towerstokkie swaai, so na as moontlik aan daardie regsfiguur bly. Dit besorg aan mens die gemeenregtelike agtergrond waarteen enige sodanige wet vertolk kan word tesame met 'n stel basiese regsbeginsels om nuwe en tot nog toe onvoorsiene probleme te hanteer.

Maar is so iets enigsins moontlik? Hoe vereenselwig 'n mens twee op die oog af onversoenbare oogmerke: die gedagte dat die vorderingsreg by die sedent moet bly setel, aan die een kant, met voldoende sekuriteit vir die sessionaris, aan die ander kant?

Myns insiens bestaan daar wel 'n bepaalde sessie-konstruksie wat 'n mens met vrug as uitgangspunt vir enige beoogde wetgewing kan aanwend, en dit is om die oordrag van die vorderingsreg wat as sekuriteitsvoorwerp moet dien met 'n voorwaarde te kwalifiseer. Wat ek in gedagte het, is dit: gestel die skuldenaar skuld aan die sedent 'n bedrag, sê maar R1 500 – die eerste vorderingsreg; die sedent leen by die voorgenome sessionaris sê nou maar R1 000 wat hy aanstons moet terugbetaal – die tweede vorderingsreg. Die sedent en die sessionaris kom ooreen om die eerste vorderingsreg as sekuriteit vir die tweede te gebruik, maar op so 'n wyse dat die eerste vorderingsreg alleen op die sessionaris oorgaan as en wanneer die tweede vorderingsreg nie op die gegewe datum vereffen word nie. Die oordrag is onderhewig aan 'n voorwaarde. Die voorwaarde (die onsekere toekomstige gebeurtenis) is die wanbetaling van die tweede vorderingsreg. Inmiddels, in afwagting van betaling, bly die vorderingsreg 'n bate in die sedent se boedel. Word die versekerde skuld gedelg, verval die voorwaarde en bly die eerste vorderingsreg steeds 'n bate in die sedent se boedel. Geen retro-sessie is nodig nie. Word die tweede vorderingsreg daarenteen nie op die gegewe datum vereffen nie, is die voorwaarde vervul en gaan die eerste vorderingsreg outomaties op die sessionaris oor. Hy kan dit dan afdwing met die voorbehoud dat as dit 'n oorskot oplewer hy sodanige oorskot aan die sedent moet terugbetaal.

So 'n skema, eenvoudig in konsepsie, sal uiting gee aan die werklike oogmerk van die partye, naamlik dat die vorderingsreg om as sekuriteitsobjek te funksioneer, vir die sessionaris beskikbaar moet wees maar eers daadwerklik op hom sal oorgaan indien die skuld wat dit verseker nie vereffen word nie.

Dadelik ontstaan die vraag: as dit dan so 'n slim plan is, hoekom maak niemand ooit daarvan gebruik nie? Waarom is wetgewing hoegenaamd nodig? Die antwoord is eenvoudig: sonder wetgewing om dit te rugsteun, is dit nie so 'n slim plan nie want dit bied onvoldoende sekuriteit aan die beoogde sessionaris.

Al waarmee hy gewapen sal wees, is 'n voorwaardelike aanspraak op die oordrag van die vorderingsreg en dit bied skamele troos as die sedent insolvent raak of as hy die vorderingsreg intussen op die een of ander manier gerealiseer het.

Sou 'n mens hierdie konstruksie dus as basiese uitgangspunt wou gebruik, sal jy noodgedwonge sekere statutêre versterkings moet aanbring. Die eerste is verklarend van die gemenereg, naamlik dat die vorderingsreg by vervulling van die voorwaarde outomaties op die sessionaris oorgaan. Die ander is aanvullend, naamlik dat die sedent die vorderingsreg, hangende òf die vervulling òf die verval van die voorwaarde, nie teenoor die skuldenaar mag afdwing of kompromiteer, of aan enigiemand anders as die sessionaris mag oordra nie. Enige strydige optrede moet sowel nietig as strafbaar wees. Dit sal die gevaar verminder waarop regter Booysen in die gemelde uitspraak wys en 'n verbetering wees op die stelsel soos dit tans heers, of mens dit nou as 'n manifestasie van sessie of van pand sien. 'n Mens moet die skuldenaar ook nie vergeet nie. Hangende vervulling van die voorwaarde is die sedent volgens dié konstruksie steeds sy skuldeiser. Weier laasgenoemde om betaling te ontvang, pleeg hy denkbaar *mora creditoris* teenoor die skuldenaar. Ontvang hy egter wel betaling, fnuik hy die sessionaris se sekuriteit. (Dit geld natuurlik vir die huidige stelsel ook.) Een moontlike oplossing sou wees om die skuldenaar toe te laat, en die sedent statutêr te verplig, om sodanige betaling te konsigneer op gevaar van straf indien die sedent dit nie doen nie. Laastens moet enige sodanige wet natuurlik voorsiening maak vir die sessionaris se voorkeur ingeval die sedent, hangende die vervulling van die voorwaarde, bankrot speel. Origens geld die bepalings van die *pactum fiduciae* en die gemenereg.

Met dié paar statutêre aanpassings meen ek dat daar op grondslag van hierdie konstruksie, geanker in die gemeenregtelike sessie-figuur, 'n behoorlike en aanneemlike stelsel uitgewerk kan word sonder dat dit nodig word om die sessie-figuur in die pand-korset in te forseer.

Sover ek kan oordeel, sou dit al die tipiese probleem-situasies bevredigend oplos: insolvensie van die sedent, hetsy voor hetsy na wanbetaling, is geen probleem nie want die sessionaris geniet volgens die voorstel voorkeur. Insolvensie van die sessionaris bied insgelyks geen probleem nie want die vorderingsreg vestig eers by die sedent se wanbetaling in sy boedel; dubbel-sessie word deur die verbod daarteen gedek; en so ook afdwinging van die skuld deur die sedent of die sessionaris in stryd met die *pactum fiduciae*, want afdwinging van die skuld deur die sedent word pertinent verbied en afdwinging van die skuld deur die sessionaris is nie moontlik nie aangesien hy, voor vervulling van die voorwaarde, nog geen vorderingsreg teen die skuldenaar het nie. Betaling deur die skuldenaar aan die sedent, hangende vervulling van die voorwaarde, word spesifiek gereël op 'n wyse wat die sessionaris se posisie ten beste beveilig. Dra die skuldenaar van die sessie kennis, konsigneer hy. Betaal hy daarenteen in onkunde, geld die gemenereg en word hy as bevry beskou. Die sessionaris wat dit wil verhoed, moet aan die skuldenaar kennis gee of anders met sy remedies teen die sedent of laasgenoemde se strafregtelike vervolging tevrede wees; behalwe natuurlik as mens professor Oelofse se suggestie invoer, wat hy in sy referaat geopper het, dat die skuldenaar regmatig kan weier om aan iemand anders as die sedent te betaal tensy so iemand bewys van die sessie voorlê.

Toegepas op die feite van die *Sniegocki*-saak, sou die stelsel wat ek genoem het die eerste skuldeiser ten koste van die tweede beskerm het. Bedrog, in die

besonder bedrieglike dubbel-sessie, bly maar 'n netelige probleem, of dit nou die sedent is of iemand wat hom as reghebbende voordoen, wat die reg kastig aan die onskuldige vierde oordra. Teen 'n insolvente bedrieër kan geen wet ooit beskerming verleen nie. Om sessies *in securitatem debiti* te moet openbaar, ooreenkomstig regter Booysen se voorgestelde rekenaar-model, sal beslis help. 'n Nagedagte: registrasie hoef regtens nie verpligtend te wees nie maar sal feitelik gou genoeg verpligtend word indien dit 'n bepaling is dat 'n ongeregistreerde sessie voor 'n latere geregistreerde sessie moet wyk. By so iets kan die skema wat ek pas aan die hand gedoen het, gerieflik inskakel ten einde die net van beskerming op sy wydste te span.

Vir sekerheid, indien nie sekuriteit nie, moet die ooreenkoms wat die statutêre sessie *in securitatem debiti* ten grondslag lê, of minstens die kernbepalings daarvan, seker maar op skrif wees. Die kernbepalings, sou ek dink, moet die *causa* en die bedrag van die versekerde skuld behels, asook die vorderingsreg wat oorgedra moet word, en in die besonder die tydstip of insident waarop die vorderingsreg outomaties, kragtens wet, op die sessionaris sal oorgaan. Word daar nie aan hierdie formaliteitsvereistes voldoen nie, behoort die transaksie darem nie nietig te wees nie, maar ontneem dit die partye die addisionele beskerming wat die wet hul andersins sou bied. Op dié manier kan ons die interessante debat oor die aard van die gemeenregtelike sessie *in securitatem debiti* nog 'n rukkie langer voortsit. Dalk ook nie, want as die beoogde statutêre sekerheidsessie eers behoorlik geïnstalleer is, bied dit voldoende beskerming sodat mens van die lawwe pand-konstruksie gerus maar kan begin vergeet. Dan het jy net twee vorme van sessie *in securitatem debiti*: een wat, by die nakoming van sekere voorskrifte, statutêre beskerming verleen, en een waar alleen die gemenereg geld.

Natuurlik is die gedagtes wat ek tot dusver uitgespreek het, tentatief en bolangs. Hulle getuig ook nie van 'n besondere regterlike perspektief nie. Dit is bloot die opvatting van iemand wat toevallig 'n regter is – baie toevallig. Sessie, of sessie *in securitatem debiti*, is vir 'n regter maar net nog 'n regsverskynsel. Nòg die amp self, nòg sy algemene ervaring, rus die regter toe om 'n eiesoortige siening of insig in die verskynsel te hê. Mens kan sessie *in securitatem debiti* dus nouliks vanuit die spesifieke hoek van die regbank bekyk. Die regbank is in elk geval nie die gerieflikste plek vir die beste perspektief nie.

PM NIENABER

Regter van die Natalse Provinsiale Afdeling van die Hooggeregshof van Suid-Afrika

THE REGISTRABILITY OF A CLOSE CORPORATION NOT FOR GAIN

That a close corporation can be used for a purpose not for gain has been emphasised by Professor SJ Naudé (first chairman of the standing subcommittee on close corporations of the standing advisory committee on company law) on more than one occasion ("Alternatiewe regsvorm vir entrepreneur" 1984 *Volkshandel* 58; "The close corporation. A new legal form for enterprise in South

Africa" 1984 (June) *Boardroom* 18). The full import of these statements can be appreciated from the following remark:

> "[T]here is no requirement, as in partnership law, that there must be an object of making profits. Hence a close corporation may be used for a purpose not for gain. However all provisions of the Act will have to be observed . . ." (Naudé "The South African close corporation" 1984 *JJS* 119).

Oosthuizen (*Beslote korporasies* (1987) 36) also mentions the fact that a close corporation need not necessarily strive for the acquisition of gain, while Allan (*The Close Corporations Act, 1984. A basic introduction* (1984) 8) submits that a close corporation need not be motivated by profit-making and may be formed to pursue some non-profit-making goal such as the advancement of art, basing his argument on the use of the word "business" in both section 12(b) of the Close Corporations Act 69 of 1984 (hereinafter referred to as the act) and section 33 of the Companies Act 61 of 1973, and the fact that a company need not necessarily be formed with the object of the acquisition of gain. However, a contrary view has been put forward, based on the fact that section 21 of the Companies Act, which deals with "an association not for gain", uses the words "purpose" and "object" and not "business" (Ramsden "Close corporations" 1988 *Businessman's Law* 108). The merits of these arguments will emerge from the investigation of the registrability of a close corporation not for gain in terms of the act.

Section 2(4) of the act provides that a close corporation shall have the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers. This is a fundamental departure from the traditional approach that a juristic person created by or in terms of an act has a certain limited capacity which is determined by its fixed objects. The fact that the principal business must be stated in the founding statement has no effect on the capacity of the corporation but does to some extent affect the power of members to bind the corporation *vis-à-vis* third parties (Henning "Die aanspreeklikheid van 'n beslote korporasie vir die handelinge van 'n lid en enkele ander aspekte van eksterne verhoudings" 1984 *JJS* 165). The act requires that the founding statement of the corporation be signed by or on behalf of every person who is to become a member upon registration (s 12) and that an amended founding statement be signed by or on behalf of any person who is to become a member of an existing corporation (s 15). The founding statement has been construed as a contract between the members *inter se* on the one hand and between the members and the corporation on the other hand (Malan *Beslote korporasiereg* (1986) 20). The common-law rule of contract in regard to lawfulness, namely that a contract is illegal when its object is expressly or impliedly prohibited by legislative enactment or is contrary to good morals or public policy (Van Rensburg 5 *LAWSA* 74), is therefore applicable to the principal business of a corporation. The only limitation on the type of business registrable under the act is the provision contained in section 13 that the business to be carried on by the corporation must be lawful, and it is submitted that, in addition to specific enactments, statutory provisions may affect the lawfulness of a corporation as they affect bodies corporate in general. As regards statute law, an example of a type of business which a close corporation is specifically prohibited from conducting, is that of trustee of a unit trust scheme (s 20(1)(b) of the Unit Trusts Control Act 54 of 1981 as substituted by s 13 of

the Financial Institutions Amendment Act 51 of 1988). Furthermore, the business of a bank, for example, may in terms of section 7 of the Banks Act 23 of 1965 be carried on only by a person registered under this act. Although it would appear from the provisions of section 8B of the South African Reserve Bank Act 29 of 1944 (inserted by s 1 of the South African Reserve Bank, Banking Institutions, Mutual Building Societies and Building Societies Amendment Act 96 of 1988 (*Government Gazette* 11418 of 1988–07–22)) that a close corporation may carry on the business of a bank, it is clear that, unless it is duly registered in terms of the Banks Act, it would be unlawful for a close corporation to carry on such a business. In addition, certain objects may be unlawful or be declared unlawful in terms of the Internal Security Act 74 of 1982 and it would obviously be unlawful for a close corporation to have the promotion of such an object as its principal business. However, it is submitted that neither the act nor the policy of the law necessitates a conclusion that a close corporation is required to be operated by its members with the object of making and sharing profits.

The requirement in section 12(b) of the act that the principal business to be carried on by the corporation be stated in the founding statement, poses a problem in so far as the term "principal business" is not defined in section 1 of the act, but is essential for comprehending the purview of the act. The only other instance where the term "principal business" occurs, is in section 46 (b)(1), and it is not possible to establish the exact meaning of the term in the context of this section either. Legislation providing a definition of the word "business" is scant, the Business Names Act 27 of 1960 and the Harmful Business Practices Act 71 of 1988 being exceptions in this regard. It is nevertheless noteworthy that in statutory provisions the word is also used with regard to associations whose main object is not the acquisition of gain. The term "business of the society" is frequently encountered in the Mutual Building Societies Act 24 of 1965, and section 21A of the Companies Act deals with the transfer of, *inter alia*, the business of certain branches of foreign companies and associations not for gain.

Perhaps because of the paucity of statutory definitions of the term "business", case law in which this term is discussed, is legion both in South Africa and in England. Probably one of the oldest and most oft-quoted definitions is that contained in *Smith v Anderson* (1880) 15 ChD 247, namely that "anything which occupies the time and attention and labour of a man for the purpose of profit is business" (258). How this definition was arrived at, appears from the following quotation of Jessel's discussion of the word "business" (258—259):

> "As regards the only point which was not elaborately discussed in *Sykes v Beadon*, the meaning of the word 'business', I must say a few words. In *Sykes v Beadon* the only point I had to consider was whether it was an association formed for the purpose of gain. The supposed distinction between an association formed for the purpose of gain and an association formed for the purpose of taking upon itself a business having for its object the purpose of gain was not there argued, but it has been argued since, and I have given an opinion upon it which I will repeat. First, what is the meaning of 'any other business'? Now 'business' itself is a word of large and indefinite import. I have before me the last edition of *Johnson's Dictionary*, edited by Dr Latham, and there the first meaning given of it is, 'Employment, transaction of affairs'; the second, 'an affair'; the third, 'subject of business, affair, or object which engages the care'. Then there are some other meanings, and the sixth is, 'something to be transacted'. The seventh is, 'something required to be done'. Then taking the last edition of the *Imperial Dictionary*, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: 'Business, employment, that which occupies the time and attention and labour

> of men for the purpose of profit or improvement'. That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification. Then, 'Business is a particular occupation, as agriculture, trade, mechanics, art, or profession and when used in connection with particular employments it admits of the plural that is, businesses.' Therefore the Legislature could not well have used a larger word."

While the inference which Jessel makes from the definition contained in the *Imperial Dictionary* has frequently been quoted by our courts as a definition of the word "business" (e g in *South African Flour Miller's Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 204; *Standard General Insurance Co v Hennop* 1954 4 SA 560 (A) 564), it is evident from the above quotation of Jessel's general discussion of the term that it does admit of a wider meaning and that a limited meaning was used only for purposes of interpretation of section 4 of the English Companies Act of 1862. This provision which is a precursor of section 30(1) of our Companies Act of 1973, reads as follows:

> "No company, association or partnership consisting of more than twenty persons shall be formed after the commencement of the Act for the purpose of carrying on any other business [that is, other than banking] that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act."

Although Jessel's judgment was upset on appeal, the cogency of his statements regarding the word "business" were not affected as appears from the following statement by Brett LJ (278):

> "Now, the word 'business' might in a grammatical sense include things which no ordinary person would call a business, and, inasmuch as the Legislature could not particularize every kind of business which they intended to include, they have, in order to confine the meaning of that large word 'business', stated that it is to be a business 'that has for its object the acquisition of gain'. The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object."

These *dicta* indicate that the term "business" is capable of bearing a very wide meaning and is not of necessity restricted to an activity having for its object the acquisition of personal gain or profit.

If it were accepted that the object of any business is the acquisition of gain, it would not have been necessary to annex this qualifying phrase to the word "business" in our Companies Act of 1973, yet sections 30 and 31 repeat the qualification of the word "business" formulated in section 4 of the English Companies Act of 1862.

Furthermore, it is noteworthy that while the object of a partnership is by definition the making and division of profits, section 1(1) of the English Partnership Act of 1890 clearly states that what is meant and required by "business" for purposes of the act is a "business with a view to profit". If "business" necessarily meant a commercial activity with the object of the acquisition of profit, why does the Partnership Act not merely require a "business" but expressly qualify the term with the phrase "with a view to profit"? The American Uniform Partnership Act 1914 similarly requires in section 6(1) that the "business" be a "business for profit". Regarding their definition the Uniform Partnership Act draftsmen stated in their commentary:

> "*A business is a series of acts directed in a certain manner toward a definite end* . . . [P]artnership is a branch of our commercial law . . . [T]herefore, the operation of the Act is *confined* to associations organised for profit."

Although the foregoing may serve to explain what "business" may mean, it is not conclusive with regard to the meaning of the word "business" in our law

nor with regard to the meaning of the word "business" as it appears in the Close Corporations Act. The latter demands a brief examination of our contemporary case law and the provisions of the act.

Numerous as South African cases in which the term "business" is discussed may be, the scope of this note demands that the analysis be confined to the leading appellate division case, namely *South African Mutual Insurance Association Ltd v Biddulph* 1976 1 SA 725 (A), in which one of the issues was the meaning of "business" in section 11(1) of the Motor Vehicle Insurance Act 29 of 1943. Having stated (738) that "business" is a vague, elastic concept capable of sustaining a great variety of connotations, some wide, others narrow, and having consulted English and South African cases, Trollip JA stated (739) that while the word "business" includes an active occupation or profession continuously carried on, the element of continuity is necessary for the concept of "carrying on business" and distinguished this from the concept of business as follows:

> "I think that even a single, isolated activity that occupies a person's time, energy or resources could, in appropriate circumstances, be included within the meaning of 'business'..."

He added:

> "[*S*]*econdly the object of the activity, enterprise or pursuit need not be the making of a profit or income, an altruistic or philanthropic object, such as the advancement of medical science can also suffice*"

and

> "thirdly an occupation indulged in purely for pleasure, sociability or the like does not ordinarily constitute business".

These interpretations of "business" were applied in two subsequent appellate division cases (*Union and South West Africa Insurance Co Ltd v Kata* 1979 2 SA 893 (A) and *Southern Insurance Association Ltd v Khumalo* 1981 3 SA 1 (A)).

It is submitted that there is nothing in the sections of the act in which the phrase "principal business" occurs and nothing in the purview of the act which indicates the legislature's intention to limit the meaning of the word "business" to an activity pursued with a view to the personal profit of the members. The qualification "principal" in section 12(b) merely indicates that the principal business as distinct from any ancillary business must be stated in the founding statement (Allan 8). In the arguments surrounding the interpretation of section 12(b) referred to previously, reliance is placed upon terminology contained in certain provisions of the Companies Act of 1973. It is submitted, however, that quite apart from the fact that a close corporation is an entirely new legal form of business and not merely an incorporated partnership or a simplified type of private company, the distinctive terminology of the Companies Act in this case is not necessarily decisive or even appropriate to close corporations. This also appears from a comparison of the functions of the requirements of the founding documents of the various forms of enterprise.

The Companies Act (s 52) requires a separate statement in the memorandum of association of the purpose for which the company is to be formed in conjunction with the main business to be carried on by the company, or, in the case of a section 21 company, in conjunction with the main object which it is to promote. The object of this requirement is to enable the Registrar to satisfy

himself *prima facie* that the purpose for which the company is proposed to be formed, is a lawful purpose (Meskin (ed) *Henochsberg on the Companies Act* (1985) 85). The Close Corporations Act, however, does not demand a statement or disclosure of the purpose for which the corporation is to be formed or incorporated. Its lawfulness is established with reference to its principal business. It would thus seem that while one of the functions of stating the principal business of a corporation in the founding statement is to enable the Registrar to establish the lawfulness of the corporation, it can hardly be concluded that the statement of the principal business of a corporation amounts to a statement of the purpose for which the corporation is to be formed or incorporated. The principal business of a corporation may be that of a confectionary but the purpose of forming and incorporating the confectionary may be to generate funds for the advancement of an altruistic or philanthropic object such as the advancement of medical science.

A second function of the separate statement — apart from the main object of the company — of "the purpose" of the formation of the company "describing the main business" to be carried on or the "main object" to be promoted, is to enable the Registrar to satisfy himself *prima facie* that the carrying on of the main business as described will be within the capacity of the company as determined by that main object (Meskin *loc cit*). The unlimited capacity and powers with which a close corporation is endowed in terms of section 2(4) makes the statement of a main object unnecessary and makes it clear that a close corporation may pursue any objective which a juristic person is capable of pursuing provided that such objective activity is lawful.

What further functions could the required statement of the principal business of a corporation fulfil? In terms of section 17, the doctrine of constructive notice does not apply to the founding statement or amended founding statement but in terms of section 16, such documents are public documents and may be inspected by any member of the public. As regards external relations, the statement of the business of the corporation may to some extent function to limit the power of members to bind the corporation as appears from the provisions of section 54. Although this section (and especially subs (1)–(4)) is modelled quite closely on sections 5, 7 and 8 of the English Partnership Act of 1890 (Henning 1984 *JJS* 167; 1985 *DR* 64) which also refer to "the business" of the partnership or firm, it should be noted that the act, unlike the Partnership Act, does not confine the meaning of the word to a "business with a view to profit".

As regards internal relations, the authority of the members *inter se* is limited by the stated principal business in so far as the power bestowed upon a member to represent the corporation in the carrying on of its business is subjected to the fiduciary duty to exercise such powers in the interest and for the benefit of the corporation. However, it is also apparent from these sections that the business actually carried on by the corporation functions in the same way (Henning 1984 *JJS* 168; 1985 *DR* 641). Should the stated business of the corporation differ from the business actually carried on by the corporation, the stated business protects third parties who have read the founding statement and who *bona fide* contract with the corporation on the strength of the particulars regarding the principal business contained therein (Henning 1984 *JJS* 168). It would seem that, apart from these considerations, it could be said that, specifically in the context of registrability, the primary function of the statement of the principal

business in the founding statement is to enable the Registrar to establish *prima facie* the lawfulness of the business which the close corporation proposes to carry on.

The question whether a close corporation not for gain is registrable in terms of the act thus turns on the meaning of the word "business" in section 12(b). Other requirements of the act regarding the founding statement have not been contested and no problems concerning them are foreseeable, except that the name of the corporation to be formed may not be undesirable (s 19). Admittedly, the association agreement of a close corporation not for gain would have to be carefully drafted to reveal that the purpose of the corporation is not primarily the making and division of profits. However, since neither entry into an association agreement nor submission of an association agreement to the Registrar are prescribed by the act, they do not affect the registrability of a close corporation.

In conclusion, it is submitted that the endowment of a close corporation with unlimited capacity and powers, the wide meaning attributable to the word "business", the absence of a prescription in the act with regard to the making and division of profits, and the fact that the provisions of the act regarding particulars to be stated in the founding statement may be complied with by persons intending to form a close corporation not for gain, serve as indications of the legislature's intention that a close corporation can be registered as a close corporation not for gain.

In accordance with the title of this brief note, attention was focussed on the registrability of a close corporation not for gain. In a later note other aspects such as the provisions of sections 46(f) and 51, the contents of the association agreement and, specifically, the nature of a member's interest in a close corporation not for gain, will be discussed.

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GEDAGTES OOR DIE GELDIGHEID VAN WISSELS, TJEKS EN PROMESSES WAT AS SKULDAKTES INGEVOLGE DIE WOEKERWET 73 VAN 1968 AANGEWEND WORD

1 Agtergrond: bepalings van die Woekerwet

In artikel 1 van die Woekerwet word 'n "skuldakte" omskryf as

> "ook 'n *verhandelbare stuk*, verband, skriftelike kontrak of ooreenkoms of ander dokument waarin die bedinge en voorwaardes van 'n kontrak of ooreenkoms in verband met 'n geldleningstransaksie of 'n krediettransaksie of 'n huurtransaksie vervat is, maar nie ook 'n dekkingsverband vir sover dit sekuriteit vir toekomstige voorskotte heet te verleen nie" (my kursivering).

Artikel 3A(1) vereis dat skuldaktes bepaalde gegewens moet bevat betreffende betaling van die hoofskuld en finansieringskoste voor die vervaldatum. Die artikel lui soos volg:

"(1) Behoudens die bepalings van subartikel (2) moet elke skuldakte, behalwe 'n skuldbrief, ingevolge waarvan die hoofskuld en finansieringskoste wat deur die betrokke geldopnemer of kredietopnemer of huurder verskuldig is en wat in paaiemente, wat finansieringskoste insluit, oor 'n tydperk in die toekoms betaal moet word, die volgende bepaal, naamlik—

(a) die tydperk, maar hoogstens 90 dae, of, indien 'n langer tydperk vir die doeleindes van hierdie paragraaf by regulasie voorgeskryf word, hoogstens die tydperk wat aldus van tyd tot tyd voorgeskryf is, wat moet verloop vanaf die datum waarop 'n geldopnemer of 'n kredietopnemer of 'n huurder skriftelik aan die betrokke gelduitlener of kredietgewer of verhuurder kennis gegee het dat hy voornemens is om die uitstaande saldo van die hoofskuld en finansieringskoste daarop voor die vervaldatum daarvan in een bedrag aan daardie gelduitlener of kredietgewer of verhuurder te betaal, voordat daardie geldopnemer of kredietopnemer of huurder geregtig sal wees om daardie uitstaande saldo en finansieringskoste aldus te bepaal;

(b) die minimumtydperk, maar hoogstens 90 dae, wat moet verloop na die datum van sodanige transaksie voordat enige kennisgewing bedoel in paragraaf (a) deur of ten behoewe van 'n geldopnemer of 'n kredietopnemer of 'n huurder gegee mag word;

(c) dat enige kennisgewing bedoel in paragraaf (a) die datum moet vermeld waarop die betrokke geldopnemer of kredietopnemer of huurder voornemens is om die uitstaande saldo en finansieringskoste bedoel in daardie paragraaf in een bedrag te betaal;

(d) dat, ondanks andersluidende bepalings van die betrokke skuldakte, die datum wat ooreenkomstig paragraaf (c) in 'n kennisgewing bedoel in paragraaf (a) vermeld word, geag word die datum te wees waarop die uitstaande saldo van die betrokke hoofskuld en finansieringskoste daarop deur daardie geldopnemer of kredietopnemer of huurder ingevolge daardie skuldakte betaal moet word:

Met dien verstande dat vir die doeleindes van paragraaf (a) verskillende tydperke vir transaksies van verskillende geldwaardes voorgeskryf kan word."

Die doel van bostaande bepalings is om die skuldeiser teen renteverlies te beskerm indien die skuldenaar skielik sou besluit om die hele uitstaande skuld te betaal (Van Jaarsveld en Oosthuizen (reds) *Suid-Afrikaanse handelsreg* (1988) vol 1 437). Otto (24 *LAWSA* par 170) verklaar in hierdie verband:

"These provisions are concerned with the creditor's loss or potential loss of finance charges. The argument is that when a creditor extends credit for a certain period he can expect to earn interest for that period. If the debtor is allowed to prepay the whole debt at any time and claim a full reduction of the interest, this will lead to a loss for the creditor. It may happen that the creditor is unable to find another debtor immediately ... The upshot of section 3A is that the creditor can safeguard himself in the contract against loss of interest within the first 180 days of the contract. He can further contractually oblige the debtor to state in advance the date on which he intends to pay the outstanding balance of the debt and that this new date will be regarded as the due date."

2 Problematiek

Die vraag na die geldigheid van wissels, tjeks en promesses wat as skuldaktes aangewend word, ontstaan wanneer die verpligting wat artikel 3A(1) neerlê om die vereiste gegewens in die skuldakte te vervat, versoen moet word met die vereiste in artikels 2(1) en 87(1) van die Wisselwet 34 van 1964, naamlik dat hierdie dokumente op aanvraag of op 'n bepaalde of bepaalbare toekomstige tydstip betaalbaar moet wees. Die vraag is of 'n wissel, tjek of promesse wel op 'n bepaalde of bepaalbare toekomstige tydstip betaalbaar is indien dit ingevolge artikel 3A van die Woekerwet 'n klousule bevat wat aan die skuldenaar die keuse gee om vervroegde betalings binne die voorgeskrewe tydperke en na die gee van die vereiste kennis te maak.

'n Tipiese probleemsituasie het hom onlangs in *Standard Credit Corporation Ltd v Kleyn* 1988 4 SA 441 (W) voorgedoen. In hierdie saak moes die hof beslis of 'n dokument wat onder andere soos volg bepaal het, 'n geldige promesse was:

> "I/We the undersigned (jointly and severally where there are two or more signatories hereto), for value received, hereby promise to pay ... the total sum of R22 439,40 ... by way of an initial instalment of R373,99 with 58 subsequent instalments of R373,99 each and a final instalment of R373,99 the first of which instalments is payable on the 9th day of January 1985, all subsequent instalments being payable on the same day of each succeeding month. If any instalment due in terms of this note or if any other obligation to the holder hereof is not paid on due date the balance of the total sum on this note shall immediately become due and payable.
>
> I/We may prepay the outstanding balance of the total sum in one amount after the lapse of 90 days after the date on which I/we have notified the holder of this note in writing to that effect. No notice as provided above may be given by me/us until 90 days have elapsed after the date of my/our signature of this note. A notice given in terms hereof shall state the date on which I/we intend to make the payment referred to therein which date shall be deemed to be the due date for that payment."

In die onderhawige saak het regter Goldstone tereg bevind (443G–H) dat die eerste paragraaf van die dokument wel binne die omskrywing van 'n promesse in artikel 87(1) van die Wisselwet val en dat dit ook aan die vereistes van artikel 7(1)(c) van dieselfde wet voldoen. (Laasgenoemde artikel bepaal dat die bedrag van 'n wissel 'n vasgestelde bedrag is al moet dit betaal word in vermelde paaiemente en by wanbetaling van enige paaiement die hele bedrag opeisbaar word uit hoofde van 'n bepaling te dien effekte in die wissel.) Die tweede paragraaf van die dokument hierbo, waarin die vereistes soos neergelê in artikel 3A van die Woekerwet weerspieël word, het egter tot gevolg gehad dat regter Goldstone bevind het dat die dokument nie 'n geldige promesse en ook nie 'n likwiede dokument was nie (445H). Vervolgens word aandag gegee aan die benadering wat die regter gevolg het om tot genoemde bevinding te kom.

3 Die hof se benadering in *Standard Credit Corporation v Kleyn*

In die *Kleyn*-saak het regter Goldstone hom laat lei deur die volbankbeslissing in *Weszak Beleggings (Edms) Bpk v Venter* 1972 1 SA 730 (T) (uitvoerig bespreek deur Petersen 1972 *SALJ* 163). Sodoende het die regter die onderhawige dokument (skuldakte) oor dieselfde boeg gegooi as dokumente wat "op of voor" of "binne" 'n sekere tyd betaalbaar is.

Oor die geldigheid van sodanige dokumente (as wissels, tjeks of promesses) bestaan deur uiteenlopende standpunte en teenstrydige (buitelandse) hofuitsprake. (Sien bv die meerderheidsuitspraak in *Williamson v Rider* 1962 2 All ER 268 en *Claydon v Bradley* 1987 1 WLR 521 (CA) waar beslis is dat sodanige dokumente nie geldige promesses is nie; sien vir die teenoorgestelde standpunt die minderheidsuitspraak in die *Williamson*-saak hierbo, die Ierse beslissing *Creative Press v Harman & Harman* 1973 IR 313 en die Kanadese beslissing *John Burrows Ltd v Subsurface Surveys Ltd* 1968 SCR 607. In die VSA word die geldigheid van sodanige dokumente geruime tyd reeds erken: sien a 3–109(1)(a) van die *Uniform Commercial Code*; Petersen 1972 *SALJ* 163; Cassim 1982 *SALJ* 552; Cowen *The law of negotiable instruments in South Africa* (1966) 62 en gesag aldaar.)

Die heersende regsposisie in Suid-Afrika is egter dat sodanige dokumente nie geldige promesses is nie. Die toonaangewende beslissing in hierdie verband is die *Weszak*-saak hierbo, waarin regter Galgut homself soos volg uitgelaat het (732A–B):

> "I share the view of the majority in *Williamson's* case ... that where a promissor undertakes to pay a fixed amount 'on or before' or 'within' a certain date the document merely limits the time within which payment must be made but does not fix the date

> of payment. *The option reserved by the document creates an uncertainty and a contingency in the time of payment and cannot be a promissory note within the meaning of s 87(1) of the Act"* (my kursivering).

Die *Weszak*-beslissing is deur regter Howard gevolg in *Salot v Naidoo* 1981 3 SA 959 (D). (Bespreek deur Cassim 1982 *SALJ* 552. Die opmerking van Hiemstra R in *Allwright v Gluck* 1962 1 SA 562 (T) 563D–E tot die teendeel, nl "[o]ns meen dus dat hierdie stuk wel 'n promesse is", skyn bloot *obiter* te wees.)

In die *Kleyn*-saak behandel regter Goldstone weliswaar meeste van bogenoemde gesag, maar sien uiteindelik nie sy weg oop om van die volbankbeslissing in die *Weszak*-saak af te wyk nie. Hy kom gevolglik tot die gevolgtrekking dat

> "the option given to the promissor 'creates an uncertainty and contingency in the time of payment' *per* Galgut J in the passage cited above. Having given the matter much consideration, I am unable to regard the document in this case as falling outside the principle adopted in the *Weszak* judgment" (445D–E).

4 Effek van die hof se benadering

Die effek van die hof se benadering en uiteindelike beslissing in die *Kleyn*-saak is, in die woorde van regter Goldstone self, onbevredigend. Hy verklaar:

> The effect of this conclusion is somewhat unsatisfactory because . . . it becomes impossible to issue a bill of exchange or a promissory note in respect of a transaction governed by the terms of s 3A(1) of the Usury Act, i e a transaction where payment of an amount includes finance charges and is to be paid over a period by way of instalments" (445E–F).

Die feit dat artikel 3A(1) van die Woekerwet dit verpligtend maak om die gegewens waarom dit in die *Kleyn*-saak gegaan het, in 'n skuldakte (wat verhandelbare stukke insluit) te vervat, raak boonop geensins die bepalings van die Wisselwet nie. In hierdie verband bepaal artikel 9A van die Woekerwet onder andere dat die bepalings daarvan nie so uitgelê moet word dat dit enige bepaling van 'n ander wet beperk, wysig, herroep of andersins verander nie (sien die *Kleyn*-saak 445F–H). Daar kan dus nie geredeneer word dat 'n wissel, tjek of promesse wat ingevolge artikel 3A van die Woekerwet as 'n skuldakte aangewend word, wel 'n geldige dokument vir doeleindes van die Wisselwet kan wees indien dit andersins aan die definisies in laasgenoemde wet voldoen nie. Indien aanvaar word dat die verpligte gegewens (en keuse) soos deur artikel 3A vereis 'n "uncertainty and contingency" aangaande die tydstip van betaling tot gevolg het, val die skuldakte buite die definisies van wissels, tjeks en promesses in die Wisselwet, welke bepalings nie deur die bepalings van die Woekerwet geraak, gewysig of beperk word nie.

5 Evaluering van regsposisie

Dit is debatteerbaar of die hof in die *Kleyn*-saak die korrekte benadering gevolg het deur die dokument waaroor beslis moes word, oor dieselfde boeg te gooi as dokumente (soos promesses) wat "op of voor" of "binne" 'n bepaalde tyd betaalbaar is.

Dit staan vas dat laasgenoemde tipe dokument nie in die Suid-Afrikaanse reg as geldige wissels, tjeks of promesses kwalifiseer nie aangesien die keuse ten opsigte van die tydstip vir betaling sodanige dokumente buite die definisies in die Wisselwet neem. Malan, Oelofse en Pretorius *Proposals for the reform of the Bills of Exchange Act, 1964* (Werkstuk 22 van die Suid-Afrikaanse Regskommissie) 47 beveel dan ook aan dat die huidige stand van sake behou word en dat die Wisselwet nie gewysig word om geldigheid aan sodanige dokumente te

verleen nie (anders as wat in die VSA die geval is). (Sien egter ook Malan en De Beer *Wisselreg en tjekreg* (1981) 64 waar 'n teenoorgestelde standpunt gehandhaaf word; vgl Malan e a *Provisional sentence on bills of exchange, cheques and promissory notes* (1986) 32; Chafee "Acceleration provisions in time paper" 1919 *Harvard LJ* 757 e v.)

Myns insiens is dit jammer dat regter Goldstone nie in die *Kleyn*-saak kans gesien het om die skuldakte van die tipe dokumente waaroor dit in byvoorbeeld die *Weszak*- en *Salot*-sake gegaan het, te onderskei nie. Na my mening kon die regter hom veel eerder, op grond van sodanige onderskeid, laat lei het deur die Kanadese beslissing in die *John Burrows*-saak hierbo waarna hy self ook verwys (*Kleyn*-saak 445B). In die *John Burrows*-saak was 'n soortgelyke dokument ter sprake. Dit het onder andere 'n belofte bevat om 'n bepaalde bedrag plus rente teen 6% per jaar in maandelikse paaiemente te betaal, maar het ook bepaal dat die promittent

> "may pay on account of principal from time to time the whole or any portion thereof upon giving 30 days' notice".

Die Kanadese hof het beslis dat die dokument wel 'n geldige promesse is en sodoende die minderheidsuitspraak in die *Williamson v Rider*-saak hierbo gevolg. Regter Ritchie het sy beslissing soos volg gemotiveer (614):

> "The instrument here in question is an unconditional promise in writing made by the respondent to pay appellant or order the sum of ... at a fixed and determinable future time, ... and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of this unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment."

Myns insiens is dit die korrekte benadering wat ook in die *Kleyn*-saak gevolg moes gewees het. Die Ierse hof het hierdie benadering dan ook in die *Creative Press*-saak hierbo goedgekeur, waar regter Pringle soos volg verklaar het (317):

> "In my opinion the fact that the defendants in the present case had an option to pay the sum ... before the 1st November, 1970, and that the plaintiffs would have had to accept such payment, does not mean that the defendants did not engage to pay the money at a fixed future time ... Therefore I hold that the document is a promissory note ..."

Voorts is ek van mening dat die volgende standpunt van Malan en De Beer (a w 64) oor dokumente wat op of voor of binne 'n vasgestelde tydstip betaalbaar gestel is, met vrug op die onderhawige tipe skuldaktes van toepassing gemaak kan word:

> "[D]it word aan die hand gedoen dat so 'n dokument wel op 'n bepaalde toekomstige tydstip, naamlik die vermelde datum [van die paaiemente], betaalbaar is."

Die enigste nadeel wat hierdie benadering vir die skuldenaar inhou, is dat enige vervroegde betaling ingevolge die dokument nie wisselregtelik as 'n sogenaamde "reëlmatige betaling beskou sal word nie aangesien dit nie op of na die vervaldag van die dokument geskied nie" (Malan en De Beer t a p; sien ook 273 e v oor reëlmatige betaling in die algemeen).

6 Moontlike wetswysigings

Omdat dit onseker is of 'n soortgelyke aangeleentheid binnekort weer, indien ooit, voor die hof sal dien en of 'n ander hof of dalk die appèlhof van die *Kleyn*-beslissing sal afwyk, kan die vraag met reg gestel word of die Wisselwet nie gewysig behoort te word ten einde erkenning en geldigheid aan sodanige skuldaktes te verleen nie. Dit is inderdaad so dat artikel 3A(1)(d) van die Woekerwet

bepaal dat die datum wat deur die skuldenaar gekies word, geag word die datum te wees waarop die uitstaande skuld en finansieringskoste betaalbaar is. Selfs al sou die Wisselwet egter gewysig word om te bepaal dat 'n wissel, tjek of promesse geldig is indien die betaaldag daarvan ingevolge artikel 3A(1)(d) bepaal kan word, sal dit nog nie die probleem heeltemal oplos nie: so 'n dokument kan, selfs al word dit (by wyse van uitsondering) as 'n geldige wissel, tjek of promesse beskou, nooit as 'n likwiede dokument kwalifiseer nie aangesien die vervroegde datum van betaling nie *ex facie* die dokument self blyk nie en ekstrinsieke getuienis nodig sal wees om hierdie datum aan te toon. Om hierdie rede sal nòg summiere nòg voorlopige vonnis op sodanige dokument verkry kan word. Dit is in elk geval die heersende stand van sake. Regter Goldstone verklaar aldus in die *Kleyn*-saak:

> "The document in the present case, in any event, is not a simple one. It was clearly intended by the draughtsman thereof to be a multi-purpose document and that it does not qualify as a promissory note should not come as a surprise. Indeed, in my opinion, the option given to the payee also has the consequence that the document is not liquid. The due date of payment does not appear *ex facie* the document" (445H–I).

Enige wetswysiging om skuldaktes van hierdie aard wisselregtelik te erken, sal dus in elk geval geen beduidende effek op die afdwingbaarheid daarvan by wyse van voorlopige of summiere vonnis hê nie (sien bv ook a 100(d) van die Wisselwet wat bepaal dat die bepalings daarvan in geen opsig die prosedure en praktyk met betrekking tot die verlening van namptissement raak of beperk nie). Sodanige wetswysiging kan egter moontlik tot gevolg hê dat die onbevredigende resultaat van die *Kleyn*-beslissing, naamlik dat

> "it becomes impossible to issue a bill of exchange or a promissory note in respect of a transaction governed by the terms of s 3A(1) of the Usury Act",

uit die weg geruim word.

Na my mening is wysiging van die Wisselwet nie die gewenste oplossing vir die onderhawige probleem nie. Dit sou minder gekompliseerd wees om die Woekerwet te wysig deur ook verhandelbare stukke, soos skuldbriewe, buite die trefwydte van artikel 3A te neem. Vir die skuldeiser sal so 'n stap weliswaar die nadeel inhou dat hy nie meer vir ten minste 180 dae teen renteverlies beskerm word nie, maar daarenteen die voordeel inhou dat hy waarskynlik in besit sal wees van 'n geldige wissel, tjek of promesse wat terselfdertyd as likwiede dokument kwalifiseer (mits natuurlik aan al die gewone vereistes voldoen word) wat die spesiale summiere en voorlopige vonnisprosedures tot sy beskikking stel. Hierbenewens kan byvoorbeeld artikel 6 van die Woekerwet gewysig word om voorsiening te maak vir vervroegde betalings ingevolge 'n verhandelbare stuk wat, vir doeleindes van 'n transaksie wat onder die Woekerwet ressorteer, paaiementsgewys betaalbaar gestel is deur 'n formule daar te stel ingevolge waarvan die skuldenaar steeds op 'n vermindering van die bedrag finansieringskoste geregtig is en waardeur die skuldeiser terselfdertyd nie benadeel word nie.

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VONNISSE

BEHEER OOR 'N GEVAARLIKE VOORWERP: DIE TOEPASLIKHEID VAN DIE DELIKSELEMENTE HANDELING, ONREGMATIGHEID EN NALATIGHEID

Ablort-Morgan v Whyte Bank Farms (Pty) Ltd 1988 3 SA 531 (OK)

Die feite in hierdie saak was kortliks soos volg: die eiser wou 'n stuk gereedskap by sy neef, 'n direkteur van die verweerder, leen. Om die gereedskap te gaan haal, het hy sy neef na 'n werkswinkel op die verweerder se perseel vergesel. Daar het die eiser in 'n twee meter diep motorinspeksieput geval en ernstige beserings opgedoen. Hy stel 'n aksie vir vergoeding teen die verweerder in. Regter Kannemeyer wys egter die eis van die hand omdat daar nie nalatigheid aan die kant van die verweerder was nie.

Alhoewel die regter se uitspraak instemming verdien, is daar tog enkele aspekte rondom die delikselemente handeling, onregmatigheid en nalatigheid wat in verband met die kwessie van beheer oor 'n gevaarlike voorwerp (wat *in casu* ter sprake is) nadere beskouing regverdig:

1 Handeling

Soos bekend, word sowel 'n doen as 'n late as 'n handeling ('n willekeurige menslike gedraging) beskou. Nietemin is daar belangrike verskille tussen die twee handelingsvorme wat nie misken moet word nie (sien Neethling, Potgieter en Visser *Deliktereg* (1989) 25–26 45–46). Volgens Van der Merwe en Olivier (*Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 29–30) het "dit egter geen sin om prinsipieel tussen doen en late te onderskei by die oorweging van die handeling as voorvereiste vir deliktuele gebondenheid nie . . ." Hulle verklaar (29):

> "Waar die skeidslyn tussen *commissio* en *omissio* geleë is, kan beswaarlik altyd aangetoon word. Neem die geval waar motoris A die rooi lig ignoreer en dientengevolge vir voetganger B omry en beseer. Is B se besering nou die gevolg van 'n positiewe optrede van A, die feit dat laasgenoemde vet gegee het toe die verkeersligte teen hom was, of spruit B se benadeling uit A se versuim om rem te trap en die verkeersreëls te gehoorsaam?"

Hiermee gaan Van der Walt (*Delict: principles and cases* (1979) 58) nie akkoord nie. Hy redeneer soos volg:

> "In general the legal nature of conduct is determined by the particular context in which it occurs. An 'omission' to take certain measures in the course of some activity is therefore not necessarily a form of conduct but may well indicate that the action was negligently performed. Inaction as a part or a stage of some positive activity can therefore constitute or indicate negligence on the part of the actor; negligence is ex definitione a failure to take reasonable precautions. Many 'omissions' are therefore merely indications of legally deficient positive conduct. To drive a car through a stop street into another car constitutes a course of positive conduct, viz the driving of a car. The failure to stop ('omission')

> indicates negligent or deficient positive conduct – culpa in faciendo. The mere fact that linguistic alternatives enable us to describe the positive occurrence in a negative way (e g 'the driver failed or omitted to stop at the stop street') is legally irrelevant in the determination of the nature of the conduct."

Onses insiens is Van der Walt se uiteensetting te verkies. In die voorbeeld van Van der Merwe en Olivier gaan dit dus eerder oor 'n *nalatige commissio* (die onsorgvuldige bestuur van die motor) as oor 'n late. Daarom behoort ook nie aanvaar te word dat elke menslike handeling sowel positief as negatief beskryf kan word en dat daar om dié rede nie werklik 'n onderskeid tussen die twee vorme van die handeling bestaan nie (Van der Walt 60 vn 20).

Ons standpunt impliseer dat dit in 'n geval soos die onderhawige waar die verweerder *reeds* beheer oor 'n gevaarlike voorwerp uitoefen (die verweerder het bv reeds stappe gedoen om die motorinspeksieput vir kinders te beveilig: sien 536G), en dan versuim om stappe te doen om skade vir ander te voorkom (soos om die eiser teen die put te waarsku), dit eerder gaan oor 'n nalatige uitoefening van beheer (*commissio*) as oor 'n late. Hierdie afleiding word bevestig deur die feit dat regter Kannemeyer slegs die moontlike nalatigheid van die verweerder hoef te bepaal het en dat dit vir hom nie nodig was om aandag aan die late (as handelingsvorm) te gee nie. Dit sou slegs nodig gewees het om aanspreeklikheid weens 'n late te ondersoek as die versuim om voorsorgmaatreëls teen die intrede van skade te tref, nie 'n integrerende deel van 'n positiewe (beheer-) handeling was nie. Anders as *in casu* het mens met sodanige gevalle te doen byvoorbeeld waar 'n grondeienaar versuim om hoegenaamd beheer uit te oefen oor vuur wat sonder sy toedoen op sy grond ontstaan, waar 'n polisiebeampte nalaat om iemand te beskerm wat deur 'n derde aangerand word of waar 'n kampioenswemmer wat 'n kind in 'n swembad sien verdrink, dit eenvoudig ignoreer. In hierdie drie gevalle is daar werklik 'n late teenwoordig omdat daar in die omstandighede *'n versuim is om hoegenaamd positiewe stappe te doen* om die gevaar af te weer. Dit is natuurlik 'n ander vraag of die betrokke lates onregmatig is, dit wil sê of daar 'n regsplig was om op te tree (sien ook Neethling, Potgieter en Visser 26). Hierop word vervolgens ingegaan.

2 Onregmatigheid

As algemene reël geld dat 'n dader nie deliktueel onregmatig handel waar hy versuim om te verhoed dat 'n ander skade ly nie. Aanspreeklikheid volg slegs indien die late inderdaad onregmatig was; en dit is net die geval as daar in die besondere omstandighede 'n *regsplig* ("legal duty") op die dader gerus het om positief op te tree om die intrede van skade te verhoed, en hy nagelaat het om die regsplig na te kom. Of sodanige regsplig bestaan, word beantwoord aan die hand van die regsopvattinge van die gemeenskap (*boni mores*) (*Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; sien in die algemeen Neethling, Potgieter en Visser 46–47). Met verloop van tyd het 'n aantal faktore na vore gekom wat volgens die *boni mores* dui op die bestaan van 'n regsplig om positief op te tree (*ibid* 47 e v). Een van hierdie faktore is beheer oor 'n gevaarlike voorwerp. In besondere omstandighede rus daar naamlik 'n regsplig op 'n persoon om deur positiewe optrede beheer oor 'n gevaarlike voorwerp of toestand (byvoorbeeld vuur, 'n gevaarlike dier, stukkende trappe of 'n gat in die grond) uit te oefen en toe te sien dat niemand deur die toestand benadeel word nie. Die kernvraag is om te bepaal *of* daar sodanige plig op 'n persoon rus; met ander woorde of die persoon sodanige beheer *moet* uitoefen. Hierdie vraag moet van geval tot

geval beantwoord word. Daarom kan nie by voorbaat aangedui word in welke gevalle daar 'n regsplig om inderdaad beheer uit te oefen, aanwesig is nie. Nietemin is byvoorbeeld reeds beslis dat die okkupeerder van grond of 'n gebou waar gevaarlike toestande inderdaad heers, 'n regsplig het om te voorkom dat mense (selfs betreders) wat op die perseel kom, benadeel word (sien bv *King v Arlington Court (Muizenberg) (Pty) Ltd* 1952 2 SA 23 (K) (gevaarlike trappe en trapreëling); *Wolff v Foto Helga (Pty) Ltd* 1986 1 SA 816 (0) (stukkende trap); vgl Van der Walt 33–34; Van der Merwe en Olivier 42–43). Alhoewel nog nie uitdruklik so beslis is nie, sal die feit dat 'n persoon van die gevaarstoestand (bv 'n gevaarlike gat op sy perseel) *geweet* het, waarskynlik 'n belangrike, straks deurslaggewende, rol speel by die bepaling of hy inderdaad beheer oor die gevaarstoestand moet uitgeoefen het en daar bygevolg 'n regsplig op hom gerus het om stappe te doen om benadeling te voorkom. (Die rol van die *subjektiewe wete of kennis* van die verweerder by die bepaling van die regsplig word reeds in die regspraak erken by aanspreeklikheid weens suiwer ekonomiese verlies en die late (*Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386; vgl Knobel 1987 *THRHR* 484; Neethling, Potgieter en Visser 244 52).)

Nou is dit opmerklik dat die howe dit in hierdie tipe gevalle gewoonlik nie nodig vind om op die onregmatigheidsvraag, dit wil sê die vraag na die bestaan van 'n regsplig, in te gaan nie. Dit is waarskynlik so omdat die aanwesigheid van die regsplig so duidelik uit die feite blyk dat dit sonder meer aanvaar word. Die ondersoek wentel gevolglik meestal om die vraag of die verweerder in die omstandighede redelike stappe gedoen het om benadeling te voorkom – of hy met ander woorde soos die redelike man opgetree het – dit wil sê om die nalatigheidsvraag. Dit is klaarblyklik ook die geval *in casu* omdat die verweerder eerstens *kontrole gehad het* oor die grond waarop die inspeksieput was, en tweedens omdat hy beslis *geweet het* van die gevaarstoestand. Daarom het onregmatigheid vir die hof vasgestaan en hoef die hof slegs op nalatigheid in te gegaan het. Hieraan word ten slotte aandag gegee.

3 Nalatigheid

Nalatigheid is aanwesig as die redelike man in die posisie van die dader anders sou opgetree het as wat die dader inderdaad gedoen het; en die redelike man sou volgens die regspraak anders opgetree het indien die onregmatige veroorsaking van skade redelikerwys voorsienbaar en voorkombaar was (*Kruger v Coetzee* 1966 2 SA 428 (A) 430; Neethling, Potgieter en Visser 111). *In casu* beslis regter Kannemeyer (533 e v) dat die verweerder nie nalatig was nie omdat skade (die val en besering van die eiser) nie redelikerwys voorsienbaar was nie en die verweerder dientengevolge nie stappe hoef te gedoen het (bv deur die verweerder te waarsku) om die skade te voorkom nie. Die skade was volgens die hof nie redelikerwys voorsienbaar nie omdat die inspeksieput so duidelik sigbaar was dat 'n redelike man sou aanneem dat die eiser dit sou vermy (soos die verweerder inderdaad gedoen het). Die hof verklaar in hierdie verband (537):

> "In the circumstances it would be unrealistic to have expected Ablort-Morgan to warn the plaintiff of the presence of the pit. It did not, viewed against the facts of this case, constitute a real danger. Such danger as it might have presented to an adult in the plaintiff's position was 'so slight as not to give rise to an obligation to guard against it happening'."

Die hof se redenering verdien instemming.

Wat die toets vir nalatigheid in die algemeen betref, is dit belangrik om daarop te let dat die hof die sogenaamde *konkrete* benadering met betrekking tot redelike voorsienbaarheid toepas. Hierdie benadering is daarop gebaseer dat 'n dader se handeling net as nalatig beskou kan word met verwysing na *'n spesifieke gevolg* of gevolge; met ander woorde is dit 'n vereiste vir die bestaan van nalatigheid dat 'n spesifieke ingetrede gevolg redelikerwys voorsienbaar moet wees. Die hof stel dit soos volg (536):

> "In applying the law to the facts it must be borne in mind that the test is not whether, in the abstract, danger should have been foreseen. The facts peculiar to the occurrence under consideration must be established and in the light thereof one must determine whether the defendant ought reasonably to have foreseen the occurrence itself."

In teenstelling met die konkrete benadering word daar volgens die sogenaamde *abstrakte* benadering tot voorsienbaarheid gekyk of die benadeling van andere *in die algemeen* redelikerwys voorsienbaar was; anders gestel, of die dader se optrede in die algemeen 'n onredelike risiko van benadeling vir andere inhou (Van der Walt 68). Uit die aard van die saak is dit volgens die abstrakte benadering geen vereiste vir die bestaan van nalatigheid dat die *algemene aard* van die ingetrede skade of die *omvang* daarvan of veral 'n *spesifieke ingetrede gevolg* redelikerwys voorsienbaar hoef te gewees het nie; is dit voldoende as benadeling *in die algemeen* redelik voorsienbaar was. Die vraag of 'n dader vir 'n *spesifieke gevolg* aanspreeklik is, word ingevolge die abstrakte benadering beantwoord met verwysing na *juridiese kousaliteit* en nie aan die hand van die vraag of die dader met betrekking tot daardie spesifieke gevolg nalatig was nie (sien in die algemeen Neethling, Potgieter en Visser 118–119 en i v m juridiese kousaliteit *ibid* 153 e v).

Die vraag ontstaan nou welke benadering aanvaar behoort te word. Onses insiens is die konkrete benadering te verkies en wel om die volgende oorwegings. Soos Boberg (*The law of delict* (1984) 276–277) tereg aanvoer, kan die vraag of die redelike man anders as die dader in die betrokke geval sou opgetree het om benadeling te voorkom, slegs sinvol beantwoord word met verwysing na die nadelige gevolg of gevolge wat inderdaad redelikerwys voorsienbaar was. Alleen met inagneming van hierdie gevolg(e) kan weloorwoë besluit word welke stappe die redelike man sou gedoen het of welke voorsorgmaatreëls hy sou getref het (indien enige) om die gevolg(e) te voorkom. Hierbenewens kom die abstrakte benadering omslagtiger as die konkrete benadering voor aangesien die vraag of 'n bepaalde gevolg redelik voorsienbaar is, by die *konkrete* benadering regstreeks beantwoord word, terwyl dit by die abstrakte benadering langs 'n omweg geskied. In laasgenoemde geval moet mens naamlik eers bepaal of skade in die algemeen redelik voorsienbaar was alvorens na die voorsienbaarheid van 'n bepaalde gevolg (juridiese kousaliteit) gevra word (Neethling, Potgieter en Visser 119–120 en 169 i v m juridiese kousaliteit). (Hou nietemin in gedagte dat indien deur middel van die konkrete benadering bevind is dat die dader nalatig was omdat die redelike man in die lig van die voorsienbaarheid van 'n *spesifieke gevolg* anders sou opgetree het, juridiese kousaliteit ook moet vasstaan met betrekking tot *verdere gevolge* wat uit sy optrede voortgevloei het.)

J NEETHLING
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DIE VEREISTES VIR EIENDOMSOORDRAG VAN ROERENDE GOED BY WYSE VAN *ATTORNMENT*; DIE REGSGEVOLGE VAN DIE SESSIE VAN 'N HUURKONTRAK (*LEASE*) KRAGTENS 'N ALGEMENE VERDISKONTERINGSOOREENKOMS

Barclays Western Bank Ltd v Ernst 1988 1 SA 243 (A)*

1 Feite

Die appellant (Barclays Western Bank, hierna BW) het op 28 Februarie 1981 'n *algemene verdiskonteringsooreenkoms* met Midway Killarney ('n motorhandelaar, hierna MK) gesluit waarvan die vernaamste bepalings die volgende was:

> Aanhef (*Preamble*): "It is contemplated that the bank shall in its sole discretion from time to time purchase the trader's rights, title and interest in credit, instalment sale and suspensive sale agreements and leases ('the agreements' or 'agreement') and thereby acquire ownership in and to the subject-matter of such agreements ('the goods')."
>
> 1 Die kontrakbepalings geld ten aansien van alle ooreenkomste soos in die Aanhef omskryf.
>
> 2.1 In alle gevalle waar MK sy regte aan BW wil oordra, moet die nodige dokumentasie (onder meer die betrokke ooreenkoms tussen MK en die koper of huurder) aan BW oorhandig word.
>
> 2.2 Oorhandiging van die dokumente soos in 2.1 omskryf, stel 'n aanbod van MK aan BW daar met as inhoud die verkoop en oordrag (onderhewig aan die bepalings van die algemene verdiskonteringsooreenkoms en die prys soos tussen BW en MK ooreengekom) van:
>
> 2.2.2 "the ownership of the goods described therein".
>
> 2.3 BW het na ontvangs van die dokumentasie 'n keuse om
> 2.3.1 òf die ooreenkoms na MK terug te stuur as hy nie belang stel om die regte daarin beliggaam oor te neem nie; òf die bedrag waarop hy en MK ooreengekom het aan MK oor te betaal – sodanige betaling stel die aanname deur BW van MK se aanbod (om die ooreenkoms oor te neem) daar.

Die *algemene verdiskonteringsooreenkoms* bepaal verder soos volg:

> 3 (saamgelees met 3.6) MK waarborg dat hy onmiddellik voor die oorname van die ooreenkoms deur BW eienaar van die goedere was en dat alle regte uit die ooreenkoms asook eiendomsreg onmiddellik daarna na BW oorgaan.
>
> 15 Wysigings aan die algemene verdiskonteringsooreenkoms is slegs geldig indien dit op skrif gestel is en deur beide partye onderteken is.

Op 19 Mei 1988 het 'n derde (Van Coller, hierna C) met MK onderhandel om 'n voertuig te huur. MK het BW by wyse van 'n faktuur hieromtrent ingelig. Die huurkontrak (*lease*) is deur BW opgestel. Dié kontrak het ook voorsiening vir die verdiskontering daarvan aan 'n ongespesifiseerde derde gemaak:

> 1.1 "The lessee is aware that all the lessor's rights in this agreement are to be ceded and together therewith ownership of the goods transferred. In contemplation thereof, the lessee:
>
> 1.1.1 agrees to recognise the cessionary of the lessor's rights as the new owner and to hold the goods as bailee on behalf of the new owner subject to the terms of this agreement . . ."
>
> 3 "The goods shall remain the property of the lessor and nothing in the agreement shall be construed as conferring on the lessee any right or interest in the goods other than as lessee . . ."

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* Sien ook Sonnekus 1988 *THRHR* 534–543 vir 'n bespreking van hierdie saak (redakteur).

Op 21 Mei het C en MK dié kontrak onderteken en onmiddellik daarna is die voertuigsleutels, die handleiding en ander dokumentasie (onder meer 'n blanko oordrag van eiendomsreg-vorm) aan C oorhandig. Laasgenoemde het direk daarna die beheer oor die voertuig aan die eggenoot (hierna F) van die respondent (Ernst, hierna E) oorgedra. Die oordrag het kragtens 'n koopkontrak tussen C en E plaasgevind; MK was egter onder die indruk gebring dat F beheer in sy hoedanigheid van C se plaasbestuurder verkry het. Op 22 Mei het F die voertuig op E se naam in Lichtenburg geregistreer. Die huurooreenkoms is kragtens klousule 2.1 en 2.2 van die algemene verdiskonteringsooreenkoms aan BW oorhandig en op 26 Mei het BW 'n tjek vir R6 720,43 aan MK gelewer. Die volle kontrakprys volgens die huurkontrak was R8 958,24. C moes 24 maandelikse paaiemente van R248,84 elk aan MK betaal; daarna kon hy teen 'n prys soos deur MK bepaal eienaar van die voertuig word. C het egter in gebreke gebly om die laaste 12 paaiemente te betaal.

Die hof *a quo* het BW se eis vir die lewering van die voertuig (op grond van die beweerde oorgang van eiendomsreg wat uit die sessie van die huurooreenkoms sou voortgevloei het) van die hand gewys en 'n bevel van absolusie van die instansie gemaak. Die *ratio* vir dié beslissing was dat daar nie aan die vereistes vir die oorgang van eiendomsreg by wyse van *attornment* voldoen is nie, aangesien C deur sy oorhandiging van die voertuig aan E voordat die sessie van die huurkontrak aan BW plaasgevind het, nie oor die nodige beheer (*necessary control*) of reg op beheer (*power of control*) op die tydstip van die verdiskontering – 26 Mei – beskik het nie (251I–252B).

2 Appellant se betoog

Die basis van BW se betoog in appèl was dat verdiskontering van die huurkontrak reeds op 19 Mei plaasgevind het. Dié verdiskontering sou dan – nieteenstaande die uitdruklike bepalings van klousule 2.1 en 2.2 en die wysigingsverbod soos in klousule 15 vervat – by wyse van 'n mondelinge of stilswyende sessie geskied het. Daarvolgens het die beweerde sessie op 19 Mei tydens die oorhandiging deur MK van die faktuur aan BW (met die doel om BW in staat te stel om die huurkontrak op te stel) geskied, en het dit op 21 Mei regskrag (met die ondertekening daarvan deur MK en C) verkry. Die sessie het volgens BW se betoog dus plaasgevind op die tydstip toe C nog in beheer van die voertuig was en gevolglik is aan die vereistes vir *attornment* voldoen. BW het hiervolgens op 21 Mei eienaar geword en is daarom geregtig om die voertuig op te eis.

3 Uitspraak

3 1 Algemene uitgangspunt

In appèl aanvaar die hof dat eiendomsoorgang slegs kon geskied het as C op die tydstip van verdiskontering (sessie) van die huurooreenkoms òf steeds in beheer van die voertuig was òf oor die nodige reg op beheer beskik het (253D–E). Die hof beslis dat die verdiskontering eers op 26 Mei plaasgevind het, maar dat eiendomsreg nie aan BW oorgedra is nie aangesien C op daardie stadium nie (meer) in beheer van die voertuig was of oor 'n reg op beheer beskik het nie.

3 2 Bevinding

BW se betoog word gevolglik op die volgende gronde van die hand gewys:

a Wysiging van die prosedure (soos deur klousule 2.1 en 2.2 van die algemene verdiskonteringsooreenkoms voorgeskryf) vir die oorhandiging van die voltooide kontrakte aan BW kon kragtens klousule 15 slegs skriftelik geskied en moes bowendien deur beide partye onderteken wees (253I–254B). Die hof verwys in hierdie verband na *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A).

b Nòg die uitreiking van die faktuur deur MK nòg die opstel van die huurkontrak deur BW kan as handelinge wat 'n verdiskontering daarstel, beskou word; dit is bloot praktiese en administratiewe maatreëls (254A–B).

c Daar was geen getuienis dat die optrede in paragraaf (b) omskryf enigsins 'n afwyking van die normale prosedure daargestel het of dat daar enige magtiging deur MK en BW was vir die volg van 'n administratiewe praktyk wat in stryd met die bepalings van die algemene verdiskonteringsooreenkoms sou wees nie (254C–D).

d Daar was uitdruklike *viva voce*-getuienis tydens die verhoor in die hof *a quo* dat sessie van MK se regte eers op 26 Mei – met die lewering van die tjek aan MK – geskied het (254D–J).

3 3 Vereistes vir attornment

Die hof vermeld (met 'n beroep op *Hearn & Co (Pty) Ltd v Bleiman* 1950 3 SA 617 (K) 625C–G; *Caledon & Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* 1972 1 SA 270 (A) 273A–C en *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 923B–G) die volgende vereistes vir die oorgang van eiendomsreg by wyse van *attornment* (253C–D):

> "To enable ownership to pass in a case such as the present, the law requires that the person who is to hold the article on behalf of the intended new owner must be in control thereof (or at least have the right of control thereover) when the owner of the article cedes his rights in respect thereof to the intended new owner."

Die hof beklemtoon die belang van die vereiste dat Van Coller nog in beheer van die voertuig moet wees op die tydstip wanneer oordrag van regte deur MK aan BW plaasvind; indien daar nie aan dié vereiste voldoen word nie, kan eiendomsoordrag by wyse van *attornment* nie plaasvind nie (253E):

> "In the circumstances it is vital to the success of appellant's claim that it is for the owner of the vehicle to establish, as its counsel endeavoured to do, that the trader's rights in respect of the vehicle were ceded to it while Van Coller was in control of the vehicle."

3 4 Verbandhoudende probleme

In die lig van die beslissing dat eiendomsreg nie oorgegaan het nie en die appèl gevolglik met koste van die hand gewys word, vind die hof dit nie nodig om die volgende vrae te beantwoord nie (255A–D):

a Het Van Coller ooit die voertuig namens die nuwe eienaar BW gehou of beoog om dit aldus te hou?

b Kon die beoogde sessie ooit geldig geskied het as Van Coller nie *bona fide* beoog het om die voertuig namens die nuwe eienaar BW te hou nie?

4 Regsimplikasies by die verdiskontering van kredietooreenkomste

In navolging van die *Air-Kel*-saak *supra* 924H kan aanvaar word dat dit geykte reg is dat sessie van regte in geval van 'n kredietooreenkoms die volgende behels:

a 'n saaklike ooreenkoms om eiendomsreg oor te dra (*animus transferendi*) en te ontvang (*animus accipiendi*);

b die normale sessie van vorderingsregte uit die kredietooreenkoms;

c in die geval van die oordrag van eiendomsreg, die aanwesigheid van een van die bestaande vorme van lewering – by die verdiskontering van kredietooreenkomste sal dit waarskynlik meestal *attornment* wees.

5 *Attornment* en konstruktiewe lewering

Naas die bekende vorme van konstruktiewe lewering (*traditio fictiva*) – *traditio longa manu*, *traditio simbolica*, *traditio brevi manu* en *constitutum possessorium*, is *attornment* – wat uit die Engelse reg in die Suid-Afrikaanse reg oorgeneem is – 'n afsonderlike verskyningsvorm daarvan. Hoewel die meeste outeurs van mening is dat *attornment* die omvattende begrip vir albei gevalle is wat hieronder bespreek word, word die onderskeid van Erasmus, Van der Merwe en Van Wyk *Lee and Honoré: Family, things and succession* (1984) 284–285 en Van der Merwe *Law of things* (1987) 162–165 tussen twee nuwe (nie-gemeenregtelike) afsonderlike gevalle van konstruktiewe lewering (*attornment* en *traditio iuris vindicationis*) vir doeleindes van die bespreking wat volg, aanvaar:

a *Attornment* Waar die saak in die fisiese beheer van 'n derde is wat dit namens die eienaar hou, kan eiendomsoordrag by wyse van *attornment* geskied – die sluit van 'n drieledige ooreenkoms tussen die oordraggewer (huidige eienaar), die oordragnemer (nuwe eienaar) en die houer (wat in fisiese beheer is) met as inhoud dat die houer die saak voortaan namens die nuwe eienar hou.

In die *Air-Kel*-saak *supra* 924H word die leweringsvereiste in die geval van *attornment* omskryf as

> " 'n besitsoordrag van die verkoper-eienaar-besitter aan die ander ... tov die saak wat die koper hou".

In navolging van *Hearn & Co (Pty) Ltd v Bleiman* 1950 3 SA 617 (K) 625H is die regsposisie volgens die *Air-Kel*-saak tans dat eiendomsoorgang by wyse van *attornment* slegs kan plaasvind (924A)

> "terwyl die derde houer bly; as hy eers sy beheer verloor het (dws *detentio* verloor het) dan kan 'n besitsoordrag aan die verkryger nie op hierdie manier geskied nie".

Volgens Silberberg-Schoeman *Law of property* 278–281 is daar in die lig van die *Caledon*- en *Air-Kel*-beslissings sprake van twee vorme van *attornment*:

i *attornment stricto sensu* waar die houer op die stadium dat oordrag ("sessie") van die regte plaasvind, enersyds self nog in beheer is en andersyds ook onderneem om in die toekoms namens die nuwe eienaar te hou – in hierdie geval moet die houer ten tyde van die "sessie" meewerk; en

ii 'n uitgebreide vorm van *attornment* volgens die *ratio* van die *Caledon*-beslissing: hier stem die houer onherroeplik by voorbaat toe om in die toekoms namens 'n ongespesifiseerde derde te hou indien en wanneer sessie van regte (dus ook eiendomsoordrag) – selfs al is hy onbewus wanneer dit geskied – plaasvind. Al verdere vereiste is dat die houer op die tydstip van sessie òf self in beheer van die saak moet wees òf 'n reg op beheer moet hê.

b *Cessio iuris vindicationis* Waar die saak in die fisiese beheer van 'n derde is, het die sessie deur die eienaar van sy reg om die saak op te eis (*rei vindicatio*) die gevolg dat eiendomsreg aan die verkryger oorgedra word. Dié vorm van konstruktiewe lewering staan ook as *cessio iuris vindicationis* bekend. Erasmus, Van der Merwe en Van Wyk *Lee and Honoré* 285 en Van der Merwe *Law of things* 164–165 meen dat hoewel hierdie oordragwyse dogmaties beskou, onhoudbaar is, dit vanweë oorwegings van handelsgerief tog deel van die Suid-Afrikaanse reg vorm. Aangesien daar nie aan die normale vereistes vir *attornment* voldoen hoef te word nie, is hier sprake van 'n nuwe afsonderlike vorm van konstruktiewe lewering.

Hierdie standpunt sluit in 'n bepaalde sin aan by die siening van Silberberg-Schoeman *Law of property* 278–282 dat daar 'n derde vorm van *attornment* (naas die twee wat hierbo bespreek is) voorkom wanneer daar nie sprake is van òf medewerking deur die houer ten tyde van die sessie òf toestemming by voorbaat om namens 'n derde een of ander stadium in die toekoms te hou nie. In so 'n geval kom die geldigheid van 'n kennisgewing aan die kredietopnemer (wat self in daardie stadium in fisiese beheer is) deur die eienaar dat hy sy regte (benewens die vorderingsregte voortvloeiend uit die kredietooreenkoms gèvolglik ook sy eiendomsreg op die betrokke saak) aan 'n derde verkryger sedeer, ter sprake. In die *Caledon*-saak *supra* 275A is die gee van so 'n kennisgewing genoem as 'n verdere moontlikheid om eiendomsoorgang by wyse an *attornment* te laat geskied. In dié saak is die volgende gesê (275A):

> "Wanneer die koper geen nadeel ondervind deur 'n sessie nie kan selfs met reg gevra word of die besitter kon weier om sy wil te wysig en of kennisgewing van die sessie aan die koper nie voldoende behoort te wees om lewering te laat plaasvind nie. Deur sessie en so 'n kennisgewing sou die sessionaris tog in staat gestel word om die mag uit te oefen oor die saak wat die sedent as eienaar gehad het. Dit is immers hierdie instaatstelling om daardie mag uit te oefen wat 'lewering' is."

In die *Air-Kel*-saak is na dié bespiegeling verwys (924F; sien daaroor ook Neethling en Van der Merwe 1973 *THRHR* 86–91; Delport en Olivier *Sakereg vonnisbundel* (1985) 307–308) en het die hof, hoewel hy 'n bepaalde interpretasie daaraan heg (925H; sien daaroor Olivier 1981 *THRHR* 212), dit nie nodig gevind om op die korrektheid daarvan in te gaan nie (925H).

Dit wil voorkom of die siening van Erasmus, Van der Merwe en Van Wyk en Van der Merwe dat bogenoemde *obiter dictum* in die *Caledon*-saak gesag is vir die standpunt dat die sessie van die *rei vindicatio* (gepaardgaande met kennisgewing daarvan aan die houer) voldoende vir eiendomsoorgang is, op die vrye sedeerbaarheid van dié aksie berus. Dit wil verder voorkom asof hulle aanvaar dat sodanige sessie (met kennisgewing daarvan aan die houer) voldoende is om eiendomsoordrag te bewerkstellig.

Daar bestaan gesag dat die *rei vindicatio* sedeerbaar is. In hierdie verband kan daar verwys word na *Mayaka v Havemann* 1948 3 SA 457 (A) 465 waar gesê word:

> "The plaintiffs were the cessionaries from the owners. They could consequently have relied solely on that fact . . ."

en na *Marcus v Stamper & Zoutendijk* 1910 AD 58:

> "It is clear that an action *in rem* is as capable of cession as an action *in personam* (*Voet*, 6, 1, 21; *Voet*, 18, 4, 9); but in neither case can such a cession be presumed to have been made unless the intention to make it were clear" (per De Villiers HR 75); "The right to vindicate the goods . . . is a special right vested in the owner, and requiring a special cession to enable another person to exercise it" (per Innes R 83–84).

Regter Innes maak 'n onderskeid tussen daardie geval waar 'n eiser sy eis op die sessie van die *rei vindicatio* baseer, en waar hy in sy hoedanigheid as *dominus* eis (84; so ook Solomon R 87). Die *Marcus*-beslissing is met goedkeuring in *Vivier v Waterberg Ko-operatiewe Landboumaatskappy Bpk* 1956 2 SA 665 (T) 671E–672D aangehaal.

Volgens 'n aantal ander beslissings laat die blote sessie van die *rei vindicatio* as sodanig nie eiendomsreg oorgaan nie; die sessionaris word eers eienaar nadat hy ook beheer oor die saak verkry het (vgl bv *Gillett v Pickard* 1927 AD 155 158; *Mayaka v Havemann supra* 465; *Marcus v Stamper & Zoutendijk supra* 76 78 84; die *Vivier*-saak *supra* asook die verdere vonnisse vermeld deur Erasmus, Van der Merwe en Van Wyk *Lee and Honoré* 285). Die vraag ontstaan of *lewering* (soos in laasgenoemde uitspraak vereis word) deur die *kennisgewing* (soos in die *Caledon*-beslissing omskryf word) vervang word; indien dit die geval sou wees, is daar sprake van ingrypende regswysiging wat slegs by wyse van 'n ondubbelsinnige beslissing van die appèlafdeling behoort te geskied.

6 Probleme

Daar is nog heelwat probleme rondom *attornment* wat waarskynlik binne afsienbare tyd die aandag van die howe sal geniet (sien bv Ferreira 1981 *Obiter* 165–171; Malherbe 1983 *Responsa Meridiana* 295–304 asook die bespreking van die *Ernst*-beslissing deur Badenhorst 1988 *TSAR* 298–303). 'n Aantal sodanige probleme is:

a die vrae wat *obiter* in die *Ernst*-beslissing gestel is ten aansien van die regsgevolge in 'n geval waar die houer nooit opreg bedoel het om in die toekoms namens 'n derde te hou nie;

b die inhoud van die begrip *reg op beheer* in daardie gevalle waar die houer nie self in beheer is op die tydstip wanneer die betrokke ooreenkoms sedeer word nie;

c die vraag of 'n uitdruklike sessie van die *rei vindicatio* (wat volgens die uitspraak by implikasie nog by MK moet berus) aan BW laasgenoemde in staat sou kon stel om die voertuig suksesvol te kan opeis (die verdere vraag ontstaan of dié moontlikheid nie dalk die *ratio* vir die beslissing van absolusie van die instansie was nie – in so 'n geval sou E nie 'n beroep op *res iudicata* kan maak nie);

c die regsgeldigheid en effek van bovermelde *obiter dictum* in die *Caledon*-beslissing dat sessie en kennisgewing daarvan aan die houer voldoende is om eiendomsoordrag te bewerkstellig. 'n Verbandhoudende vraag is of dit volgens dié benadering enige sin het om van die standpunt uit te gaan dat die kennisgewing slegs aan die oorspronklike houer (wat nog steeds in beheer moet wees of oor 'n reg op beheer moet beskik) gegee kan word; en

e die vraag of die howe gevolg gaan gee aan die moontlikheid deur Van der Merwe *Law of things* 165 genoem, naamlik dat die oorgang van eiendomsreg bloot op grond van die sessie van die *rei vindicatio* gepaardgaande met kennisgewing aan die houer ook na ander gevalle (en nie net t a v die verdiskontering van kredietooreenkomste nie) uitgebrei sou kon word.

Dit is duidelik dat daar nog wesenlike probleme aangaande *attornment* bestaan; om die waarheid te sê, dit is – gesien die toename in kredietooreenkomste

– waarskynlik dat konstruktiewe lewering en die moontlike invoering van konsensuele eiendomsoordrag binnekort in die brandpunt sal staan. Daar kan net gehoop word dat indien verdere aanpassings aan die leweringsbegrip geskied, alle implikasies (ook met betrekking tot publisiteit en regsekerheid) behoorlik verdiskonteer sal word.

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STATE LIABILITY FOR THE DELICTS OF THE POLICE

Minister of Police v Rabie 1986 1 SA 117 (A)

In *Minister of Police v Rabie* the appellate division made a radical departure from the "traditional approach" to the issue of state liability for the delicts of the police. This decision warrants closer scrutiny and justifies a review and re-examination of aspects of such liability. However, my comments will generally be confined to considerations other than policy.

Stranax ("Liability for the delicts of the police: The underwriter state" 1986 *SALJ* 192) has summarised the facts of the *Rabie* case as follows:

> "[A] policeman employed as a mechanic, whose duties centred on repairing police vehicles and who worked office hours, shortly after midnight assaulted, then arrested and detained the respondent, and caused a charge to be laid against the respondent. It was common cause that at the time of the assault the policeman was dressed in private clothing, in his private vehicle and at the scene of the assault in pursuance of private interests. It was not disputed that the respondent had been unlawfully assaulted and arrested by the policeman."

The appellate division for various reasons upheld the decision of the Witwatersrand local division in which the minister was held liable.

State liability for the acts of its servants is based on section 1 of the State Liabilities Act 20 of 1957 (hereafter the act) which reads as follows:

> "Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognisable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State, acting within his capacity and within the scope of his authority as such servant."

The traditional approach

The traditional approach to state liability for the delicts of the police is summed up in *Mhlongo v Minister of Police* 1978 2 SA 551 (A) 556F, in which the court indicated that (a) all members of the South African police force are *prima facie* servants of the state; and (b) the state is *prima facie* liable when a member of the force commits a wrongful act in the course or scope of his employment. The only defence was to show that at the time the wrong was committed, the policeman was

> "engaged upon a duty or function of such a nature as to take him out of the category of servant *pro hac vice*" (*Mhlongo* case *supra* 567E).

For a duty or function to take the policeman out of the category of servant, it had to be one which was "personal" to the policeman in the sense that the state did not have the power to direct or control its performance.

Some of the problems arising from the traditional approach are as follows:

a The concept of a servant acting within the "scope of his authority" (s 1 of the act) has been interpreted as "embracing" the concept "within the scope of his employment" (*Mhlongo* case *supra* 567B). While I agree with this view, I hasten to add that the scope of a servant's *authority* may differ from that of his *employment* as illustrated by the *Rabie* case: the policeman, Van der Westhuizen, though employed as a mechanic, was authorised to exercise police functions by virtue of being a member of the police force (133A–E). The fact that the one concept is included in the other, means they are not equivalent and cannot be used synonymous with each other (see *Feldman v Mall* 1945 AD 733 736).

b Instead of inquiring whether the servant's act was within the capacity and scope of his *authority*, the courts have in some cases sought to determine whether the act was within the *scope* of his *employment* (*Union Government v Thorne* 1930 AD 47 51), while in other cases the courts have said that the act must have been within the *course* or scope of his employment (see the *Feldman* and *Mhlongo* cases *supra*). The courts, however, appear not to recognise that "course" and "scope" are separate and distinct concepts, because they often use the terms interchangeably (see the *Feldman* case *supra* 736; *Minister of Police v Mbilini* 1983 3 SA 705 (A) 712D). The correct approach seems to be to decide whether an act falls within the scope of a servant's employment. All one has to do is to interpret the contract of employment in order to establish the nature of the activities the servant was expected to engage in or the "class of acts" he was expected to perform (Willes J quoted by Schreiner JA in *Moosa v Duma and the Vereeniging Municipality* 1944 TPD 30 38). If, objectively considered, the servant's act was of the kind one would expect of a servant employed to carry out his functions, then it falls within the scope of his employment.

Whether an act was performed in the *course* of the servant's employment, on the other hand, requires one to have regard to

> "the relation of the acts done by [the servant] to the functions he had to carry out" (the *Rabie* case 132H and the *Moosa* case *supra* 37, neither of which gives any clear indication of what the requisite relation is).

What has to be established is a causal *nexus* or link between the policeman's actions and his authority, because the act requires him to have been acting in the scope "of his authority" as a state servant. The question to be answered is: "Why did he perform the act complained of?"

The answer lies in the servant's intention. What he intended accomplishing is what induced him to perform the act. Only if, at the very least, the policeman's intention in part was to fulfil one of his functions or to exercise his authority for the purposes it had been granted, is the necessary causal link established.

The importance of the intention is highlighted when one considers that when a member of the South African police force is off duty

> "it cannot be suggested that his statutory duties as a member of the Force or that his authority are suspended" (*Rabie v Minister of Police* 1984 1 SA 786 (W) 791F).

One could say that these powers, duties and authority lie dormant until such time as the policeman decides to exercise them. His decision will naturally require him to formulate an intention to do so.

This suggested "intention approach" may be criticised as being irreconcilable with cases in which the masters were held liable even though their servants had made significant deviations from the course of, and appeared to have no intention of carrying out their duites (the *Feldman* case *supra*; *African Guarantee and Indemnity v Minister of Justice* 1959 2 SA 437 (A)). This difficulty is more apparent than real, as the servants did

> "not entirely abandon their employer's work but continued, partially, at any rate, to do it while they were devoting attention to their own affairs" (the *African Guarantee* case *supra* 447E–F; see also the *Feldman* case *supra* 743).

The inquiry into the relation between the servant's acts and his functions would be nothing more than an unnecessary repetition of the inquiry into the scope of the servant's employment, if all it was aimed at was to determine whether the acts were objectively related to the servant's functions. To borrow the words of Stranax (*supra* 194), it would require some stretch of the court's imagination to find that even though the wrongful acts fell within the scope of the servant's employment, viewed objectively, they were not related to his functions. Consequently, this "relation" has to be sought in something other than the objective similarity between the wrongful acts and the servant's functions (one could say his job description). In the *Rabie* case itself, Jansen JA commences his investigation of the relationship by pointing out that even though the policeman was on the scene of the occurrence "in pursuance of private interests", this did not

> "exclude the possibility of his having then embarked upon police work . . . [because] . . . he could at any time decide to proceed as a policeman" (133F–G).

This statement raises the crucial question: did he actually proceed as a policeman?

Initially Jansen JA suggests that the answer lies in the policeman's intention (133B–C) but then turns to examine whether Van der Westhuizen was involved in police work at the time of the incident, something which had already been decided when the court examined whether the acts were within the scope of his employment (133A–E). In connection with the policeman's intentions the judge says:

> "Van der Westhuizen certainly professed at the material time to act as a policeman . . . It also seems a fair inference that he intended throughout to act as a policeman, in the sense of intending to exercise his authority as a policeman" (133G).

In my opinion, little weight ought to have been given to the policeman's statements regarding his intentions since the court accepted as fact that he had acted in a "totally self serving and *mala fide*" fashion (134A). A person's intentions generally have to be inferred from his conduct because of the difficulties inherent in attempting to probe the human mind. Price ("The basis of the South African law of defamation" 1960 *Acta Juridica* 271) explained the situation very aptly when he said:

> "As it [the intention to insult] is an abstract or mental conception, the law in self defence, often has to resort to objective rather than subjective methods in its endeavours to isolate it . . . There is nothing unusual in this; the law does very much the same thing in deciding whether the parties to an alleged agreement were ad idem, or whether a person making a false representation has done so fraudulently."

The court's rather perfunctory inquiry does to some extent indicate a recognition of the importance of the servant's intention.

It is submitted that the use of "course" and "scope" of employment as interchangeable, and the all too frequent use of the phrase "course or scope of

employment", has caused confusion, leading to an over-emphasis of the objective relationship between the servant's acts and his functions, namely the "scope" of his employment and the almost non-recognition of the subjective element involved in the concept of "course" of employment. Judge Frankfurter is reported to have said in *Tiller v The Atlantic Coast Line Railroad Company* 318 US 54 68 (quoted in 1987 *SALJ* 51):

> "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."

"Course or scope of employment" is just such a phrase, for its injudicious use has led to a blurring of the distinction between the concepts "course" and "scope" in cases dealing with the liability of the state for police delicts.

c The idea of a person's temporarily being outside the category of servant seems to be based on the assumption that whenever a servant is on duty, everything he does is either a duty or a function. The *Mbilini* case *supra* illustrates that this assumption is unfounded. If it is accepted that even while a servant is on duty he can perform acts which fall outside the course and scope of his employment, there will be no need to look for a "duty or function which takes him outside the category of servant". The criterion would simply be whether the act was within the course and scope of his employment, having regard to all the circumstances.

d The over-emphasis on the element of control has also contributed to a playing down of the importance of the servant's intentions. One of the criteria for deciding whether a person is a servant is the degree of control the master has over his activities. It does not follow, however, that he ceases to be a servant when the possibility or right of control does not exist. This misconception ties in with the idea of a person's temporarily ceasing to be a servant. Rejection of the idea that a wide measure of discretion is incompatible with the status of a servant will once again lead to an inquiry into the circumstances under which the act was performed.

The Rabie approach

The majority, consisting of Jansen, Joubert and Cillié JJA and Vivier AJA, decided that

> "a more apposite approach to the present case would proceed from the basis for vicarious liability mentioned by Watermeyer CJ in *Feldman (Pty) Ltd v Mall* (*supra* at 741):
>
> > '[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove negligent or inefficient or untrustworthy; that, because he has created the risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work . . .' "(134H).

Van Heerden JA delivered a dissenting judgment. The majority was at pains to point out the factual differences between the *Rabie* case and most others: the *Rabie* case was one in which a servant ostensibly commenced doing his master's business at a time when he was pursuing his own private affairs, as opposed to the more common case of a servant "deviating" from the course of duty at a time when he was actually engaged in his master's work (143F). Where a servant does something for his own purposes, purposes other than those of his master or disobeys instructions, this roughly amounts to a deviation. Where such a

deviation is only partially for the servant's own purposes, the master is liable (the *Feldman* case *supra*). On the other hand, where the servant's acts are completely for his own purposes, the master is not liable (*Carter & Co v McDonald* 1955 1 SA 202 (A); *Dolf v Heath* 1959 1 SA 714 (E)).

On the strength of the factual differences, the majority adopted a completely different approach to the question of state liability for police delicts.

The following are some of the criticisms which may be levelled at the *Rabie* decision.

a Jansen JA's use of the words "actually" and "ostensibly" (134F) may cause one to question the abandonment of the traditional approach. In the *Rabie* situation, as in all others, the issue should simply be: was the servant acting in the course and scope of his employment or, to put it another way, was he acting in furtherance of his master's business? Even in cases where he was doing so by improper means, the master would still be liable. The question is not whether he deviated, but always whether his acts were in the course and scope of his employment. How he came to be about his master's business is of no consequence, particularly because the police can resume duty or exercise police functions at any time and place. Therefore all that had to be done in the *Rabie* case was to decide whether he was acting in furtherance of his master's business along the lines of the revised traditional approach.

b The *ratio* of the *Feldman* case *supra* does not support the court's approach in the *Rabie* case. In the first case, immediately after the passage quoted in the *Rabie* case (*supra*), the chief justice goes on to say:

> "[W]e have first to decide what the work was which was assigned to Baloyi [the servant] by his master" (the *Feldman* case *supra* 741).

The purpose, it is submitted, was to ascertain whether the master was liable; liable, not for the wrongs falling within the risk he had created, but for those committed in the course of the servant's doing the master's work. Watermeyer CJ concludes the material portion of his judgment by saying:

> "[H]e was driving the van, not solely for his own purposes but also for his master in his capacity as a servant . . ." (743).

Capacity, it is submitted, involves both the servant's intentions and the scope of his employment. In other words, the *Feldman* decision is based squarely on the traditional approach.

c The *dicta* of Watermeyer CJ quoted from the *Feldman* case in the *Rabie* case (134H), taken in context, were part of his examination of the explanations given for imposing vicarious liability upon a master. The chief justice was neither formulating a test for determining the extent of such liability, nor setting out the circumstances under which liability should ensue. The words of the chief justice himself bear ample testimony to this interpretation where he says:

> "I have gone into this question more fully than seems necessary, in the hope that the reasons which have been advanced for the imposition of vicarious liability upon a master may give some indication of the limits of a master's responsibility . . ." (741).

So the fact that the master has created a risk is merely one of the reasons why he is held responsible for some of his servant's wrongs and not a test for such liability, something to which the *Rabie* decision has elevated it.

d No attempt is made to define the limits of liability based on the creation of risk, but the court does mention that Van der Westhuizen's appointment as a

policeman was "conducive" to the wrongs which he committed (135B). If the master is liable for every act facilitated by the servant's appointment, his liability is limitless (*The shorter Oxford English dictionary* defines the word "conducive" as follows: "Conducing or tending to (a specified end); fitted to promote or subserve"). One notes, however, that implicit in the court's refusal to define the limits of such liability is an acceptance of the fact that there must be limits. Even if it is accepted that acts facilitated by a servant's appointment are the ones which fall within the "risk", one still wonders how Van der Westhuizen's appointment facilitated the assault on Rabie: did it perhaps provide him with the technical skills of the art of wielding a wheelspanner? How did it facilitate the arrest? Anyone in private clothes can approach another, announce that he is a policeman and purport to arrest the latter. It is my submission that Van der Westhuizen's being a policeman merely deluded him into thinking that he could escape detection and made it easier for another policeman, one Sadie, to accept his version of events despite the fact that there were no signs of the alleged attempted housebreaking. Had the majority dealt with Van Heerden JA's "rape comparison" (the *Rabie* case 132B) we might have had a clearer indication of the court's understanding of the term "facilitated".

e The question of limitations is also important, because it is generally accepted that at some point the "law will visit the sins of policemen not upon the State, but solely upon the policeman himself" (Stranax *supra* 192). At what point ought this to happen? I submit that only where the servant is engaged upon or about the master's business, is the master vicariously liable for the wrongful acts of his servant, even on the basis of the "risk" test for a master's vicarious liability. This submission is supported by remarks such as those of Watermeyer CJ in the *Feldman* case where he said:

> "[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove negligent or inefficient or untrustworthy; that, because he has created the risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work . . ." (741).

Statements of this nature suggest that the risk the master creates, is the risk that the servant will cause harm while doing his (the master's) work and not the risk that the servant will maliciously and intentionally injure other persons while only pretending to be doing the master's work. (In the *Feldman* case *supra* 741 Watermeyer CJ carefully avoids mentioning malice or intentional wrongdoing by the servant, speaking only of negligence, inefficiency, untrustworthiness and improper conduct, which to some extent tends to indicate that wilful and malicious wrongdoing would be treated differently.) It is a false argument that a policeman cannot pretend to be a policeman: one could surely say this of a policeman who has been suspended from duty but continues to do his "duty". It is submitted that a policeman can also be said to be pretending to be on duty when there are no reasons for him to exercise the powers he has been given, he knows it and still proceeds to do so (as Van der Westhuizen did).

f In the *Rabie* case the nature of the required relationship between the servant's acts and functions was to a large extent ignored. The court speaks of looking at the course or scope of employment "from the angle of creation of risk", and suggests that if this is done

> "the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and police work, to the *dominant question* whether those acts fall within the risk created by the State" (134I; emphasis added).

With respect, there is no shifting of emphasis, but a complete abandonment of the inquiry into the course and scope of the servant's employment and its replacement with another inquiry.

The *Mbilini* case *supra* points out clearly that certain acts committed while on duty are not in the course of the servant's employment. So even where a person is ostensibly engaged upon his master's business, not everything he does will be for the master's purposes (e g smoking: *Mkhize v Martens* 1914 AD 382). The master will be liable only where such an act which is ostensibly performed for the servant's own purposes can be classified as an improper mode of doing the master's work (the *Feldman*, *African Guarantee* and *Estate van der Byl* cases *supra*). It is submitted that intentional wrongdoing on the part of the servant, completely for his own purposes, does not constitute an improper mode of doing that which he is employed to do (the *Moosa* case *supra* 39 40; the *Feldman* case *supra* 741; *Carter & Co v McDonald* 1955 1 SA 202 (A); *Dolf v Heath* 1959 1 SA 714 (E)). Jansen JA's statement to the effect that the state creates a risk that a policeman will "abuse or misuse [his] powers for his own purposes" (135A) tends to imply that the state should be liable for any abuse of a policeman's powers. It is difficult to conceive of any limitations once one has rejected the idea that the purposes for which the acts were done, operate to limit the master's liability (as the court seems to have done in the *Rabie* case).

g The appellate division's "risk" approach is ultra-objective, looking only at the range of activities which the servant may be expected to engage in and ignoring all other factors. It is submitted that the act requires the person to be acting "within his capacity" as a servant because the scope of his authority alone, being judged objectively, would result in liability being cast too wide.

Conclusions

In my opinion the decision to base the state's liability on the creation of risk in this instance, was perhaps unfortunate because no indication is given of the type of limitation the court foresees being placed on such liability. The case could quite satisfactorily have been disposed of by first deciding whether the policeman had actually proceeded as a policeman and then applying the revised traditional approach suggested.

It is submitted that the following would be an appropriate way of revising the traditional approach:

a The idea of a person's temporarily falling outside the category of a servant should be replaced with the concept of an act falling outside the course and scope of the servant's employment.

b It should also be more clearly recognised that under certain circumstances a lack of control is not incompatible with a master and servant relationship and consequently that inability to control the manner in which the servant executes his task does not *per se* take a servant's act outside the course and scope of his employment.

c The twofold test referred to in the *Rabie* case (132H) should be more rigorously applied:

i The servant's act, viewed objectively, must be within the scope of his employment, that is to say, at the very least closely related to the functions he has to perform; and

ii the acts must be related to the servant's functions, in the sense that his intention must at least in part have been to achieve the objects for which his master had employed him. In cases where his intentions cannot be established, objective factors should determine the issue, none other being available.

Finally, I wish to suggest that the decision in the *Rabie* case can justifiably be restricted to cases where the policeman, while attending to his own private matters, actually commences to do his master's business. This is the type of situation for which the court found the traditional approach inappropriate and to which the new approach should therefore be limited. Although it may seem illogical to have two tests running side by side dealing with the same issue, it is submitted that this is preferable to having all cases decided on the *Rabie* basis. The traditional approach should still be employed to deal with situations not falling within the ambit of the *Rabie* case, since the court did not consider whether the risk approach would be appropriate for all circumstances (the *Rabie* case 134G).

It is noteworthy that in *Gibbins v Williams, Muller, Wright & Mostert Ingelyf* 1987 2 SA 82 (T), a case dealing with vicarious liability, no mention is made of the "risk" approach and the matter is decided in accordance with the traditional approach. When one takes the *stare decisis* doctrine into consideration, this means that the vicarious liability of the state and that of other employers have finally been placed on a different footing.

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VERBOD OP BEPERKENDE PRAKTYKE: UITWERKING OP BESTAANDE KONTRAKTE

National Home Products (Pty) Ltd v Vynide Ltd 1988 1 SA 60 (T)

1 Inleiding

Ingevolge die bepalings van die Wet op die Handhawing en Bevordering van Mededinging 96 van 1979 (hierna die wet), is 'n verbod op bepaalde tipes beperkende praktyke gedurende 1986 uitgevaardig. Die onderhawige saak is die eerste gerapporteerde uitspraak waarin hierdie verbod (vervat in par 2 van kennisgewing 801 *SK* 10211 van 1986-05-02 — hierna die kennisgewing) ter sprake gekom het. Die hof moes uitsluitsel gee oor die vraag of 'n bepaalde kontrak strydig met hierdie verbod is. Ten aanvang word gelet op die feite van die saak asook die benadering van die hof, waarna kommentaar op bepaalde aspekte van die beslissing gelewer word.

2 Feite

Vynide (V) was die vervaardiger van selfklewende materiaal bekend as "Con-Tact" wat hoofsaaklik aangewend word vir die bedekking van rakke. Hierdie produk is versprei na groot- en kleinhandelaars asook na eindverbruikers. National Home Products (NHP) het "Magic Cover", 'n produk soortgelyk aan dié

van V, vanuit die VSA ingevoer en op dieselfde wyse versprei (63H–I). Ingevolge 'n ooreenkoms op 1 Maart 1984 gesluit, sou V deur bemiddeling van NHP die reg verkry om "Magic Cover" in Suid-Afrika te vervaardig terwyl NHP afstand sou doen van die reg om laasgenoemde in te voer. As teenkant hiervan sou NHP — onderworpe aan sekere voorwaardes — die uitsluitlike verspreider deur sy gewone kanale van "Con-Tact" of soortgelyke produkte word (63I–64B). Genoemde voorwaardes het onder meer behels dat V steeds "Con-Tact" aan Sterkolite (S) mag verskaf, maar dat S 'n hoër prys as NHP daarvoor moet betaal en dit slegs aan opvoedkundige inrigtings mag verkoop (64C–D). Ook sou V kon voortgaan om "Con-Tact" aan Sylko te verskaf teen dieselfde prys as waarteen S dit kon verkry. Hierdie verskaffing sou egter beëindig word by die verkryging van 'n lisensie deur V om "Magic Cover" plaaslik te vervaardig (of onder ander bepaalde omstandighede (64E)). NHP se eksklusiewe verspreidingsreg van "Con-Tact" sou verbeur word indien sekere omskrewe kwotas nie aangekoop word nie (65E–F).

Op grond van hierdie feite het V die hof genader om 'n verklarende bevel te dien effekte dat die ooreenkoms met NHP, inaggenome die bepalings van die kennisgewing, onwettig is, of dat hy vanaf 2 Mei 1986 nie meer 'n party tot die ooreenkoms mag wees nie. As alternatief is gevra om 'n verklaring dat NHP versuim het om die vermelde minimum aankope te doen (62A–C).

3 Die benadering van die hof

Die sentrale vraag voor die hof was uiteraard of die ooreenkoms strydig met die kennisgewing is deurdat dit op van die verbode tipes beperkende praktyke neerkom. In die beantwoording van hierdie vraag het die hof veral drie aangeleenthede ondersoek:

3 1 Omskrywing van die onderskeie tipes beperkende praktyke

a V beweer dat die ooreenkoms aanleiding gee tot drie verskillende tipes beperkende praktyke (71G). Eerstens word beweer dat daar horisontale prysamespanning is deurdat V onderneem om "Con-Tact" teen "'n besondere minimum prys" aan S te verskaf (71G–H). Die omskrywing van "horisontale prysamespanning" in paragraaf 4 van die kennisgewing lui, sover dit relevant is, soos volg:

> "[E]nige ooreenkoms . . . tussen twee of meer verskaffers . . . van enige handelsartikel, of van wesenlik soortgelyke handelsartikels, om —
>
> (i) 'n besondere, of 'n besondere minimum, prys te vra . . . "

b Tweedens word beweer dat horisontale samespanning oor verskaffingsvoorwaardes plaasvind deurdat V verplig is om "Con-Tact" aan S te verskaf op voorwaarde dat S dit op sy beurt slegs aan sekere instansies sal verskaf (71I). "Horisontale samespanning oor verskaffingsvoorwaardes" beteken volgens paragraaf 5 van die kennisgewing

> "enige ooreenkoms . . . tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, om sodanige handelsartikel of handelsartikels te verskaf —
>
> (i) slegs op of met enige besondere voorwaarde of bepaling . . . "

c Derdens word beweer dat horisontale samespanning oor markverdeling plaasgevind het deurdat V en NHP in effek die mark vir "Con-Tact" en soortge-

lyke produkte tussen hulle verdeel (71J). "Horisontale samespanning oor markverdeling" beteken volgens paragraaf 6 van die kennisgewing

> "enige ooreenkoms . . . tussen twee of meer verskaffers van enige handelsartikel of van wesenlik soortgelyke handelsartikels, wat die uitwerking het om die mark vir sodanige handelsartikel of handelsartikels in die geheel of gedeeltelik tussen hulle soos volg te verdeel —
>
> (ii) ten opsigte van klante of klasse klante . . . "

Die hof meld dat die ooreenkoms tussen V en NHP teen die agtergrond van hierdie omskrywings beoordeel moet word (69A). Voor 1 Maart 1984 het V en NHP onafhanklik en in mededinging met mekaar wesenlik soortgelyke handelsartikels aan die mark beskikbaar gestel — V as vervaardiger en NHP as invoerder (69B). Hulle het dus as verskaffers op dieselfde vlak oftewel *horisontaal* gefunksioneer (69C–D). Hierdie beskikbaarstelling van soortgelyke produkte is een van vier identifiseerbare "markte" of situasies waar V en NHP op dieselfde vlak meegeding het. Volgens die kontrak tussen V en NHP kom dit voor of hulle in drie verdere "markte" ook mededingers was — naamlik ten aansien van verskaffing van hulle onderskeie (soortgelyke) produkte aan groot- en kleinhandelaars asook eindverbruikers (par B en C van die aanhef tot die ooreenkoms (63H–I)). Hierdie drie groepe kon dus voor 1 Maart 1984 'n keuse uitoefen ten aansien van (ten minste) twee produkte van mededingende verskaffers.

Na 1 Maart 1984 het V en NHP se posisie oënskynlik verander — V is nou uitsluitlik in die vervaardigingsegment en NHP uitsluitlik in die verspreidingsegment. Hierdie resultaat laat die vraag ontstaan of daar dan sprake kan wees van 'n *horisontale* beperkende praktyk. Die antwoord hierop is egter nie voor-die-hand-liggend nie omrede die kennisgewing 'n bepaalde betekenis aan die begrip "verskaffer" heg.

3 2 Die betekenis van "horisontaal"

Volgens die woordomskrywing in paragraaf 10(f) van die kennisgewing sluit "verskaffer", tensy dit uit die samehang anders blyk, die vervaardiger, produsent, verkoper en herverkoper van goedere in. Die hof merk tereg op dat die effek hiervan is dat "verskaffer" kan verwys na

> "both the first introducer of a commodity into the market and the purchasers who buy the commodity for resale and who in turn further introduce the commodity to other purchasers by reselling it. Between these two 'suppliers' there may be an agreement regarding a particular condition of supply although the first purchaser (the middleman) buys the commodity for resale to consumers and the first seller sells only to the middleman and not the consumer. Would there in the example then be 'horizontal collusion on conditions of supply"? . . . In my view not. Although both parties are *suppliers* they are not functioning on the same level, or horizontally, since one is the first supplier who supplies to a middleman on the next level who supplies to a consumer on a subsequent level" (69F–H).

Ten einde vas te stel wat die beperkende praktyke behels wat deur die kennisgewing verbied word, het die hof verwys na die verslag (hierna die ondersoekverslag) wat die Mededingingsraad ingevolge artikels 10(1)(c) en 12(1) van die wet aan die Minister van Handel en Nywerheid (soos hy toe bekend was) voorgelê het. Die hof het bevind (70F–H) dat die gebruik van die verslag toelaatbaar is (vgl ook Labuschagne "Die rol van voorafgaande ondersoeke en beraadslagings by wetsuitleg" 1987 *SA Publiekreg* 90; Steyn *Uitleg van wette* (1981) 134–136 en in die algemeen Labuschagne "Die begrip 'dubbelsinnigheid' by wetsuitleg" 1987 *TRW* 96). Die verslag is kragtens artikel 12(4)(b) van die wet deur die

minister gepubliseer (in *SK* 9959 van 1985–10–04). Artikel 10(1)(c) van die wet verleen aan die Mededingingsraad die bevoegdheid om ondersoek te doen na 'n bepaalde *tipe* ooreenkoms wat gewoonlik in verband met die skepping of handhawing van 'n beperkende praktyk aangewend word (die hof (69H) verwys na a 10(1)(a) wat egter handel met 'n ondersoek na 'n bepaalde beperkende praktyk).

Die ondersoekverslag meld in paragraaf 38 dat 'n praktyk "horisontaal" van aard is indien die samespanning met ander verskaffers op dieselfde vlak in die produksie- of distribusieketting geskied, terwyl dit "vertikaal" plaasvind indien dit tussen verskillende vlakke in die produksie- of distribusieketting plaasvind. Die hof kom tot die gevolgtrekking dat V en NHP voor 1 Maart 1984 verskaffers op dieselfde vlak van die produksieketting was, maar dat die onafhanklike mededinging van NHP as verskaffer (dit wil sê *invoerder*) vanaf daardie datum beëindig is. Op hierdie datum het NHP van 'n horisontale vlak (ook verskaffer) na 'n volgende vlak (slegs verspreider) beweeg sodat die partye dus nie langer horisontaal (op dieselfde vlak van die produksie- of verskaffingsketting) nie, maar wel vertikaal gefunksioneer het (70G–H). Hier kan bygevoeg word dat ook V se mededinging (as *verspreider*) vanweë die kontrak beëindig is deurdat hy voortaan slegs sou vervaardig).

V voer egter aan dat die partye op 2 Mei 1986 *steeds* as mededingende verskaffers beskou moet word omrede dit hulle hoedanigheid was toe die kontrak op 1 Maart 1984 gesluit is (71C–D). Hierdie benadering kom dus daarop neer dat die partye, ondanks die ooreenkoms tussen hulle, nogtans in wese mededingers gebly het en dat hulle die kontrak in hierdie (horisontale) hoedanigheid voortgesit het. Die hof moes dus beslis oor die toepaslike "status" van V en NHP en het in hierdie verband op die moontlikheid gelet dat die kennisgewing terugwerkend van aard is.

3 3 Die terugwerkendheid van die kennisgewing

a Die hof verwys na die vermoede teen die terugwerkendheid van wetgewing en meld dat daar, in afwesigheid van 'n uitdruklike bepaling tot die teendeel, vermoed word dat die wetgewer nie wil inmeng met gevestigde regte of met kontrakte wat wettig voor die promulgasie van die betrokke wetgewing gesluit is nie (66I). Hierdie vermoede geld eweneens waar 'n strafbepaling van krag gemaak is (66J) (vgl a 14(7) en 19(c) van die wet). Die hof verklaar dan dat daar geen aanduiding in die wet of die kennisgewing is dat die kennisgewing terugwerkende krag het nie en dat dit inteendeel duidelik is dat die wet en die kennisgewing slegs huidige en toekomstige beperkende praktyke raak (67A).

Artikel 14(5)(a) van die wet vermeld die voorskrifte wat die minister in die kennisgewing kan gee en in ooreenstemming daarmee verklaar die kennisgewing (par 1) eerstens die onderskeie tipes ooreenkomste onwettig en verbied dan (par 2) enigiemand om so 'n tipe ooreenkoms aan te gaan, 'n party daarby te wees of aan te hou om 'n party daarby te wees (die hof (66D) verwys ook na a 14(1)(c) wat egter nie verband hou met die ondersoek ingevolge a 10(1)(c) nie). Die hof kom dus tot die gevolgtrekking dat beide die wet en die kennisgewing betrekking het op die hede en wel die tydstip van publikasie van die kennisgewing of enige tydstip daarna (67C). Op die relevante tydstip — dit is 2 Mei 1986 — was die partye reeds vir twee jaar nie meer op dieselfde vlak van die produksie- of verspreidingsketting nie. Die implikasie hiervan is dat die ooreenkoms wat V

en NHP bereik het, naamlik om na verskillende vlakke in die vervaardigings- en verspreidingsproses van (vroeër mededingende) produkte te beweeg, nie deur die verbod vervat in die kennisgewing getref word nie (71B–C). Die hof verwerp derhalwe V se bewerings dat die kontrak die gemelde tipes beperkende praktyke (vgl 3 1 hierbo) daarstel en wys daarop dat die kontrak waarmee op 2 Mei 1986 voortgegaan is, nie tussen horisontale partye was nie (71G–72A). Die ooreenkoms word gevolglik geldig verklaar (74C).

b Die beslissing is dus in wese gebaseer op die siening dat die ooreenkoms nie een tussen twee (horisontale) mededingers is nie. Die kontrak is *gesluit* tussen twee mededingers maar die onderskeie regte en verpligtinge wat ontstaan het, was tussen die twee partye as nie-mededingers afdwingbaar. Die vernaamste aspek is egter die verandering in die partye se markstatus of -hoedanigheid as gevolg waarvan die kontrak tussen twee vertikale partye voortbestaan het. Die hof het bevind dat 'n kontrak soos dié tussen V en NHP op 1 Maart 1984 wettig was en het ook uitdruklik vermeld dat so 'n ooreenkoms nie noodwendig vandag 'n beperkende praktyk ingevolge die kennisgewing sal daarstel nie (70I–J). Die regsposisie het dus nie verander nie. Vanuit hierdie oogpunt het dit dus eerder gegaan oor die vraag of die partye se hoedanigheid vir doeleindes van die omskrywings van die kennisgewing as horisontaal of vertikaal beoordeel moes word; dit is tog die aard van die kontrak op die huidige stadium wat oorweeg moet word aangesien daar gevra word of die partye *op dié tydstip* die kennisgewing oortree, ongeag die aanvangsdatum daarvan.

Die betekenis van terugwerkendheid moet egter van naderby bekyk word (vgl Driedger "Statutes: retroactive retrospective reflections" 1978 *Canadian Bar J* 269 vir die onderskeid tussen die retrospektiewe en retroaktiewe werking van 'n maatreël). Terugwerkendheid in die betekenis van retroaktiwiteit is nie werklik hier ter sprake nie omdat daar nie met 'n voltooide transaksie op sigself ingemeng word en die reg geag word te wees wat dit nie was nie (Du Plessis *The interpretation of statutes* (1986) 98). Terugwerkendheid kan eerder met die kwessie van bestaande regte in verband gebring word omrede, soos reeds vermeld, die kontrak regte en verpligtinge deurlopend omvat. Dus is die kennisgewing in 'n retrospektiewe sin wel terugwerkend omdat die partye bestaande regte het wat wel aangetas sou kon word. (Labuschagne "Retroaktiewe wetgewing" 1986 *SA Publiekreg* 137 149 meen dat in die geval van inmenging met bestaande regte daar wel van retroaktiwiteit gepraat kan word. Die nut van die onderskeid van Driedger is volgens hom daarin geleë dat dit aantoon dat daar nie voor promulgasie op bestaande regte inbreuk gemaak kan word nie maar slegs daarna.)

4 Geldigheid van die ooreenkoms

Die hof het bevind dat die ooreenkoms nie in stryd met die kennisgewing is nie. Wat sou egter die posisie wees indien 'n kontrak wel aldus strydig is? Ter beantwoording van die vraag of dit sou beteken dat die ooreenkoms onafdwingbaar is, kan ten eerste op die beslissing van die hof gelet word. Daar kan moontlik geargumenteer word dat die beslissing gesag bied vir die siening dat, indien eenmaal bevind is dat 'n bepaalde ooreenkoms binne die tersaaklike omskrywings van die kennisgewing val, die hof *noodwendig* sal (moet) bevind dat die ooreenkoms onafdwingbaar is (vgl bv die opmerkings op 66C). Die aangeleentheid is egter nie werklik deur die hof oorweeg nie en derhalwe is die beslissing

nie vatbaar vir 'n gesaghebbende afleiding nie. Daar sal dus in tweede instansie op die algemene beginsels van die kontraktereg gelet moet word.

Dit is 'n erkende vereiste vir die geldigheid van 'n kontrak dat dit geoorloof moet wees (De Wet en Yeats *Kontraktereg en handelsreg* (1978) 80). Dikwels is die ongeoorloofdheid van 'n voorgenome kontrak geleë in die strydigheid daarvan met 'n statutêre verbod op die sluiting van so 'n kontrak. Die feit dat 'n kontrak in stryd met so 'n verbod is, het egter nie noodwendig die uitwerking dat die kontrak nietig is nie. Van kardinale belang is die vraag na die bedoeling van die wetgewer en verskeie faktore word in ag geneem ten einde te bepaal of dit inderdaad die bedoeling van die wetgewer was om die kontrak nietig te stel (*Metro Western Cape v Ross* 1986 3 SA 181 (A) 188F–189C; *Swart v Smuts* 1971 1 SA 819 (A) 829C–830C; *Standard Bank v Estate Van Rhyn* 1925 AD 266 274; *Wilken v Kohler* 1913 AD 135 142–143; Joubert *General principles of the law of contract* (1987) 131; Christie *The law of contract in South Africa* (1983) 335; Kerr *The principles of the law of contract* (1980) 98; Steyn 195; Cheshire, Fifoot & Furmston *Law of contract* (1986) 334). Verskeie van hierdie faktore was *in casu* teenwoordig, waaronder 'n uitdruklike onwettigverklaring van 'n sodanig omskrewe ooreenkoms. Ook is daar 'n verbod, gekoppel met 'n strafbepaling, op die sluit van of voortgaan met so 'n kontrak. Verder speel die openbare belang 'n deurslaggewende rol (vgl a 14(5)(a) van die wet).

Word hierdie faktore (of aanduidings van die wetgewersbedoeling) toegepas, moet daar myns insiens as algemene uitgangspunt 'n nietigheidsbedoeling deur die wetgewer aanvaar word. Die feit dat die kennisgewing uitdruklik bepaal dat dit 'n misdryf is om 'n party tot 'n onwettige ooreenkoms te bly, dui onteenseglik op 'n bedoeling om die betrokke ooreenkoms se voortsetting te ontmoedig. Hierdie siening word versterk deur die swaar strawwe waarvoor die wet voorsiening maak in geval van oortreding van die kennisgewing. (Volgens a 19(c) kan 'n boete van R100 000 of gevangenisstraf van vyf jaar of beide opgelê word.) Hierdie strawwe is uiteraard daarop gemik om selfs vermoënde ondernemers af te skrik. Dit sou ook anomalies wees indien 'n kontraktant deur middel van die howe 'n teenparty tot die nakoming van laasgenoemde se kontraktuele verpligtinge kon dwing; aldus word bewerkstellig dat beide steeds partye tot die ooreenkoms bly — 'n situasie wat direk verbied word en weer tot (strafregtelike) verrigtinge aanleiding kan gee. Die verbreking van die gemeenregtelike dooie punt rakende ooreenkomste wat mededinging benadeel, kan as 'n fundamentele motivering vir die daarstel van die proses aanvaar word waarvolgens die Mededingingsraad en die minister optree (vgl verder die Raad op Mededinging *Sesde jaarverslag* (1985) par 7 en 9 asook Van der Merwe "Die funksie van die reëls ter beskerming van handelsvryheid" 1988 *TSAR* 261 vn 66). Statutêre bepalings beoog gevolglik om die regulering van mededinging meer doeltreffend te maak — dit is trouens 'n wyd aanvaarde benadering (vgl par 112–189 van die ondersoekverslag van die Mededingingsraad). Die bovermelde standpunt rakende die geldigheid van 'n kontrak strydig met die kennisgewing moet egter in perspektief gestel word.

a Eerstens moet die moontlikheid oorweeg word dat 'n bepaalde ooreenkoms, ondanks die feit dat dit strydig met die kennisgewing is, tog geldig en afdwingbaar kan wees. Moet die feit dat 'n ooreenkoms slegs 'n "geringe" beperking van mededinging meebring, nie dalk beskou word as 'n oorweging hoekom die wetgewer nie uitdruklik vermeld het dat kontrakte strydig met die kennisgewing

nietig sal wees nie? Voorts, sou 'n hof byvoorbeeld in 'n strafsaak die *de minimis non curat lex*-beginsel op so 'n ooreenkoms kon toepas? Dit is duidelik dat 'n bevredigende antwoord op hierdie vraagstuk ten nouste saamhang met die standpunt wat die howe oor die omvang van hulle "toetsingsbevoegdheid" in hierdie verband gaan inneem. Die presiese omvang van die bevoegdheid is moeilik in abstraksie definieerbaar vanweë onder meer die volgende gegewe. Die wet maak voorsiening daarvoor dat die minister, op aanbeveling van die Mededingingsraad, skriftelike vrystelling van die verbod kan verleen in die mate en onderworpe aan die voorwaardes uiteengesit in die vrystelling (a 14(5)(b) van die wet. Die finale kennisgewing (par 8) bevat ook sekere outomatiese vrystellings waarvan een ook in die beslissing (71H) ter sprake gekom het).

Wat is die materieelregtelike betekenis hiervan vir die gestelde vraagstuk? Daar word aan die hand gedoen dat die wet die strekking het dat die howe hulle normale interpretasie- of konstruksiebevoegdheid ten volle behou en gevolglik 'n ooreenkoms grondig aan die oogmerk en omskrywings van die kennisgewing mag toets. Daar kan egter betwyfel word of die wetgewer die howe wil laat funksioneer as alternatief vir die minister sodat die howe — deur 'n ooreenkoms aan 'n volwaardige ondersoek na die ekonomiese effek daarvan te onderwerp — 'n resultaat soortgelyk aan die verlening van 'n vrystelling deur die minister kan bewerkstellig. Die korrekte benadering sou eerder wees dat dit die taak van die howe is om ondersoek in te stel of 'n bepaalde ooreenkoms *wesenlik* in stryd met die kennisgewing is en dat dit slegs binne die bevoegdheid van die minister val om die bepaalde kontrak van die werking van die verbod vry te stel (kyk ook Van der Merwe 1988 *TSAR* 256–259). Die howe moet dus hul bevoegdhede na analogie van die administratiefregtelike beginsels rakende die verhouding van deskundige administratiewe liggame en die burgerlike howe in gevalle van hersiening toepas (vgl die benaderings voorgestel deur Wiechers *Administratiefreg* (1984) 250–251; Baxter *Administrative law* (1984) 472–474 en verder ook Van Eeden "Basiese norme en meganismes van mededingingsbeleid" 1986 *MB* 22–23).

b 'n Tweede aspek wat ter sprake kom, is die prosesregtelike betekenis van die moontlikheid dat 'n vrystelling verkry kan word. In *Essop v Abdullah* 1988 1 SA 424 (A) 434I–J was die appèlhof van mening dat indien die blote moontlikheid van die verkryging van 'n permit — deur 'n gediskwalifiseerde persoon ingevolge die Wet op Groepsgebiede 36 van 1966 — die uitwerking sou hê om 'n bepaalde verbod se toepassing te verhoed, dit laasgenoemde se effektiwiteit totaal sou ontneem. In dié saak (437B) het die hof egter die moontlikheid geopper — maar nie beslis nie — dat 'n onwettige kontrak deur die verkryging van 'n permit geldig kan word (kyk ook Beck "Contracts and the Group Areas Act: an interesting reversal" 1987 *SALJ* 252). In die mate wat hierdie beslissing van toepassing is in die huidige verband kan gesê word dat dit 'n litigant in 'n privaatregtelike geding sou loon om vooraf uitsluitsel oor die verkryging van 'n vrystelling te verkry. Dit is egter denkbaar dat 'n hof bereid sou wees om 'n tussentydse bevel uit te reik of die saak uit te stel en dat hierdie diskresie uitgeoefen sal word afhangende van die waarskynlikheid van die verkryging van so 'n vrystelling — wat weer eens die bogenoemde problematiek betrek. Veral in 'n strafsaak sal 'n hof waarskynlik meer geneë wees om 'n toepaslike prosesregtelike stap te doen om die moontlikheid van 'n vrystelling besleg te kry. Veel sal egter afhang van die betrokke misdaadomskrywing wat ter sprake is

(kyk die *Essop*-saak 435A asook *Neugarten v Standard Bank of South Africa Ltd* 1989 1 SA 797 (A) 812G–J). Daar kan aanvaar word dat die howe, indien sodanige probleem sou voorkom, die korrekte balans tussen die nodigheid van effektiwiteit van die kennisgewing en billikheid teenoor die beskuldigde of litigant sal vind in die lig van die besondere omstandighede van die geval en die aard en struktuur van die wet.

c Derdens behoort 'n hof te kan bevind dat 'n bepaalde ooreenkoms slegs gedeeltelik onafdwingbaar is. Dit kom voor of die appèlhof in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) van die vereistes van die sogenaamde "blue pencil"-toets afgesien het (Schoombee "Agreements in restraint of trade: the appellate division confirms new principles" 1985 *THRHR* 148). Daar word aan die hand gedoen dat hierdie benadering ook in gevalle van beoordeling van 'n kontrak teen 'n statutêre agtergrond moontlik moet wees.

d In die vierde plek behoort die *ratio* van beslissings soos dié in *Metro Western Cape supra* steeds te geld ten aansien van kontrakte wat verband hou met gedrag wat neerkom op beperkende praktyke. In dié saak is naamlik bevind (192I–J) dat die betrokke wetgewing nie beoog het dat kontrakte wat onskuldige kopers met ongelisensiëerde handelaars gesluit het, nietig moet wees nie. Tersaaklike oorwegings was dat die oogmerk van die wetgewing voldoende bereik sou word deur strafbepalings en dat die nietigheid van kontrakte onbillikheid en ongerief vir kopers sou veroorsaak sonder om die oogmerke van die wetgewing te bevorder (vgl ook *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 207G–208D). Waar 'n verbruiker dus 'n handelsartikel koop by 'n ondernemer wat die verkoopprys daarvan met verwysing na 'n ooreenkoms tot pryssamespanning vasgestel het, behoort sodanige transaksie nie sonder meer nietig te wees nie.

5 Mededingingsimplikasies van die ooreenkoms

Die bevinding van die hof is te dien effekte dat die ooreenkoms tussen V en NHP nie neerkom op 'n horisontale beperkende praktyk soos omskryf in die kennisgewing nie. Die vraag ontstaan egter of daar nie dalk volgens ander mededingingsnorme teen die ooreenkoms en die resulterende situasie opgetree kan word nie. Uiteraard kan 'n gesaghebbende oordeel ten aansien van die *wenslikheid* van sodanige optrede slegs na 'n volledige ondersoek uitgespreek word. Gevolglik word volstaan met sekere algemene opmerkings rakende die eksterne aspekte van die aangeleentheid. Daar bestaan veral vier moontlike gronde vir verdere optrede.

5 1 Oortreding van die kennisgewing

Waar die optrede van V of NHP wel op 'n beperkende praktyk soos vervat in die kennisgewing sou neerkom, kan daar teen die partye opgetree word. Indien NHP aan die groot- of kleinhandelaars aan wie verskaf word 'n bepaalde herverkoopprys sou voorskryf en afdwing, sou dit 'n oortreding van paragraaf 2(a) van die kennisgewing kon daarstel. In hierdie geval sou die feit dat die optrede reeds voor 2 Mei 1986 plaasgevind het nie op sigself moontlike optrede kon verhinder nie. Sou V en S egter op 'n bepaalde herverkoopprys ooreenkom, sou dit nie 'n oortreding daarstel nie (vanweë die outomatiese uitsluiting in par 8(a) van die kennisgewing ten gunste van ooreenkomste tussen volfiliale van dieselfde houermaatskappy).

5 2 Beding ter beperking van handelsvryheid

Indien daar bevind sou word dat 'n ooreenkoms nie op 'n beperkende praktyk neerkom nie en dus nie op dáárdie basis aangeveg kan word nie, sal enige party steeds die keuse hê om as alternatief op die beginsels rakende bedinge ter beperking van handelsvryheid te steun. In so 'n geval sal 'n hof natuurlik nie — soos in die onderhawige saak — tot bepaalde statutêre omskrywings beperk wees nie. In die *Magna Alloys*-saak 893C–D is dit duidelik gestel dat die openbare belang in sodanige gevalle die toepaslike toetssteen is. Die beding ter beperking van handelsvryheid kan vanweë die wye aanwendingsgebied van die begrip "handelsvryheid" (sien bv die omskrywing van Du Plessis en Davis "Restraint of trade and public policy" 1984 *SALJ* 92) 'n belangrike rol speel in die regulering van mededinging. Dit sou egter afhang van die vraag of die howe aan die begrip openbare belang 'n wyer betekenis as die oorweging van die redelikheid van die beperking *inter partes* sal gee (vgl ook Visser "Vonnisbespreking" 1985 *De Jure* 198). V sou dus kon aanvoer dat die ooreenkoms sy vryheid om ook te versprei (onredelik) beperk. (Vir huidige doeleindes word aanvaar dat daar nie 'n regsbeperking bestaan wat NHP verhoed om aan die klante van S te verskaf nie. Of S sou kon aanvoer dat V (vanweë die ooreenkoms tussen V en NHP (klousule 5.5 (64F–G)) sy handelsvryheid strydig met die openbare belang beperk deurdat hy slegs aan sekere klante mag verskaf, is problematies. Sal 'n ooreenkoms tussen mede-filiale byvoorbeeld as 'n ooreenkoms gesluit tussen gelyke partye beskou word?) Of so 'n benadering meer suksesvol sou wees, is egter 'n ope vraag. Binne die konteks van die gemenereg is daar 'n verdraagsame benadering tot vergelykbare ooreenkomste te bespeur (vgl *Nel v Drilec (Pty) Ltd* 1976 3 SA 79 (D) 81C–H asook *Ohlsson's Cape Breweries Ltd v Coney* 1905 TS 16 20; *Shell Co of SA Ltd v Gerrans Garage (Pty) Ltd* 1954 4 SA 752 (GW) en *Rhodesian Milling Co (Pvt) Ltd v Super Bakery (Pvt) Ltd* 1973 4 SA 436 (R) 440A–C).

5 3 Bepaalde beperkende praktyk

a Die omskrywing van "beperkende praktyk" in artikel 1 van die wet verwys na "enige ooreenkoms . . . hetsy regtens afdwingbaar of nie". Hierdie omskrywing bevat 'n belangrike implikasie vir die wisselwerking tussen die ondersoek na 'n bepaalde tipe ooreenkoms wat in verband met die skepping of handhawing van 'n beperkende praktyk aangewend word (a 10(1)(c)) en die ondersoek na 'n bepaalde beperkende praktyk (a 10(1)(a)). Met hierdie omskrywing word uitdruklik voorsien dat 'n bepaalde kontrak (andersins) in ooreenstemming met die positiewe reg kan wees maar desondanks op 'n beperkende praktyk kan neerkom (die situasie waar die kontrak statutêr gemagtig is, word uiteraard uitgesluit). Omdat die artikel 10(1)(a)-ondersoek ook op hierdie omskrywing gebaseer is, kan dit derhalwe gestel word dat die feit dat 'n kontrak buite die bestek van 'n bepaalde mededingingsnorm val, nie alternatiewe optrede ingevolge hierdie bepaling kan verhinder nie. Daarom sou die kontrak tussen V en NHP ondersoek kon word as 'n bepaalde *vertikale* beperkende praktyk ongeag die feit dat dit vanuit die perspektief van die kennisgewing (as *horisontale* beperkende praktyk dus) of die gemenereg (die beding ter beperking van handelsvryheid) wel afdwingbaar is (hierdie moontlikheid is ook deur die hof voorsien (71D–E)). Dit is stellig moontlik dat die beperking wat V aan S oplê ten aansien van afsetgebiede en die diskriminasie in die verskaffingsprys volgens hierdie siening ondersoek kan word ingevolge artikel 10(1)(a). Optrede sou egter onder

meer afhang van opvattings oor die mededingingsimplikasies van 'n maatskappygroep as ekonomiese eenheid in hierdie verband (sien bv par 450(i) en 451(d) van die ondersoekverslag).

b 'n "Beperkende praktyk" word in artikel 1 van die wet onder meer omskryf as 'n ooreenkoms wat mededinging regstreeks of onregstreeks beperk en aldus die uitwerking het of waarskynlik sal hê om sekere gevolge te veroorsaak. By die vergelyking van die ooreenkoms met bovermelde omskrywing van beperkende praktyk moet dit dus allereers vasstaan dat daar regstreeks of onregstreeks 'n beperking van mededinging is. Hier moet dan ook 'n oriëntering plaasvind ten aansien van wat onder mededinging verstaan word (Van Eeden 1986 *MB* 22–23). Selfs al sou gemelde elemente teenwoordig wees, moet die openbare belang by oorweging van optrede ingevolge die wet as verdere (en deurslaggewende) kriterium geneem word (a 14(1)).

c Die ooreenkoms het in wese bewerkstellig dat 'n mededinger in vier onderskeibare velde (kyk 3 1 hierbo) mededinging gestaak het. V is nou die enigste vervaardiger en NHP die enigste verspreider van die produk na gemelde persone (S het 'n beperkte verspreidingsarea). Hieroor kan verskeie gesigspunte bestaan. As basiese uitgangspunt kan gestel word dat die blote feit dat die onderskeie markte ten aansien van die vervaardiging en verspreiding van die betrokke produkte elk van 'n mededinger ontneem is, nie noodwendig neerkom op 'n vermindering in *mededinging* nie, ondanks die feit dat daar 'n vermindering van mededingers was (vgl die moontlike voordele vermeld in par 381 van die ondersoekverslag). Dit kan trouens tot 'n vermeerdering in mededinging lei. Die rol van effektiwiteit is belangrik en het stellig ook die hof tot die volgende beoordeling van die kontrak gelei (70I–71B):

> "I expressly do not find that such an agreement, if entered into subsequent to the date of the Notice, would constitute a restrictive practice prohibited by para 2 of the Notice. On the contrary, in spite of the Notice, it would appear to be *an ordinary commercial agreement* where one supplier decides, in the interest of business efficacy, to become a sole distributor while the other party becomes the sole supplier. There is no doubt that a competitor is eliminated but there is doubt in my mind whether this can be called collusion on market sharing or on conditions of supply. However for the purpose of this judgment it is not necessary to resolve this question" (my kursivering).

Die afbakening van rolle en die gevolglike rasionalisasie kan straks tot 'n verlaagde prysstruktuur van die uiteindelik gelewerde produk aanleiding gee. Die nuwe kombinasie kan derhalwe moontlik meer effektief met ander ondernemings meeding. Indien van die standpunt uitgegaan word dat, gegewe die aard van die produk, prysmededinging belangrik is, moet hierdie oorweging wel as besonder relevant beskou word. Hierteenoor kan gestel word dat daar sekerlik een of ander aansporing vir die partye moet bestaan om die (moontlike) besparing deur te gee of in elk geval billike pryse te vra. Drie moontlikhede kan aan die hand gedoen word.

d Eerstens kan daar onderlinge mededinging ten aansien van die verspreiding van die produk wees. Die gewone bemarkingskanale van NHP sluit groot- en kleinhandelaars asook eindverbruikers in (63I–J). Daar kan dus, afhangende van die vraag *in watter mate* (en in watter gebiede) NHP direk aan kleinhandelaars en eindverbruikers (kan) verskaf, wisselende grade van mededinging tussen die onderskeie verskaffers wees (en ook tussen laasgenoemde en NHP).

In die tweede plek kan mededinging deur vervaardigers en verspreiders van soortgelyke of plaasvervangende produkte die prys van die produk redelik hou.

('n Invloed van nie-mededingende aard wat bygevoeg kan word is dat dit argumenteerbaar is of die aanvraag vir die produk (buitendien) pryselasties is.) Dit is uiteraard van belang hier dat daar wel plaasvervangende produkte of ander mededingers moet bestaan. Indien op die bewoording van die kontrak peil getrek kan word, lyk dit of laasgenoemde nie die geval is nie (omstandighede kon egter verander het). So kom die partye – klousule 6.2 van die kontrak – ooreen op 'n bepaalde prysstrategie:

> "In the event of a *third* party entering the marketplace with a similar product which is made available to resellers at a price less than 'Con-Tact' or 'Magic Cover' " (64H–J) (my kursivering).

(Vgl Van Heerden en Neethling *Onregmatige mededinging* (1983) 81–85 ten aansien van die problematiek (in die privaatreg) wat hierom kan ontstaan.) Hier is die posisie van Sylko relevant. Volgens die kontrak sou Sylko ten minste tot 1985 "Con-Tact" van NHP kon verkry (klousule 5.3 (64E–F)). Indien hy ook as verspreider sou optree, is dit denkbaar dat daar in 'n bepaalde gebied (bv t a v verskaffing aan kleinhandelaars) mededinging tussen hom en NHP kan wees. Dit sou problematies wees indien Sylko òf deur onthouding van voorrade òf deur 'n besondere prys uit die mark geweer word (kyk in hierdie verband veral par (vi) van die omskrywing van beperkende praktyk in a 1 van die wet).

Derdens kan die moontlikheid dat ander (of verdere) verspreiders in geval van buitensporige pryse tot die mark kan toetree, gemeld word. Hier sal dit relevant wees om te oorweeg of, en indien wel in watter mate, daar hindernisse in die weg van voornemende toetreders tot die mark is.

e Ten aansien van moontlike optrede deur die minister na 'n ondersoek deur die Mededingsraad bestaan daar verskeie moontlikhede. Dit sou moontlik wees om byvoorbeeld die alleenverspreidingsreg wat aan NHP verleen is, onwettig te verklaar. Die betekenis van die verbod vir V sou wees dat hy meerdere verspreiders moet aanstel of self weer mag versprei. Die oogmerk en uitwerking hiervan sou wees om die partye te dwing om dan die *status quo ante* voort te sit. Die posisie van NHP in geval van 'n verbod is meer problematies omrede dit nie duidelik uit die hofverslag blyk of daar wel 'n lisensie vir die vervaardiging van "Magic Cover" verkry is dan wel of die produk steeds ingevoer word nie. (Uit die verkoopsyfers van "Con-Tact" blyk dit dat nie NHP nie, maar wel V in 1985 aan Sylko verskaf het (72F–G; 73A). Sodanige verskaffing sou slegs kon plaasvind tot met die verkryging van 'n lisensie deur V of by die voorbereiding deur V van sekere ontwerpe (64D–E). Daarna sou Sylko "Con-Tact" van NHP kon koop (64E–F). Indien dus aanvaar word dat 'n lisensie wel verkry is, kan die gevolgtrekking gemaak word dat V in stryd met die ooreenkoms verskaf het. Dit sou ook beteken dat V wel bevoeg is om "Magic Cover" plaaslik te vervaardig.) Sou die betrokke produk wel deur V vervaardig word, sou NHP dus òf self 'n produk moet begin vervaardig òf hom wend tot alternatiewe voorsieningsbronne. Daar die kontrak in elk geval net op "Magic Cover" betrekking het, sou NHP moontlik ander produkte kon invoer.

'n Verdere aspek is die moontlikheid dat die invoerheffing op soortgelyke produkte opgeskort kan word (a 14(1)(a)). Aldus kan aan NHP 'n alternatiewe bron van produkte verskaf word. Die dienlikheid van hierdie optrede is egter afhanklik van die beskikbaarheid, gehalte en pryse van soortgelyke produkte en die vraag of NHP op grond daarvan 'n mededingingende posisie sal kan verkry. Dit spreek vanself dat die uitweg net gevolg kan word indien sodanige heffing

wel op die produkte bestaan. Vanuit hierdie perspektief moet dit ook in gedagte gehou word dat daar wel groothandelaars bestaan wat in so 'n geval deur die invoer en verspreiding van die produkte moontlik (in 'n groter mate as voorheen) as mededingers van V en NHP kan optree.

5 4 Monopoliesituasie

Die wet maak voorsiening vir ondersoeke na 'n "monopoliesituasie" (a 10(1)(d)). 'n Monopoliesituasie word in artikel 1 omskryf as

> " 'n situasie waar enige persoon, of twee of meer persone met 'n wesenlike ekonomiese verbintenis, geheel en al of grootliks die tipe besigheid waarin hy of hulle met betrekking tot enige handelsartikel betrokke is, in die Republiek of enige deel daarvan beheer".

Daar is nie spesifieke aanduidings van wanneer 'n bepaalde persoon geag sal word 'n tipe besigheid te beheer nie. Dit sal bepaal moet word na gelang van die omstandighede van elke geval. Faktore wat oorweeg sou kon word, is onder meer of daar wel meerdere mededingers in die onderskeie markte waarin V en NHP aktief is, voorkom en, indien wel, wat hulle onderskeie markaandele is. Afhangende van die antwoord op hierdie en ander relevante vrae (waaronder die besondere kenmerke van die produk en die mark) kan die vervaardiging van selfklewende produkte deur V en die verspreiding daarvan deur NHP moontlik ondersoek word. Daar moet egter beklemtoon word dat die blote bestaan van 'n monopoliesituasie nie noodwendig teen die openbare belang is nie (a 14(1) en die opmerkings gemaak in par 5 3 hierbo behoort dus ook hier van toepassing te wees).

6 Samevatting

Publiekregtelike mededingingsmaatreëls verkry geleidelik 'n verhoogde sigbaarheid in die Suid-Afrikaanse mededingingsreg. Een van die redes hiervoor is die uitvaardiging van die kennisgewing van 2 Mei 1986. Van die onderskeie komponente van die wet is hierdie ondergeskikte wetgewing enigsins meer vatbaar vir figurering in die hofverslae. Die *ad hoc*-ondersoeke van die Mededingingsraad sal stellig nie geredelik in die burgerlike howe ter sprake kom nie (vgl a 15(13) van die wet). Gemelde kennisgewing het weliswaar 'n voorganger gehad wat verskeie elemente van die huidige reëling bevat het, maar wat in die geheel gesien nie so 'n omvangryke uitwerking gehad het nie. Tydens die geldingsduur van laasgenoemde het weinig sake daaroor in die hofverslae verskyn sodat daar kwalik sprake van 'n gevestigde raamwerk van gewysdes is. Vanweë die struktuur van die wet is dit ook te betwyfel of daar 'n dramatiese verandering in hierdie posisie sal plaasvind. Die onderhawige beslissing vorm dus deel van 'n klein aantal sake wat oor die onderhawige gebied handel. As sodanig is hierdie beslissing dan te verwelkom omrede dit 'n aanduiding gee van die bestek van die kennisgewing.

Verskeie aangeleenthede is egter nog grootliks onaangeroer en behoef verdere ondersoek. Hier kan veral verwys word na die vraag na die presiese betekenis van die begrip openbare belang binne die kader van die beding ter beperking van handelsvryheid asook die verhouding van laasgenoemde met statutêre mededingingsmaatreëls. Voorts sal dit interessant wees om te let op die benadering

wat die howe sal volg in die afbakening van hulle bevoegdhede teenoor dié van die Mededingingsraad en die minister. Antwoorde op gemelde vrae is van besondere belang vir die behoorlike ontwikkeling en bestudering van hierdie dinamiese regsgebied.

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BOEKE

BROCARDICA IN HONOREM GCJJ VAN DEN BERGH

Redakteurs: JE SPRUIT en M VAN DE VRUGT

Kluwer Deventer 1987; xxii en 133 bl

In die jaar waarin professor Govaert van den Bergh, professor in regsgeskiedenis en hoof van die Instituut voor Rechtsgeschiedenis aan die Universiteit van Utrecht, met (vervroegde) pensioen afgetree het, is hierdie feesbundel met 'n heel besondere tema en opset aan hom opgedra. Die tema blyk uit die subtitel "22 studies over oude rechtspreuken" en word deur sy twee Utrechtse kollegas wat as redakteurs opgetree het, in die "Ten geleide" toegelig. Waar professor Van den Bergh dwarsdeur sy illustere loopbaan 'n besondere liefde vir taal en kultuur naas en saam met sy belangstelling in die regsgeskiedenis getoon het, is hierdie kombinasie aangegryp as die tema van die bundel deurdat die bydraes bestaan uit kort besprekings van verskillende regspreuke uit verskillende tydperke van die regsgeskiedenis. Hierdie regspreuke, wat mens vanaf die Romeinse tyd in regsgeskrifte aantref, is veral in die regsonderrig aangewend om 'n les oor 'n bepaalde onderwerp af te sluit. Versamelings van hierdie samevattende spreuke of *brocardica*, aldus professor Van den Bergh self in een van sy geskrifte, is tot diep in die agtiende eeu gebruik. Die beperkte omvang van die *Brocardica* is gedikteer deur 'n uitgewer wat bereid was om sonder finansiële steun 'n feesbundel te laat verskyn – 'n skaars verskynsel – en begryplikerwys op so 'n beperking aangedring het; derhalwe is die bydraers beperk tot kollegas uit Nederland en België en beslaan elke bydrae slegs enkele bladsye (wat terloops in baie gevalle die styl en leesbaarheid van die bydraes ten goede kom). Die prys van die bundel is nie aan die resensent bekend nie, maar die poging om op die gesketste wyses die publikasie se prys binne perke te hou, is sekerlik te verwelkom en die resultaat is desondanks baie aantreklik. Op die sagte band verskyn 'n interessante reproduksie van 'n sewentiende eeuse *Digesta*-teël wat *D* 10 1 voorstel en die inhoud, behalwe die genoemde voorwoord en bydraes, bevat ook 'n foto en 'n indrukwekkende bibliografie van die jubilaris.

Dit is vermoedelik nie die bedoeling, en ook nie eintlik moontlik, om al die afsonderlike bydraes te bespreek nie. 'n Verwysing na enkele van die behandelde spreuke sal lesers 'n idee van die bestek van die bundel gee. Naas ou Romeinse bekendes soos *pignoris causa indivisa est* (JA Ankum), *reus in exceptione actor est* (G Dolezalek), *bis de eadem re ne sit actio* (E Slob), *quod principi placuit legis habet vigorem* (TJ Veen) en *nemo sibi causam possessionis mutare potest* (FBJ Wubbe), tref ons ook spreuke aan wat eers in die Middeleeue of later hul beslag gekry het, soos *nullum delictum, nulla poena sine praevia lege poenali* (JPA Coopmans) en *nemo auditur suam turpitudinem allegans* (R Feenstra). Die meeste van die spreuke sal vir lesers bekend voorkom, maar enkeles was, vir die resensent altans, vreemd, soos die intrigerende *den dode leit den levende niet op stro* (O Moorman van Kappen); dit is blykbaar die negatiewe weergawe van 'n oud-Gelderse spreekwoord waarmee

aangedui word dat na die oorlye van 'n eggenoot en voor verdeling van die gemeenskaplike boedel die langslewende *stricto iure* niks in die boedel sy eie kan noem nie – nie eers die egtelike bed nie, en dus op 'n bed van strooi op die grond aangewese is.

Weens die keuse van tema bestryk die bydraes 'n interessante verskeidenheid regsgebiede in sowel die privaat- as die publiekreg. Almal beantwoord ook aan die verdere vereiste wat die redakteurs gestel het, naamlik dat die betrokke regspreuk nog van aktuele belang moet wees. Die name van die 22 bydraers bring mens onder die besef van die rykdom aan uitstaande Nederlandssprekende regshistorici en weerlê op klinkende wyse diegene wat meen of beweer dat kodifikasie 'n einde aan die geskiedkundige studie van die reg gemaak het. Hierdie prikkelende lektuur kan by enigiemand wie se belangstelling in hierdie rigting gaan, sonder voorbehoud aanbeveel word – ten spyte van die feit dat die waarskynlik "beskeie" prys wellig nie meer so aanloklik sal klink wanneer dit in rande omgesit word nie.

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TESTAMENTE: 'N KORTBEGRIP
deur NJ WIECHERS
Juta Kaapstad Wetton Johannesburg 1988; 134 bl
Prys R28,00 + AVB (slegs sagteband)

Die Suid-Afrikaanse regsliteratuur is nie ryk bedeel met werke oor die erfreg nie. Enige bydrae tot hierdie gebied is dus besonder welkom. Dit geld ook vir hierdie boek van professor Wiechers, ten spyte van die beskeie oogmerk wat hy blykbaar vir homself met die skryf daarvan gestel het. Volgens die voorwoord is die oogmerk van die boek om praktisyns aan te moedig om weer opnuut oor testamente en die opstel daarvan te besin. Laasgenoemde werksaamheid het volgens die skrywer ten onregte die "afskeepkind" van die regspraktisyn geword – 'n onaangename takie wat so spoedig moontlik afgehandel moet word. In hierdie boek word 'n poging aangewend om diegene wat testamentopstelling op so 'n wyse benader tot ander insigte te bring. Nie alleen word die belangrikheid van hierdie werksaamheid beklemtoon nie, maar daar word ook riglyne vir die uitvoering daarvan verskaf. Die boek poog dus bloot om 'n praktiese handleiding te wees en dit moet dan ook as sodanig beoordeel word.

Verskeie onderwerpe wat met die testate erfreg in verband staan, word in vyf kort hoofstukke bespreek. Die betekenis van en doel met 'n testament kom in die eerste hoofstuk aan die orde. Alhoewel darem aanvaar kan word dat regspraktisyns nie veel voorligting hieroor nodig het nie, word 'n aantal aspekte benadruk wat maklik uit die oog verloor kan word. Veral belangrik is die waarskuwing teen gedrukte testamentvorms ("toonbanktestamente") en die oproep aan testamentopstellers om kliënte te wys op die invloed wat veranderde omstandighede op hulle testamente kan hê.

Formele aspekte wat met die opstel van testamente saamhang, word in die tweede hoofstuk bespreek. Hieronder tel die bevoegdheid om 'n testament te maak, die bevoegdheid om ingevolge 'n testament bevoordeel te word en die formaliteite wat

by die verlyding van 'n testament nagekom moet word. Die wysiging en herroeping van testamente kry ook kortliks aandag. Hierdie hoofstuk kan myns insiens hoogstens as 'n nuttige opsomming van bogenoemde aangeleenthede beskou word. Die praktisyn wat opnuut 'n studie hiervan wil maak, sal hom verkieslik na een van die standaardwerke moet wend.

In die derde hoofstuk stel die skrywer vir homself die moeilike taak om die moontlike inhoud van testamente nader toe te lig. Soos gebruiklik word slegs gefokus op bepalings wat algemeen in testamente voorkom. Benewens praktiese wenke in verband met die instelling van eksekuteurs, trustees en voogde, kry die leser ook 'n behandeling van aspekte soos voorwaardelike bemakings en substitusieklousules. Daar word ook 'n kernagtige uiteensetting van die onderskeid tussen vruggebruik en *fideïcommissum* gegee. Wat hierdie hoofstuk egter veral waardevol maak, is die talle voorbeelde wat die skrywer ter toeligting van sy voorstelle gebruik. Hy gee dan ook deurgaans raad in verband met die formulering van klousules wat dikwels in testamente voorkom. Opvallend is die duidelike en onopgesmukte taal wat in hierdie voorgestelde formulerings gebruik word. Die klem op eenvoud en helderheid in testamente kan trouens as een van die boek se deurlopende temas aangemerk word. Dit is duidelik dat die skrywer 'n afkeer het van hoogdrawende, opgeblase en niksseggende taal in testamente. Daar kan maar net gehoop word dat die herhaalde beklemtoning hiervan nie op dowe ore sal val nie. Dieselfde geld ook vir die skrywer se pleidooi vir die weglating van klousules (soos die voorsiening vir latere wysigings) wat bloot as versiering in testamente voorkom.

Die uitleg van testamente kom in die vierde hoofstuk aan die beurt. Alhoewel dit nie werklik die praktisyn is wat met die uitlegtaak gekonfronteer word nie, word sy belang daarby soos volg deur die skrywer verduidelik (114):

> "As gevolg van historiese redes het die uitleg van testamente dikwels nie die beoogde uitwerking dat gevolg gegee moet word aan die bedoeling van die testateur nie. Daarom is dit van kardinale belang dat die opstellers weet wat hulle doen, dat die begeerte van die testateur duidelik en seker bepaal word en dat hierdie begeerte dan op so 'n wyse in 'n testament weergegee word dat dit na sy dood geen uitlegprobleme verskaf nie."

Vollediger besprekings van die uitleg van testamente is weer eens elders beskikbaar. Die behandeling in hierdie hoofstuk dien bloot om die leser op die belangrikste beginsels bedag te maak.

In die laaste hoofstuk word allerlei uiteenlopende praktiese wenke gegee. In werklikheid is dit egter net 'n opsomming van standpunte wat reeds vroeër gestel is. Twee konsep-testamente en 'n afdruk van die Wet op Testamente 7 van 1953 kom as bylaes na hierdie hoofstuk voor.

Die boek is in 'n heel gemaklike en informele styl geskryf en selfs nie-juriste behoort dit maklik leesbaar te vind. 'n Ligte aanslag is deurgaans merkbaar; dit word beklemtoon deur 'n reeks komiese tekeninge waarmee die skrywer se broer, professor Marinus Wiechers, die teks aanvul. Die tegniese versorging is puik en drukfoute is feitlik afwesig. Enkele ander onnoukeurighede val egter op: "op die eerste oogopslag" (48); "mees-voor-die-handliggende" (64); " 'n Beginsel waarmee volkome gepaard gegaan word" (91); "aldan nie" (84 94 100).

Hierdie is nie 'n werk wat as handboek vir studente geskryf is nie en dit kan ook nie daarvoor aanbeveel word nie. Dit behoort egter gelees te word deur diegene wat die skrywer in die voorwoord identifiseer. Die benadering en styl maak dit selfs geskik vir belangstellendes wat hulleself as leke beskou.

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CENSORSHIP IN SOUTH AFRICA
by JCW VAN ROOYEN
Juta Cape Town Wetton Johannesburg 1987; pp 152
Price R34,95 + GST

It is unusual for the chairman of a board (in this case the Publications Appeal Board) to write a book on the board's functions and its administration, and Professor van Rooyen is the first to admit that his action is somewhat unorthodox. But, having said this, one must immediately ask if there is anyone who is better qualified than he, who has had more than ten years' experience in the field of censorship, to write a book on the subject?

In *Censorship in South Africa* the author has not devoted a great deal of time or energy to a discussion of the juridical principles involved in censorship, but has approached the subject from the perspective of the application of the provisions of the Publications Act 42 of 1974 by the publications committees and the appeal board.

On a reading of the book, it immediately becomes apparent that the censorship machine is currently more streamlined and systematised than in the past. The juridical criteria applied in the adjudication of undesirable matter are more clearly defined, and the author shows that the board has, in applying these criteria, kept abreast of developments in the fields of public morality, religion, contempt (of a section of the population), race relations and state security.

The book is divided into seven chapters. In the first chapter (Introduction) the author deals (rather briefly) with issues such as whether it is the task of the state to legislate for morality, the forms of censorship control, the criteria laid down in the act and the guidelines developed by the publication board, community standards, the tension between community and writers, the question of changing moral attitudes and certain other controversial issues. In discussing the criticism which has been directed at the anonymity of the committee system, the author merely says that this is a controversial area. It is in areas such as this that the book falls short, since the author, as chairman of the board, is obviously reluctant to focus too much criticism on the provisions of the act and its application. In this instance he falls back on the argument that although the committee is faceless, the board is not anonymous. This reasoning must have the appearance of a second prize to a distributor of a firm or book which has been declared undesirable by a committee. In the case of such a finding the distributor must then lodge an appeal and a date is set for a hearing. This procedure obviously involves not only a loss of time but could also involve the loss of considerable revenue. Although it is recognised that the book is aimed at presenting a practical application of the act, the cursory discussion in this introductory chapter of many vital issues and principles underlying the application of the act, detracts from the overall standard of the work.

In chapter 2 the author outlines the procedure and authority of the statutory bodies created by the act, namely the rights and duties of the directorate, committees, book and film distributors and producers of public entertainment. The controversial issue of reference by the minister is also briefly discussed, as are the composition, function and procedure of the appeal board. This chapter presents an extremely good outline of the powers and functions of the bodies concerned, and the inclusion of the informative section on the rights and duties of book and film distributors and producers

of public entertainment will be of great assistance to distributors, producers and their legal representatives.

Predictably, the major portion of the book is devoted to a discussion of the concept of undesirability, and here the greatest emphasis has been placed on a discussion of section 47(2)(a) of the act, that is, the concept of morality. In terms of the act, immorality includes that which is indecent, obscene, offensive or harmful to public morals. These concepts are briefly examined in chapter three, and are then related to the board's interpretation of concepts such as nudity, sex, crude language and violence. A valuable inclusion in the book is the discussion of sexual descriptions in novels with literary merit, as well as the board's approach to escapist fiction and sexual depiction in films.

In chapter four, section 47(2)(b) of the act (undesirability in religious perspective) is discussed. Chapter 5 deals with the bringing of any section of the population into ridicule or contempt, race relations and state security.

In chapter 6 the conditional approval of films, videos, public entertainment and publications is discussed in the context of an age, date, place and time restriction. The board's approach to the imposition of restrictions with regard to sex and nudity, crude language, profane language and violence is clearly set out. Since 1987, publications have also been subject to age restrictions and restrictions relating to distribution, and here, too, the author has discussed the restrictions and their application.

In the final chapter, entitled "Criminal liability", the author discusses the various offences created by the act, namely the production, importation, distribution and possession of an undesirable publication or object. Certain other contraventions relating to films, videos and public entertainment are also discussed.

It is apparent that the administration of the act has developed along liberal lines under the chairmanship of Professor van Rooyen, who has recognised the need to interpret the act in the light of common-law principles such as freedom of expression and freedom of religion. The 1978 and 1980 amendments to the act have admittedly created a more liberal forum for the adjudication of undesirable matter, but the role played by Professor van Rooyen and the other members of the board in upholding the principles of freedom of expression and religion in the light of competing interests such as morality, race relations and state security cannot be underestimated.

A criticism which may be directed at the book is that the author has not adopted a critical approach to censorship, but has merely given an outline of the functions, powers and procedures of the directorate, committees and the board, as laid down in the act. This rather neutral approach is understandable in view of the author's position, but the lack of critical analysis detracts from the academic standard of the work. Despite this criticism, it must immediately be said that the author has succeeded in providing a clear outline of the control of undesirable matter in South Africa. The book, which includes the board's decisions to the end of 1986, is clear, concise and immensely readable, and is an essential source of reference to journalists, writers, distributors, producers of films and public entertainment and lawyers.

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THE LAW OF INSOLVENCY
deur CH SMITH
Derde uitgawe; Butterworths Durban 1988; xi en 491 bl
Prys R93,00 (hardeband) R71,00 (sagteband) + AVB

Hierdie boek is die derde hersiene uitgawe van 'n hoogs suksesvolle werk deur 'n skryfster wat geen bekendstelling nodig het nie. Sedert die publikasie van die eerste uitgawe in 1973 het hierdie boek 'n waardevolle bydrae tot die Suid-Afrikaanse literatuur oor die insolvensiereg gelewer. In die geheel gesien, bied die boek 'n volledige uiteensetting van sowel die bepalings van die Insolvensiewet as nuttige en dikwels indringende besprekings van problematiese aspekte.

Die druk- en bindwerk is van 'n baie hoë gehalte en die tegniese afronding is uitstaande. Die voetnote in die boek is goed versorg en doeltreffend aangewend: Smith gebruik dikwels die voetnote om alternatiewe argumente te vermeld of verduidelikende inligting te verskaf. 'n Skema lui elke hoofstuk in en juis hieruit blyk hoe vernuftig Smith die leser in die besonderhede van die insolvensiereg inlei. Die Insolvensiewet 24 van 1936 is agter in die boek opgeneem. Die praktiese waarde van die werk word verder verhoog deur die bylaes ten opsigte van die regulasies kragtens die Insolvensiewet, formuliere en vorms met betrekking tot die sekwestrasieproses en die taksasie en tariewe van regskoste. Die gebruiklike registers is nuttig en volledig.

Die werk is inderdaad sowel nuttig as indrukwekkend. Dit volg die patroon van die eerste en tweede uitgawes: die formele ordening van die stof bly onveranderd; die volgorde en betiteling van hoofstukke volg in alle opsigte die patroon van die vorige uitgawe; en die indeling van die teks in paragrawe word gehandhaaf, alhoewel etlike nuwe paragrawe ingevoeg is.

Hierdie uitgawe word veral verwelkom aangesien sekere wetswysigings 'n nuwe uitgawe genoodsaak het. Nuwe beslissings is natuurlik ook bygewerk en verwysings na die standpunte van verskillende skrywers kom voor. Indien hierdie feit die indruk kan wek dat die werk bloot 'n akademiese en teoretiese bespreking van die insolvensiereg is, is dit verkeerd, want die skrywer stel haar ook ten doel om onduidelikhede in die praktiese bereddering van die insolvente boedel deeglik onder die loep te neem. Heelwat van dié tipe besprekings kom in die voetnote voor – hulle moet dus nie oor die hoof gesien word nie. Moontlike oplossings en riglyne word aan die hand gedoen en dit dra myns insiens grootliks by tot die waarde van die boek vir die regsprofessie.

Die werklike meriete van hierdie boek (en wat my veral beïndruk het) lê in die vermoë van die skryfster om 'n produk die lig te laat sien wat as 'n volledige en uiters bevredigende handboek vir die regstudent kan dien, maar terselfdertyd ook 'n onontbeerlike handleiding vir die insolvensieregpraktisyn is. Die boek bevat heelwat praktiese wenke, soos ten aansien van die opstel van 'n vermoënstaat en 'n *nulla bona*-relaas; die aansoek vir 'n vrywillige boedeloorgawe of verpligte sekwestrasie; ensovoorts.

Die verskyning van 'n omvattende werk oor die sekwestrasieprosedure op die hakke van die daarstelling van 'n nuwe huweliksgoederebedeling en standpunte ten aansien van sekere omstrede vraagstukke op hierdie gebied, is te verwelkom. Die skryfster se bespreking van die ontwikkeling van die insolvensiereg in Suid-Afrika is ook bevredigender as in vorige uitgawes. 'n Mens sou egter graag haar standpunte

oor die *praktiese* probleme en toepassings rondom onvoltooide kontrakte, veral met betrekking tot aanbestedingskontrakte en kontrakte in die konstruksiebedryf, wou verneem.

Dit is met huiwering, gesien die vele verwysings na akademiese bydraes van sekere akademici, dat die aandag daarop gevestig word dat die bespreking van feitlike en handelsinsolvensie deur Fourie 1980 *THRHR* 298 ontbreek. Na my mening is dit 'n bydrae wat vermelding verdien.

Die oorheersende indruk is egter dat die skryfster se logiese en deeglike benadering die studie van die insolvensiereg vergemaklik. Die nuwe *Law of insolvency* sal sy volwaardige plek inneem in die boekery van elke juris wat met hierdie gedeelte van die reg gemoeid is.

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THE NEW LABOUR LAW

Strikes, dismissals and the unfair labour practice in South African law

by MSM BRASSEY, E CAMERON, MH CHEADLE and MP OLIVIER

Juta Cape Town Wetton Johannesburg 1986; xxxii and 478 pp

Price R87,00 + GST (soft cover)

The new labour law is the intriguing title of a work dealing with important developments in labour law. Following the report of the Wiehahn commission a new dispensation was introduced into the South African labour and industrial relations scene. *The new labour law* is a successful attempt to record, debate and explain the most important changes brought about in the last few years.

The work contains the independent contributions of the four writers. The preface states that there has been no attempt to synthesise the various contributions. While the different styles do not hinder the reader, each part must nevertheless be reviewed separately since the authors accept responsibility only for their own contributions.

The lion's share of the work belongs to Martin Brassey. His first section examines the inadequacies of the common law and pre-1979 statutory law. He points out that the policy of voluntarism began to look jaded and that it was obvious that a non-party, an independent outsider, was required to resolve some kinds of industrial disputes. The legislature entrusted this task to a revamped industrial court. As Brassey is at pains to point out, the industrial court was never given the status, power or the means to carry out its task. Nevertheless it soldiered on. Even at the time of writing the industrial court remains the Cinderella court on the South African judicial scene.

The developments in labour law are so dynamic that even this section has been overtaken by events. The author mentions that two important functions were given to the industrial court, namely the power to grant *status quo* applications and the power to determine alleged unfair labour practices. This is correct, and these two functions continue to occupy the foreground. But in the last year or two the so-called court-of-law functions of the court have been extensively used mainly by employers.

Employers have invoked the assistance of the industrial court to interdict unlawful conduct on the part of employees and unions. In general, employees and their unions have obeyed court orders, though there seem to be exceptions. In a sense this jurisdiction of the court counterbalances its other functions. Ironically, a bill pending before parliament at the time of writing proposes to remove this jurisdiction from the court.

In his chapter on the definition of an unfair labour practice Brassey cogently argues that illegal strikes and lock-outs are *not* excluded from the respective definitions. It is arguments like the one advanced here that make this part of the work so valuable to counsel and the courts. Brassey's interpretation has, however, not yet been put to the test. A novel argument always requires a litigant to test it in court. Employers generally seem to be more reluctant to innovate new remedies. Corporate culture does not look too kindly on unsuccessful innovators.

Brassey devotes a great deal of space to the concept of fairness. First of all, he advances the proposition that an employer's conduct towards his employees, for instance in disciplining an employee or in terminating his services for non-disciplinary reasons, must have a "commercial rationale" in order to be fair. By commercial rationale is meant that the employer must not be acting capriciously or arbitrarily. There must be a valid reason for his action, for example, the operational requirements of his business may indicate the need to cut back staff. If there is no commercial rationale the employer is acting unfairly. There is a great deal of merit in this suggestion. The difficulty lies in its application, since disputes will also arise as to whether he was commercially motivated. This raises the difficult question whether the test should be objective or purely subjective. Brassey vigorously rejects any attempt to measure the conduct of an employer against the course of conduct which a reasonable employer would have chosen.

In the course of his discussion, Brassey adverts to the problem of procedural fairness. He is of the opinion that the failure to hold an inquiry should not inevitably result in the dismissal being classed as unfair. Rather he views it as a separate complaint. He states that there should be no reinstatement at the final stage where the dismissal is substantively fair. There is much to be said for this approach.

In *Metal and Allied Workers Union v Siemens Ltd* 1986 7 ILJ 547 the industrial court, without reference to Brassey, attempted to apply this approach at a final determination. It refused to reinstate certain employees and instead ordered the employer to hold a disciplinary inquiry in order to decide their fate. The court had heard the evidence of the parties and was therefore in the position that the employer should have been had he held a proper inquiry. The court was in my view obliged to decide the issue. Instead it referred the decision back to the employer party. This cannot be correct. What if the employer holds an inquiry and dismisses the employees? They may still be dissatisfied and return to court, perhaps to complain of some procedural irregularly and to argue the substantive merits a second time. The maxim *interest reipublicae ut sit finis litium* must also apply to industrial disputes.

Brassey concludes his discussion of fairness by considering the question of legitimacy including an excursus on the source of the rules relating to fairness.

Edwin Cameron's contribution is entitled "*Status quo* relief". It deals essentially with the power and the procedure of the industrial court to grant interim orders in terms of section 43 of the LRA. One would have expected a highly technical exposition of the act and the rules. Cameron has dealt with his subject in a special way: he analyses and discusses *status quo* relief in the text under seven principles, namely the principles of autonomy, impermanence, constraint, urgency, legality, equity and flexibility. He does not neglect a technical discussion altogether but relegates it to copious footnotes. The citation of relevant cases must be close to being exhaustive. An interesting feature is that the names of the members who decided

the various decisions are given. Somehow one feels more comfortable knowing who handed down which decision.

Cameron's contribution on the subject should be compulsory reading for the uninitiated. He captures the often unarticulated approach and attitude of the members of the industrial court to the adjudication of *status quo* applications. For instance, the response of the court to supreme court directives is sometimes a little unconventional. Some decisions such as *Consolidated Cotton Frame Corp v The President of the Industrial Court* 1986 7 ILJ 285 (N) are, as Cameron puts it, treated with "polite disregard" or "dignified ignorance". The industrial court has a daily and pressing function to perform and if the directives which it receives from the supreme court are so impractical that their implementation will stultify the function of the court, then it can be expected that practical realities will prevail if the decision in question allows any latitude for such a course. The superior court must often perforce rely on the litigants seeking relief for its practical knowledge of the problems and difficulties of the lower court. Their representatives may often have no or little experience of or appreciation for the intricacies faced by the industrial court. Normally an inferior court of law simply abides by the decision of the superior court. One wonders whether the industrial court should not break with tradition and present its views on law and practice to the supreme court by briefing counsel to appear on its behalf. This would mean that the industrial court accepts its role as an administrative agency – something which, notwithstanding a decision of the highest authority, it is reluctant to do.

Halton Cheadle contributes two sections: one on strikes and the other on retrenchments. He reviews the social and historical efforts of the law to deal with the complex phenomenon of strikes. He goes on to discuss the protection which is given under our law to striking workers. To put it mildly, he does not find the approach adopted by the industrial court in *Die Raad van Mynvakbonde v Die Kamer van Mynwese van SA* 1984 5 ILJ 344 acceptable. Instead he proffers his own approach for distinguishing between protected and unprotected strikes. Semantically there are differences between the two approaches but in the end one is reminded of an advertisement for a certain washing powder. A new garment is compared to one washed in the advertiser's brand. The audience is invited to compare the difference and end up saying "I can't see the difference. Can you see the difference?"

Cheadle's contribution on retrenchments is a thoughtful attempt to explain and justify the industrial court's approach to the determination of retrenchment cases. However, it pays little attention to some fundamental issues such as why there should be an obligation on an employer considering the retrenchment of his workforce to consult with them and their union as opposed to, say, negotiating with them on the issue. The contribution deals extensively with the rights of the employees in a retrenchment situation and the corresponding duties on the employer. However, not a word is said about the duties of the employees or their union.

One is, of course, unconsciously influenced by one's proclivities but, even so, this aspect should have been considered.

Marius Olivier contributes the section on individual dismissals. His section is based partly on his earlier monograph *Unfair dismissal law: an appraisal of current developments*. The section deals comprehensively with the case and statutory law relating to individual dismissals. It is in fact the only comprehensive analysis of the subject to have been published since the revamped industrial court opened its doors. The contribution differs from the others in that it seeks to document developments rather than to explain them. It is a sizable contribution which could very well (and probably will be) published as a monograph.

In conclusion, the reader must bear in mind that *The new labour law* is not a conventional textbook. The authors of the first three sections are equally concerned

with expressing their thoughts and opinions on the subject as they are with detailing the law. It is easy to overlook this. The sections must be read from beginning to end. In *SA Breweries v Food and Allied Workers Union* (unreported (W)) the judge was referred to several extracts dealing with the question whether an overtime ban constituted a strike. He was referred to Cheadle's contribution (264–265) from which he concluded that the authors did not express a view one way or the other. Unfortunately the judge was not referred to 270, where Cheadle says: "*Overtime bans and other forms of partial strikes.* These strikes clearly fall within the ambit of the definition".

Many of the sentiments expressed in the work have already found themselves embodied in decisions of the industrial court and the supreme court. Other suggestions are still waiting in the wings. *The new labour law* is prescribed reading for seasoned practitioners, novices and of course law students.

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DE JURIDISCHE TITELPRENT IN DE 17DE EEUW – HET HOF VAN HOLLAND

deur MA BECKER-MOELANDS

Coutinho Muiderberg 1985; 50 bl

Prys f 17,50 (sagteband)

Hierdie werk is 'n publikasie van die *Nederlands Centrum voor Rechtshistorische Documentatie* en vorm deel een van 'n reeks onder die titel "Rechtshistorische verkenningen". Met hierdie reeks word beoog om regshistoriese geskrifte van 'n mindere omvang te publiseer.

Wat hierdie werk interessant maak, is die feit dat dit oor 'n buitengewone onderwerp handel, naamlik die juridiese titelprent: daardie pragtige houtsneedrukke en kopergravures wat die skutblaaie van talle van ons ou bronne versier. Studies oor die titelprent in die algemeen is baie skaars aangesien dit 'n multidissiplinêre terrein betree wat die boekhistoriese, kunshistoriese, kultuurhistoriese en sosiaalhistoriese terreine insluit.

Die outeur poog om met hierdie werk aan te toon in welke mate die juridiese titelprent deur die regshistorikus as bron gebruik mag word ten einde sekere feite rondom die reg en regspleging in vorige eeue af te lei. Die outeur plaas die bestudering van die juridiese titelprent binne die vakgebied "regsikonologie" – 'n vakgebied wat sy self skep en omskryf as die wetenskap wat hom besig hou met die bestudering van beelde, tekeninge, gravures en so meer wat op enige wyse die reg af- en uitbeeld of simboliseer. Sy voel haarself genope om hierdie vakgebied te skep aangesien die vakgebiede van regsargeologie en regsvolkekunde nie sodanige studie binne hul kaders akkommodeer nie.

In 'n beknope uiteensetting word aangetoon dat die titelprent sy ontstaan met die opkoms van die boekdrukkuns gedurende die vyftiende eeu gehad het. Aanvanklik is 'n houtsnee op die skutblad, wat as beskerming vir die boek moes dien, afgedruk. Mettertyd is die houtsnee met die duursamer kopergravure vervang. Die koperplaat

is oor en oor gebruik by latere en ander uitgawes. Waar nodig is gedeeltes van die koperplaat telkens weggepoleer en opnuut gegraveer.

Ten einde in haar doel te slaag, spits die outeur haar toe op twee verskillende gravures wat die Hof van Holland uitbeeld, soos dit vir die eerste keer onderskeidelik op die skutblaaie van De Groot se *Inleiding tot de Hollandsche rechtsgeleertheyt* (1631) en Coren se *Observationes* (1633) voorkom, asook op die veranderde weergawes daarvan soos dit in latere uitgawes van die genoemde werke en werke van ander outeurs afgedruk is. Vir hierdie ondersoek het die outeur haar beperk tot 1 000 boeke wat gedurende 1600 tot 1750 in Nederland verskyn het. Uit die statistiek in verband met hierdie boeke wat onder andere in bylae 1 van die onderhawige werk verskyn, verkry die leser ook sekere inligting omtrent die bedrywighede van uitgewers gedurende hierdie periode.

Die genoemde twee gravures beeld 'n sitting van die Hof van Holland, Zeeland en West-Friesland in die Haagse Rolsaal uit. Die verskil tussen die twee afbeeldings is dat in die geval van die afbeelding in Coren se werk, die stadhouer wat die simboliese hoof van justisie was, voorsit. Die outeur kom tot die gevolgtrekking dat dit heel waarskynlik die inhuldiging van prins Frederick Hendrik as stadhouer in 1625 uitbeeld. Beide gravures word ontleed aan die hand van die argitektuur van die hofsaal en die uitbeelding van die gebeurlikhede in die hof. Daarna word die vraag bespreek of die gravure 'n getroue weergawe is en derhalwe as kenbron gebruik kan word. Ten slotte kom in beide gevalle die latere, gewysigde afbeeldings van die gravures onder die loep. Die outeur doen haar ontleding in die lig van talle suiwer historiese asook juridiese bronne. Regshistoriese inligting wat uitkristalliseer staan hoofsaaklik in verband met die verskillende amptenare van die hof asook die prokureurs en advokate. Die outeur kom tot die gevolgtrekking dat die afbeelding in De Groot se werk wel as kenbron gebruik kan word, maar nie die afbeelding in Coren se werk nie. Die onderhawige werk word afgesluit met 'n kort bespreking van 'n ander, baie gewilde, juridiese titelprenttipe, naamlik die bekende driehoekskomposisie van Justitia met Justinianus aan haar regtersy en 'n regsgeleerde aan haar linkersy.

Dit blyk dat die titelprent slegs met die grootste omsigtigheid as bron gebruik kan word. Die rede hiervoor is dat 'n bestudering van die titelprent 'n multidissiplinêre historiese kennis vereis en daar moet deeglik tred gehou word met die wysiging wat oor die jare heen op 'n besondere plaat aangebring is. Aan die ander kant kan die inligting wat uit die onderhawige studie na vore kom, vir die regshistorikus hoogstens as interessant aangemerk word. Enkele spelfoute is opgemerk, naamlik "eeen" in plaas van "een" (11) en "Justitianus" in plaas van "Justinianus" (14 32).

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A HOME OF YOUR OWN: A MANUAL ON HOME-OWNERSHIP IN THE TOWNSHIPS

by JC BEKKER

JL van Schaik Pretoria 1987; pp 74

Price R3,50 + GST (soft cover)

This book is concerned with new developments in the area of home-ownership (including leasehold) for Blacks in the townships, and is meant to provide a practical guide for those involved in the provision, acquisition and financing of black housing

(black home-owners and prospective home-owners, building contractors, estate agents, attorneys, financial institutions, officials and employers). It should be said right at the outset that everybody concerned with (and about) black housing should read this book – it is so cheap and readable that there is no excuse for not doing so. The intention was clearly to provide a book for non-lawyers, and therefore the language and explanations are not technical or involved, but clear and to the point. The emphasis is stated in the preface to be on practical advice rather than on rules of law.

The book is divided into six chapters, dealing with *the property* (the township, the site, houses acquired under the home ownership scheme, land development and construction of houses by the private sector, privately owned land for resale, leasehold, ownership and limitations in respect of dwellings acquired with housing funds), *the buyer* (competent persons, legal status of black women), *the money* (sources of financing, the purchase price of land, mortgage bond finance, building a new home, additional expenses), *the acquisition and registration of leasehold and ownership* (leasehold, insolvency and sale in execution, conversion of leasehold to ownership, ownership, estate agents, sales *voetstoots*, Alienation of Land Act), *the effects of death and divorce on the family home* and *leases* respectively. An index of statutes and a subject index make the information more readily available. (In passing, it may be mentioned that a bibliography would have been valuable, since the book was not documented with the interests of legal scholars in mind. The subject is so obscure that a bibliography would have served to bridge the gap.)

From the point of view of a black person the book must be seen as a welcome and valuable manual to guide the prospective home-owner through the intricacies and potential dangers he will encounter in this field. The very readable and succinct explanations will make it useful for both the lawyer and the layman involved in land transactions. The same must be true for employers and private individuals or groups who want to involve themselves in the provision of black housing. In this respect the chapters on financing and the practical registration procedures are possibly the most valuable, although none of the other chapters should be seen as of less importance or interest. The chapter on the effects of death and divorce on the family home and the chapter on the capacity of the buyer are just as important, and should go a long way to help explain to laymen some of the difficult issues involved.

From the point of a view of a lawyer (and, perhaps, an academic lawyer in particular) it is the chapters on the nature of ownership and leasehold that capture the attention. The section on ownership in the first chapter, setting out as it does the limitations on ownership as a backdrop to the section on limitations in respect of dwellings acquired with housing funds, is especially interesting. The inherent limitations (and duties) of ownership, and specifically land ownership, seem to command more and more attention from lawyers, and this will no doubt result in a fundamental change of attitude towards ownership as a socio-legal phenomenon. In the same context, the author's remarks concerning the development of leasehold are equally interesting, since the evolution of ownership may well involve some measure of approximation of ownership and other forms of land-use such as leasehold. It should be mentioned, however, that the picture created in this book, according to which there seems to be no practical difference between ownership and leasehold and no disadvantages for the leaseholder as opposed to the landowner (see 3 6 10–11 44) may be misleading. If there really are no practical differences and no disadvantages, one wonders what all the fuss is about: what is the point then of creating yet another separate and different scheme for Blacks? The fact is that leasehold does not offer the legal, financial, socio-political and psychological advantages of land ownership. The very real political and psychological impact of this fact should not be understated in a book like this. If any point of criticism must be raised against this book, it

would be that the advantages of leasehold are painted too brightly, while the disadvantages are understated. For the rest, the book is cheap, very readable, practical and extremely useful. It is warmly recommended to everybody, lawyers and laymen alike, who is interested or involved in black housing.

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SUID-AFRIKAANSE STAATSREG
deur HENNING VILJOEN en DION BASSON
Juta Kaapstad Wetton Johannesburg 1988; 432 bl
Prys R68,00 + AVB (sagteband)

Die skrywers van hierdie boek is albei verbonde aan die departement publiekreg van die Universiteit van Pretoria. Die boek is die hersiene uitgawe van *Suid-Afrikaanse staatsreg* wat in 1987 verskyn het en dus ook 'n verdere uitbreiding van die *Studentehandboek vir die Suid-Afrikaanse staatsreg* wat in Januarie 1986 gepubliseer is.

Die skrywers stel dit in die voorwoord dat die boek op datum gebring is weens die snelle ontwikkeling op die gebied van die staatsreg en die feit dat die eerste oplaag byna uitverkoop is. Hierdie uitgawe kom wesenlik ooreen met die eerste uitgawe maar enkele veranderinge is aangebring wat sowel inhoud as struktuur betref. Daar is byvoorbeeld 'n inleidende hoofstuk oor die staatsregteorie ingevoeg en onlangse hofbeslissings is bygewerk tot September 1987. Sommige hoofstukke, soos hoofstuk 6, wat handel oor die provinsiale bestuurstelsel is effens gewysig. Die taalversorging is oor die algemeen heelwat beter as in die eerste uitgawe en slegs enkele taal- en drukfoute is opgemerk.

Wat die *indeling* van die inhoud van die boek betref, is die enigste verskil van die eerste uitgawe die toevoeging van 'n nuwe inleidende hoofstuk oor die staatsregteorie. Hierdie inleiding word gevolg deur nege hoofstukke, die 1983-Grondwet in 'n bylaag asook 'n bibliografie, vonnisregister en woordregister. Die onderwerpe word soos volg bespreek:

Hoofstuk 1: Staatsreg en die staat (15–35: Viljoen)

Hoofstuk 2: Geskiedenis, konvensies en prerogatiewe (36–43: Viljoen)

Hoofstuk 3: Die uitvoerende gesag (47–82: Viljoen)

Hoofstuk 4: Die wetgewende gesag (83–217, onderverdeel in 6 afdelings (A–F): Basson): *Afdeling A* – Die aard en wese van verteenwoordiging in die staatsreg; *Afdeling B* – Die samestelling van die parlement en die verkiesingsproses; *Afdeling C* – Kiesstelsels van proporsionele verteenwoordiging; *Afdeling D* – Die wetgewingsproses; *Afdeling E* – Verhouding tussen die parlement en die howe: parlementêre soewereiniteit; *Afdeling F* – Die Suid-Afrikaanse staat as 'n konsosiatiewe demokrasie en die Suid-Afrikaanse staat as 'n Westminster-regeringstelsel

Hoofstuk 5: Die regstaatbeginsel en die leerstuk van fundamentele menseregte (226–295: Basson)

Hoofstuk 6: Die provinsiale bestuurstelsel (298–308: Viljoen)

Hoofstuk 7: Plaaslike regering (309–320: Basson)

Hoofstuk 8: Die staatsreg van afsonderlike ontwikkeling (321–337: Viljoen)

Hoofstuk 9: Burgerskap (339–362: Basson)

Die byvoeging van 'n inleidende hoofstuk oor die staatsregteorie verleen 'n afgerondheid aan die tweede uitgawe wat in die 1987-uitgawe ontbreek het. Hierin word die benadering wat deur die skrywers gevolg word, die sogenaamde "waarde-georiënteerde" of normatiewe benadering van die staatsreg, duidelik gestel. Ingevolge hierdie benadering word die staatsreg nie bloot beskrywend of onkrities behandel nie, maar word deurgaans beoordeel aan die hand van (hoër) regswaardes, wat op hulle beurt fundeer word deur die vryheidsgesinde Westerse tradisie en in besonder die Europese regstradisie van die regstaatsidee. In die eerste uitgawe is na hierdie benadering verwys as die "filosofiese benadering" tot die staatsreg in teenstelling met die positivistiese benadering. Ongelukkig is hierdie verandering nie konsekwent aangebring nie – op byvoorbeeld 272 en 279 voetnoot 205 word steeds na die "regstaatsfilosofie" of "regsfilosofiese benadering" verwys.

Hoofstuk 1, waarin grondliggende staatsregtelike begrippe behandel word, is kort en bondig. Dieselfde geld vir hoofstuk 2 waarin die Suid-Afrikaanse staatsreggeskiedenis bespreek word. Dié hoofstuk beslaan slegs 10 bladsye, wat myns insiens effens kort is inaggenome die lang tydperk waartydens ontvoogding plaasgevind het. Belangrike aspekte soos prerogatiewe en konvensies kon meer aandag geniet het, veral gesien in die lig van die verandering wat laasgenoemde in ons staatsreg ondergaan het. Hoofstuk 3, waarin die wetgewende gesag behandel word, is goed; veral insiggewend en interessant is die bespreking van die kabinetskomitees. Hoofstuk 4 handel oor die wetgewende gesag. Hierdie afdeling word volledig en duidelik uiteengesit met 'n lang bespreking oor die teorie van verteenwoordiging in die staatsreg. Die gevolgtrekking wat op afdeling A volg (99), is 'n aansienlike verbetering op dié in die eerste uitgawe aangesien dit bondig en heelwat duideliker gestel word. Dieselfde geld vir die inleiding tot afdeling C wat oor kiesstelsels van proporsionele verteenwoordiging handel. Afdeling E (parlementêre soewereiniteit) is verbeter wat sowel inhoud as struktuur betref en onlangse gesag in hierdie verband is bygewerk.

In hoofstuk 5 word die regstaatbeginsel en leerstuk van fundamentele menseregte bespreek. Hierdie baie aktuele onderwerp word helder en deeglik uiteengesit en onlangse hofbeslissings, veral met betrekking tot die staatsregtelike noodtoestand, is bygewerk. Dit is juis in hierdie hoofstuk waar die "waarde-georiënteerde" benadering tot die staatsreg duidelik toegelig word. Die klem val op gekontroleerde owerheidsgesag in plaas van die arbitrêre uitoefening van owerheidsgesag (274). Die belangrike rol wat 'n onafhanklike regbank in hierdie verband kan speel, word krities bespreek en daar word myns insiens tereg aangetoon dat daar nie ligtelik inbreuk gemaak moet word op die reëls van natuurlike geregtigheid wat administratiewe regverdigheid verseker nie. Hierdie hoofstuk behoort interessant te wees vir sowel belangstellendes as studente in die staatsreg. Hoofstuk 6 behels 'n bespreking van die provinsiale bestuurstelsel; dit is goedbegryplik effens kort, gesien in die lig van die interessante ontwikkeling op dié gebied. Hoofstuk 8 handel oor die staatsreg van afsonderlike ontwikkeling en word goed aangebied. Dit is egter jammer dat die aanloop en bespreking van die onafhanklikheid van Transkei soveel meer aandag geniet as die onafhanklikheid van die ander Swart state waarna net kortliks verwys word. Die slothoofstuk, wat handel oor burgerskap, is grootliks teoreties. Na my mening sou studente daarby kon baat indien die agtergrond van artikel 11A (naturalisasie deur middel van permanente verblyf) in meer besonderhede bespreek en met voorbeelde toegelig sou wees. Daar word ook verkeerdelik verwys na die Kinderwet 33 van 1960 (348) in plaas van die Wet op Kindersorg 74 van 1983. By herverlening van burgerskap aan burgers van die onafhanklike Swart (TBVC) state op grond van registrasie (360 (2)), word foutiewelik na die tydperk van wettige en

permanente verblyf verwys as een jaar voor die aansoek in plaas van vier jaar, soos ingevolge die Wet op Herverlening van Suid-Afrikaanse Burgerskap 73 van 1986 vereis word.

Die woordregister is nie in alle opsigte bevredigend nie. Enkele begrippe kon moeilik opgespoor word, soos "administrateur" en "staatspresident". Kruisverwysings behoort die naslaan daarvan aansienlik te vergemaklik; die skrywers kon byvoorbeeld onder "grondwet(te)" – wat glad nie verskyn nie – 'n verwysing na "konstitusie" gehad het, om maar 'n enkele voorbeeld te noem.

Die enkele punte van kritiek doen egter nie afbreuk aan die belangrikheid van hierdie bydrae tot die hedendaagse staatsreg nie. Die skrywers moet gelukgewens word met hulle produk wat vir elke student en belangstellende van groot nut behoort te wees.

RIKA PRETORIUS
Universiteit van Suid-Afrika

DIE INHEEMSE STAAT IN SUIDER-AFRIKA

deur AC MYBURGH

Sentrum vir Inheemse Reg, Universiteit van Suid-Afrika 1986; 121 bl

Prys: Nie in die handel beskikbaar nie. Op aanvraag beskikbaar by professor LP Vorster, Departement Antropologie en Inheemse Reg, Universiteit van Suid-Afrika

Hierdie werk van professor Myburgh is die eerste omvattende regsvergelykende studie oor die inheemse staatsreg wat al die Suid-Afrikaanse groepe dek. Dit is nog 'n publikasie in 'n reeks sistematiese uiteensettings van die verskillende inheemse regstelsels van Suider-Afrika, uitgegee deur die Universiteit van Suid-Afrika se Sentrum vir Inheemse Reg.

Dit blyk uit die omvattende lys van aangehaalde literatuur dat 'n uitvoerige studie gemaak is van sowel die beskikbare etnografiese as regsmateriaal oor die inheemse volke van Suider-Afrika, asook die volke wat etnies met hulle saamval. Daarna is verder gebruik gemaak van 'n reeks hofberigte, hoewel slegs in die mate waarin dit gegewens verskaf van feite en menings van deskundige getuies en assessore.

Die tradisionele inheemsregtelike posisie wat as logiese vertrekpunt vir regshervorming gesien moet word, word bespreek. Daar word telkens aangetoon of 'n regsverskynsel hedendaags nog waarneembaar is en in hoeverre dit op sommige van die inheemse volke van toepassing is of was. Dit blyk duidelik dat dit nie die skrywer se oogmerk was om die moderne staatsregtelike posisie uiteen te sit nie en 'n mens vind gevolglik nie verwysings na die statutêre reg of die staatsregtelike opset in die nasionale state nie.

In die voorwoord toon die skrywer aan dat die werk as 'n vertrekpunt vir verdere navorsing gesien moet word en dat dit nie trag om 'n uitputtende behandeling van die omvattende literatuur te wees nie; dit dien dus as voorloper tot meer spesifieke

navorsing van ten minste die hooftipes inheemse regstelsels. Voorbeelde van spesifieke navorsing in hierdie verband is Prinsloo en Myburgh *Inheemse publiekreg in Lebowa* (1983) en Myburgh en Prinsloo *Indigenous public law in KwaNdebele* (1985).

Hoewel die werk slegs 121 bladsye beslaan, is dit in die tipiese styl van die skrywer so kripties gestel dat wat op die oog af na 'n bondige uiteensetting van die onderwerp lyk, by nadere ondersoek 'n uiters volledige behandeling daarvan bevat.

Die werk begin inleidend, met 'n oorsig oor die plek van die inheemse publiekreg in die inheemse reg as geheel en met spesifieke verwysing na die teenstelling tussen publiek- en privaatreg, asook die vraag of daar met reg van 'n inheemse volkereg gepraat sou kon word. Die skrywer kom ook tot die gevolgtrekking dat daar in die inheemse reg nie sprake van volkereg in die Westerse sin van die woord is nie, maar slegs van internasionale publiekreg as deel van die inheemse nasionale reg.

In die tweede hoofstuk word die staat omskryf wat in ooreenstemming met die nie-gespesialiseerde aard van die hele inheemse kultuur nie as abstrakte figuur beskou word nie en dus nie in die privaatreg as regsubjek kan funksioneer nie. Die tuisgebied, onderdane, staatshiërargie en diensplig asook inkomste en staatsgoed word deurgaans met verwysing na die toepaslikheid daarvan by die verskillende volke bespreek.

Hoofstuk drie, getitel "Sentrale beheer", handel oor die vorstehuis en meer spesifiek die staatshoof of vors as die belangrikste lid van die vorstehuis. Daar is onder meer 'n verwysing na die interessante polemiek oor die vors se onderworpenheid aan die reg. Teenstrydige berigte word volledig uiteengesit en die skrywer kom tot die gevolgtrekking dat die vors publiekregtelik as staatsorgaan beskou moet word en geen privaatregtelike of private hoedanigheid het nie. Hy is as hoof van die hoofraad die hoogste regspreker en onvervangbaar deur 'n ander persoon; prakties kan hy dus nie as regter in sy eie saak optree nie. Daarom is hy nòg strafregtelik, nòg privaatregtelik aanspreekbaar. Hy word verder nòg publiekregtelik as onderdaan beskou, nòg privaatregtelik as regsubjek en kan gevolglik nie in 'n strafgeding as klaer of aangeklaagde of as party tot 'n siviele geding optree nie.

Waar die vors wel die subjektiewe reg van 'n derde bedreig, word die noodsituasie of onafwendbare euwel wat ontstaan, beskou as veroorsaak te wees deur die niemenslike kragte van 'n hipermens eerder as 'n regsubjek. Die derde sal hom dan op noodtoestand kan beroep indien hy aangekla sou word van die misdaad in Tswana bekend as *go nyatsa kgosi*, ofte wel die inbreukmaking op die waardigheid of minagting van die vors.

Nog 'n interessante onderwerp wat in hoofstuk drie behandel word, is die regentskap of waarneming van die heerserstaak waar die vors nie in staat is om te regeer nie. Dié taak berus meesal by mans en wel by senior lede van die vorstehuis. Regentesse kom ook voor maar 'n regentes kan op grond van haar geslag nie aan alle verrigtinge van rade deelneem nie en moet dan verteenwoordig of bygestaan word deur 'n man.

Die vierde en laaste hoofstuk handel oor die verskillende inheemse rade betrokke by die staat, naamlik die private, algemene en hofraad asook die volksvergadering – almal waarin die vors as hoof optree. Die vors is egter nie verplig om in-rade op te tree nie en kan selfs van die siening van 'n raad afwyk. By die enkele volk waar die vors 'n vrou is, kan sy egter nie die verrigtinge van die hofraad bywoon nie, aangesien die hof slegs vir mans gereserveer is.

Die werk is taalkundig en tipografies uitstekend versorg en kan sonder voorbehoud aanbeveel word vir elkeen wat in hierdie gespesialiseerde onderwerp belangstel.

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MOTOR LAW

Volume II by WE COOPER

Juta Cape Town Wetton Johannesburg 1987; pp li and 507

Price R94,00 + GST

This second volume of *Motor law* was preceded by volume one, published in1982, which dealt with road traffic legislation. Volume II deals with the principles of liability applicable to claims for patrimonial loss caused by motor collisions. However, according to the author, this work is not restricted to an exposition of the principles peculiar to motor collision claims but is an attempt to state the general principles of Aquilian liability.

Chapter 1 is a brief introduction to the work setting out, *inter alia*, the elements of liability under the Aquilian action.

In part two, the elements of actionable conduct (chapter 2), negligence (chapter 3) and causation (chapter 4) are discussed. The discussion of the element of actionable conduct is devoted mainly to the liability for an omission and the correct test to be applied to ascertain whether the defendant's conduct was unlawful. The conclusion is reached that, although it does not matter whether the question of the wrongfulness of a defendant's conduct is answered by enquiring whether the conduct constituted an infringement of a legal right or by enquiring whether it constituted the breach of a legal duty, the proper means of determining whether an omission is wrongful is to ask whether the defendant's conduct constituted a breach of a legal duty, which arises when reasonableness and society's legal convictions demand it. The view is also expressed that there is no place in the South African legal system for the English doctrine of a "duty of care" as well as the doctrine of the unforeseeable plaintiff.

In the chapter on negligence (chapter 3) there is an in-depth discussion of the so-called rules and duties of road users in general. This discussion includes aspects such as the "speed and range of vision" rule, the foreseeability of the nature and extent of the harm caused, precautions and error of judgment, assumptions relating to, *inter alia*, intersections, overtaking and turning, sudden emergency, skidding and the *res ipsa loquitur* rule. The relevance of the rules and duties formulated by the courts is also considered, and it is correctly pointed out that these rules are not absolute rules of law, but merely reflect how a reasonable man drives, so that a breach of these rules frequently establishes liability.

The contents and application of each of these rules are illustrated by numerous decided cases, many of which are discussed in detail. As the test for negligence is the same in criminal and civil cases, it is not only practitioners dealing with civil cases who will find this chapter helpful. Prosecutors and practitioners dealing with prosecutions for the offence of reckless or negligent driving in terms of section 138(1) of the uniform Road Traffic Ordinance of 1966 will also find it worth their while to consult this chapter.

In the chapter on causation there is a brief statement of the main tests for causation, and it is pointed out that the reasonable foreseeability test has, since 1966, invariably been employed in collision cases for limiting liability under the *conditio sine qua non* test.

Part three of the work deals with defences. Aspects considered are the nature of a defence (chapter 5), mental incapacity (chapter 6), involuntary conduct (chapter 7), contributory negligence (chapter 8), voluntary assumption of risk (chapter 9) and

prescription (chapter 10). Most of these defences are, of course, merely factors excluding any one of the elements of a delict, namely conduct, negligence or unlawfulness, and the question may be asked why these defences were not included in the discussion of these elements. It appears from chapter 5 that the author recognised that this question may arise, at least in regard to the defences of automatism and mental incapacity, but that he chooses to discuss these defences separately because every one of them is invariably advanced in an endeavour to escape liability.

The defence of mental incapacity (chapter 6) is considered mainly with reference to decided cases in which children are knocked down by motor vehicles, while the defence of involuntary conduct (chapter 7) is considered with reference to decided cases dealing with automatism. In this regard it is correctly pointed out that a foreseeable loss of consciousness will not provide the driver of a motor vehicle with a defence.

In the chapter on contributory negligence (chapter 8), detailed attention is given to the aspect of apportionment and the matter of joint wrongdoers. In the chapter on voluntary assumption of risk (chapter 9) the defence of *volenti non fit iniuria* in relation to motor collision cases is discussed, while the problems relating to the prescription of actions are considered and discussed in chapter 10.

Mediate liability is discussed in part four of the work. This part is divided into a general discussion of vicarious liability (chapter 11), a comprehensive discussion of the liability of a master for the acts of a servant (chapter 12) as well as a discussion of the liability of the owner of a motor vehicle who entrusts the driving of his vehicle to an unremunerated driver.

Part five (chapter 14) deals with material loss suffered and part six (chapters 15 and 16) deals with matters relating to procedure and evidence.

In an addition to the work there is a chapter on the calculation of vehicle braking distance and speed by Professor P Metcalf, Emeritus Professor of Mechanical Engineering, University of Cape Town.

The work also contains in appendices South African Statistics of Motor Vehicles and Road Traffic Accidents, the Apportionment of Damages Act of 1956, the Motor Vehicle Accidents Act of 1986 and the Prescription Act of 1969.

Although Volume II of *Motor law* contains an exposition of the general principles of Aquilian liability, the discussion of these general principles is directed specifically to the principles of liability for patrimonial loss caused by motor collisions. The work is first and foremost a work dealing with an aspect of "motor law", as the title correctly reflects.

Motor Law Volume II will be invaluable to practitioners involved in claims resulting from motor collisions or accidents. All aspects are discussed comprehensively, with ample references to and discussion of relevant decided cases.

MC MARÉ
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'n Monument in die Suid-Afrikaanse regsontwikkeling: die werkstuk van die Suid-Afrikaanse Regskommissie oor groeps- en minderheidsregte[1]

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SUMMARY

A monument in the South African legal development: the working paper of the South African Law Commission on group and minority rights

Through the wealth of information, the depth of research and investigation and especially the clear message which is conveyed, namely that South Africa is urgently in need of a bill of rights for the protection of human rights, the working paper of the South African Law Commission on group and human rights stands out as a monument in our legal development. An enquiry into the contents and nature of the working paper reveals a strong intention on the part of the law commission in particular to persuade and convince Afrikaner opinion. Various topics are selected from the working paper for consideration: human rights protection and the *Rechtsstaat*, the recognition of economic rights, human rights and duties, group rights, judicial enforcement of a bill of rights, the defensibility of the democratic state and the introduction of a formal bill of rights in South Africa. It is concluded that although we have not yet reached the stage of formal acceptance of a bill of rights for South Africa, since we are as yet not in a position of actual constitution-making, the time is ripe for the propagation of such a bill and the purging of the laws in order to create the necessary climate for its introduction.

INLEIDING

Ons mense is nogal lief vir monumente. Baie monumente word orals in die land aangetref – volksmonumente, historiese monumente en sommer monumente vir kleinere gebeurtenisse of selfs mindere figure. Sommiges sal beweer dat ons te behep is met monumente, alhoewel daar sekerlik niks mee verkeerd is om monumente op te rig nie. Daardeur word die geskiedenis verbeeld en word daar inspirasie en trots gekweek.

Om van monumente in ons regsontwikkeling te praat, mag effens vreemd aandoen. Tog is daar in die gang van regsdenke en -ontwikkelings sekere geskrifte, uitsprake en ook wette wat uitstaan as ligbakens. Ware monumente, sou

1 Werkstuk 25, projek 58, vrygestel in April 1989. Verwysings in hierdie artikel is na die Afrikaanse teks van die werkstuk.

mens kon sê, wat nie slegs 'n beslissende rol in die ontwikkeling van ons regsisteem gespeel het nie maar ook toekomstige navorsing en insigte inspireer en help vorm het.

As so 'n monument in ons regsontwikkeling moet die Suid-Afrikaanse Regskommissie se werkstuk oor groeps- en minderheidsregte aangemerk word. Hierdie werkstuk is weliswaar nog nie afgerond nie en nog minder op hierdie stadium deur die hoë owerhede aanvaar.[2] Ook is dit moontlik om enkele foute of ten minste onsuiwerhede in die werkstuk aan te dui.[3] Wat egter hoogs belangrik is en van die werkstuk 'n monument in eie reg maak, is sowel die enorme werk en navorsing wat daarin weerspieël word[4] asook die onomwonde, duidelike boodskap wat uitgedra word: dat erkenning en beskerming van menseregte 'n onontbeerlike, noodsaaklike bestanddeel van ons toekomstige regsontwikkeling is en dat geen blywende maatskaplike, ekonomiese en politieke hervorming daarsonder kan geskied nie. In hierdie opsig het die kommissie werklik 'n bres vir menseregte geslaan en die ou, steekse argumente dat ons nie nodig het om menseregte te beskerm nie of dat so 'n beskerming teen ons regstradisie indruis en al te veel humanisties geïnspireerd is,[5] hopelik vir eens en vir altyd uit die weg geruim. Deur die werkstuk het die kommissie verseker dat die menseregdebat hier te lande steeds meer konstruktief, vrugbaar en positief sal ontwikkel. In dié opsig is die werkstuk 'n ware monument.

Met hierdie bespreking word beoog om kortliks te let op die inhoud en aard van die werkstuk en om sekere perspektiewe oor bepaalde onderwerpe wat deur die kommissie behandel word, verder toe te lig. Daardeur word geen besondere kritiek op die werkswyses en insigte van die kommissie geopper nie, maar slegs uiting gegee aan die oortuiging – soos hierbo verduidelik – dat die werkstuk 'n ryke bron vir verdere ontginning en inspirasie bied.

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2 Die werkstuk word as 'n werksdokument gepubliseer om kommentaar, verdere bydraes en voorstelle uit te lok. Eers na die verwerking van sodanige kommentaar ens maak die kommissie sy finale gevolgtrekkings wat dan as 'n finale verslag aan die Minister van Justisie voorgelê word vir ter tafellegging in die parlement. Op dié stadium kan verwag word dat die regering amptelik stelling sal inneem oor die verslag.

3 Daar kan bv met die kommissie verskil word oor sy weergawe van die *drittwirkung* (sien die werkstuk 470-473). Die kommissie sien *drittwirkung* as die moontlike vergoedingsplig van die staat of ander individue indien daar op beskermde menseregte inbreuk gemaak word. In werklikheid is dit nie waaroor die saak gaan nie. *Drittwirkung* het nl te doen met die vraag of beskermde menseregte in 'n menseregakte ook op ander regsterreine, newens die publiekregtelike, geld. In Duitsland kom *drittwirkung* daarop neer dat die Bundesverfassungsgericht sal toesien dat wetgewing wat op private aangeleenthede tussen burgers betrekking het, ook *verfassungskonform* is, d w s die grondregte-bepaling nakom. Oor *drittwirkung* in die Duitse reg, sien o a Maunz en Zippelius *Deutsches Staatsrecht* (1982) 134 wat daarop wys dat onregstreekse nakoming van menseregbeskerming verseker word vir sover privaatregtelike norme hul aan die *wertenscheidungen* van grondregte moet oriënteer.

4 By die voorbereiding van die werkstuk het die kommissie letterlik honderde mondelinge en skriftelike vertoë verwerk; in die werkstuk self word bykans 250 bronne en geskrifte aangehaal.

5 Sien veral 304 e v van die werkstuk waar die besware teen 'n menseregakte een vir een genoem en weerlê word, bv dat so 'n akte liberalisties en egalitaristies is, dat dit 'n onbuigsame, ondemokratiese struktuur daarstel, dat groepsregte negeer word, dat die regbank daardeur gepolitiseer word, dat dit onnodig is, dat dit die wetgewer belemmer, dat dit vreemd aan 'n Afrika-kultuur is, dat dit die veiligheid van die staat en die handhawing van wet en orde ondermyn, ens.

DIE INHOUD EN AARD VAN DIE WERKSTUK

Die sestien hoofstukke van die werkstuk dek 'n geweldig breë terrein. Ten aanvang, alvorens internasionale menseregbeskerming onder oë geneem word, kyk die kommissie na die verskillende menseregte-teorieë soos hulle deur die eeue ontwikkel het en tans in politieke ideologie neerslag gevind het. Verskeie teologiese opvattings asook die Marxisties-Leninistiese benadering en Derde Wêreldse denke word behandel. Ekskursies word na Brittanje, die VSA en Wes-Duitsland onderneem om oorsigtelik vas te stel hoe menseregbeskerming in dié lande hanteer word. In 'n afsonderlike hoofstuk word daar 'n opname van menseregaktes oor die ganse wêreld onderneem en word die omvang van menseregbeskerming getabuleer. Alhoewel hierdie hoofstuk geensins poog om die kwessie van beskerming en afdwinging van menseregte in al die lande van die wêreld te ontleed of in diepte te bespreek nie, is dit op sigself 'n waardevolle bron van verwysing wat ongetwyfeld verdere navorsing sal stimuleer. Na hierdie teoretiese en wêreldwye verkenning word die kwessie van menseregte in Suid-Afrika getakel, enersyds vanuit 'n juridiese hoek en andersyds vanuit die sienings van individue, organisasies en politieke partye. Die Suider-Afrikaanse ervarings van menseregaktes word ook bespreek en in hierdie verband is dit opvallend en verblydend dat manifeste soos die Vryheidshandves en die Sakehandves van maatskaplike, ekonomiese en politieke reg asook die Kwazulu/Natal-handves nie verwaarloos word nie want alhoewel hierdie handveste geen amptelike status het nie, is hulle belangrike, konkrete bydraes met 'n besondere, eiesoortige oorredingskrag.

Die bevinding van die kommissie wat voortvloei uit al hierdie navorsing en oorweging van alle getuienis, is onomwonde:

> "Na oorweging en opweging van die voor- en nadele van die daarstelling in ons land van 'n menseregtehandves meen ons dat die voordele en trouens noodsaak van so 'n akte die beweerde nadele en gevare daarvan ver oorskry."[6]

Interessant genoeg – en trouens heeltemal korrek – neem die kommissie sy vertrekpunt by die beskerming van individuele menseregte en vervolg dan met sy ondersoek na die beskerming van groeps- en minderheidsregte.[7] Alvorens die kommissie sy eie evaluasie van groeps- en minderheidsbelange gee, word 'n wye ondersoek onderneem na die beskerming van sulke regte en belange op die internasionale terrein asook in die grondwette van ander state. Die kommissie se eie oordeel oor die saak is duidelik: daar moet onderskei word tussen politieke groepsregte wat nie in 'n menseregakte nie, maar in die grondwet self beskerm behoort te word en groepswaardes soos kultuur, taal en godsdiens wat nie as "groepsregte" beskerm behoort te word nie maar as regte van die individu.[8]

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6 Werkstuk 324.

7 Die versoek van die Minister van Justisie (Hansard 1986-04-23 kolom 4107) was "om ondersoek in te stel en aanbevelings te doen t a v die definiëring en beskerming van groepsregte in die konteks van die Suid-Afrikaanse staatkundige opset en die moontlike uitbreiding van die bestaande beskerming van individuele regte asook die rol wat die howe in bogemelde speel of behoort te speel". Heeltemal tereg draai die kommissie die volgorde van die ondersoek om en wys duidelik dat beskerming van groepsregte eers aan die orde kan kom na 'n grondige ondersoek na die beskerming van individuele regte. Dit kan egter gebeur dat die regering juis hierdie benaderingswyse van die kommissie gaan gebruik vir kritiek op die verslag.

8 Werkstuk 413.

Nadat die kommissie sy bevindinge oor mense- en groepsregte in die algemeen uitgespreek het, behandel hy vervolgens bepaalde kwessies soos watter regte beskerm moet word, regstellingsaksies (sogenaamde "affirmative action"), beregbaarheid, *locus standi*, en so meer. In 'n voorlaaste hoofstuk neem die kommissie die bewonderenswaardige stap om konkreet 'n ontwerpmenseregte-akte voor te stel en in die laaste hoofstuk word die maniere waarop so 'n akte ingevoer sou kon word, aan die hand gedoen. Hiermee bewys die kommissie 'n waardevolle guns aan die regs- en die politieke wetenskap in ons land. Dikwels word die invoering van 'n menseregakte deur sowel regsgeleerdes as politieke wetenskaplikes aan die hand gedoen sonder dat daar bespiegel word hoe so 'n akte verwesenlik kan word. Die kommissie se slotaanbevelings vir die verwerkliking van 'n Suid-Afrikaanse menseregte-akte is dus op sigself 'n reuse deurbraak.

Die kommissie se verslag is 'n werkstuk. Alhoewel die ondersoek voorafgegaan is deur intensiewe navorsing en die verwerking van mondelinge en skriftelike getuienis, is dit ook nie 'n verslag van 'n kommissie van ondersoek in die ware sin van die woord nie. Diegene wat verwag het dat die kommissie 'n volledige ondersoek na die miskenning van menseregte, ongelykhede en diskriminasie in die Suid-Afrikaanse bestel sou onderneem het, gaan beslis teleurgesteld wees. Aan die positiewe kant moet egter aangemerk word dat die kommissie deur sy werkswyse en aanbieding van 'n juridiese werksdokument daarin slaag om mense- en groepsbeskerming duidelik as regsgegewe aan te bied sonder al die rookmis wat dikwels dié soort debatte in ons land benewel.

Wat ook opmerklik is, is die kommissie se klaarblyklike bedoeling om te oorreed en te oortuig, en veral om Afrikanerdenke aan te spreek. Hiermee kan glad nie fout gevind word nie. Enersyds is die politieke mag sterk in die hande van die Afrikaner gesentreer en andersyds is dit juis in Afrikanergeledere dat die debat oor mense- en groepsregte so welig woed. Deur die bespreking van verskillende gangbare teologiese opvattings en die gebruikmaking van die Raad op Geesteswetenskaplike Navorsing se belangwekkende verslag oor tussengroepverhoudings[9] waarin geldende gemeenskapswaardes ondersoek is, verkry die werkstuk 'n regssosiologiese perspektief wat grootliks bydra tot sy verdere oortuigingskrag.

MENSEREGTE EN DIE REGSTAAT

Oor die regstaatbeginsel maak die kommissie nie groot gewag nie. Trouens, al wat gesê word is dat

> "Afrikaanse terme soos 'oppergesag of soewereiniteit van die reg' en die 'regstaatbeginsel' . . . egter ook in die onderhawige verband [t w oor die inhoud en betekenis van die *rule of law*-begrip] gebruik [word]. Die vraag is of daar 'n betekenisverskil tussen die terme bestaan en of dit sinonieme is. Vir ons doeleindes is die dispuut nie van wesensbelang nie".[10]

Daar kan verstaan word dat die kommissie nie 'n lang bespreking aan die verskille tussen *rule of law* en die regstaat kon wy nie en hierdie begrippe eerder in samehang met die opkoms van natuurregteorieë wou bespreek. Tog moet duidelik uitgewys word dat beide hierdie begrippe van wesenlike belang is by die oorweging van menseregbeskerming.

9 Werkstuk 272 e v.
10 Werkstuk 20 par 2 44.

Rule of law is 'n Engelsregtelike begrip wat as uitgangspunt die privaatregtelike beskerming van die individu deur die gewone howe gehad het. 'n Omvattende publiekregtelike teorie om die verhouding tussen staat en onderdaan te omskryf, was dit geensins nie. Eers later is *rule of law* begripmatig uitgebrei om 'n regspolitieke gedragskode aan te dui,[11] of om meer konkreet die vereiste van legaliteit daar te stel.[12] 'n Omvattende leerstuk om die aard en wese van die moderne staat en die verhouding tussen owerheid en burger te omskryf, het die *rule of law* egter nie geword nie.

Die regstaatbeginsel, daarenteen, is wel so 'n omvattende leerstuk. Volgens dié leerstuk word die ganse staat, daardie magskonsentrasie oor 'n bepaalde nasie op 'n bepaalde geografiese gebied, gesien as 'n grootheid wat deur die reg bepaal word. Gesag, staatstaak en doelstelling is alles regsomskrewe begrippe met besondere regskontoere en voorskrifte. Omdat die reg uiteraard normatief en objektiverend is,[13] volg dit logies dat die owerheid as draer van die gesag binne die regstaat in alle opsigte aan objektiewe regsvoorskrifte gebonde is. Ook die staatsvolk as regsbepaalde entiteit is aan regsvoorskrifte gebonde en kan nie sy wil ongekwalifiseerd laat geld nie.[14] Die regstaat ken nie so iets soos 'n ongebonde, vrye owerheidswil of aansprake van die staat en owerheid wat buite die magtiging van die reg bestaan nie.[15]

Die individu met sy regte en vryhede vervul 'n besondere plek in die regstaat. Die individu, anders as die staat, is nie 'n skepping van die reg nie. Sy handelinge en gedraginge word weliswaar deur die reg gereël, maar sy menswees gaan oneindig verder as die reg se voorskriftelikheid. Die reg kan objektiewe erkenning en beskerming aan die enkeling se regte en vryhede verskaf maar is nie die skepper van daardie regte en vryhede nie; dit is waarom dié regte en vryhede fundamenteel is. In die regstaat vervul beskerming van individuele regte en vryhede 'n tweeledige funksie: eerstens om die staatsheerskappy te legitimiseer vir sover die owerheid slegs owerheid kan en mag wees as hy die individu erken en beskerm, en tweedens word die individu daardeur in staat gestel om in vryheid en gelykheid homself as deelgenoot van die maatskappy te laat geld.[16]

'n Aandrang op erkenning van die regstaatbeginsel is nie bloot 'n akademiese genoegdoening nie. Erkenning en beskerming van menseregte soos die kommissie aanbeveel, is die mees fundamentele manier om die materiële regstaat te verwesenlik. Wanneer die kommissie dus aanbeveel dat 'n toekomstige Suid-Afrikaanse bestel grondwetlike waarborge vir menseregbeskerming moet bevat,

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11 Vgl prof Sanders soos op 19 van die werkstuk aangehaal.

12 Sien Mathews "The rule of law – a reassessment" in Kahn (red) *Fiat Iustitia: essays in memory of Oliver Deneys Schreiner* (1983) 301: "The Rule of Law requires the observance of legality in the form of general and clear pre-announced rules administered by independent courts."

13 Sien Louw "Reg in die demokrasie" in Faure, Kriek *et al* (reds) *Suid-Afrika en die demokrasie* (1988) 172: "Die wese van die reg is dus objektief maar sy toepassing is subjektief."

14 Sien Bleckmann "Vom subjektiven zum objektiven Rechtsstaatsprinzip" 1987 *Jahrbuch des öffentlichen Rechts* 16 wat daarop wys dat ook die staatsvolk verstaan word as 'n "an die Verfassung gebundenes Organ des Staates".

15 Sien Wiechers "Die publieke subjektiewe reg" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 281.

16 Sien Wiechers "Herdemokratisering" in Faure, Kriek *et al* a w 214: "[M]enseregte [bied] die indiwidu die geleentheid ... om sy status as burger te handhaaf ten einde binne 'n vryheidsfeer homself as mens en deelgenoot van die maatskappy te laat geld."

vra hy vir die oprigting en instandhouding van 'n regstaat.[17] 'n Regstaatlike perspektief bied veel meer as net dienstigheid of selfs noodsaaklikheid; dit gee 'n totale visie op staat, owerheid en burger en 'n dieper dimensie aan hervorming. Met so 'n visie op 'n toekomstige regstaat verkry die aanbevelings van die kommissie nog groter samehang en betekenis.

EKONOMIESE REGTE

Die kommissie het nie sy oë gesluit vir die feit dat daar in ons land geweldige groot ekonomiese ongelykhede bestaan nie. Veral eiendom en besit staan in die brandpunt van politieke dispuut omdat meer as tagtig persent van die grond aan 'n klein bevoorregte minderheid behoort. Na oorweging van vertoë en 'n verkenning van ander regstelsels beveel die kommissie aan dat eiendomsreg wel in 'n menseregakte beskerm behoort te word en dat die reg op vergoeding uitdruklik erken behoort te word. Regstellende aksies en die normale politieke prosesse in 'n demokratiese staat behoort verder in wisselende ekonomiese behoeftes (deur middel van werkverskaffing, maatskaplike voordele, onderwysvoorsiening) te voorsien.

Eiendomsreg en die reg op privaatbesit is 'n fundamentele mensereg. Anders as al die ander maatskaplike versorgingsaansprake wat gewoonlik as tweede en derde generasie-regte bestempel word, is eiendomsreg wel 'n basiese mensereg. In ons omstandighede waar eiendomsreg en besit buite alle verhoudings skeefgetrek is, is die versoeking egter baie groot om beskerming van eiendomsreg nie in 'n voorgestelde menseregakte in te sluit nie. Die rede hiervoor is dat bestaande ongelykheid dan moontlik eenvoudig verskans word.[18]

'n Ontkenning van eiendomsreg as basiese mensereg, selfs in ons huidige omstandighede, is egter gevaarlik en kan al te maklik 'n tweesnydende swaard word. In werklikheid is dit so dat die mens se uitlewing van sy aansprake op menswaardigheid, gelykheid en vryheid in 'n moderne samelewing juis verseker kan word omdat hy eiendom en private besit het. Beskerming van die familie, vryheid van beweging en meeste van die ander klassieke vryheidsregte kan alleen beslag en verwesenliking verkry as gevolg van die materiële posisie waarin die individu hom bevind. Een van die vernietigendste kenmerke van die Suid-Afrikaanse beleid van rasse-diskriminasie in die verlede was juis die miskenning van eiendomsreg wat verpligte verskuiwings, onwettigverklaring van besit en grootskaalse ontruimings tot gevolg gehad het. Waarskynlik sal daar in ons omstandighede na 'n formulering en kwalifikasie gesoek moet word wat, soos in die Duitse grondwet,[19] 'n balans handhaaf tussen beskerming van eiendomsreg aan die een kant en die benutting van natuurlike hulpbronne en produksiemiddele aan die ander kant. Die beginsel van gelyke deelname aan openbare

17 Werkstuk 470.

18 Werkstuk 420; oor eiendomsreg in die besonder, sien die waarskuwing van prof Davis op 464 van die werkstuk: "Given the massive imbalance in the various groups' share in the wealth of this country and the need for major policies of redistribution and welfare, extreme caution should be exercised before recommending a property clause, which could limit a future government's ability of implementing policies of redistribution of income."

19 Vgl a 14 en 15 van die Duitse grondwet soos aangehaal op 103 van die werkstuk. Vgl verder die Besigheidshandves van die SA Federasie van Nywerheidskamers en die ontwerp van die Natal/Kwazulu-Indaba op 431-432 van die werkstuk, asook die kommissie se eie voorstelle in a 14 en 15 van die ontwerphandves op 478 van die werkstuk.

laste wat in kontinentale regstelsels geld en wat daarop neerkom dat alle burgers ewe swaar aan openbare laste moet dra (en gevolglik gelyke deelname aan die staatslas van herverdeling veronderstel), blyk die aangewese rigting vir die toekoms te wees.

Die aandrang op vele ander maatskaplike en ekonomiese regte soos veelal in die Vryheidshandves en ander geskrifte uiting vind,[20] kan nie bloot as sosialistiese aansprake afgewys word nie. In ons omstandighede is hulle pertinent belangrik. Daarenteen moet beklemtoon word dat hierdie aansprake wesenlik verskil van die klassieke mense- en vryheidsregte wat uit die aard van menswees en 'n oorspronklike verhouding tussen burger en staat voortvloei. Ekonomiese en maatskaplike regte is die produk van die moderne welvaartstaat. In werklikheid kán hulle net in so 'n welvaartstaat ten volle verwesenlik word omdat die ontwikkelende staat eenvoudig nie oor die middele en inkomste beskik om daaraan voldoening te kan gee nie. Vir die ontwikkelende staat moet hierdie aansprake dus noodwendig 'n meer programmatiese aard inneem en behoort hulle as doelstellings op die regeringsagenda ingeskryf te word. In hierdie opsig kan die kommissie se bevinding ondersteun word dat sogenaamde ekonomiese regte deur regstellende aksies en deur die politieke prosesse aangespreek behoort te word. Niks hoef egter te verhoed dat daar reeds op hierdie stadium 'n soort voorkeurlys opgestel word waarin 'n program vir die verwesenliking van hierdie aansprake uiteengesit word nie.

MENSEREGTE EN MENSEVERPLIGTINGE

Die kommissie neem 'n enigsins afwysende houding teenoor die vermelding van burgerverpligtinge teenoor die staat in 'n voorgestelde menseregakte in:

> "Klaarblyklik bestaan daar geen nut om verpligtinge te tabuleer wat in elke geval bestaan en deur wetgewing afgedwing word nie. Die opnoem van die verpligtinge skep ook die gevaar dat sommige verpligtinge nie genoem word nie of tans nie voorsienbaar is nie, wat die afleiding kan regverdig dat dié verpligting nie afgedwing mag word nie."[21]

Hierdie standpunt is egter 'n oorvereenvoudiging. Elke staatsburger het 'n magdom verpligtinge teenoor die owerheid en hierdie verpligtinge neem amper daagliks toe. In dié opsig is dit volkome onmoontlik om hulle in 'n menseregakte in te skrywe. In ieder geval word hul nakoming verseker deur die algemene plig óm die landswette te gehoorsaam. Benewens hierdie algemene gehoorsaamheidsplig is daar egter wel burgerverpligtinge wat vermelding in 'n menseregakte verdien. Die burger is geroepe om staatsburger en gemeenskapswese te wees; as sodanig moet hy die regte en vryhede van sy medeburgers respekteer en moet hy bepaalde pligte teenoor die staat nakom.[22] Sommige van hierdie pligte is so belangrik vir die gemeenskapsorde en algemene belang dat hulle opgeskort en selfs weggeneem kan word as die burger hulle nie nakom nie. In die Duitse

20 In hierdie verband word die eerste, tweede en derde generasie regte soos volg verduidelik; eerste generasie regte is die klassieke vryheidsregte, tweede generasie die welvaartsregte en derde generasie die sg gemeenskapsregte, soos die reg op 'n skoon omgewing, selfbeskikking en die reg op vrede.

21 Werkstuk 475 par 14 138.

22 Sien Stern *Das Staatsrecht der Bundesrepublik Deutschland* I (1977) 422 wat die beslissing van die Bundesverfassungsgericht van 1960-12-20 aanhaal waarin die hof beslis dat die Duitse grondwet se "Menschenbild ist nicht das des selbsstherrlichen Individuums, sondern das der in der Gemeinschaft stehenden und ihr vielfältig verpflichteten Persönlichkeit".

grondwet word 'n misbruik van vryhede wat die demokratiese bestel aantas, uitdruklik genoem as gronde waarop 'n burger se regte hom deur die konstitusionele hof ontneem kan word.[23]

In ons omstandighede is daar sekere burgerverpligtinge teenoor die gemeenskap en staat wat besondere uitdrukking behoort te verkry, soos die verpligting om nie rassehaat en -onmin en gevoelens van opstand teen bevolkingsgroepe te bevorder nie. Natuurlik kan gesê word dat hierdie verpligtinge ewe goed in ander wette vasgelê kan word. Die kern van die saak is dat in ons land met sy besondere bevolkingsamestelling en historiese agtergrond van diskriminasie, die opsweep van rassegevoelens 'n dieper dimensie verkry. So 'n aanstigting kan inderdaad die demokratiese staatsorde bedreig en daarom behoort die verpligting tot rasse- en groepsharmonie in 'n menseregakte ingesluit te word.[24]

GROEPSREGTE

Een van die heel belangrikste aspekte van die werkstuk is die kommissie se duidelike ontleding van die groepsregte-gedagte. In die algemeen kan daar nie met die kommissie se gevolgtrekkings[25] geredekawel word nie dat onderskei moet word enersyds tussen politieke groepsregte en groepswaardes wat kultuur, godsdiens en taal insluit, en andersyds minderheidsgroepe wat sowel natuurlike as vrywillig geassosieerde groepe behels. Veral die standpunt van die kommissie dat groepsbeskerming as basis die beskerming van die individu se reg op vrye assosiasie behoort te hê, verdien volmondige steun. Die sogenaamde "reg om te disassosieer"[26] is egter problematies. 'n Reg om te assosieer veronderstel 'n positiewe bevoegdheid om vrywillig lid van een of ander organisasie te word.

Die individuele besluit om by so 'n organisasie aan te sluit of om daaruit te tree, is steeds 'n uitoefening van die reg op vrye assosiasie. Sou die organisasie besluit om 'n lid te skors of op 'n ander wyse sy lidmaatskap te beëindig, doen die organisasie dit nie uit hoofde van 'n reg van disassosiasie nie, maar uit hoofde van die organisasie se reg op assosiasie soos vasgelê in sy akte van assosiasie. Ook die reg van 'n organisasie om 'n aansoek om assosiasie af te wys, word nie uit hoofde van disassosiasie gedoen nie maar steeds ingevolge die voorwaardes van assosiasie. Sou die voorwaardes van assosiasie die uitsluiting op grond van ras, kleur, taal, godsdiens of kultuur veroorloof, het 'n mens te doen met 'n vereniging of organisasie wat 'n sekere eksklusiwiteit wil beoefen en op genoemde gronde sy lidmaatskap wil beperk. Die kommissie beveel aan dat in so 'n geval daar nie direk of indirek op openbare of staatsfondse aanspraak gemaak mag word nie. So 'n standpunt lyk egter onnodig rigied. Alhoewel ras-, kleur- en selfs geslagsdiskriminasie vir diskwalifikasie van staatsondersteuning aangedui behoort te word, geld dieselfde oorwegings vir diskwalifikasie nie by assosiasie-voorwaardes ten opsigte van taal, geloof en kultuur nie. Indien

23 A 18 op 475 van die werkstuk.
24 In die Natal/Kwazulu-voorstelle word die verbod so geformuleer: "Enige voorspraak vir nasionale, rasse- of godsdienstige haat en aggressie tussen groepe wat neerkom op aanstigting tot diskriminasie, vyandigheid, geweld of politieke kwaadgesindheid is verbode" (werkstuk 254).
25 Werkstuk 413-414.
26 A 17 van die konsep-handves op 479 van die werkstuk.

aanvaar word dat taal, geloof en kultuur wel beskermingswaardige groepswaardes is,[27] is dit tog geregverdig om groepe wat vrywillig geassosieer het om dié waardes te bevorder, op vorme van staatsondersteuning geregtig te maak?

Die kommissie verklaar:[28]

> "Politieke groepsregte, dit wil sê die kwessie van die aard, samestelling en onderverdelings van die wetgewer, moet in die konstitusie self beskerm word onderworpe aan die gelykheidsbeginsel."

Waaroor dit egter hier gaan, is streng gesproke nie politieke groepsregte nie, maar staatsregtelike reëlings waardeur verseker word dat parlementêre minderhede en faksies voorgestelde wetgewing kan verhinder, vertraag of wysig. Natuurlik kan so 'n verhindering, vertraging of wysiging geskied om bepaalde groepswaardes te beskerm.[29] Maar wat eintlik in so 'n geval ter sprake kom, is staatsregtelike meganismes om die wetgewersproses en in die besonder die meerderheidsbeginsel by die aanname van wetgewing te kwalifiseer ten einde konflik te besweer,[30] grondwetlike verskansing te verseker en om sekere kulturele waardes soos tale te beskerm.[31] Van politieke regte van 'n bepaalde groep in die parlement is daar nie werklik sprake nie omdat volgens die leerstuk van die vrye mandaat, verkose verteenwoordigers in die parlement – afgesien van hul party-politieke affiliasies en lojaliteite – in eerste instansie volksverteenwoordigers is wat vrylik en individueel hul kiesers verteenwoordig.

Die beskermingswaardige politieke groep in die demokrasie is die politieke party. In hierdie opsig gee die kommissie wel erkenning aan

> "die reg van landsburgers om vrylik politieke partye te stig, daaraan te behoort, op vreedsame wyse hul politieke oortuigings uit te leef en om tot wetgewende, uitvoerende en administratiewe ampte benoem en verkies te word".[32]

Die beskerming wat hiermee in die vooruitsig gestel word, is steeds individue se reg op vrye assosiasie alhoewel in 'n meer uitdruklike, politieke verband. Afgesien van hierdie beskerming, behoort die politieke groep, te wete die politieke party, as vrywillige assosiasie egter ook beskerm te word. Periodieke en vrye verkiesings by wyse van geheime stemming gekoppel aan die fundamentele reg om te stem en verkies te word, verkry in 'n demokratiese bestel eers volledige inhoud as die regte van politieke partye ook erken word. Politieke partye se regte sluit benewens die reg tot stigting en organisasie, ook die reg in tot vrye mening, propagandavoering en die reg om deur middel van kandidate aan verkiesings deel te neem.

Met die kommissie se bevinding dat sogenaamde groepsregte ten beste gedien word deur die beskerming van groepsbelange en -waardes en die verskansing van die individu se reg op vrye assosiasie, is daar in beginsel nie mee fout te vind nie. Ook die kommissie se aanbeveling dat daar nie teen natuurlike groepe

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27 Sien a 21 van die konsep-handves op 479 van die werkstuk: "Die reg van elke individu om afsonderlik of gesamentlik met ander sy kultuur, godsdiens en taal vrylik te beoefen."
28 Werkstuk 413.
29 Bv die Natal/Kwazulu-voorstelle van 'n tweede kamer waarin kultuurgroepe verteenwoordig word.
30 In die Amerikaanse grondwet word 'n konflik oor wetgewing tussen die president en die kongres deur 'n tweederdemeerderheid in die kongres opgelos.
31 In a 99(2) van die Suid-Afrikaanse Grondwet 110 van 1983 word amptelike tale deur 'n tweederdemeerderheid beskerm.
32 A 18 van die konsep-handves op 479 van die werkstuk.

soos vrouens, kinders en gestremdes gediskrimineer moet word nie,[33] kan gesteun word. Daarenteen moet beklemtoon word dat ten minste één natuurlike groep, te wete die familie en gesin, wel op positiewe beskerming in 'n menseregakte geregtig is – soos die kommissie trouens self ook in sy ontwerp aanbeveel.[34]

In die reël behoort ras nie as 'n faktor by die beskerming van minderhede te geld nie. Veral in Suid-Afrika kan beskerming van die rasgroep baie maklik tot 'n voortsetting van rassedominasie lei.[35] So heel eenvoudig is die saak egter nie. 'n Rasgroep is uiteraard 'n natuurlike groep wat eenvoudig bestaan en nie weg te redeneer is nie.

Dit mag gebeur dat 'n bepaalde rasgroep terselfdertyd 'n minderheidsgroep uitmaak wat besondere hulp en beskerming van die staat verlang. Niks sou verhoed dat aan so 'n natuurlike minderheidsgroep spesiale ekonomiese en maatskaplike voorregte verleen word by wyse van regstellende aksies nie. Net soos die moderne welvaartstaat gedurig daarop bedag is om aan agtergeblewe en hulpbehoewende natuurlike groepe, byvoorbeeld bejaardes en gestremdes, bykomende ekonomiese en maatskaplike voordele te laat toekom, is daar ook geen beswaar om die hulpbehoewende rasgroep vir hulp en bystand te definieer nie. Wat die staat onder geen omstandighede mag doen nie, is om lidmaatskap van 'n rasgroep vas te pen. As 'n lid van 'n rasgroep sou verkies om nie dieselfde status as die ander lede van dieselfde rasgroep te aanvaar nie, mag hy nie gedwarsboom word nie.[36] Gestel byvoorbeeld dat die staat aan 'n agtergeblewe ras-minderheidsgroep 'n reservaat toeken waarbinne dié groep besondere regte en voorregte kan uitoefen. Dan mag die staat nie alle lede van daardie minderheidsgroep teen wil en dank dwing om in daardie reservaat te woon nie.

Die saak word selfs meer gekompliseerd as 'n ras-minderheid 'n eie taal, kultuur en selfs godsdiens het. In so 'n geval sou daar wel 'n saak vir groepsregte en -beskerming van die ras-minderheid uitgemaak kan word veral as die betrokke minderheid weens besondere ongunstige omstandighede moontlike uitwissing in die gesig staar. Ook is dit denkbaar dat daar selfs politieke regte aan so 'n natuurlike minderheidsgroep verleen kan word as daar geen ander politieke party is wat hom oor die groep wil ontferm nie. Hierdie besondere beskerming aan die inheemse rasgroep met 'n eie taal, kultuur en godsdiens kom veral ter sprake in lande waar daar bepaalde, moeilik assimileerbare minderhede van Indiane, aborigines en pigmees lewe. By ons is die posisie van die Boesmans vergelykbaar. In die jongste tyd word baie ernstig daaraan gedink om by wyse van internasionale verdrae die maatskaplike, ekonomiese en politieke regte van sulke ras- en kulturele minderhede te beskerm.[37]

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33 Werkstuk 404 par 13 51.

34 A 11 van die konsep-handves op 478 van die werkstuk.

35 Sien in hierdie verband die oortuigende betoog van prof Du Plessis soos vermeld op 378-379 van die werkstuk.

36 Carpenter *Introduction to South African constitutional law* (1987) 123 haal Sigler in hierdie verband aan en sê: "Although membership of a minority group is based on status which is not acquired voluntarily, continued membership should be voluntary."

37 Sien in hierdie verband die Draft Universal Declaration on Indigenous Rights wat deur 'n subkomitee van die VVO se menseregkommissie op 1988-08-24 uitgereik is (E/CN 4/Sub 2/1988/24). Ook die ontwerp-konvensie en Europese protokol vir die reg van nasionaliteite en die beskerming van minderhede van die Internationales Institut für Nationalitätenrecht und Regionalismus, stel soortgelyke beskerming voor (Intereg, München 1984).

Dit sou egter vergesog wees om die analogie van 'n beskermingswaardige ras- en kulturele minderheidsgroep soos die Indiane te gebruik om die beskerming van die blanke rasgroep in Suid-Afrika te probeer regverdig. Blankes in ons land is weliswaar 'n natuurlike ras-minderheidsgroep maar besit geen gemeenskaplike kulturele, godsdienstige of linguistiese identiteit wat 'n besondere groepsbeskerming sou regverdig nie. Ook is dit onmoontlik om die blanke Afrikanergroep as 'n beskermingswaardige groep met eie ekonomiese, maatskaplike en politieke regte te identifiseer: die blanke Afrikaner is lid van 'n kultuur- en linguistiese minderheidsgroep wat sy taal, godsdiens en kultuur met ander rasgroepe deel; nòg as rasgroep nòg as kulturele groep kan blanke Afrikaners hul dus as eksklusiewe groep op eiesoortige beskerming en selfbeskikking beroep. Die Afrikanergroep sou egter wel kon aandring op die beskerming van sy taal- en kulturele waardes.[38]

WELKE HOWE MOET DIE MENSEREGTEHANDVES KAN AFDWING?

Die kommissie is nie ten gunste van 'n spesiale konstitusionele hof, soos in Duitsland, om 'n menseregakte af te dwing nie; eerder, meen die kommissie, behoort die taak aan die gewone regterlike gesag oorgelaat te word.[39]

Alhoewel die kommissie taamlik uitvoerig aandag gee aan die argumente ten gunste van geregtelike hersiening deur 'n spesiale konstitusionele hof, word die saak egter nie daardeur uitgeput nie. Kontrole van wetgewende, uitvoerende en administratiewe handelinge van die staat aan die hand van 'n menseregakte, soos die kommissie aanbeveel,[40] het verskeie fasette. Alhoewel daar in die algemeen geredeneer kan word dat die gewone howe jurisdiksie behoort te hê om uitvoerende en administratiewe handelinge aan die hand van 'n menseregakte te toets, is die kwessie of die gewone howe ook wetgewing behoort te kan toets, nie so eenvoudig nie.

'n Menseregakte behels veel meer as net die formele beskerming en verskansing van menseregte. So 'n akte beliggaam 'n ganse waardestelsel; dit bepaal die mens in sy regsnormatiewe menswees en sy plek in die samelewing. Sonder om te beweer dat die gewone howe nie in staat is om die waardestelsel onderliggend aan 'n menseregakte te interpreteer en toe te pas nie, is dit nietemin ook waar dat 'n spesiale konstitusionele hof waarskynlik beter toegerus is om vergestalting aan so 'n stelsel te gee. Soos in Duitsland gebeur het, kan die spesiale hof deur sy regspraak 'n eenheid in uitspraak en leerstelligheid bewerkstellig met 'n uitstralende, bevrugtende werking nie slegs na die gewone howe toe nie maar ook na die wetgewer en administratiewe organe.

Origens moet steeds onthou word dat toetsing van parlementêre wetgewing aan die hand van 'n menseregakte altyd 'n netelige saak sal bly: eerstens omdat die verwyt gedurig gehoor sal word dat die regters wat wette toets nie verkose is nie en dus nie die volksverteenwoordigers in die parlement mag teëgaan nie; en tweedens dat die regbank daardeur gepolitiseer word. Alhoewel hierdie verwyte 'n mate van demagogiese inslag het, kan hulle egter nie negeer word nie.

38 Wat in ooreenstemming met a 27 van die International Covenant on Civil and Political Rights sou wees (sien Wrobel *South Africa and human rights* Parliamentary Human Rights Group (1989) 29).

39 Werkstuk 450-454 asook a 31 van die ontwerp-akte op 484.

40 Werkstuk 476.

Vele uitstekende menseregaktes het juis as gevolg daarvan hul effektiwiteit ingeboet, veral in Afrika. In hierdie verband sal dit die moeite werd wees om ook hernieud na die Kanadese praktyk te kyk wat die invoering van 'n menseregakte laat voorafgaan het met 'n tydperk van konstitusionele adviese deur die hof aan die wetgewer in plaas daarvan om onmiddellik 'n toetsingsreg in te voer.[41] Ook moet die Franse manier van hersiening nie uit gedagte verloor word nie. In daardie land het die *Conseil Constitutionnel*, 'n kwasie-regbank van die hoogste orde, die bevoegdheid om konsepwetgewing in die proses van aanname in die parlement aan die mensereghandves te toets en onkonstitusioneel te verklaar. Die *Conseil Constitutionnel* bestaan uit nege regters wat elk vir nege jaar aangestel word deur die regering op so 'n wyse dat daar elke drie jaar drie regters aftree; beroep op die *Conseil* om konsepwetgewing te toets, kan deur die president van die republiek, die eerste minister en die presidente van die nasionale vergadering en die senaat asook sestig lede van die parlement gedoen word. Die merkwaardige van die Franse stelsel is dat hersiening van parlementêre wetgewing geensins tot 'n botsing tussen regering en regbank gelei het nie, maar inderdaad die aansien van die regering verhoog het vir sover die regering as 'n eerbieder van konstitusionalisme gesien word.[42]

Ook moet in gedagte gehou word dat nakoming aan die bepalings van 'n menseregakte nie net in die hande van die howe gelaat moet word nie, maar 'n wydvertakte institusionalisering van hersienings-, hervormings- en kontroleringsinstansies vereis. 'n Ombudsman, regshersieningskommissies en parlementêre menseregtekomitees is alles bykomende en belangrike wyses ter verwesenliking van mensregtebepalings.

DIE WEERBARE DEMOKRASIE

Een van die heel moeilikste vrae in verband met die erkenning van menseregte en vryhede, is die vraag in hoever die demokrasie – wat in wese juis 'n vryheidsbestel is – kan toelaat dat vryhede misbruik word om ander mense se vryhede en die staatsbestel in gevaar te stel en aan te tas. Die kommissie beveel in sy ontwerp-akte aan[43] dat

> "die regte in hierdie akte verleen ... ingevolge wetgewing beperk mag word tot die mate wat dit redelikerwys nodig is uit hoofde van staatsveiligheid, openbare orde, openbare belang, die goeie sedes, openbare gesondheid, die regsadministrasie, die regte van andere of ter voorkoming van wanorde en misdaad, maar slegs tot die mate en op 'n wyse wat in 'n demokratiese gemeenskap aanvaarbaar is".

Die probleem is dat die kommissie hiermee nie 'n duidelike omlyning van sowel beperking as uitsluiting van menseregtebepalings gee nie. Trouens, die wye reeks gronde wat as regverdiging vir sodanige uitsluiting en beperking gegee word, kan juis veroorsaak dat die kind met die badwater uitgegooi word. Daar sou byvoorbeeld geredeneer kon word dat die "wyse wat in 'n demokratiese gemeenskap aanvaarbaar is", juis die volksverteenwoordigers in die parlement toelaat om soos hulle goeddink, menseregte in te perk en uit te sluit.

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41 Oor die Kanadese praktyk sien o a Naidu *Fundamental human rights: a bill of rights for South Africa* (1988) 11.

42 Oor die *Conseil Constitutionnel* sien o a Morton "Judicial review in France; a comparative analysis" 1988 *The American Journal of Comparative Law* 89.

43 A 30 van die ontwerp-akte op 484 van die werkstuk.

Beperkings op en uitsluiting van menseregte en -vryhede in sekere omstandighede moet in die samehang van 'n weerbare demokrasie gesien word. Die demokrasie moet homself kan verweer teen ondemokratiese magte[44] sonder om daardeur sy demokratiese wese te verloor. Geen beperkings op menseregte mag self onbeperk wees nie en moet gediend wees om ander belange te beskerm.[45] Twee belangrike aspekte wat nie deur die kommissie in sy aanbevelings genoem word nie en wat sekerlik aandag verdien, is dat beperkings en uitsluitings van menseregte in sommige gevalle nooit die essensiële inhoud van menseregte behoort aan te tas nie en ook nie 'n beroep op die howe behoort uit te sluit nie.[46]

In samehang met die kwessie van opskorting en uitsluiting van menseregte is daar nog die ander wesenlike vraag of sommige menseregte *überhaupt* deur die wetgewer uitgesluit mag word. Die kommissie voorsien dat sy voorgestelde menseregakte deur 'n tweederdemeerderheid in die parlement gewysig en opgeskort mag word.[47] Behoort die mens se reg op waardigheid en gelykheid egter deur enige parlementêre meerderheid van welke aard ook al, afgeskaf of selfs opgeskort te word?

DIE INVOERING VAN 'N MENSEREGAKTE IN SUID-AFRIKA

In 'n kort, finale hoofstuk[48] word seker die heel belangrikste kwessie oor menseregbeskerming by ons aangespreek, naamlik hoe 'n menseregakte op die huidige tydstip by ons ingevoer moet word. Die kommissie voorsien vyf fases vir die invoering van 'n menseregakte: eers 'n beginselaanvaarding deur die parlement vir die invoering van so 'n akte, dan die voortsetting van regshervorming ten einde die wetboek te suiwer van wette wat menseregte aantas en wat gepaard gaan met 'n breë opvoedkundige proses, en dan die bereiking van 'n konsensus oor 'n toekomstige konstitusie en menseregakte in 'n grondwetskeppende fase; uiteindelik volg die finale fase, die legitimisering van die nuwe grondwet met die insluiting van 'n menseregakte by wyse van referendum.

Met die kommissie se vertrekpunt dat invoering van 'n menseregakte en die opstel van 'n nuwe grondwet met mekaar saamloop, kan geen fout gevind word nie. 'n Menseregakte, om werklik menseregakte te wees, vind sy tuiste en beslag in 'n grondwet. 'n Grondwet is die kulminasie van die staatsregtelike proses van integrasie van politieke mag en emansipasie van die posisie van die burger.[49] 'n Grondwet is boonop die hoofbron van regmatige gesagsuitoefening en legitimiteit van die regeringsbestel – sowel endogene legitimiteit waarvolgens die politieke elite kragtens sy bekwaamhede geregtig is om te regeer, as eksogene

44 In die Duitse grondwet word die beginsel van 'n weerbare demokrasie ("streitbare Demokratie") verskans. Stern *Das Staatsrecht der Bundesrepublik Deutschland* bd I (1977) 175 verduidelik dit so: "Die Verfassung hat damit selbst Grundwerk gesetzt, die unantasbar sind, und die Kompetenze zur Selbstverteidigung eingeräumt, also nicht Freiheit bis zur Selbstpreisgabe und Selbstvernichtung das Staates verlangt."

45 Sien Bleckmann en Bothe in Armand de Mestral *et al* (reds) *The limitation of human rights in comparative constitutional law* (1986) 107.

46 Vir 'n voorbeeld van so 'n bepaling, sien a 19(2) en (4) van die Duitse grondwet soos aangehaal op 104 van die werkstuk.

47 A 33 van die ontwerp-akte op 485 van die werkstuk.

48 Hfst 16 van die werkstuk op 486-496 van die werkstuk.

49 Vgl Couwenburg *Van monarchale machtstaat naar liberale democratie* (1979) 7.

legitimiteit waarvolgens politieke mag geregverdig word weens sy verteenwoordigende karakter.[50]

Hier lê egter die groot probleem vir Suid-Afrika. Die staatsregtelike proses van integrasie met die oorheersende werktuig van parlementêre soewereiniteit het by ons skeefgetrek sodat alle mag in der waarheid in die hande van die blanke bevolkingsgroep gesetel is, terwyl die emansipasie-proses nooit die grootste deel van die bevolking van onderdrukking bevry het nie. Boonop ly ons ganse bestel aan 'n ernstige legitimiteitskrisis. Hierdie krisis veroorsaak dat bloot die propagering van 'n menseregakte vir Suid-Afrika al ernstig onder verdenking gekom het. Hoe is dit moontlik, word gevra, dat die bevoorregte klas blankes nou 'n menseregakte voorstaan terwyl die aandrang op so 'n akte eintlik die prerogatief van die minderbevoorregtes en onderdruktes behoort te wees?[51]

Laat ons nugter wees. Ons het nog nie by benadering 'n aktiewe fase van grondwetskepping in Suid-Afrika betree nie. Ons het wel 'n *pouvoir constitué*, die parlement, wat grondwetskepping kan magtig en selfs 'n *pouvoir constituant* in die vorm van 'n nasionale konvensie sou kon instel, maar weens die omvangryke legitimiteitskrisis blyk so iets vir die heel voorsienbare toekoms eenvoudig nie moontlik te wees nie. Om van die invoering van 'n menseregakte, hetsy volledig of gedeeltelik, in die ware sin van die woord te praat, lyk op hierdie stadium dus voortydig en onvanpas. Kortom, daar word op hierdie stadium nog nie grondwet vir ons land gemaak nie en derhalwe kan daar ook nie sprake van die invoering van 'n menseregakte wees nie.

Niks verhoed egter dat met die oog op 'n toekomstige menseregakte, voorbereiding en klimaatskepping deur opvoedkundige prosesse en aktiewe regshervorming nie nou reeds 'n aanvang neem nie. Niks behoort eweneens te verhoed dat die wetboek reeds nou gesuiwer word van wette wat die invoering van 'n menseregakte sou vertraag nie. En niks verhoed dat die ideaal van 'n menseregakte nie nou reeds gepropageer en in konkrete vorm aan die regsgeleerde, die regspraktisyn, die bevolking en die politieke akteurs voorgehou word nie. In werklikheid word daardeur die fondamente gelê vir die toekomstige aanvaarding van 'n demokratiese grondwet met 'n volwaardige menseregakte. Per slot van sake is dit presies wat die werkstuk van die Suid-Afrikaanse Regskommissie besig is om te bewerkstellig. En dit is die rede waarom dit 'n monument in ons regsontwikkeling is.

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50 *Ibid* 61.

51 Daar is al daarop gewys dat 'n werklike, ware menseregakte 'n produk van die stryd ("struggle") is en al die mense moet betrek. Sien ook Du Plessis " 'n Regsteoretiese-regspolitiese peiling van die menseregtehandvesdebat in Suid-Afrika" 1987 *Tydskrif vir Regswetenskap* 139: "Resente kritici van die menseregtehandvesidee wys daarop dat die oorbevoorregte blanke minderheid in Suid-Afrika vir baie jare lank nie veel erg aan die daarstel van 'n menseregtehandves gehad nie, maar nou dat dit lyk asof blanke minderheidsregering beëindig kan word, gryp wittes na 'n menseregtehandves as 'n middel om hulle teen die regmatige aansprake van die (swart) meerderheid te beskerm."

Die subjek van 'n bestorwe boedel: die bestuursliggaam as regspersoon[1]

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SUMMARY

The subject of a deceased estate: the management body as juristic person

B is bitten by "A" 's dog one day after A's death. Who can be sued on the basis of the *actio de pauperie*: the Master of the Supreme Court, the executor who was appointed after the said occurrence, the heir, the "estate" as a juristic person, or nobody? This problem cannot be solved unless one knows who or what was the subject or "owner" of the relevant estate when the dog bit B. In a previous article the proposition was defended by the author that a deceased estate does not belong to the Master of the Supreme Court or the executor. In this article the author contends that a deceased estate is vested in a juristic person consisting of a management body and that this juristic person is referred to when the term "estate" is used to denote the *subject* of the deceased estate, for example in the following extract from *Henderson v Bartlett* 1950 3 SA 109 (W) 116: "[T]he estate can only act through the executor and so while the executor is in charge of it, it can only do what he can do." (Cf also *Estate Hughes v Fouche* 1930 TPD 41 42–43: "The usual way in which an estate sues or is sued is through the executors . . . ")

1 INLEIDING

'n Dag na A se dood val "sy" hond B aan en beseer hom. Wie is met die *actio de pauperie* aanspreeklik: die meester, die eksekuteur wat tydens die voorval nog nie aangestel was nie, die erfgenaam, die "boedel" as regspersoon, of niemand nie? Sou dit 'n verskil maak as die eksekuteur reeds aangestel was toe die hond B gebyt het? Wie of wat was die eienaar van die hond tydens die betrokke voorval?

Hierdie probleem kan nie opgelos word nie tensy 'n mens weet wie of wat die subjek van die betrokke boedel is.

In 'n vorige artikel[2] het ek die standpunt verdedig dat 'n bestorwe boedel nie aan die meester van die hooggeregshof of aan die betrokke eksekuteur behoort nie. Verder huldig ek die mening dat 'n bestorwe boedel nie 'n "subjeklose

1 Hierdie artikel is gebaseer op die skrywer se gepubliseerde LLD-proefskrif *Universele opvolging in die Suid-Afrikaanse erfreg* (hierna aangehaal as *Universele opvolging*) (Annale van die Universiteit van Stellenbosch vol 5 reeks B nr 1 1983).

2 Sien 1989 *THRHR* 184 e v.

vermoë" is nie[3] en ook nie aan die oorledene[4] of die bevoordeeldes[5] behoort nie. As hierdie standpunte korrek is, volg dit logies dat 'n bestorwe boedel 'n regspersoon as subjek het.[6] *Daar bestaan geen ander moontlikheid waarmee redelikerwys rekening gehou hoef te word nie.*

Dit blyk dus dat as 'n mens die probleem op welke subjek die nalatenskap van 'n oorledene oorgaan, langs die *negatiewe* weg van eliminasie benader, 'n mens noodwendig tot die slotsom geraak dat 'n bestorwe boedel in ons teenswoordige reg aan 'n regspersoon behoort. Die vraag kan egter gestel word of daar ook *positiewe* aanduidings bestaan dat hierdie slotsom juis is. Die antwoord is ongetwyfeld bevestigend. Verskeie regsverskynsels dui onteenseglik op die bestaan van sodanige regspersoon wat deur sy organe aan die regsverkeer deelneem: die sluit van kontrakte, nou deur dié persoon in amptelike hoedanigheid, dan deur 'n ander persoon in amptelike hoedanigheid, naamlik deur 'n tussentydse kurator,[7] 'n eksekuteur,[8] 'n persoon wat kragtens artikels 18(3) of 25(1) van die Boedelwet 1965 gemagtig is om 'n boedel te beredder[9] of deur die genoemde persone se ampsopvolgers, *telkens met die resultaat dat die regte en verpligtinge wat uit sulke kontrakte voortvloei, deel van een en dieselfde boedel vorm*; die verkryging van ander bates as vorderingsregte, nou deur die werksaamheid van een persoon in amptelike hoedanigheid, dan deur dié van 'n ander – telkens op so 'n wyse dat sulke bates deel van *dieselfde vermoë* word; die betaling van skulde, nou deur dié ampsbekleder, dan deur 'n ander – telkens uit die bates van een en dieselfde vermoë; die voer van hofgedinge, nou deur dié persoon in amptelike hoedanigheid, dan deur 'n ander, terwyl die vonnis telkens ten voordele of ten nadele van *een en dieselfde entiteit* werk;[10] die omstandigheid dat onroerende boedelbates, ten aansien waarvan die oorledene tydens sy dood 'n vorderingsreg gehad het, in die naam van die "boedel" geregistreer word en nie in die naam van een of ander natuurlike persoon nie;[11] die betekenisvolle omstandigheid dat 'n eksekuteur vanweë wanbestuur ontslaan kan word[12] net soos die ampsbeklеders van ander regspersone; en die omstandigheid dat een ampsbekleder deur 'n ander vervang kan word sonder dat die regte en verpligtinge, waaruit die bestorwe boedel bestaan, aan die nuwe ampsbekleder oorgedra, respektiewelik gedelegeer, hoef te word.

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3 *Universele opvolging* 229 e v.
4 *Ibid* 233 e v.
5 Vgl *ibid* 205 e v wat die oorledene se erfgename betref en *Greenberg v Estate Greenberg* 1955 3 SA 361 (A) wat legatarisse betref.
6 Vgl ook Murray in Hahlo en Kahn *The union of South Africa: the development of its laws and constitution* (1960) 661: Murray 1948 *Annual Survey* 103; 1956 *Annual Survey* 171; 1959 *SALJ* 372; 1962 *SALJ* 37. Murray se standpunt kom daarop neer dat "the estate of a deceased person" 'n regspersoon is. Indien hy daarmee te kenne wil gee dat 'n boedel as eenheid van bates en laste 'n regspersoon is, kan ek nie saamstem nie.
7 Vgl a 12(3) en (4) van die Boedelwet 66 van 1965 (hierna "die Boedelwet 1965" genoem).
8 Die eksekuteur kan 'n verskeidenheid kontrakte namens die "boedel" sluit, bv goedere verkoop ten einde die boedelskulde te betaal.
9 Ook so 'n persoon kan boedelgoedere verkoop met die oog op die betaling van die boedelskulde.
10 Nie slegs 'n eksekuteur nie maar ook 'n tussentydse kurator kan onder bepaalde omstandighede 'n hofgeding voer (vgl a 12(3) van die Boedelwet 1965).
11 Vgl reg 54(1) uitgevaardig ingevolge die Registrasie van Aktes Wet 47 van 1937.
12 Vgl a 54 van die Boedelwet 1965 en *Port Elizabeth Assurance Agency and Trust Co Ltd v Estate Richardson* 1965 2 SA 936 (K) i v m die hof se gemeenregtelike bevoegdheid om 'n eksekuteur te ontslaan.

Aan die ander kant bestaan daar geen enkele regsverskynsel wat daarop dui dat die bates en laste, wat 'n bestorwe boedel vorm, *nie* aan 'n regspersoon behoort nie. Veral moet die aandag daarop gevestig word dat die omstandigheid dat 'n eksekuteur of tussentydse kurator boedelregshandelinge in *eie* naam, dog in amptelike hoedanigheid, verrig, geensins as 'n aanduiding beskou kan word dat die nalatenskap *nie* 'n regspersoon as subjek het nie[13] – ewe min as wat die omstandigheid dat die kurator van 'n geestesongestelde hofgedinge in eie naam maar in amptelike hoedanigheid voer, as 'n aanduiding beskou kan word dat die ware gedingvoerende party in hierdie geval *nie* die geestesongestelde is nie.[14] Selfs in die geval waar bates aan die eksekuteur in sy amptelike hoedanigheid oorgedra word, byvoorbeeld in 'n geval waar die eksekuteur onroerende goedere aankoop wat met verband ten gunste van die "boedel" beswaar is,[15] bestaan daar geen rede waarom nie aangeneem sal word dat 'n regspersoon in werklikheid daardie bates verkry nie. In hierdie verband word die aandag op die volgende *dictum* in die appèlhofuitspraak in *Group Areas Development Board v Hurley*[16] gevestig:

> "Where property is registered in the name of an office-bearer for the time being of a juristic person, without any provision to qualify the nature of the registration, it would stand to reason, on the view here postulated, that he would figure in the deed in a representative capacity, the juristic person being the real owner. He would merely be the authorised representative through whom the juristic person would act and hold the property."[17]

Die volgende werkwyse sal gevolg word: eers sal vasgestel word in hoeverre die regspersoon wat in 'n oorledene se nalatenskap opvolg, reeds in ons wetgewing en regspraak "raakgesien" en erken is en daarna sal die struktuur van sodanige regspersoon ondersoek word. Die wyse waarop die regstoestand ingevolge waarvan 'n regspersoon as die universele opvolger van 'n oorledene tot stand gekom het en die redes vir dié totstandkoming sal hierna aan die orde gestel word, terwyl die vraag of dit wenslik is dat hierdie toestand wetteregtelik bekragtig word, ten slotte aandag sal geniet.

2 DIE ERKENNING VAN 'N REGSPERSOON AS UNIVERSELE OPVOLGER VAN 'N OORLEDENE IN ONS WETGEWING EN REGSPRAAK

2 1 Wetgewing

Die wetgewer het al verskeie male die uitdrukking "boedel" of "estate" gebesig om 'n entiteit met regsubjektiwiteit aan te dui, en wel een wat volgens die sinsverband as subjek van die betrokke bestorwe boedel fungeer.[18] Daar word

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13 Vgl *Zalk v Inglestone* 1961 2 SA 788 (W) 794 *per* Marais R: "Where an executor as such is a party to litigation, in the sense that it is not he in his capacity as an individual who appears before the Court, but rather that the estate is the real party, the *Natal Bank* and *Potgieter* cases would apply. Ordinarily in such a case, the executor cites himself or is cited *nomine officii*. If judgment is given against him, *it is a judgment against the estate* . . ." (ek beklemtoon). (Die verwysing is na *Natal Bank v Kuranda's Trustee* 1904 TS 586 en *In re Estate Potgieter* 1908 TS 983.)

14 Vgl *Minister of the Interior v Cowley* 1955 1 SA 307 (N) 311: "The position is that the patient must be regarded as the real defendant and she is outside the area of this Court's jurisdiction."

15 Vgl bv *Ex parte Battenhausen* 1936 CPD 94 98–99.

16 1961 1 SA 123 (A) 130.

17 Vgl ook *Klerksdorp and District Muslim Merchants' Association v Mahomed* 1948 4 SA 731 (T) 738; *Moloi v St John Apostolic Faith Mission* 1954 3 SA 940 (T) 942–943.

18 Vgl bv a 17(5) van die Registrasie van Aktes Wet 47 van 1937 ("word die goed aan die

beklemtoon dat die gebruik van die term "boedel" in die gemelde sin daarop dui *dat die wetgewer deur die eise van die praktiese regsvorming daartoe gedwing is om met die bestaan van een of ander entiteit, wat die universele opvolger van 'n oorledene is, rekening te hou.* Daar is geen voorskrif in gemelde wetgewing wat die uitlegger verhinder om genoemde uitdrukking so uit te lê dat dit na 'n regspersoon verwys nie. Inteendeel, dié wetgewing pas nie alleen goed in by 'n stelsel waarin 'n oorledene se nalatenskap op 'n regspersoon oorgaan nie, maar dit is die voor-die-hand-liggende betekenis wat daaraan geheg moet word aangesien dit na geen ander entiteit op 'n sinvolle wyse kan verwys nie. In soverre verleen die wetgewer reeds *inderdaad* erkenning aan die bestaan van 'n regspersoon as die universele opvolger van 'n oorledene. Hiermee is egter nie gesê dat die wetgewer met die genoemde uitdrukking noodwendig na 'n regspersoon, *wat uit 'n eenheid van bates en laste bestaan,* verwys nie. Soos hieronder aangetoon sal word, is die term "boedel", in die sin van 'n regsubjek, bloot 'n gerieflike *benaming* vir daardie regspersoon wat die universele opvolger van 'n oorledene is sonder dat sy *aard en struktuur* daardeur aangedui word.

2 2 Regspraak

Net soos die wetgewer maak ons howe van die uitdrukking "boedel" of "estate" gebruik om 'n entiteit aan te dui wat – volgens die sinsverband – nie alleen regsubjektiwiteit het nie, maar ook subjek van die erflater se nalatenskap is. So is 'n "boedel" of 'n "estate" al voorgestel as: 'n eienaar van boedelgoedere;[19] 'n aandeelhouer;[20] 'n vennoot;[21] 'n skuldeiser;[22] 'n skuldenaar;[23] 'n gedingvoerende party;[24] 'n entiteit wat verryk kan word;[25] 'n entiteit wie se belange deur 'n *negotiorum gestor* behartig kan word;[26] 'n regsubjek wat deur 'n kurator of 'n

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vervolg van vorige bladsy

gemeenskaplike boedel van die eggenote getransporteer of oorgedra . . . en word . . . beskou as die gemeenskaplike eiendom van die langslewende eggenoot en die boedel van die oorlede eggenoot"); die Boedelwet 1965: a 23(5) ("die verlies wat die boedel gely het"); a 28(1)(a) (" 'n tjekrekening op naam van die boedel open"); a 28(1)(c) (" 'n vordering teen die boedel"); a 32(4) ("op koste van die boedel of van die eiser"); a 48 (" 'n skuldenaar van die bestorwe boedel").

19 Vgl bv *Moyce v Estate Taylor* 1947 2 SA 134 (K) 136: "This is an appeal against an order of ejectment of the appellant from the premises belonging to the respondent estate . . . "

20 Vgl bv *Ex parte Estate Heulin* 1959 4 SA 85 (K) 86: "The aforesaid estate is the beneficial holder of all the shares in a Johannesburg Company . . . "

21 Vgl bv *Ex parte Duncan's Executor* 1910 TPD 886 888: "The estates of Duncan and Louise Juta, and Cuypers . . . are undoubtedly domiciled in the Cape. The Cape courts have sanctioned, in substance, an arrangement by which . . . the estate of Juta, the estate of Duncan, and Cuypers carry on the business as partners."

22 Vgl bv *CIR v Sive's Estate* 1955 1 SA 249 (A) 264: "The trial Court was correct in declaring on the application made to it by the deceased estate that that estate had no claim against the testator's estate . . . "

23 In *CIR v Estate Hersov* 1952 4 SA 559 (A) 567 verklaar Centlivres HR dat "where the proceeds of an insurance policy form portion of the estate of a deceased it is the estate, and no other person, that is liable to pay estate duty".

24 Vgl bv *Cradock's Estate v Cradock* 1951 3 SA 51 (N) 56: "I should mention here that there has already been litigation between the widow and the estate . . . "

25 Vgl bv *Walt v Estate Wait* 1930 CPD 1 4: "[U]ntil the termination of the usufruct it will be impossible to say whether the estate of James Wait has derived any benefit from the improvements."

26 Vgl *L Ferreira (Private) Ltd v Vos* 1953 3 SA 450 (A). Ten opsigte van 'n hipotetiese geval waar 'n eksekuteur uit eie sak voer gekoop het vir diere wat tot 'n bestorwe boedel behoort, verklaar Greenberg WN HR (465): "The executor in such a case could purchase the fodder himself and hold the estate liable on a *negotiorum gestio* . . . "

eksekuteur verteenwoordig kan word;[27] 'n besitter;[28] 'n regsubjek wat 'n som geld kan betaal[29] en waaraan 'n som geld betaal kan word;[30] en les bes, 'n entiteit wat by die erflater se dood tot stand kom[31] en wat opvolg in die erflater se bates[32] en laste.[33]

Miskien kan aangevoer word dat 'n mens hier maar slegs met onnoukeurige spraakgebruik te doen het en dat die regters in werklikheid die eksekuteur bedoel wanneer hulle die term "boedel" of "estate" gebruik. Hoewel toegegee moet word dat 'n mens soms in ons regspraak wel die verskynsel vind dat die begrippe "eksekuteur" en "boedel" met mekaar vereenselwig word[34] – miskien as gevolg van die onsekerheid oor die antwoord op die vraag wie of wat in werklikheid die universele opvolger van 'n oorledene is – bestaan daar ook verskeie gewysdes waarin die uitdrukking "boedel" nie na die eksekuteur kan verwys nie, byvoorbeeld in gevalle waar van "die boedel" as 'n bestaande regsubjek melding gemaak word hoewel die eksekuteursamp vakant is,[35] of waar dit uit die sins-

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27 Vgl bv i v m die verteenwoordiging van die "boedel" deur 'n kurator *Ex parte McEwan: In re Estate Williams* 1930 WLD 325: Na die dood van 'n verbandhouer is 'n kurator deur die hof aangestel en met sekere bevoegdhede beklee, o a "to represent the estate of Williams in connection with Lyne's estate, to receive payments from the estate of Lyne, and . . . to purchase the mortgaged property on behalf of the estate of Williams . . . " (326). I v m die verteenwoordiging van 'n "boedel" deur die eksekuteur, vgl bv *Ex parte Battenhausen* 1936 CPD 94 99: "It was no normal function of executors to purchase landed property on behalf of the estate when the will . . . gives them no power to do so."

28 Vgl bv *Dowdle's Estate v Dowdle* 1947 3 SA 340 (T) 348: "The movable assets are now in the possession of the estate . . ."

29 Vgl bv *Grobbelaar v Grobbelaar* 1959 4 SA 719 (A) 725: "Die koste in beide Howe moet deur die boedel betaal word."

30 Vgl bv *CIR v Estate Hersov* 1952 4 SA 559 (A) 564: "The estate is only the payee of what the deceased has earned . . . "

31 In *Fuller's Estate v Fuller* 1949 3 SA 570 (N) 575 het die hof verklaar dat indien sekere testamentêre bevoordeeldes, wie se regsposisie in geskil was, nie 'n "vested interest" by die erflater se dood verkry het nie, "no doubt each would have a contingent interest but *their estates would have no interest whatever, for death would bring a dead heir's estate into existence* and would at the same time deprive the dead heir and his estate of any interest in the residue" (ek beklemtoon). Die gedagtegang is klaarblyklik dat geen reg op die oorlede erfgenaam se regsopvolger (sy "boedel") sou oorgaan nie, aangesien die regsopvolger eers by die erfgenaam se dood tot stand sou kom, terwyl die erfgenaam se voorwaardelike reg juis deur sy dood beëindig sou word.

32 Vgl bv *Estate Leathern v Edwards* 1915 NPD 404 416: "[T]he vested right of Harry and Thomas Edwards, who predeceased the period of distribution, passed to their estates."

33 Vgl *Lentz v Schroder's Estate* 1955 1 SA 366 (OD) 367 *per* Jennett R: "[T]he purchaser's rights and obligations . . . passed on his death to his successor." Uit die res van die uitspraak blyk dat Jennett R die "boedel" as die opvolger in die erflater se bates en laste beskou het (vgl bv die sinsnede "the obligation transmitted to it by the purchaser's death" (368); die onpersoonlike voornaamwoord "it" verwys na die "estate").

34 Vgl bv *Ex parte Pierce* 1950 3 SA 628 (O) 367: "Where these rights are still *held by the estate* of the late John Sporle Pierce under some title deed, then these rights should be conveyed *from the executors* of such estate to the beneficiaries and any subsequent or simultaneous transfer of property *from the said estate* to a particular beneficiary . . . will then have to be made subject to such aforementioned notarial deed."

35 Vgl bv *Ex parte McEwan: In re Estate Williams* 1930 WLD 325; *Ex parte Moffett* 1930 OPD 156; *In re Scallan's Estate* 1954 3 SA 282 (K) (in lg gewysde is 'n *curator ad litem* aangestel "to represent in these proceedings the estates of those deceased intestate heirs of the children of the testator and testatrix in which there are no executors or no surviving executors . . . " (286)).

verband blyk dat die begrippe "boedel" en "eksekuteur" naas mekaar staan.[36]

Ook sou miskien aangevoer kan word dat ons howe bedoel om met die onderhawige term na die oorledene te verwys. Uit die omstandigheid dat die "boedel" of "estate", soos hierbo aangetoon is, voorgestel word as iets wat by die erflater se dood tot stand kom en wat in die erflater se bates en laste opvolg, blyk egter dat die betrokke term nie gebruik word om die oorledene aan te dui nie.

Dit blyk uit voorgaande dat daar in ons regspraak 'n algemene spraakgebruik bestaan om een of ander entiteit wat klaarblyklik nie 'n lewende of oorlede mens is nie en wat "boedel" of "estate" genoem word, as die universele opvolger van 'n oorledene aan te dui. Indien uitgegaan word van die standpunt dat elke regsubjek wat nie 'n mens is nie, 'n regspersoon is,[37] moet tot die slotsom gekom word dat ons howe – al is dit soms onbewustelik en slegs by wyse van spraakgebruik – 'n *regspersoon* as die universele opvolger van die oorledene erken. So 'n erkenning moet allermins geringgeskat word, *want dit is gebaseer op die eise van die praktyk: die ware regstoestand in verband met bestorwe boedels dring homself na vore en vind weerklank in die spraakgebruik.*

In verband met die erkenning van die "boedel" of "estate" as 'n regspersoon, verdien die appèlhofuitspraak in *Lockhat's Estate v North British and Mercantile Insurance Co Ltd*[38] besondere vermelding aangesien dit hier nie slegs om spraakgebruik gegaan het nie. 'n Mens kan naamlik uit die appèlhof se redenasie aflei dat die hof vir doeleindes van die beslegting van die geskil òf 'n "boedel" as 'n regspersoon beskou het, òf minstens rekening gehou het met die moontlikheid dat 'n "boedel" 'n regspersoon is.

Die feite was kortliks soos volg: A is oorlede kort nadat hy op nalatige wyse deur die bestuurder van 'n motor, ene Naude, raakgery is. Die eksekuteurs van A se boedel het hierop 'n eis teen die versekeraar van die motor ingevolge die Motorvoertuigassuransiewet 1942 ingestel. Die skade wat volgens die eksekuteurs deur die "boedel" gely sou gewees het, sou bestaan het uit die verlies van inkomste wat die oorledene gedurende sy lewe sou verdien het as hy nie gesterf het nie.

Appèlregter Ramsbottom, wat die eenparige uitspraak van die hof gelewer het, verklaar die volgende ten aansien van die argumente van die eksekuteurs se advokaat:[39]

> "He advanced alternative contentions. His first contention was that the estate of Lockhat is a *persona* in law and is a person which has suffered loss as a result of the death of the deceased which was caused by Naude. He contended that the estate, as a person, would at common law have been entitled to claim damages from Naude, and therefore the executors can make the same claim against the respondent in accordance with the provisions of sec 11(1)(b) of the Act."

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36 Vgl *Estate Hughes v Fouché* 1930 TPD 41 42–43: "The usual way in which an estate sues or is sued is through the executors . . . "; *Henderson v Bartlett* 1950 3 SA 109 (W) 116: "[T]he estate can only act through the executor and so while the executor is in charge of it, it can only do what he can do."

37 Vgl *Group Areas Development Board v Hurley* 1961 1 SA 123 (A) 130 *per* Steyn HR: "In our law a person is either an individual or a juristic person."

38 1959 3 SA 295 (A).

39 302.

Dit spreek vanself dat indien die hof nie bereid was om 'n "boedel" as 'n regspersoon te beskou of om rekening te hou met die moontlikheid dat 'n "boedel" 'n regspersoon is nie, die voor-die-hand-liggende antwoord op die gemelde argument die volgende sou gewees het: die "boedel" is nie 'n "derde party" kragtens die Motorvoertuigassuransiewet 1942 nie, aangesien dit nie iets met regspersoonlikheid is nie. Die hof redeneer egter heeltemal anders:[40]

> "The first contention is, I think, based on untenable grounds. Neither the appellants, as executors of the deceased estate, nor that estate, are in the position of a third party who was in existence at the date of the accident or of the death. The estate which the executors have been appointed to administer came into existence after the death of the deceased and, except in respect of certain matters to which I shall refer later, it is difficult to see how it could suffer loss or damage as the result of the death or bodily injury of the deceased."

Daar sal opgemerk word dat die hof nie die argument dat die "boedel" 'n "derde party" kragtens die Motorvoertuigassuransiewet 1942 sou wees, met die teenargument dat 'n "boedel" geen regspersoonlikheid het, beantwoord het nie; inteendeel, dit wil voorkom of die hof die "boedel" se regspersoonlikheid juis by implikasie erkén het deur te beweer dat die "boedel" na die erflater se dood tot stand kom en dat dit dus moeilik is om in te sien hoe die "boedel" juridies relevante skade kon gely het as gevolg van die dood of besering van die oorledene. Die agterliggende gedagte is skynbaar dat 'n "boedel" 'n regsubjek met 'n vermoë is wat dus wel skade kan ly,[41] maar dat die "boedel" in die geval voor die hof nie juridies relevante skade gely het nie omdat dit nie tydens die ongeval of die oorledene se dood bestaan het nie.

Aan die ander kant kan die aangehaalde *dictum* vanweë die omstandigheid dat verklaar word *dat nòg die eksekuteurs nòg die "boedel"* die posisie beklee van 'n derde party wat ten tyde van die ongeval of die dood van die oorledene bestaan het, ook so geïnterpreteer word dat die hof onseker was wie van die eksekuteur of die "boedel" die universele opvolger van die oorledene is en dat die hof eintlik wou sê: "Wie van die eksekuteur of die boedel ook al die universele opvolger van die oorledene mag wees: geeneen van hulle beklee die posisie van 'n derde party nie." Dit is egter opvallend dat in die sin wat volg op die stelling dat nòg die eksekuteurs nòg die "boedel" die posisie van 'n "derde party" beklee, nie weer van die eksekuteurs melding gemaak word nie maar dat slegs verduidelik word waarom die "boedel" nie (juridies relevante) skade gely het nie: omdat dit eers ná die erflater se dood tot stand gekom het. Dit wil dus voorkom of die hof in werklikheid die "boedel" as die oorledene se universele opvolger beskou het en na die eksekuteurs slegs *ex abundante cautela* as moontlike universele opvolgers van die oorledene verwys het. Daar moet egter ook daarop gewys word dat hoewel die stelling dat nòg die eksekuteurs nòg die "boedel" die posisie van 'n derde party beklee, daarop dui dat die hof nie die uitdrukkings "eksekuteurs" en "boedel" as sinonieme beskou het nie, beide die terme "boedel" en "eksekuteurs" elders in die uitspraak gebesig is om die universele opvolger van die oorledene aan te dui, terwyl die eksekuteur ook voorgestel word as

40 *ibid.*

41 Vgl ook die woorde "except in respect of certain matters to which I shall refer later" wat in die onderhawige *dictum* voorkom en wat die duidelike implikasie bevat dat 'n "boedel" iets is wat skade kan ly. (Die verwysing is na begrafniskoste – vgl 304.)

iemand wat 'n eis namens (of ten behoewe van) die "boedel" kan hê.[42] 'n Mens kan dus nie met sekerheid sê wie of wat die hof as die universele opvolger van die oorledene beskou het nie. Hoe dit ook al sy, deur te verklaar dat nòg die eksekuteurs nòg die "boedel" die posisie van 'n derde party beklee, het die hof ongetwyfeld rekening gehou met die moontlikheid dat 'n "boedel" 'n regspersoon is.[43]

Voorts moet aandag geskenk word aan die vraag in hoeverre ons howe reeds die standpunt ingeneem het dat 'n bestorwe boedel *nie* 'n regspersoon as subjek het nie.

In die eerste plek bestaan daar 'n reeks hofuitsprake met die strekking dat die eksekuteur die universele opvolger van die oorledene sou wees en waarin dus by implikasie die standpunt ingeneem is dat 'n oorledene se nalatenskap nie op 'n regspersoon oorgaan nie.[44] Soos egter reeds in 'n vorige artikel[45] aangetoon is en verder aan uit hierdie artikel sal blyk, speel die eksekuteur in werklikheid nie hierdie rol nie. Die teorie dat die eksekuteur die universele opvolger van die oorledene is, is 'n valse verklaring vir die regswerklikheid.

In die tweede plek bestaan daar verskeie gewysdes waarvolgens die erfgenaam òf 'n universele opvolger van die oorledene òf 'n *ipso jure*-opvolger in die boedelbates is.[46] Die erfgenaam beklee egter tans nòg die een nòg die ander regsposisie en gevolglik is gemelde gewysdes nie meer gesaghebbend nie.[47]

Ten slotte bestaan daar enkele gewysdes waarin uitdruklik beweer is dat 'n "boedel" nie 'n regspersoon is nie. Die volgende gewysdes word in hierdie verband bespreek:

a *Haarhoff's Executor v De Wet's Executor* (1939)[48] Die vraag wat beantwoord moes word, was of slegs die eksekuteur van die boedel van die eerssterwende van twee gades wat in gemeenskap van goedere getroud was, vir namptissement aangespreek kon word ten opsigte van 'n boedelverbandskuld wat met

42 Vgl: "[A] right which had vested in the deceased before his death and which on his death, vested in his estate" (304); "and nothing more could pass to his executors" (306); en "the executor has no claim on behalf of the estate to recover his value as the earner of money" (304). Hierdie onnoukeurige taalgebruik word klaarblyklik deur die onsekerheid oor wie of wat die universele opvolger van 'n oorledene is, veroorsaak.

43 Die "boedel", wat volgens die aangehaalde *dictum* na die erflater se dood ontstaan, bestaan op die oog af uit bates en laste, want die eksekuteurs is (volgens die onderhawige *dictum*) aangestel om dit te beredder. Oënskynlik wou die appèlhof te kenne gee dat die entiteit wat moontlik regspersoonlikheid het, uit 'n eenheid van bates en laste bestaan. Ek kom hieronder terug op die betekenis van die term "boedel" of "estate" wanneer dit verwys na iets wat die draer van regte en verpligtinge is.

44 Vgl bv *Fischer v Liquidators of the Union Bank* (1890) 8 SC 46 (by implikasie); *Liquidators of the Union Bank v Watson's Executors* (1891) 8 SC 300; *Ex parte Du Toit* 1911 CPD 713; *Krige v Scoble* 1912 TPD 814; *White v Landsberg's Executors* 1918 CPD 211; *Ex parte Grobler* 1924 OPD 65; *Van der Westhuizen v Van der Westhuizen* 1929 TPD 603; *Estate Bazley v Estate Arnott* 1931 NPD 481; *De Wet v Attie Badenhorst (Edms) Bpk* 1963 3 SA 117 (T); *Du Toit v Vermeulen* 1972 3 SA 848 (A); *S v Reyneke* 1972 4 SA 366 (T); *Barker v Chadwick* 1974 1 SA 461 (D); *Ex parte Puppli* 1975 3 SA 461 (D); *Segal v Segal* 1976 2 SA 531 (K); *Nyati v Minister of Bantu Administration* 1978 3 SA 224 (OK); *SA General Electric Co (Pty) Ltd v Sharfman* 1981 4 SA 592 (W).

45 Sien 1989 *THRHR* 184 e v.

46 Vgl *Universele opvolging* hfst 7 par 2 4 6; hfst 8 par 3; en hfst 9 par 3.

47 Vgl *Universele opvolging* hfst 11.

48 1939 CPD 271.

toestemming van die hof op aansoek van sowel die eksekuteur van die eerssterwende gade se boedel as die eksekuteur van die laassterwende gade se boedel aangegaan is, dan wel of die gemelde eksekuteurs gesamentlik aangespreek moes word. Die hof het bevind dat die eksekuteur van die eerssterwende gade wel die nodige *locus standi* gehad het. In die loop van die uitspraak het regter Davis die volgende verklaar:[49]

> "Now that payment is sought to be obtained upon this bond . . . it is obviously the joint estate which must be sued. As Mr. *Van Zyl* . . . has said, it is clear from the case of *Estate Hughes v Fouche* (1930, T.P.D. 41) that an estate is not a *persona* which can be sued; the executor or executors in the estate are the proper persons to be sued. The whole question then seems to turn upon whether a summons directed . . . against the executor of the previous deceased husband's estate, and describing him as administering the joint estate, is a summons properly issued against the joint estate. In my opinion it is."

In die eerste plek kan daar nie met die stelling saamgestem word nie dat dit uit *Estate Hughes v Fouché* blyk dat 'n "boedel" nie 'n regspersoon is nie; trouens, hierdie gewysde skep juis die teenoorgestelde indruk.[50] Die bewering dat 'n "boedel" nie 'n regspersoon is nie, is dus nie behoorlik gestaaf nie. Verder word daarop gewys dat die omstandigheid dat "the executor or executors in the estate are the proper persons to be sued", ook nie as stawing vir die stelling dat "an estate is not a *persona*" kan dien nie. 'n Regsubjek hoef immers nie noodwendig bevoeg te wees om in eie naam as eiser en verweerder op te tree nie, want dit kan ook in naam van 'n verteenwoordiger of orgaan *qualitate qua* ageer. So ageer 'n geestesongestelde nie in eie naam nie maar in naam van sy kurator *qualitate qua*. Desnietemin is die ware gedingvoerende party die geestesongestelde.[51]

In die tweede plek kom dit vreemd voor dat verklaar word dat 'n "boedel" nie 'n *persona* is nie, terwyl die hof origens in die aangehaalde *dictum* die term "joint estate" op so 'n wyse gebruik dat die indruk gewek word dat 'n "gemeenskaplike boedel" wel 'n regspersoon is.[52] Trouens, die tweede sin van die aangehaalde *dictum* onder bespreking pas glad nie by die res in nie. Die volgende sin sou naamlik veel beter ingepas het: "An estate is a legal person, but it must sue or be sued through the executor or executors." Die uitspraak sou dus 'n logiese eenheid uitgemaak het indien die hof sy ondersoek na die vraag of die

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49 273.

50 In 'n aksie vir namptissement op grond van 'n verbandskuld is die eiser in die dagvaarding beskryf as "the estate of Meshach Harry Hughes". Die hof verklaar (42–43): "The usual way in which *an estate sues or is sued is through the executors*, and the summons and pleadings allege who the executors are, what kinds of executors they are, and when letters of administration were issued to them . . . The proper plaintiff, in an action, is not the Estate of Meshach Hughes; but either an executor . . . or, if the estate is being administered in terms of the will by an administrator . . . then that . . . administrator must proceed against the defendant. At present the estate of *Meshach Harry Hughes is not properly before the Court*." Die gedeeltes van die *dictum* wat deur my beklemtoon word, skep onteenseglik die indruk dat die hof van mening was dat 'n "boedel" 'n regspersoon is wat slegs *deur* bepaalde organe kan dagvaar. Omdat die "boedel" in die betrokke geval nie deur die juiste orgaan gedagvaar het nie, was dit egter "not properly before the Court". In die lig hiervan beteken die bewering dat "the proper plaintiff . . . is not the Estate of Meshach Hughes; but either an executor . . . or . . . administrator . . . " klaarblyklik nie dat die "boedel" nie die ware gedingvoerende party is nie maar slegs dat die aksie nie *in naam* van die "boedel" ingestel kan word nie; dat dit *in naam* van die eksekuteur (of administrateur) ingestel moet word.

51 Vgl vn 14 hierbo.

52 Vgl: "[A] summons properly issued against the joint estate"; asook (274): "when provisional sentence is sought against the joint estate, which is the debtor under the bond".

juiste persoon gedagvaar is, op die standpunt gebaseer het dat 'n "boedel" 'n regspersoon is wat deur die eksekuteur of eksekuteurs ageer.

b *Commissioner for Inland Revenue v Emary* (1961)[53] Die appèlhof moes die vraag beantwoord of die Kommissaris van Binnelandse Inkomste bevoeg was om ingevolge artikel 74 van die Inkomstebelastingwet 31 van 1941 die eksekuteur van 'n boedel "tot agent" van daardie boedel te verklaar met die oog op die betaling van inkomstebelasting ten opsigte van boedelinkomste. Hierdie vraag sou bevestigend beantwoord kon word indien die betrokke boedel 'n "persoon" was aangesien die kommissaris ingevolge die gemelde artikel bevoeg was "om 'n persoon tot agent van 'n ander persoon [te] verklaar". Die hof, *per* hoofregter Steyn, het die betrokke vraag egter ontkennend beantwoord.

Daar is bevind dat 'n bestorwe boedel nie ingevolge die voorskrifte van die Interpretasiewet 33 van 1957 'n "persoon" vir doeleindes van die Inkomstebelastingwet is nie. Vervolgens word die vraag bespreek of 'n bestorwe boedel ingevolge ons gemenereg 'n regspersoon is. In hierdie verband word onder meer die volgende verklaar:[54]

> "A deceased estate is an aggregate of assets and liabilities. If it is a legal *persona* at all, it would belong to this less common class of juristic persons."

Die hof verwys hier na dit wat reeds tevore in die uitspraak gesê is, naamlik dat

> "[t]he concept of a legal *persona* existing of or based upon things and without membership of any natural persons, is not unknown in our common law or statute law".[55]

Ten opsigte van hierdie soort regspersoon verklaar die hof dat "[a] foundation or 'stigting' would be such a legal *persona*" en dat "[a] case more nearly in point would be an *hereditas jacens*".[56]

Die hof kom egter tot die gevolgtrekking dat 'n bestorwe boedel nie 'n regspersoon is nie, en wel op grond van 'n redenasie wat innerlik weersprekend is. In die eerste plek word die volgende gesê:[57]

> "Whatever the position may in particular circumstances be before the appointment of an executor, there can be little room for the legal personality of a deceased estate once, as is the case here, an executor has been appointed. In our common law authorities I have, except for the possible case of *hereditas jacens*, found no suggestion of any rights or obligations which would be vested in a deceased estate as such."

Direk hierna, in dieselfde paragraaf, word daarop gewys dat 'n bestorwe boedel in die Romeins-Hollandse reg na aanvaarding deur die bevoordeeldes aan hulle behoort het, en dat, in die geval waar 'n eksekuteur aangestel is, die eksekuteursaanstelling

> "did not have the effect of divesting the beneficiaries of their rights in respect of the estate, except, presumably, to the extent necessary to enable the executor to carry out his functions".[58]

Die gevolgtrekking word dan gemaak dat die aanstelling van 'n eksekuteur nie 'n verandering van so 'n aard teweeggebring het nie "as to present any occasion for calling into existence another *persona* in the form of the deceased estate".[59]

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53 1961 2 SA 621 (A).
54 624.
55 623–624.
56 624.
57 *Ibid.*
58 *Ibid.*
59 625.

In die volgende paragraaf word verklaar:[60]

> "In our present day law the position is no different. The totality of the rights, obligations and powers vested in the executor and the heirs and other beneficiaries is such that it is difficult to conceive of any *residuum* left in the estate which could be said to require or to presuppose legal personality in the estate as holder of the *residuum* or as the real recipient of income in the estate. The general trend of our decisions is against it."

Hierna word na 'n aantal beslissings verwys, waarvan sommige tot dié groep behoort waarin die standpunt ingeneem is dat 'n bestorwe boedel aan die eksekuteur behoort.[61] Direk hierna word verklaar:[62]

> "They leave no greater room for the legal personality of a deceased estate administered by an executor, than our common law authorities."

Die aangehaalde sin wat met die woorde begin "Whatever the position . . . " impliseer onteenseglik *dat die eksekuteur, en hy alleen, na sy aanstelling die subjek van die bestorwe boedel is.* As dit nie die bedoeling was nie, is dit onverstaanbaar waarom daar na die eksekuteursaanstelling "little room for the legal personality of a deceased estate" sou wees. Hierdie implikasie word versterk as in ag geneem word dat in sommige van die uitsprake waarna die appèlhof met goedkeuring verwys, die standpunt ingeneem is dat die eksekuteur in die bestorwe boedel opvolg. In verband met die beslissings waarna die appèlhof verwys, word – soos aangetoon – verklaar:

> "They leave no greater room for the legal personality of a deceased estate *administered by an executor*, than our common law authorities."[63]

Daar word klaarblyklik geïmpliseer dat hierdie gewysdes geen ruimte laat vir die regspersoonlikheid van 'n boedel wat deur 'n eksekuteur beredder word nie, *omdat die eksekuteur die subjek van die boedel is.*

Hierteenoor moet die aangehaalde sin wat begin met die woorde "The totality of rights, obligations and powers . . . " in oënskou geneem word. Hierdie sin hou in *dat die bevoordeeldes saam met die eksekuteur die subjekte van 'n bestorwe boedel is* en dat daar daarom nie 'n *residuum* bestaan wat aan die boedel, as regspersoon, kan behoort nie. As die appèlhof dit nie so bedoel het nie en die bevoordeeldes as blote skuldeisers ten opsigte van hulle bevoordelings beskou het, bestaan daar hoegenaamd geen rede nie waarom die aanwesigheid van die bevoordeeldes se *vorderingsregte* sou verhoed dat daar 'n *residuum* bestaan wat aan 'n regspersoon kan behoort. Die onderhawige sin kan myns insiens net die volgende beteken: alle regte, verpligtinge en bevoegdhede waaruit 'n bestorwe boedel bestaan, behoort *alreeds* aan die eksekuteur, erfgename en bevoordeeldes en dus is daar geen *residuum* wat aan 'n regspersoon kan behoort nie.

Teen hierdie agtergrond moet op die volgende gewys word:

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60 *Ibid.*

61 *Fischer v Liquidators of the Union Bank* 8 SC (dié uitspraak bevat 'n implikasie dat 'n bestorwe boedel aan die eksekuteur behoort); *Krige v Scoble* 1912 TPD 814; *Van der Westhuizen v Van der Westhuizen* 1929 TPD 603. Daar is ook verwys na *Haarhoff's Executor v De Wet's Executor* 1939 CPD 271 wat hierbo bespreek is, asook na drie gewysdes waarin die standpunt ingeneem is dat bevoordeeldes nie *ipso jure* in die boedelbates opvolg nie, nl *Estate Smith v Estate Follett* 1942 AD 364; *CIR v Estate Crewe* 1943 AD 656; *Greenberg v Estate Greenberg* 1955 3 SA 361 (A). (In lg vier uitsprake is nie bevind dat 'n bestorwe boedel aan die eksekuteur behoort nie.)

62 625.

63 Ek beklemtoon.

i Die hof se bevinding dat die bates en laste waaruit 'n bestorwe boedel bestaan, nie 'n regspersoon as subjek het nie, berus op 'n *ratio decidendi* wat innerlik weersprekend is. Hierdie bevinding kan dus nie op oortuigingskrag aanspraak maak nie.

ii Die hof was die mening toegedaan dat indien 'n bestorwe boedel 'n regspersoon was, dit 'n regspersoon "consisting of or based upon things", soos 'n stigting of 'n *hereditas jacens*, sou gewees het. Daar moet myns insiens aanvaar word dat met "things" bates en laste bedoel word, soos blyk uit die hof se stelling dat 'n bestorwe boedel "an aggregate of assets and liabilities" is, asook uit die hof se verwysing na 'n *hereditas jacens* wat immers 'n eenheid van bates en laste was. In die volgende paragraaf sal egter aangetoon word dat 'n eenheid van bates en laste ('n vermoë) nie 'n regspersoon kan wees nie.

Ten slotte kan die vraag gestel word of hierdie uitspraak die uitwerking kon gehad het dat die reg met betrekking tot universele opvolging in die erfreg verander is. Moet 'n mens, met ander woorde, aanvaar dat indien 'n regspersoon voor dié uitspraak die universele opvolger van 'n oorledene was, so 'n regstoestand juis deur die uitspraak verander is? Indien vir doeleindes van die beantwoording van hierdie vraag aangeneem word dat 'n hof deur 'n enkele uitspraak, en wel deur die werking van die presedentestelsel, bevoeg is om 'n reg te vorm,[64] is die antwoord hierop na my mening ontkennend. Hoewel die appèlhof beslis het dat 'n bestorwe boedel na die eksekuteursaanstelling[65] nie 'n regspersoon as subjek het nie, *het dit nie duidelik beslis wie of wat wél die subjek daarvan is nie*. Die gevolg is dat die veronderstelde regsreël dat 'n regspersoon in 'n oorledene se nalatenskap opvolg, nie deur 'n regsreël wat 'n ander subjek met daardie posisie beklee, vervang is nie en dat die regstoestand wat voor die uitspraak bestaan het, ook daarna voortgeduur het.[66]

c *Yoonuce v Pillay* (1964)[67] In hierdie gewysde het die Natalse hof *per* regter Henning bevind dat dit onreëlmatig vir die Durbanse Lisensie-appèlraad was om die uitreiking van 'n sertifikaat te magtig waardeur 'n handelslisensie aan 'n "boedel" toegesê word. Omdat die aansoeker nie benadeel was nie, het die hof egter geweier om die besluit van die gemelde lisensie-appèlraad waardeur die uitreiking van die genoemde sertifikaat gemagtig is asook die sertifikaat self en die lisensie wat ingevolge die sertifikaat uitgereik is, ter syde te stel. Die hof het sy bevinding met betrekking tot die vermelde onreëlmatigheid onder andere[68]

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64 Ek is die mening toegedaan dat 'n hof wél ingevolge die presedentesisteem deur 'n enkele uitspraak reg kan vorm (vgl Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 309 e v).

65 Die appèlhof het die vraag of 'n bestorwe boedel voor die eksekuteursaanstelling aan 'n regspersoon behoort, onbeslis gelaat. Vgl ook *Yoonuce v Pillay* 1964 2 SA 286 (D).

66 Net so sou 'n "wet" wat enersyds bepaal dat die verskillende provinsies bly voortbestaan, maar wat andersyds voorskryf dat die Vaalrivier nie meer die grens tussen die Transvaal en die Oranje-Vrystaat sal wees nie, sonder dat voorgeskryf word waar die nuwe grens sal wees, nie die bestaande regstoestand verander nie. Daar kan immers nie gevolg aan so 'n "wet" gegee word nie.

67 1964 2 SA 286 (D).

68 Vgl ook 289–290 waar die hof die vraag bespreek of 'n bestorwe boedel " 'n persoon" vir doeleindes van die betrokke statutêre voorskrifte is. Die hof het bevind dat dit nie die geval is nie.

daarop gebaseer dat 'n "boedel" – in elk geval na die eksekuteursaanstelling – nie 'n regspersoon is nie, en wel met beroep op die *Emary*-uitspraak.[69]

Hoewel die hof uitdruklik bevind het dat 'n "boedel" na die eksekuteursaanstelling nie 'n regspersoon is nie, is hierdie bevinding nie behoorlik gestaaf nie aangesien dit op die *Emary*-uitspraak steun wat, soos hierbo aangetoon is, self nie behoorlik begrond is nie. Die oorheersende kernvraag, naamlik wie of wat wél die subjek van 'n oorledene se nalatenskap is as dit nie aan 'n regspersoon behoort nie, is nie gestel nie en gevolglik ook nie beantwoord nie.[70]

Dit blyk dus dat hoewel 'n mens die standpunt in ons regspraak aantref dat 'n bestorwe boedel nie op 'n regspersoon oorgaan nie, daardie standpunt nie 'n oortuigende antwoord verstrek op die vraag op welke subjek dit wél oorgaan nie.[71]

Samevattend kan verklaar word dat ons wetgewer en howe al talle male deur die eise van die regsverkeer verplig is om 'n entiteit wat met die term "boedel" of "estate" aangedui word, as die universele opvolger van die oorledene te erken; dat hierdie term nie na die oorledene verwys nie en ook nie in alle gevalle bedoel word om die eksekuteur aan te dui nie; dat die gewysdes waarin bevind is dat 'n bestorwe boedel nie aan 'n regspersoon behoort nie, geensins 'n gevolgtrekking dat 'n bestorwe boedel in werklikheid wél aan 'n regspersoon behoort, in die weg staan nie; en dat 'n mens dus tot die slotsom kom dat die *geheelbeeld van ons wetgewing en regspraak* onteenseglik daarop dui dat die bestaan van 'n regspersoon as die subjek van 'n oorledene se nalatenskap deur ons wetgewer en howe erken word.

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69 Op 289 verklaar die hof met verwysing na die *Emary*-uitspraak: "The question whether at common law a deceased estate, before the appointment of an executor, is a legal entity was thus left open, but the status of a deceased estate which is being administered by an executor was decided. It is unnecessary to decide definitely in this case whether a deceased estate which is not so administered is a legal *persona*. It appears to me the better view that it is not. It cannot for example, as such sue and be sued. Cf. *Estate Hughes v Fouche*, 1930 TPD 41; *Muter and Stone v Spangenberg*, 2 Menz 457." Hierdie argument is onoortuigend. Soos reeds hierbo aangetoon is, hoef 'n regsubjek nie noodwendig bevoeg te wees om in eie naam as eiser en verweerder op te tree nie aangesien dit ook in naam van 'n verteenwoordiger of orgaan, *qualitate qua*, kan ageer.

70 Verdere gewysdes waarin, soos in die *Yoonuce*-uitspraak, onder invloed van die *Emary*-uitspraak die standpunt ingeneem word dat 'n bestorwe boedel (in die sin van 'n eenheid van bates en laste) nie 'n regspersoon is nie, is *CIR v MacNeillie's Estate* 1961 3 SA 833 (A) 840; *Clarkson v Gelb* 1981 1 SA 288 (W) en *SA General Electric Co (Pty) Ltd v Sharfman* 1981 1 SA 592 (W). Aangesien hulle bloot op die *Emary*-uitspraak steun sonder om *nuwe lig* te werp op die vraag wie of wat die universele opvolger van 'n oorledene is, hoef hulle nie in besonderhede bespreek te word nie. Weliswaar word in die *Sharfman*-uitspraak met beroep op *Krige v Scoble* 1912 TPD 814 verklaar dat 'n bestorwe boedel aan die eksekuteur behoort (598), maar ook deur hierdie bewering word geen nuwe insigte i v m die vraag na die universele opvolger van 'n oorledene na vore gebring nie.

71 Vir sover in die *Emary*-, *MacNeillie*-, *Yoonuce*-, *Clarkson*- en *Sharfman*-uitspraak die standpunt ingeneem word dat 'n bestorwe boedel *in die sin van 'n eenheid van bates en laste* nie 'n regspersoon is nie, moet 'n mens daarmee saamstem, want, soos hierna aangetoon sal word, kan regspersoonlikheid nie aan 'n vermoë ('n boedel) verleen word nie. Vir sover egter in hierdie gewysdes te kenne gegee word dat 'n bestorwe boedel hoegenaamd nie op 'n regspersoon oorgaan nie, kan sodanige standpunt nie onderskryf word nie. Soos hierna aangetoon sal word, gaan 'n oorledene se nalatenskap wel op 'n regspersoon oor, maar dié regspersoon bestaan nie uit bates en laste nie.

3 DIE AARD EN STRUKTUUR VAN DIE REGSPERSOON WAT DIE UNIVERSELE OPVOLGER VAN DIE OORLEDENE IS

3 1 Inleiding

Dusver is aangetoon dat die universele opvolger van 'n oorledene in ons huidige reg 'n regspersoon is wat deur ons wetgewer en howe met die term "boedel" of "estate" aangedui word. In verband met hierdie spraakgebruik ontstaan die vraag of die term "boedel" of "estate" in hierdie sinsverband noodwendig 'n eenheid van bates en laste aandui. Die antwoord op hierdie vraag is na my mening ontkennend. In werklikheid het 'n mens hier – soos reeds hierbo vermeld – bloot met 'n gerieflike *benaming* vir die subjek van 'n bestorwe boedel te doen, *sonder dat daardeur noodwendig te kenne gegee word dat hierdie subjek uit 'n eenheid van bates en laste bestaan.*

Die spraakgebruik waarom dit hier gaan, kan by wyse van 'n voorbeeld toegelig word. Wanneer iemand byvoorbeeld sou sê: "Ek skuld R10,00 aan die kafee op die hoek", bedoel die spreker nòg dat die gebou nòg dat die handelsonderneming sy skuldeiser is. Hy bedoel bloot dat hy R10,00 aan *die reghebbende van die kafee, wie of wat dit ook al mag wees*, skuld. Wat hier in die volksmond gebeur – dikwels juis vanweë die onsekerheid oor die antwoord op die vraag wie of wat die subjek van die bepaalde handelsonderneming is – is dat die *subjek* van die handelsonderneming met die *objek* (die handelsonderneming) vir identifikasie-doeleindes vereenselwig word,[72] net soos die eiendomsreg op 'n saak soms met die saak self vereenselwig word.[73] Insgelyks word by die gebruik van die term "boedel" die subjek van die nalatenskap – wie of wat dit ook al mag wees – vir identifikasiedoeleindes met die nalatenskap self vereenselwig.[74] Interessantheidshalwe word daarop gewys dat 'n mens 'n soortgelyke taalverskynsel in die Wet op Prokureurs 53 van 1979 aantref: die woord "fonds" word in verskeie artikels in 'n sinsverband gebruik wat daarop dui dat na 'n entiteit met regspersoonlikheid verwys word,[75] terwyl die werklike subjek van die betrokke fonds kragtens artikel 27(1) 'n liggaam van persone, 'n "beheerraad" is.[76] Met die term "fonds" word dus in werklikheid die *subjek van die fonds* bedoel sonder dat te

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72 Vgl bv *Union Trust Maatskappy (Edms) Bpk v Thirion* 1965 3 SA 648 (GW) waarin die woord "garage" verskeie kere in die sin van 'n regsubjek gebruik is. Op 651–652 word bv verklaar: "Na verdiskontering van die huurkoopkontrak was die posisie dus dat die eiser krediteur van die hoofskuldenaar, en die garage en die verweerder medeborge vir die hoofskuld was." Die hof het na nòg die gebou, nòg die sake-onderneming verwys, maar na die *subjek* van die sake-onderneming.

73 Bv in die sin: "A se plaas val in sy insolvente boedel."

74 Iemand wil bv te kenne gee dat die regsubjek – wie of wat dit ook al mag wees – wat die opvolger in wyle mnr X se nalatenskap is, hom R100 skuld. Gerieflikheidshalwe sê hy: "X se boedel skuld my R100." Vgl ook *Minister of the Interior v Confidence Property Trust (Pty) Ltd* 1956 2 SA 365 (A): die appèlhof moes a 2(4) van Wet 37 van 1919, soos ingevoeg deur a 7 van Wet 35 van 1932 waarin die uitdrukking (volgens die Engelse teks) "on behalf or in the interest of his estate" voorkom, uitlê. Schreiner AR verklaar (375): "The word 'estate' is clearly not used in the sense of the totality of the deceased's property; the reference is to a holding on behalf or in the interest of persons." Die woord "boedel" of "estate" hoef dus nie noodwendig na 'n *vermoë* te verwys nie.

75 Vgl bv a 47(1): "Die fonds is nie aanspreeklik nie . . . "; a 48(1): "Niemand het 'n eis teen die fonds ten opsigte van enige diefstal . . . "; a 49(1) " 'n Aksie word nie sonder verlof van die beheerraad teen die fonds ingestel nie tensy . . . "

76 A 27(1): "Die fonds berus by en word beheer deur 'n beheerraad . . . " (Die woorde "berus by" word in die Engelse teks van die wet weergegee as "shall vest in".)

kenne gegee word dat hierdie subjek uit 'n eenheid van bates en laste bestaan. Die wetgewer skryf immers self voor dat die subjek van die betrokke fonds 'n liggaam van persone is.

Dit blyk uit die voorgaande dat die omstandigheid dat die wetgewer en howe na die universele opvolger van 'n oorledene met die term "boedel" of "estate" verwys, geen aanduiding is dat hulle noodwendig sou bedoel dat 'n oorledene se nalatenskap op 'n regspersoon, *wat uit 'n eenheid van bates en laste bestaan*, oorgaan nie.

Teen hierdie agtergrond kan die vraag gestel word wat die aard en struktuur van die regspersoon is wat die universele opvolger van 'n oorledene uitmaak. Op hierdie vraag sal juriste verskillende antwoorde verstrek, afhangende van die regspersoonsteorie wat hulle aanhang. Dat daar 'n groot verskil van mening onder juriste oor die aard en struktuur van 'n regspersoon bestaan, blyk uit die omstandigheid dat daar gedurende die afgelope een en 'n half eeu nie alleen 'n omvangryke literatuur oor hierdie regsinstelling verskyn het nie, maar ook 'n groot aantal teorieë die lig gesien het. Die belangrikste van hierdie teorieë is die volgende: die fiksie-teorie;[77] die teorie van die subjeklose doelvermoë;[78] die teorie dat diegene wat die genot uit die sogenaamde regspersoon se bates put (die lede van die vereniging, die bevoordeeldes in die geval van die stigting) die ware regsubjekte is;[79] die teorie van die amptelike vermoë van die bestuurder in die geval van die stigting;[80] die teorie van die kollektiewe eiendom;[81] die organiese

77 Die ontwerper van die moderne fiksieteorie was Von Savigny (vgl Von Savigny *System des heutigen römischen Rechts* bd II (1840) par 85; vgl ook Dooyeweerd *Encyclopaedie der rechtswetenschap* bd II (1946) 86 e v (aangehaal as "*Encyclopaedie* II"); Houwing *Subjectief recht rechtssubject rechtspersoon* (1939) 66 e v; Hommes *De samengestelde grondbegrippen der rechtswetenschap* (1976) 159–160; Pienaar *Regsubjektiwiteit en die regspersoon* (1984) 11 e v). Die basiese fout van hierdie teorie is dat van die standpunt uitgegaan word dat *slegs die mens* 'n ware regsubjek kan wees en dat daar dus in die geval van die regspersoon geen werklike regsubjek kan bestaan nie.

78 Die ontwerper hiervan was Brinz (vgl Brinz *Lehrbuch der Pandekten* bd III 2e afd (1888) 453 e v; vgl ook Polano *Rechtspersoonlijkheid van vereenigingen* (1910) 82 e v; Zevenbergen *Formeele encyclopaedie der rechtswetenschap als inleiding tot die rechtswetenschap* (1925) 265–266; Houwing 74; Pienaar 30 e v). Die kernfout van hierdie teorie is dat nie ingesien word dat 'n subjektiewe reg 'n *regsobjek* veronderstel wat regtens bestem is om 'n *regsubjek* tot nut te wees en dat 'n subjektiewe reg dus nie sonder 'n subjek kan bestaan nie. Vgl ook Hommes 162 wat daarop wys dat Brinz se teorie neerkom op die aanvaarding van subjeklose regte en verpligtinge wat "juridiese ondingen en innerlijk tegenstrijdige voorstellingen" is.

79 Die vader van hierdie teorie was Von Jhering (vgl Von Jhering *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* deel III afd I (1954) 355 e v; Houwing 85 e v; Hommes 163 e v; Pienaar 38 e v). Hierdie teorie gaan van die foutiewe uitgangspunt uit dat slegs die mens nut van regsobjekte kan hê en dat dus slegs die mens regtens beskermde belange kan hê.

80 Dié teorie word verdedig deur Hölder *Natürliche und juristische Personen* (1905) 241 en Binder *Das Problem der juristischen Persönlichkeit* (1907) 126 e v. (Vgl ook Polano 86 e v; Houwing 134 e v; Hommes 166 e v.) Die Engelsregtelike opvatting dat 'n bestorwe boedel aan die eksekuteur in sy sg "representative capacity" behoort, vertoon 'n merkwaardige ooreenkoms met Hölder en Binder se teorie. Die kernfout van hierdie teorie is dat nie ingesien word nie dat die bestuurder van 'n stigting deel vorm van 'n bestuursliggaam met regspersoonlikheid. Ek kom hieronder op die struktuur van die stigting terug.

81 Voorstanders van hierdie teorie is o a Molengraaff *Leidraad bij de beoefening van het Nederlandche handelsrecht* deel I (1930) 185–186; Land *Verklaring van het burgerlijk Wetboek* deel I 1e stuk, le dr deur Star Busman (1909) 760 e v; Van Apeldoorn *Inleiding tot de studie van het Nederlandse recht* 17e dr deur Leyten (1972) 161. (Vgl ook Houwing 96; Pienaar 41.) Die voorstanders van hierdie teorie slaag nie daarin om die *eie identiteit* van 'n samelewingsverband raak te sien nie, vandaar dat hulle van mening is dat die lede van die sg regspersoon *gesamentlik* die reghebbendes van die sg regspersoon se bates is.

verbandsteorie (of orgaansteorie);[82] die positivistiese teorie van die sogenaamde juridiese realiteit;[83] die teorie dat 'n stigting 'n "vermoënskompleks" sou wees;[84] en ten slotte die funksionele verbandsteorie.[85]

Van hierdie teorieë openbaar laasgemelde teorie, wat deur Dooyeweerd ontwerp is, na my mening die suiwerste insig in die aard en struktuur van die regspersoon en moet die aard en struktuur van die regspersoon wat die universele opvolger van die oorledene is, in die lig hiervan verklaar word.

Vir doeleindes van hierdie ondersoek is die volgende aspekte van gemelde teorie belangrik: dat 'n regspersoon nie 'n fiksie is nie maar 'n werklike bestaan voer;[86] dat afgesien van die mens slegs in "samelewingsverband" (of slegs "verband" genoem) vir die verlening van regsubjektiwiteit vatbaar is,[87] dit wil sê, 'n menslike gemeenskap wat "histories gefundeerd" is,[88] waarvan die samestellende dele ("lede" in die wye sin van die woord)[89] kan wissel sonder dat die identiteit daarvan tot niet gaan en wat 'n interne gesagstruktuur het;[90] en dat 'n verband nie slegs uit 'n eenheid van lede (in die eng sin van die woord)[91] en

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82 Die opvatting (in die woorde van Von Gierke *Deutsches Privatrecht* bd I (1895) 466) "dass die menschlichen Verbände wirklich existirende Wesenheiten und somit auch für das Recht reale Personen seien", is vir die eerste keer deur Beseler gehuldig en deur Von Gierke verder uitgebou. (Raadpleeg Von Gierke par 59 i v m hierdie teorie, asook Dooyeweerd 94 e v; Hommes 167 e v; Pienaar 20 e v.) Dooyeweerd *Encyclopaedie* II 96 kritiseer hierdie teorie op grond daarvan dat die menslike samelewingsverbande tot "geestelijke, Überpersonen" "gesubstansialiseer" word, dat hierdie "Überpersonen" "met de individueele menschelijke personen op één lijn worden gesteld" en dat die lewe en wil van hierdie "Überpersonen" geheel en al na analogie van die "volle menschelijke persoonlijkheid gevat" word. Volgens Dooyeweerd was Von Gierke se basiese fout dus om die samelewingsverband en die mens aan mekaar gelyk te stel terwyl hulle wesensverskillende dinge is.

83 Hierdie teorie word o m deur Zevenbergen a w 267 en Suijling *Inleiding tot het burgerlijk recht* I *Algemene beginselen* (1948) 143–144 verdedig. (Vgl ook Dooyeweerd 98–99; Pienaar 45 e v.) Die voorstanders van hierdie teorie slaag nie daarin om die *eie identiteit* van 'n samelewingsverband raak te sien nie, vandaar dat 'n regspersoon volgens hulle nie een of ander ding met regspersoonlikheid is nie maar 'n *gedagtekonstruksie* wat slegs vir regsdoeleindes bestaan.

84 I v m skrywers wat hierdie teorie aanhang, raadpleeg Von Gierke 647 vn 15 en Joubert *Die stigting in die Romeins-Hollandse reg en die Suid-Afrikaanse reg* (1951) 17 vn 35. Joubert self hang hierdie teorie aan: vgl a w 13. Vgl ook *CIR v Emary* 1961 2 SA 621 (A) 623–624. (Die *Emary*-uitspraak is hierbo bespreek.) Ek kom op hierdie teorie terug.

85 Dooyeweerd *Encyclopaedie* II 100 e v; dieselfde skrywer "Grondproblemen in de leer der rechtspersoonlijkheid" (1937) *Themis* 199 200 e v; 367 e v (hierna aangehaal as *Rechtspersoonlijkheid*). Vgl verder ook i v m hierdie teorie Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 391 e v; Pienaar 52 e v. Hieronder word op enkele aspekte van hierdie teorie teruggekom.

86 Vgl *Rechtspersoonlijkheid* 199 209 239 370–371; *Encyclopaedie* II 102.

87 *Rechtspersoonlijkheid* 120 383.

88 Vgl Dooyeweerd *Verkenningen in die wijsbegeerte, de sosiologie en de rechtsgeschiedenis* (1967) 11 (hierna aangehaal as *Verkenningen*). Hiermee bedoel Dooyeweerd dat die betrokke gemeenskap planmatig gevorm is, in teenstelling met die sg natuurlike gemeenskappe (bv die kognatiese familie) wat bioties gefundeerd is.

89 Hiermee word bedoel sowel lede in die eng sin van die woord (vgl vn 91) as persone wat bestuursfunksies vervul.

90 Vgl Dooyeweerd *Verkenningen* 111; *De wijsbegeerte der wetsidee* III (1935) 131; *Rechtspersoonlijkheid* 396. In die geval van die vrywillige vereniging stel ons howe ook die vereiste vir die verlening van regspersoonlikheid dat die vereniging se identiteit behoue bly ondanks die wisseling van lede. Vgl bv *Morrison v Standard Building Society* 1932 AD 229; *Moloi v St John Apostolic Faith Mission* 1954 3 SA 940 (T) 942.

91 Met "lede" word hier daardie persone bedoel wat deel van die betrokke samelewingsverband of "organisasie" vorm, maar wat (behalwe d m v die ledevergadering) nie as bestuursorgane daarvan fungeer nie.

bestuurders kan bestaan nie *maar ook uit 'n eenheid van bestuurders wat mekaar opvolg.*[92] Dit kom daarop neer dat nie slegs 'n "organisasie" van persone, waarin lede én bestuurders aanwesig is, byvoorbeeld 'n handelsmaatskappy of 'n sportvereniging, met regspersoonlikheid beklee kan word nie, maar ook 'n bestuursliggaam wat slegs uit persone met bestuursfunksies bestaan.

In ooreenstemming met die voorgaande verwerp Dooyeweerd die bogemelde opvatting dat 'n stigting uit 'n vermoënskompleks met regspersoonlikheid bestaan en leer dat die stigting "het continu subjectief verband van stichtings*organen*[93] in correlatie tot het afgesonderd vermogen" is.[94] Selfs in die geval waar daar slegs een bestuurder op 'n keer aanwesig is, bestaan daar 'n verband van bestuurders met 'n eie identiteit, aangesien dit vir die bestaan van 'n verband nie nodig is dat meerdere "skakels" in die verband gelyktydig aanwesig hoef te wees nie: *dit is voldoende as hulle in opeenvolging aanwesig is.*[95] Hierdie standpunt dat 'n reeks bestuurders 'n eenheid met 'n eie identiteit – 'n bestuursliggaam – vorm, selfs al is daar net een bestuurder op 'n keer aanwesig, kan aan die hand van die maatskappy met een aandeelhouer toegelig word.[96] So 'n maatskappy vorm, net soos 'n maatskappy met meerdere aandeelhouers, 'n eenheid of verband van opeenvolgende aandeelhouers en het derhalwe net so 'n werklike identiteit as die maatskappy met meerdere aandeelhouers. Daar bestaan derhalwe geen rede waarom 'n maatskappy sy regspersoonlikheid moet verloor wanneer dit net een aandeelhouer het nie.

Die insig dat die regspersoonlikheid van 'n stigting nie in 'n vermoënskompleks setel nie, *maar in 'n bestuursliggaam*, is besonder waardevol vir die beantwoording van die vraag na die aard en struktuur van die regspersoon wat die universele opvolger van die oorledene is, aangesien die aard en struktuur van die regspersoon wat die subjek van 'n bestorwe boedel is, klaarblyklik 'n groter ooreenkoms vertoon met dié van die stigting as met dié van die vereniging-regspersoon. In die geval van sowel die stigting as die "boedel" is daar bestuurders aanwesig maar ontbreek lede in die eng sin van die woord,[97] terwyl dit juis die kenmerk van die vereniging-regspersoon is dat daar naas bestuurders ook lede in die korporatiewe eenheid aanwesig is.

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92. Vgl *Rechtspersoonlijkheid* 414–415.

93 Dooyeweerd beklemtoon.

94 Vgl *Rechtspersoonlijkheid* 414. Ook Von Gierke 647–648 verwerp die "Auffassung der Stiftung als eines personifizirten Vermögens" en leer dat die stigting 'n "selfständiger gesellschaftlicher Organismus" is "dessen Seele der in ihm fortwirkende Wille des Stifters und dessen Körper *der zur Verwirklichung dieses Willens hergestellte Verband von Menschen* bildet". (Die woorde wat deur my beklemtoon word, verwys na die stigting se verband van bestuurders.) Von Gierke 647 vn 13 verklaar voorts: "Und bis heute hat die Stiftung härter als die Körperschaft um die Anerkennung der Realität ihrer Verbandspersönlichkeit zu ringen." Tans, byna 'n eeu later, is dit steeds die geval. Om een of ander rede is die opvatting dat 'n "vermoënskompleks" 'n regsubjek kan wees, nog steeds besonder aantreklik (vgl bv Joubert 13 en *CIR v Emary* 1961 2 SA 621 (A) 623–624).

95 Vgl *Rechtspersoonlijkheid* 414.

96 Dié standpunt dat 'n reeks bestuurders 'n eenheid met 'n eie identiteit ('n bestuursliggaam) vorm, kan ook aan die hand van die volgende analogie verduidelik word: 'n melodie is 'n verband van mekaar-opvolgende note maar is iets méér as die blote somtotaal van die individuele note. Daar bestaan 'n *geordende samehang van die note met mekaar* wat van hulle 'n *eenheid*, 'n melodie, maak. Net so bestaan daar 'n geordende samehang tussen die mekaar-opvolgende bestuurders wat van hulle 'n entiteit met 'n eie identiteit, 'n bestuursliggaam, maak.

97 Vgl vn 91 hierbo.

Teen hierdie agtergrond sal die aard en struktuur van die regspersoon wat die universele opvolger van die oorledene is, in oënskou geneem word.

3 2 Die aard en struktuur van die regspersoon wat die universele opvolger van die oorledene is: 'n bestuursliggaam

Daar is reeds aangetoon dat die regspersoonlikheid van 'n stigting volgens Dooyeweerd nie in 'n "vermoënskompleks" setel nie, maar in 'n bestuursliggaam. Na aanleiding hiervan kan die vraag gestel word of die regspersoon wat deur die wetgewer en howe met die term "boedel" of "estate" aangedui word, 'n soortgelyke struktuur het. Na my mening is die antwoord op hierdie vraag bevestigend. Ewe min as 'n stigting bestaan daardie regspersoon uit 'n "vermoënskompleks", aangesien 'n "vermoënskompleks" nie vir die verlening van regspersoonlikheid vatbaar is nie. 'n Vermoë is immers 'n *eenheid van regsverhoudinge wat 'n gemeenskaplike regsubjek as een pool het.* Daardie regsverhoudinge kan dus *onmoontlik* self die een pool van hulleself wees – net so min as wat 'n liefdesverhouding die een pool van homself kan wees. Die stelling dat 'n vermoë die subjek van homself is, is dus net so absurd as om te sê dat 'n liefdesverhouding 'n minnaar (die subjek van daardie liefdesverhouding) is. Dit volg hieruit dat wanneer beweer word dat 'n vermoë met regspersoonlikheid beklee kan word, "die regspersoonlikheid van die vermoë" in werklikheid *gefingeer* word en wel omdat die persoon wat so 'n bewering maak, nie daarin geslaag het om *die ware toedrag van sake*, naamlik dat die regspersoonlikheid in so 'n geval in 'n *bestuursliggaam* setel, te ontdek nie.[98]

In die lig van die voorgaande moet aanvaar word dat die regspersoonlikheid van 'n "boedel" in 'n bestuursliggaam (hierna 'n "boedelbestuursliggaam" genoem) setel. Hierdie bestuursliggaam bestaan uit 'n *eenheid* wat deur die volgende persone en instansies daargestel word: die hof wat in 'n belangrike mate oor die bereddering van bestorwe boedels toesig hou[99] en, as *opper-bestuurder*, regshandelinge deur bestuurders van laer rang kan magtig;[100] die meester van die hooggeregshof en adjunk- en assistent-meesters, wat enersyds hulle funksie onder toesig van die hof vervul en andersyds, *as bestuurders van die tweede rang*, toesig oor die bewaring en bereddering van die nalatenskap hou;[101] en verder een of meer van die volgende *bestuurders van die laagste rang* en hulle ampsopvolgers, afhangende daarvan of hulle in 'n bepaalde geval aangestel is: een of meer tussentydse kurators,[102] een of meer eksekuteurs;[103] en een of meer

98 Vgl Dooyeweerd *Rechtspersoonlijkheid* 255; die "proclameering" van 'n " 'doelvermogen' tot toerekeningsubject (in den zin van rechtssubject) [is] *een fictie in den slechtsten zin des woords*" (Dooyeweerd beklemtoon).

99 Vgl a 95 11(1)(b) 30(b) 36 43(6) en 54(1)(a) van die Boedelwet 1965; *Universele opvolging* 41.

100 I v m die magtiging van 'n eksekuteur deur die hof vgl bv *Ex parte Battenhausen* 1936 CPD 94; *Ex parte Steel* 1949 4 SA 157 (W); *L Ferreira (Private) Ltd v Vos* 1953 3 SA 450 (A) 465. I v m die magtiging van 'n kurator vgl *In re Alexander* 1912 CPD 1116; *Ex parte McEwan: In re Estate Williams* 1930 WLD 325; *Ex parte Moffett* 1930 OPD 156; *Ex parte Craig* 1951 1 SA 35 (O).

101 Vgl *Universele opvolging* 239 e v vir 'n oorsig van die meester se bevoegdhede en pligte.

102 Vgl a 12 van die Boedelwet 1965. Ingevolge hierdie artikel kan die meester 'n tussentydse kurator aanstel. Daar bestaan ook 'n aantal gewysdes waarin die hof 'n kurator ten opsigte van 'n bestorwe boedel aangestel het: vgl *Hassim v Mohideen* 1930 TPD 562; *Ex parte McEwan: In re Estate Williams* 1930 WLD 325; *Ex parte Moffett* 1930 OPD 156; *Southern Motor Cycle Co v Welthagen's Estate* 1934 OPD 49; *Ex parte Adkins* 1937 EDL 188.

103 'n Groot deel van hfst II van die Boedelwet 1965 het op die aanstelling, bevoegdhede, pligte en ontslag van eksekuteurs betrekking.

boedelberedderaars wat ingevolge artikels 18(3) of 25(1) van die Boedelwet 1965 aangestel is. Daar word weer eens beklemtoon dat al hierdie persone en instansies *'n bestuursliggaam met regspersoonlikheid vorm.* Dit is hierdie bestuursliggaam wat, as universele opvolger van die oorledene, by die erflater se dood in sy nalatenskap opvolg met die administratiefregtelike doel om die boedel te beredder en die restant van die boedel aan die bevoordeeldes oor te dra.

'n Mens het nie hier met een of ander vreemde of geheimsinnige regsfiguur te doen nie. Bestuursliggame met regspersoonlikheid is 'n *alledaagse regsverskynsel* in ons moderne samelewing. Hier volg 'n aantal voorbeelde: "beheerrade" ingestel kragtens die Bemarkingswet 59 van 1968;[104] besproeiingsrade en waterrade;[105] nywerheidsrade;[106] beroepsrade soos die Suid-Afrikaanse Raad op Verpleging,[107] die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad,[108] die Suid-Afrikaanse Aptekersraad[109] en die Openbare Rekenmeesters- en Ouditeursraad;[110] die Nasionale Behuisingskommissie;[111] die Raad van Kuratore vir Nasionale Parke;[112] Eskom;[113] die Wetenskaplike en Nywerheidnavorsingsraad;[114] en die Raad vir Geesteswetenskaplike Navorsing.[115]

Dit blyk uit hierdie voorbeelde dat dit al talle kere nodig was om bestuursliggame met regspersoonlikheid in te stel *met die oog op die uitvoering van een of ander bestuurstaak.* Trouens, bestuursliggame met regspersoonlikheid is vandag waarskynlik geheel en al onmisbaar in ons ingewikkelde staatshuishouding. *Waarom sou 'n bestuursliggaam met regspersoonlikheid met die taak om bestorwe boedels te beredder dan as 'n vreemde of geheimsinnige regsfiguur beskou word?*

Net soos bogenoemde bestuursliggame as entiteite aan die regsverkeer deelneem en hulle identiteit behou ondanks die wisseling van bestuurders, tree die boedelbestuursliggaam in die regsverkeer as 'n eenheid op ondanks die omstandigheid dat die tussentydse kurator deur 'n ander kurator of deur 'n eksekuteur vervang kan word, of dat een meester deur 'n ander opgevolg word of dat een eksekuteur 'n ander eksekuteur se plek inneem. *Dit is hierdie entiteit wat met die term "boedel" of "estate" deur ons wetgewer en howe aangedui word wanneer hulle onder die drang van die eise van die regsverkeer verplig is om die bestaan van 'n universele opvolger van 'n oorledene te erken.*

Die "konstitusie" van hierdie regspersoon bestaan uit die reëls van die intestate erfreg, indien van toepassing; dié vervat in die testament, as daar een is; en verder uit alle wetteregtelike en gemeenregtelike reëls met betrekking tot die bereddering van bestorwe boedels. In die eerste plek baken hierdie regsreëls die

104 Vgl a 25(2): " 'n Beheerraad is met regspersoonlikheid beklee . . . "
105 Vgl a 79 en 108 van die Waterwet 54 van 1956.
106 Vgl a 20 van die Wet op Arbeidsverhoudinge 28 van 1956.
107 Vgl a 2 van die Wet op Verpleging 50 van 1978.
108 Vgl a 2 van die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe 56 van 1974.
109 Vgl a 2 van die Wet op Aptekers 53 van 1974.
110 Vgl a 2 van die Wet op Openbare Rekenmeesters en Ouditeurs 51 van 1951.
111 Vgl a 5 van die Behuisingswet 4 van 1966.
112 Vgl a 5 van die Wet op Nasionale Parke 57 van 1976.
113 Vgl a 2 van die Eskomwet 40 van 1987.
114 Vgl a 2 van die Wet op die Wetenskaplike Navorsingsraad 82 van 1984.
115 Vgl a 2 van die Wet op Geesteswetenskaplike Navorsing 23 van 1968.

bevoegdhede en pligte van elk van die samestellende dele van die boedelbestuursliggaam ten opsigte van mekaar af en reël dus die verhoudinge tussen die samestellende dele van die bestuursliggaam onderling, byvoorbeeld die verhouding tussen meester en eksekuteur, hof en eksekuteur, meester en hof, en meester en tussentydse kurator. *Deur hierdie onderlinge afbakening van bevoegdhede en pligte verkry die bestuursliggaam 'n innerlike eenheid.* In die tweede plek reël die gemelde regsreëls die bevoegdhede en pligte van die boedelbestuursliggaam (handelende nou deur een orgaan, dan deur 'n ander) na buite, dit is teenoor derdes, byvoorbeeld die skuldeisers en skuldenare van die "boedel" en die bevoordeeldes van die oorledene. Hierdeur verkry die boedelbestuursliggaam 'n *juridiese eenheid na buite*: vandaar dat alle regte en verpligtinge wat uit die *verskillende* boedelbeheerders se regshandelinge voortvloei, *dieselfde* regsubjek toeval. So behoort die regte en verpligtinge wat uit die tussentydse kurator en die eksekuteur se regshandelinge voortvloei, *aan een en dieselfde subjek.*

Die boedelbestuursliggaam kom *ipso jure* by die erflater se dood tot stand en bly voortbestaan totdat die taak waarvoor dit in die lewe geroep word, die bereddering van die bestorwe boedel, afgehandel is. Aan die hand van hierdie uiteensetting van die "lewensduur" van die boedelbestuursliggaam kan verskeie regsverskynsels verklaar word, onder meer: dat 'n bevoordeelde by die dood van die erflater 'n vorderingsreg kan verkry, hoewel daar op daardie tydstip nog nie 'n eksekuteur bestaan wat as skuldenaar kan fungeer nie; dat daar weer 'n eksekuteur aangestel word om die boedelbereddering te voltooi in 'n geval waar 'n boedelbate ontdek word nadat die eksekuteur ontslaan is; dat boedelgoedere nie *res nullius* is wanneer die eksekuteursamp vakant is nie; dat 'n onregmatige daad teen die "boedel" gepleeg kan word en die "boedel" *ex quasi delicto* aanspreeklik kan word al is die eksekuteursamp vakant; en dat die meester die tussentydse kurator kan magtig om regshandelinge te verrig waaraan die eksekuteur na sy aanstelling as orgaan van die boedelbestuursliggaam gebonde sal wees.

4 HOE HET DIE REGSTOESTAND, SOOS BESKRYF IN DIE VORIGE PARAGRAAF, TOT STAND GEKOM?

Die erfgenaam het deur die ontstaan van gewoontereg sy regsposisie as universele opvolger van die oorledene verloor.[116] Die regsverandering het egter nie bloot negatief verloop nie: iemand of iets moes noodwendig in die plek van die erfgenaam kom om die posisie van subjek van die oorledene se boedel in te neem en terselfdertyd ook die boedel te beredder. Inderdaad is hierdie posisie deur 'n boedelbestuursliggaam met regspersoonlikheid gevul.

Hoe het dit dan gebeur dat daar 'n boedelbestuursliggaam met regspersoonlikheid vir elke bestorwe boedel in die lewe geroep word? Die antwoord is dat dit deur die vorming van wettereg en gewoontereg geskied het. Die wetgewer het bestuurders daargestel om bestorwe boedels te beredder of om hulle te beheer sonder om hulle te beredder (die tussentydse kurator) en om oor die beheer en bereddering toesig te hou (die meester en die hof). *Deur hierdie bestuurders se bevoegdhede en pligte onderling teenoor mekaar af te baken, het die wetgewer 'n liggaam van persone, en wel 'n bestuursliggaam, daargestel.* 'n Mens kan dus verklaar dat die wetgewer 'n bestuursliggaam vir elke bestorwe boedel daargestel

116 Vgl *Universele opvolging* hfst 11.

het met die taak om dit te beredder, maar dit was aanvanklik – behalwe miskien in die geval van die *hereditas jacens* – 'n *bestuursliggaam sonder regspersoonlikheid.* Dit het aanvanklik nie as subjek van die boedelbates en -laste opgetree nie, *want die wetgewer het nie die erfgenaam sy posisie as universele opvolger ontneem nie.*[117] Met verloop van tyd het daar egter 'n praktyk ontstaan enersyds om die erfgenaam se regsposisie te negeer en andersyds om die gemelde bestuursliggaam te behandel *asof dit regspersoonlikheid het en asof dit die universele opvolger van die oorledene is.* Hierdie praktyk het aanleiding gegee tot die ontstaan van gewoontereg waarkragtens die boedelbestuursliggaam *inderdaad* die regsposisie van universele opvolger van die oorledene verwerf het. Ons howe het wèliswaar nog nie uitdruklik die regspersoonlikheid van die boedelbestuursliggaam erken nie, maar dit is nie van wesenlike belang nie. *Die vraag is wat die uitwerking van hulle beslissings is.* Hieroor kan daar geen twyfel bestaan nie: die howe se *behandeling* van bestorwe boedels kom in werklikheid op die erkenning van die bestaan van die boedelbestuursliggaam met regspersoonlikheid neer, *selfs in gevalle waar hulle die standpunt inneem dat die eksekuteur in sy amptelike hoedanigheid die subjek van die vermoë onder sy beheer is. Wat in sulke gevalle gebeur, is dat die howe die regspersoonlikheid van die boedelbestuursliggaam aan 'n orgaan daarvan toedig, sonder om daardeur die regswerklikheid enigsins te verander.*

5 IS DIT WENSLIK DAT DIE REGSTOESTAND SOOS HIERBO UITEENGESIT, WETTEREGTELIK BEKRAGTIG WORD?

Hierbo is verklaar dat 'n boedelbestuursliggaam geensins 'n vreemde of geheimsinnige regsfiguur is nie. Wat wel vreemd is, is dat die bestaan van hierdie bestuursliggame nie lankal raakgesien en erken is nie. Die rede hiervoor moet waarskynlik gesoek word in die verskynsel dat Suid-Afrikaanse regsgeleerdes geneig is om, op die voetspore van hulle Engelse kollegas, nie die *liggaam van bestuurders* raak te sien nie; die gevolg is dat hulle die *orgaan* van die regspersoon (die eksekuteur) as die subjek van die regspersoon se vermoë beskou, maar dan in 'n sogenaamde "representative capacity". Aan die eksekuteur word gevolglik 'n sogenaamde amptelike regsubjektiwiteit toegedig, terwyl die groter eenheid waarvan die eksekuteur deel vorm, nie raakgesien word nie. Ons het hier 'n toepassing van die gesegde "they cannot see the wood for the trees"! 'n Mens vind dieselfde verskynsel in die Engelse publiekreg. Dit is welbekend dat die Engelse juriste nie die regspersoonlikheid van die staat erken nie, maar die koning of koningin as die "staatlike" subjek beskou: vandaar uitdrukkings soos "the King's enemies", "the King's peace", "the King's dominions", "His Majesty's Government" en "His Majesty's subjects".

Hierdie foutiewe beskouingswyse is in werklikheid 'n valse regspersoonsteorie wat 'n merkwaardige ooreenkoms met Hölder en Binder se teorie in verband met die stigting vertoon, naamlik dat die sogenaamde stigtingsgoedere die *amptelike vermoë van die bestuurder sou wees.*[118] Terwyl Hölder en Binder se teorie weinig indruk op die regsgeleerde wêreld gemaak het vanweë die klaarblyklike valsheid daarvan, word die opvatting dat die eksekuteur in sy amptelike hoedanigheid die subjek van die nalatenskap is, as 'n vanselfsprekende waarheid

117 Vgl *Universele opvolging* hfst 5 par 3; hfst 8 par 2; hfst 9 par 2.
118 Vgl par 3 1 en vn 80 hierbo.

deur juriste wat in die Engelse reg geskool is, aanvaar.[119] Etlike van ons regters en skrywers stem sonder enige bedenking saam.[120] Wanneer die eksekuteursamp egter vakant is, word eenvoudig na die "boedel" of "estate" as subjek van die oorledene se boedel verwys sonder enige bekommernis oor die vraag wie of wat met hierdie term aangedui word.[121] Teen hierdie agtergrond kan die vraag gestel word of dit wenslik is dat die regstoestand in verband met bestorwe boedels, soos dit inderdaad in die regsverkeer bestaan, wetteregtelik bekragtig word.

Die antwoord is na my mening dat daar wel 'n behoefte aan 'n duidelike wetteregtelike voorskrif bestaan. Hoewel die probleme in verband met bestorwe boedels meestal korrek opgelos word, kan daar tog gevalle voorkom wat onnodige probleme oplewer vir dié juriste wat nie die ware toedrag van sake begryp nie. Veral in die gevalle waar daar 'n gebeurtenis wat tot die ontstaan van 'n regsgeskil aanleiding gee, plaasvind voor die eksekuteursaanstelling of terwyl die eksekuteursamp vakant is, sal diegene wat aanneem dat die nalatenskap van 'n oorledene aan die eksekuteur behoort, onnodig probleme ondervind om die geskil te besleg. Indien 'n regter in die uitvoering van sy regsprekende funksie met so 'n probleem te doen kry, is 'n verkeerde uitspraak nie uitgeslote nie. Selfs in gevalle waar daar wel 'n eksekuteur is, kan die antwoord op die vraag of 'n "boedel" 'n regspersoon is, van die grootste belang vir die beslegting van 'n geskil wees. Indien die regter hom in sodanige geval op die standpunt stel dat 'n "boedel" nie 'n regspersoon is nie, soos in *Commissioner for Inland Revenue v Emary*[122] gebeur het, dan volg daar 'n verkeerde uitspraak wat op sy beurt as gevolg van die presedentestelsel verdere probleme skep.

Samevattend kan verklaar word dat vanweë die onduidelikheid wat daar in die regspraktyk bestaan oor die antwoord op die vraag na die universele opvolger van die oorledene, dit wenslik is dat die onderhawige aangeleentheid statutêr gereël word, en wel op so 'n wyse dat die regstoestand wat inderdaad bestaan, wetteregtelik bekragtig word.

6 SAMEVATTING

Uit die voorgaande blyk die volgende:

a Daar bestaan regsverskynsels wat onteenseglik daarop dui dat 'n oorledene se nalatenskap by sy dood op 'n regspersoon oorgaan.

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119 Vgl *Universele opvolging* hfst 3 par 3. 'n Mens vind dieselfde standpunt ook in ander regstelsels waar die Engelse gemenereg geld, bv Australië. Raadpleeg bv Hutley en Woodman *Cases and materials on succession* (1975) 233: "The personal property of the deceased being vested in the legal representative he holds it as absolute owner... Real estate is vested in an executor in the same way as personal estate"; Lee *Manual of Queensland succession law* 4: "It is the personal representatives who in general first succeed, representing the estate of the deceased as a whole, with all its assets and liabilities." In die VSA is daar egter in sommige state wetgewing verorden met die uitwerking dat 'n oorledene se bates direk op sy bevoordeeldes oorgaan: vgl bv Rheinstein *The law of decedents' estates intestacy, wills, probate and administration; text; cases and other materials* (1957) 659 vn 1.

120 Vgl *Universele opvolging* hfst VII-X i v m die regspraak. Wat ons skrywers betref, vgl bv Wille *Principles of South African law* 7e uitg deur Gibson (1977) 254; Lee, Honoré en Price *The South African law of property, family relations and succession* (1954) 150; Lee *An introduction to Roman-Dutch law* (1953) 353–354; Meyerowitz *The law and practice of administration of estates* (1976) 123.

121 Vgl vn 35 hierbo.

122 1961 2 SA 621; vgl par 2 2 hierbo.

b Hoewel ons wetgewer en howe nog nie die bestaan van hierdie regspersoon uitdruklik erken het nie, het hulle dit al verskeie male by implikasie gedoen, en wel deur onder die drang van die eise van die regsverkeer een of ander entiteit, wat klaarblyklik die subjek van 'n oorledene se nalatenskap is, met die term "boedel" of "estate" aan te dui.

c Hierdie regspersoon wat *ipso jure* by die dood van die erflater ontstaan en voortbestaan totdat die boedelbereddering voltooi is, bestaan uit 'n bestuursliggaam.

d Die gemelde bestuursliggaam is deur die wetgewer geskep. Sy regspersoonlikheid het hy egter deur die ontstaan van gewoontereg verwerf. Dit beklee die posisie van universele opvolger van die oorledene en volg *ipso jure* by die erflater se dood in sy nalatenskap op. Sy taak is om die boedel te beredder en die restant van die bates aan die bevoordeeldes oor te dra.

Culpa in contrahendo – a prescription for the ills of the South African law of contract

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OPSOMMING

***Culpa in contrahendo* – 'n oplossing vir die leemtes in die Suid-Afrikaanse kontraktereg**

Die verwesenliking van redelike verwagtinge wat teweeggebring word deur 'n ooreenkoms vorm die konsepsuele grondslag van ons kontraktereg. Wanneer nie aan sodanige verwagtinge voldoen word nie, tree die kontraktereg tussenbeide om die ekonomiese skade wat veroorsaak is, te herstel.

Daar word aangevoer dat die Suid-Afrikaanse kontraktereg hierdie grondslag op verskeie gebiede nie bevredigend hanteer nie, veral weens die volgende oorwegings: eerstens verleen dit nie beskerming aan 'n party wat oorreed was om te kontrakteer weens 'n nalatige wanvoorstelling of die verswyging van wesentlike feite deur die ander kontraksparty nie; tweedens beskerm dit nie 'n party wat tot sy of haar nadeel gehandel het ingevolge 'n nietige kontrak nie; en derdens is die kontraktereg onbevredigend in die geval waar die ontvanger van 'n aanbod tot sy finansiële nadeel gehandel het in afwagting van die aanname van die aanbod wat egter voor aanname en deur *mala fide*-optrede aan die kant van die aanbieder verval het.

Daar word aan die hand gedoen dat die regsmiddel *culpa in contrahendo*, wat ten volle deur die Duitse reg ontwikkel is, 'n oplossing vir al bogenoemde tekortkominge verskaf. Hierdie remedie is ten volle versoenbaar met die Suid-Afrikaanse gemenereg en daar bestaan ook geen hindernis teen die gebruik daarvan deur die Suid-Afrikaanse howe nie.

INTRODUCTION

There can be no doubt that economics and more particularly economic expectations provide the main justifications for the legal enforcement of agreements.[1] The essence of the law of contract is the realisation of reasonable *expectations induced* by agreement.[2] It has been suggested that where one's *reasonable* expectations are not fulfilled, the law of contract will step in to repair the economic damage that ensues.

1 Tillotson *Contract law in perspective* (1981) 12; Corbin *Corbin on contracts* vol 1 (1950) par 1.
2 Corbin *ibid.*

> "Justice and fairness, the requirements of trade, and technical developments in the law itself have all reflected the basic moral dictate: the good man should keep faith and deal fairly."[3]

If one uses the above conceptual approach as a yardstick to review the position in the South African law of contract, it is submitted that a number of deficiencies emerge. There are several areas in our law of contract that provide no satisfactory remedy for an aggrieved party.

The aim of this article is to analyse these deficiencies and to propose a possible solution to them. The submission is made that the doctrine of *culpa in contrahendo* provides the most satisfactory prescription for the ills of the South African law of contract.

MISREPRESENTATION INDUCING A CONTRACT

The first deficiency is the approach adopted by our courts to misrepresentation inducing a contract. Our law recognises three types of misrepresentation: innocent, fraudulent and negligent. In regard to innocent misrepresentation, the solution provided by common law is a limited one, namely the Aedilitian actions.[4] Because of the severe common-law constraints placed on this type of misrepresentation, the present writer will for the purposes of this article regard the solution as unassailable.

It is other species of misrepresentation that provide the problems. Both fraudulent and negligent misrepresentation have fault as a constituent element, and, given that a misrepresentation does not form part of the terms of the contract, our law as practised today uses the Aquilian action to provide a remedy. In regard to fraudulent misrepresentation the remedy of the Aquilian action seems entrenched.[5] Aquilian liability in relation to fraud is clearly established. The law of delict has no hesitation in awarding delictual damages for fraudulent misrepresentation, even though it relates to the inducement of a contract, because of the heinousness of the conduct complained of.[6]

It is in relation to negligent misrepresentation that the difficulty arises. The issue goes beyond misrepresentation inducing a contract. Rather, it must be seen in the light of the development of the law of delict in relation to negligent misstatements in general. Our law has been influenced by English law to a large extent in this regard. Early English law allowed delictual liability only for fraudulent misrepresentations, which they described as the absence of honest belief.[7] Negligence was not regarded as an absence of honest belief.[8] Such an approach was adopted in its entirety by South African law.[9] While early South African cases suggested that the Aquilian action could be used if one party had suffered loss as a result of the negligent misstatement of another,[10] subsequent cases such

3 Tillotson *op cit* 12.
4 *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A).
5 *Trotman v Edwick* 1951 1 SA 443 (A) 449; *Scheepers v Handley* 1960 3 SA 54 (A) 58; *De Jager v Grunder* 1964 1 SA 446 (A) 448; *Glaston House v Inag* 1977 2 SA 846 (A); *Ranger v Wykerd* 1977 2 SA 976 (A).
6 Boberg *The law of delict* (1984) 108.
7 *Derry v Peek* 1889 14 AC 337 (HL).
8 *R v Meyers* 1948 1 SA 375 (A) 382.
9 *Ibid.*
10 *Perlman v Zoutendyk* 1934 CPD 151.

as *Herschel v Mrupe*[11] stated that negligent misstatement would create too wide a liability and would be contrary to the interests of the community. The essence of the objections was a fear of indeterminate liability[12] associated with pure economic loss, for a misstatement does not cause corporeal damage to a single person:

> "Words are more volatile than deeds. They travel fast and far afield. They are used without being expanded and take effect in combination with innumerable facts and other words. Yet they are dangerous and can cause vast financial damage."[13]

In regard to misstatements relating to contracts (that is misrepresentation) the appellate division in *Hamman v Moolman*[14] said *obiter* that the law of delict should not provide a remedy since there were sufficient remedies in the law of contract.[15] Nevertheless, English law reversed its original approach. The House of Lords in *Hedley Byrne v Heller*[16] held that it would grant a remedy for negligent misstatement, albeit only in cases where a duty of care arose. The duty of care was to be used as a policy brake to prevent indeterminate liability.[17] In regard to negligent misrepresentation inducing a contract English law also evolved, and in *Esso Petroleum v Mardon*[18] it was recognised that where a representor has special knowledge or skill and negligently gives information or an opinion based on this knowledge, with the intention of inducing another to enter a contract, he is liable in delict.[19] This change in approach was accepted in South African law as well. In *Administrateur Natal v Trust Bank van Afrika Bpk*[20] the appellate division accepted that in principle delictual liability existed for pure economic loss caused by a negligent misstatement and that such action was founded on the *lex Aquilia*. The court stressed that fears of limitless liability which existed

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11 1954 3 SA 464 (A).

12 See the comments of Van den Heever JA in *Herschel's* case 488.

13 Per Lord Pierce in *Hedley Byrne and Co v Heller and Partners* 1963 AC 465 (HL) 534. A more succinct criticism was put by Cardozo J in *Ultramares Corp v Touche* 174 NE 441 448 – liability for negligent misstatements would result in liability "in an indeterminate amount for an indeterminate time to an indeterminate class".

14 1968 4 SA 340 (A).

15 Wessels JA in an *obiter dictum* stated that a party to whom a misrepresentation is made, is adequately protected by the existing law, since he can safeguard himself by requiring the presentor to guarantee the truth of his representation. The judge continued by saying that to grant a remedy for negligent misrepresentation which caused pure economic loss would result in more ills than the one it was intended to remedy – namely the failure of the unwary representee to have a proper regard to his own interests in the field of contract. There is no doubt that the Wessels *dictum* is staunchly representative of the *laissez-faire* approach to contract which requires the parties to fend for themselves, and the court intrudes only to interpret the agreement negotiated by the parties. For a brief explanation of this approach to contract, see Atiyah *Introduction to the law of contract* 4 – 5 and Kessler and Fine "*Culpa in contrahendo*" 1964 *Harv LR* 409.

16 *Supra* (fn 13).

17 *Weller and Co v Foot and Mouth Disease Research Institute* 1966 1 QB 569 is instructive on this point. *In casu* damages were denied to plaintiff, cattle auctioneers, who suffered financial loss when the cattle markets were closed, after a virus had escaped from defendant's premises and infected cattle belonging to farmers in the nearby region. The court held that a *legal duty* was owed by defendants to owners of cattle in the surrounding area, but not to persons whose only loss was economic and who had no proprietary interest in anything that the virus might have harmed. The court realised that policy demanded that the action be dismissed for fear of indeterminate liability.

18 1976 QB 801.

19 16a-b per Lord Denning.

20 1979 3 SA 824 (A).

in connection with pure economic loss could be controlled by employing the concept of wrongfulness and enquiring whether a legal duty not to make a misstatement rested on the defendant.[21] The court, however, declined the opportunity to extend the liability to negligent misrepresentations inducing a contract.[22] Following the lead of the *Esso Petroleum* case, Friedman J in *Kern Trust (Edms) Bpk v Hurter*[23] extended the ambit of the decision in *Administrateur Natal's* case to apply to negligent misrepresentation inducing a contract.[24] All thus appeared to be settled. However, it is submitted that the remedy for negligent misrepresentation has been severely hampered, if not rendered nugatory, by the decision of *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd.*[25] Although the majority judgement focused on the breach of a contractual duty by the negligent performance thereof, and concomitant recovery by the aggrieved party in delict, the court stressed that it would not make a difference to the judgment if the issue related to negligent misstatement.[26] While it is recognised that the court did not commit itself to pre-contractual misrepresentation, it is submitted that the judgment does have an important bearing on the Aquilian remedy for negligent misrepresentation:

a A major consideration in not allowing the Aquilian action in the circumstances was that the action "does not fit comfortably in a contractual setting".[27] This approach emerged despite the court's affirmation of the existence of concurrence of actions between contract and delict[28] and that there is no longer any impediment to obtaining a remedy with the Aquilian action for pure economic loss.[29]

b The court argued that the Aquilian action was being extended very conservatively and that no authority existed for holding a professional delictually liable for negligent misstatements.[30]

c The court adopted a conservative interpretation of the *Administrateur Natal* decision, holding that there is no *prima facie* liability for pure economic loss caused negligently. The Aquilian action would be extended to such new situations only where positive policy considerations favoured this.[31]

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21 825–826.
22 826H.
23 1981 3 SA 607 (C). The import of this decision has subsequently been confirmed in cases such as *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D) 53B–D.
24 A very important aspect of this decision was the rejection of the *dictum* of Wessels JA in *Hamman's* case *supra* (fn 15) as both impractical and unrealistic (613C).
25 1985 1 SA 475 (A). For purposes of brevity, the facts of this decision will be omitted. A good summary can be found in Boberg *op cit* 3–4.
26 503I.
27 500G–H.
28 496G.
29 498D.
30 The court stated (500C–D 505F 499F) that no authority existed at common law for the extension of liability for negligent conduct or misstatements of a professional. The judge erred in this regard, for it has been shown convincingly by Scott "Nalatige wanvoorstelling as aksiegrond in die Suid-Afrikaanse reg" 1977 *THRHR* 172–174 that in Roman-Dutch law a professional person who made a negligent misstatement in his professional capacity was liable in delict for pure economic loss. The only inference that can be made from the court's approach was that it was *determined* not to award damages in such circumstances, and accordingly overlooked authority to the contrary. This inference is supported by the court's attitude as set out in fn 32 below.
31 504F–G.

d The court ignored all cases subsequent to *Administrateur Natal* that had adopted a liberal interpretation of the judgment.[32] Such cases adopted the view that liability for negligently caused pure economic loss would ensue if the matter was *prima facie* actionable under the *lex Aquilia*, but that where policy necessitated this, the courts would not grant an action.

e It adopted the same reasoning as that of the court in *Hamman v Moolman* – namely that there are sufficient remedies in contract to cover misrepresentation without the intrusion of the law of delict.[33]

f If the court was reluctant to recognise delictual liability for a professional's misstatements, then how much more reluctant would it be to recognise liability for such misstatements in a contractual setting, or even the misstatements of a non-professional (who nevertheless had exclusive access to material information) who negligently misrepresents to another party this information, which the latter relies upon for his decision to enter the contract? Indeed, this was the case in *Kern Trust v Hurter*.

English law is able to use delict to provide a remedy for negligent misrepresentation inducing a contract. The courts have moved away from the idea of the exclusivity of contract. There is a greater acceptance by the courts of their role to intrude and to regulate matters which were formerly seen as matters of exclusive concern of the contracting parties.[34] Given this background, the courts have not found difficulty in developing the remedy for negligent misrepresentation from the liability for negligent misstatement as was laid down in *Hedley Byrne's* case.[35] Unfortunately, our law has refused to take up the challenge laid down in the *Administrateur Natal* case, and, it is regretfully submitted, returned to the dark days of *Herschel v Mrupe* and, more importantly, *Hamman v Moolman*. Some other remedy is thus needed to cater for negligent misrepresentation which will not employ criteria such as wrongfulness, pure economic loss and indeterminate liability.

NEGLIGENT NON-DISCLOSURE

The issue of non-disclosure applies to two sets of circumstances, namely: latent defects in the *res vendita*, and non-disclosure which does not relate to latent defects. In regard to the former, it is always open to the aggrieved purchaser who wishes to uphold the contract, to claim for damages as a result of the non-disclosure of the latent defect, by using the *actio quanti minoris*, an action provided by the Aedilitian remedies. (Fault is not a requirement for the success of this action, which operates on the basis of strict liability.) However, this action

32 The court ignored decisions such as *Kern Trust v Hurter supra* and *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 37 (D) which adopted the liberal interpretation of the *Administrateur Natal* judgment and cited only decisions such as *Franschhoekse Wynkelders v SAR and H* 1981 3 SA 36 (C) and *Shell and BP (SA) Refineries (Pty) Ltd v Osborne Panama (SA)* 1980 3 SA 653 (D) which adopted the narrow interpretation.

33 500H–501G. The court reaffirmed the *laissez-faire* approach to contract which had so severely been criticised in *Kern Trust's* case. The gist of the court's opinion can be summarised as follows: Contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations and they define what is expected from each party. The use of delict to enforce contract will confuse the issue of quality of performance and frustrates the concept of *pacta sunt servanda*.

34 See Atiyah *The rise and fall of freedom of contract* (1979) 773.

35 The *locus classicus* in this case is *Esso Petroleum v Mardon* 1976 1 QB 801 (CA).

does not allow for the recovery of consequential damages resulting from the non-disclosure of the defect.[36] To remedy this situation, our courts have opted for the Aquilian action[37] to be used, since the latter provides for the recovery of consequential damages in such circumstances. In adopting a delictual remedy the courts apply similar considerations to those in cases of misrepresentation – namely that non-disclosures are not terms of a contract and that therefore a contractual action, which would provide the same remedy to the problem of consequential loss, cannot be granted. This line of reasoning becomes clear in circumstances of non-disclosure which do *not* involve *latent defects*[38] and in which the aggrieved party is forced to rely on the delictual remedy.

In regard to fraudulent non-disclosure, the courts do not hesitate to grant the delictual action.[39] However, there is no solution provided for negligent non-disclosure.[40] It is submitted that the same considerations of indeterminate liability associated with negligently caused pure economic loss motivate the courts in this instance, for to succeed with the Aquilian action, it is necessary to prove all the elements of the delict, including *wrongfulness.* The same considerations which arose in *Lillicrap's* case could equally be applied here.

Indeed, support for this approach can be found indirectly in the differing approaches to *fraudulent* non-disclosure by the courts in the Transvaal and Natal. While the Natal courts adopt the regular definition of "fraudulent" – namely *wilful* non-disclosure,[41] the Transvaal courts have defined "fraudulent" as "mere knowledge of the defect and failure to disclose it".[42] The latter definition points to an action for fraud based on the mere negligence of the non-disclosing party. It therefore emerges that the courts are prepared to subvert definitions in order to avoid policy. Rather than use fictions, it is submitted that a remedy be found which will enable an aggrieved party to escape the minefield of "wrongfulness" laid down by our appellate division recently.

MISTAKE

The third area which can be seen as deficient is that of mistake in contract, both unilateral and common.

a *Unilateral mistake:* where one party makes a unilateral mistake (such as a typing error) and the court accepts such a mistake as a *iustus error*[43] which relates to a material term of the contract, such contract is *void.* If the aggrieved

36 *Die Trust Bank van Afrika Bpk v Bekker* 1961 3 SA 236 (T).
37 *Glaston House v Inag supra* (fn 5).
38 *Cloete v Smithfield Hotel (Pty) Ltd* 1955 2 SA 622 (0) 632.
39 *Glaston House* case *supra* (fn 5); *Van der Merwe v Culhane* 1952 3 SA 42 (T); *Knight v Hemming* 1959 1 SA 288 (FC).
40 Kerr *The principles of the law of contract* (1967) 188.
41 *Knight v Trollip* 1948 3 SA 1009 (N); *Forsdick v Youngelson* 1949 2 PH A57 (D). See too *Cloete's* case *supra* (fn 38) which supports this.
42 *Hadley v Savory* 1916 TPD 385; *Erasmus v Russel's Executors* 1904 TS 365.
43 While the present writer wishes to record his recognition of the continuing development in the area of *iustus error* in the case of *Horty Investments v Interior Acoustics* 1984 3 SA 537 (W), he must at the same time stress that the enquiry does not extend to this, for the issue under discussion arises only when the contract is void because of a *iustus error.* For a discussion of the concept of *iustus error,* see *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 4 SA 164 (D).

party who relied on the contract has spent money in reliance on the contract, who bears the loss? The South African courts are silent on this.[44]

b *Common mistake:* in a case of common mistake, where the parties have contracted on the basis of *impossibility of performance*, the contract is void as well.[45] Who bears the loss if one of the parties has already relied on the contract and spent money in pursuance of it? Our courts have considered this, but there does not seem to be consistency among the decisions. In *Van der Westhuizen v James*[46] the defendant sold a farm to the plaintiff and gave transfer to him on payment of the price. But only the title deeds to the farm existed, the actual farm being non-existent. Despite the fact that the seller had acted in *good faith*, the court, without referring to authority, ordered the purchase price to be returned with interest, along with the transfer fees, duties paid and the cost of the search which the buyer undertook to locate the farm.[47]

In the similar circumstances of *Lediker and Sache v Jordaan*[48] the court held that there could be no liability for damages without fault and that since fault was absent *in casu,* no damages could be awarded. All that was allowed, was the return of the money paid. The basis of the action for the return of the money was the *actio ex empto* for the return of what was given "after the sale was annulled".

In *Coombs v Muller*,[49] a case of impossibility of performance, the court granted, on the basis of the defendant's negligence, *positive interesse* damages on the basis of breach of contract.[50]

A review of the case law indicates the inconsistency which exists. It is necessary to find a remedy that can provide a single solution to this problem and harmonise what can only be described as a chaotic situation. An ordinary action for *positive interesse* damages cannot be accepted since no contract exists, nor can one use estoppel to prevent the blameworthy party from invoking the impossibility of performance.[51] It is submitted that equally one cannot claim these damages on grounds of unjustified enrichment, since one cannot prove that the blameworthy party was enriched by the expense of the aggrieved party in searching for the property. All one could ask for would be the refund of the purchase price paid, and interest. Kerr[52] submits that the proper remedy for the aggrieved party in such circumstances is restitution and restitutionary damages. With respect, such a submission cannot establish an absolute remedy for the situation. The entire theory is predicated on the notion that there has been some form of transfer between plaintiff and defendant, such as purchase price or transfer fees. Certainly the present writer accepts this notion. But what happens if the plaintiff in pursuance of a contract of sale of a non-existent house (which defendant should

44 De Wet and Yeats *Kontraktereg en handelsreg* (1978) 9 discuss the problem but cite no case where this has ever been considered.
45 Per Schreiner JA in *Dickinson Motors v Oberholzer* 1952 1 SA 443 (A) 450.
46 5 OR 90.
47 De Wet and Yeats *op cit* 79 submit that the judgment was erroneous in that the court did not enquire into the issue of fault.
48 5 OR 107.
49 1913 EDL 430.
50 De Wet and Yeats *op cit* 80 heavily criticise this judgment, raising the argument that *no contractual* damage can be awarded where no contract exists.
51 Bamford "Error and contract" 1055 *SALJ* 287.
52 *Op cit* 209.

have known no longer existed), arranges to pay defendant after moving in but in the meantime transfers all his furniture from Johannesburg to Cape Town? Discovering the problem, he has to transfer all his furniture back to Johannesburg. Who pays for this? How can restitution solve the issue? In his excursus on restitution Kerr illustrates the doctrine with examples relating not to void contracts, *but to voidable contracts* tainted by misrepresentation *as to the quality of the res vendita.* Examples of damage which are referred to are expenses incurred in preserving the property, treating a diseased animal and expenditures on accessories to a defective car.[53] None of these illustrations covers the example raised by the present writer. They all relate to contracts which involve the actual transfer of the *res vendita* and the subsequent cancellation of the contract – this being totally removed from the contracts *void ab initio.*

Bamford[54] suggests that *delict* is the answer, since it covers damages in the absence of a *contract.* He submits that all the ordinary delictual principles of *negligence, causation* and *remoteness* would apply. But would it? One merely has to look at the attitude of the court in *Lillicrap* in awarding delictual damages for pure economic loss caused *negligently* where the contract has terminated. The court expressed its determination to keep contract and delict separate. Bamford appears to have missed the crucial issue, namely wrongfulness, which has been elevated to the key ingredient in a delictual action, and over which the court holds sway. Fault and causation have taken a back seat.

If one looks at the Anglo-American jurisdictions, there is a recognition that the common law is deficient in these instances,[55] since it makes no provision for damages save the return of the puchase price (that is paid already). Solutions have been suggested in this regard. Foremost among these is the use of the delictual action to recover damages should it have been caused by either fraudulent or *negligent misrepresentation.* There are writers who are of the opinion that the required proof of a duty of care should be no serious bar, because a "finding of a breach of duty may nowadays be more frequent than it has been in the past".[56] As was explained above, this is a problematic area of our law.

However, in the case of *McCrae v Commonwealth Disposals Commission*[57] the court adopted a novel approach. The plaintiff was awarded damages in the form of wasted costs in searching for a non-existent shipwreck which he had tendered for, and whose tender had been accepted. Despite the fact that the defendants were negligent, the court based the remedy on an *implied warranty* that the wreck existed. The court thus used the concept of an implied collateral contract, in which defendant "guaranteed" that the ship existed, to award the damages despite the fact that it recognised that the main contract was void.[58]

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53 *Ibid* 200–201.

54 *Op cit* 288.

55 Holstein "Vices of consent" 13 *Tul LR* 384; Hoff "Error in the formation of contracts in Louisiana: a comparative analysis" 53 *Tul LR* 373.

56 As a result of the cases of *Hedley Byrne v Heller and Partners supra* and *Esso Petroleum v Mardon supra,* English law seems to have moved towards a recognition of a duty of care where it is reasonable for one party to rely on the other's skill and judgment in making the statement. See, e g, Treitel *An outline of the law of contract* (1984) 133; Cheshire and Fifoot *Contract* (1986) 259; Sutton "Reform of the law of mistake in contract" 1976–7 *New Zealand Universities LR.*

57 1951 84 CLR 377.

58 Cheshire and Fifoot *op cit* 210–212.

Whatever the merits of the decision, it is important to note that there has at least been some attempt to alter the deficiencies of the common law rather than to permit the unsatisfactory position to continue. So far South African law has declined to take up this challenge.

OFFER AND ACCEPTANCE

The general rule that an offer is revocable until the offeror is aware of the acceptance, is firmly entrenched in our law.[59] Up to the time of awareness of the acceptance, the offeror is free to withdraw the offer. If an offer is to remain open until a certain time,[60] and has not yet been withdrawn by the offeror, but, because of the offeror's negligence, the offeree cannot transmit his acceptance to the former in time, non-acceptance will cause the offer to lapse.[61] What remedies does the offeree have if he has altered his financial position to accord with the potential formation of the contract with the blameworthy offeror? Can he rely on the remedy enunciated in *Smith v Hughes*, or can he rely on estoppel? It is submitted that he cannot, for no representations relating to potential acceptance have been made by the offeror.

Should the offeree have no remedy? If one wishes to take a purely clinical and principled approach, it could be argued that no contract exists until the acceptance is transmitted to the offeror, and that the offeree therefore should not alter his position until then. While technically correct, it is submitted that this solution does not accord with the reality of commerce. What happens if the finances expended in pursuance of the original offer were in relation to a take-it-or-leave-it bargain, where no chance of taking out an option was available? It is submitted that some form of precontractual liability is necessary to cater for the case of the negligent offeror who prevents the formation of the contract. For the reasons already outlined above, it is submitted that the Aquilian action will not provide a suitable remedy for this problem.

An interesting development of the problem is that of delay in acceptance. For example, if A submits a proposal form and his premium to an insurance company and, through negligence on the latter's part, the form is processed only after an *unreasonable* time, no cover is provided to A at a time when he may need it,[62] and which he would have had if the insurance company had processed his proposal within a reasonable time. Who should bear A's loss? Should he in fact suffer loss which would have been covered by the policy? Principles of fairness and equity demand that the insurance company bear the loss, but in accordance with the traditional contractual theory, the offer lapses if it has not

59 Voet 5 1 73; *Greenberg v Wheatcroft* 1950 2 PH A56 (W); *R v Nel* 1921 AD 339 344; *Hersch v Nel* 3 SA 686 (A) 693.

60 Such an offer is not to be confused with an option which would enable the offeror to have a contractual action for breach of contract. The fact that an offer is to remain open for a certain period of time does not necessarily make it an option. It all depends upon the intention of the offeror. If the statement is made "in the event of your not signifying your acceptance within 3 weeks from now, the offer will be regarded as withdrawn", then the offer may be withdrawn *before acceptance* because it is not regarded as an option; cf Beinart "Offers stipulating a period of acceptance" 1964 *Acta Juridica* 200 esp 206.

61 *Ibid.*

62 Assume that no interim cover has been granted. This possibility is fairly likely in the light of insurance practice as reflected in *Dicks v SA Mutual Fire and General Insurance Co Ltd* 1963 4 SA 501 (D).

been accepted after a reasonable period of time. American law has recognised this problem, but because of the traditional approach to contract, has used the law of *delict* to create a "general duty to the public to act properly".[63] The use of a "created" legal duty to circumvent the problems of the theory of contract, has been heavily criticised. Whatever the merits of the solution, it is submitted that the delict option is not open to us. Some other form of pre-contractual liability is needed to eliminate the impasse.

It is clear from an analysis of these areas of our law that an alternative solution has to be found. The remedy needed is one that will take into account blameworthy conduct in a *pre-contractual* situation and which would thus not award full contractual or *positive interesse* damages. Damages should rather be awarded to cover the financial loss which the aggrieved party has actually incurred, namely *negative interesse* damages. In addition, the remedy should not be subject to the limitations of the Aquilian action. A remedy which fulfils all these requirements is the doctrine of *culpa in contrahendo.*

CULPA IN CONTRAHENDO

The history of the doctrine

The doctrine of *culpa in contrahendo* was created by the famous German jurist, Rudolf von Jhering. The aim of the doctrine was to impose liability on a party whose negligence during contractual negotiations resulted in its invalidity or prevented its perfection.[64] Damages would then be awarded against the blameworthy party to the extent that the innocent party suffered any loss in reasonable reliance on the assurance or representation of the former.

Jhering was prompted to develop this doctrine since the law as practised in Germany at the time did not provide a remedy for the aggrieved party in these circumstances, a situation not unlike that found in South African law today. In order to graft this doctrine onto existing German law, he referred to the German common law, which included Roman law, by virtue of the process of reception. There were areas of Roman law where a similar remedy existed to that which he hoped to introduce. The remedy in Roman law applied to areas of common mistake and impossibility of performance. The general rule which Jhering extracted from the Roman-law text was that a *blameworthy* vendor who sold a *res extra commercium* or a non-existing *hereditas* could be sued for *negative interesse* damages on the basis of a *contractual* action, despite the fact that the contract was void.[65]

From this Jhering extracted his doctrine which had four main features:

a *Fault* As its name indicates, the doctrine required fault, at least in the form of negligence.[66] Stein,[67] in an analysis of the Roman law texts, submits that

63 Cf *Swentusky v Prudential Insurance Co* cited by Kessler "Contracts of adhesion – some thoughts about freedom of contract" 43 *Col LR* 634–635.

64 Kessler and Fine "Culpa in contrahendo" 1964 *Harv LR* 401.

65 Among the texts used by Jhering were *D* 11 7 8 1; *D* 18 1 62 1; *D* 18 4 8 9 and *I* 3 23 5.

66 Kessler and Fine *op cit* 402; Riegert "The West-German Civil Code, its origin and its contract provisions" 45 *Tul LR* 94–95.

67 *Fault in the formation of contract in Roman law and Scots law* (1958) 83. The issue of *fault* and *bona fides* is a complex one and is linked directly to the particular level of conceptualisation which the particular texts reveal. The texts which Jhering extracted as support

Jhering was mistaken in extracting *culpa* as the fault requirement. The texts, says Stein, reveal that liability was based on a breach of *bona fides* and was aimed at protecting the buyer's interests in not being misled. In order for the buyer to be entitled to such remedy, he had to be *ignorans* of the flaw or defect.[68] When two parties enter into negotiations, it imposes on both a duty to go forward in good faith.[69]

b *Pre-contractual duty* The doctrine holds that the duty to exercise proper care does not begin once the contract has been concluded (that is carrying out the terms of the contract with the requisite standard of care) but also exists at the stage when the contract is being concluded.[70] Thus both parties are under a duty to refrain from making declarations of intent, which might induce the other party to believe in the perfection of the transaction, when in fact it suffers from some defect or does not come into existence.

c *Contractual remedy* The remedy which the doctrine provides is *contractual.*[71] The majority of the texts which Jhering referred to granted a contractual action, although this is not free of controversy. The texts are indicative of conflict of opinions between two schools of thought on the matter. Jurists belonging to the Sabinian school granted a *contractual action,*[72] while the Proculian school opted for an *actio in factum*[73] in such circumstances. Despite this dichotomy of opinion, both academically[74] and historically[75] the conflict tended to resolve itself in favour of contractual action.

d *Negative interesse damages* Despite the fact that a contractual action was used, the damages awarded were *negative interesse* damages, placing the aggrieved party in the position he would have been in had he not been misled into thinking that he had a contract.[76]

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for his doctrine either demanded *dolus*, or no fault at all – thus strict liability. This inconsistency in the texts is revealed by De Wet and Yeats *op cit* 77 and they draw a similar conclusion to Stein in this regard: namely that liability in the texts relating to impossibility of performance, on which Jhering based his doctrine, ensued whether there was fault or not – the basis of liability being *good faith.* The use of the word *dolus* in some texts does not necessarily indicate that fault in the form of intention was required. There are many texts in which *dolus* and *bona fides* are opposites. See *D* 17 2 33 (Paul), cited by Buckland "Culpa and bona fides" 1932 *LQR* 227. Indeed, *dolus* at the time of the late Republic came to include gross negligence and during the late classical period, *culpa* was also a violation of good faith.

68 Stein *ibid.*

69 Gilmore "Friedrich Kessler" 84 *Yale LJ* 678.

70 Smith "Four German jurists" 1897 *Political Science Quarterly* 46; Riegert *op cit* 94–95.

71 Stein *op cit* 61 82–83; Williston *On contract* (1979) 625; Schwenk "Culpa in contrahendo in German, French and Louisiana law" 15 *Tul LR* 94; Schanze 7 *Ius Commune* 327 355.

72 Stein *op cit* 76.

73 *Ibid.*

74 *Ibid* 81; De Wet and Yeats *op cit* 77.

75 Buckland *Textbook of Roman law* (1976) 420; Stein *op cit* 81.

76 Damages are thus allowed to provide relief for expenses incurred by the aggrieved party in the belief that he had a contract and he can therefore claim for expenditure for drawing up the contract, travel expenses in connection with its conclusion and other similar losses which would not be suffered by the plaintiff, had he not relied on the offer of the mistaken party (Sabbath "Effects of mistake in contract" 13 *Int and Comp LQ* 815; Patterson 28 *Col LR* 887). *Negative interesse* also allows recovery of damages for lost opportunities owing to the belief that this particular contract existed (Patterson *op cit* 887; Williston *op cit* 630). Jhering would not allow specific performance (i e contractual remedies) to be granted (Smith *op cit* 45; Schwenk *op cit* 88).

A number of problems emerge from the texts:

i A contractual action is granted on the basis of a *void* contract. We are thus faced with an inherent contradiction. How can one award a contractual action on a non-existent contract, given that effective mistake and impossibility make the contract void?[77] One is thus attempting to breathe life into a dead contract.

The texts do not seem to deal with this problem directly, but writers such as Stein and Schwenk explain the texts by saying that the "nullity" of the contract excludes its normal effect, but not every effect.[78]

The only solution to this impasse is to argue that the remedy is not strictly contractual, but quasi-contractual. An analysis of the texts proves instructive and enables a number of inferences to be made. First of all, the fact that some texts speak of an *actio in factum* rather than an *actio ex empto* seems to indicate some awareness that the situation is one which is not strictly contractual, but resembles a contractual action.[79] Secondly, the fact that *negative interesse* damages are awarded, instead of the normal *positive interesse* damages, indicates a similar awareness. The submission is made that the remedy provided is one that takes account of the contractual setting, but also recognises the conceptual problems that accompany it.

ii A less formidable problem is that the texts limit the remedy to *sale,* but Jhering wished to extend it to all contracts.[80]

Given the Roman-law roots of his doctrine, Jhering confined it to impossibility of performance and cases where the will of one party was defective. The latter instance either involved a defective manifestation of the will or a failure to enquire whether the offeree had begun to act on the offer.[81]

The evolution of the doctrine

When German law became codified, the Civil Code (*BGB*) incorporated the doctrine in areas dealing with mistake and impossibility of performance. While remaining true to its original doctrine in some areas (for example, by demanding *fault* on the part of one party in order to establish liability[82]), it has deviated from this in other areas, and established *strict liability* to compensate for *negative interesse* damages resulting from essential error.[83] The existence of strict liability clearly indicates an *alteration* in the *basis* of liability for *culpa in contrahendo.* In an analysis of these particular sections of the *BGB*, the German supreme court has affirmed the alteration of the basis of liability by insisting that the *"culpa"* in the doctrine ought not to be understood as either *dolus* or negligence, but rather as "responsibility for setting an economic process in motion".[84] Schwenk

77 The same objection is raised by Stoljar *Mistake and misrepresentation* (1968) 74 in a fn.
78 How else can one explain a text which holds the following: "Where a party ignorantly purchases *res sacra*, the purchase is *void*; and an action on *sale* can be brought against the vendor . . .": *D* 18 1 62 1 (Scott's translation).
79 Support for this submission can be found in *D* 11 7 8 1: "Ulpianus states that the praetor grants an action *in factum* against the vendor . . . since it *resembles an action on a contract of sale*" (Scott's translation).
80 Stein *op cit* 62.
81 Schwenk *op cit* 89. It will be recalled that there is no such remedy in South African law.
82 A 307 *BGB* requires fault in cases of impossibility of performance
83 A 122 *BGB*; Schwenk *op cit* 90; Kessler *op cit* 403.
84 Holstein 13 *Tul LR* 383 fn 144.

defines the altered basis as *reliance by a co-contractant* and hence reliance interest (otherwise known as negative interest) is recoverable.[85]

Despite the *BGB*'s reception of the doctrine in certain areas, it was *legal practice*, more particularly the courts, which developed and enhanced the doctrine to its present dimensions. The evolution of the doctrine provides a clear illustration of the judicial process of lawmaking. *Flexible interpretation* permitted the courts to reach a socially desirable conclusion without express codal authority.[86] Judicial initiative has extended *culpa in contrahendo* to include *inter alia* the situation where:

i the formation of the contract has been prevented by the fault of one party (for example where an offeror states that the offer will be open until 18:00 but, owing to his blameworthy conduct he is not at the place of acceptance at that time, causing the offer to lapse[87]);

ii there is a duty on the part of one contracting party to inform the other party of circumstances which might have prevented him from entering the contract. In creating a duty to disclose, the court has held that the negotiations of parties create a precontractual relationship which imposes upon each party the duty to mention all the circumstances which may influence the other party to complete the contract,[88] provided that the other party is unable to procure the information himself and the non-disclosing party is aware of the fact.[89] A party negligently discharging his duty to inform by giving erroneous information is equally liable.[90]

The development of this remedy has crucial implications for German law, which indicates an extreme reluctance to award delictual damages for pure economic loss caused negligently. Issues of disclosure relate to misstatements in the law of delict, and as in South African law prior to the *Administrateur Natal* case, liability for negligent misstatement is looked upon as a pariah, afflicted with the illnesses of indeterminate liability and multiplicity of actions. Nevertheless, by creating contractual liability for negligent misstatement in inducing a contract, one removes considerations of the above nature.

To create the contractual liability in the circumstances outlined above, fault is required. The negligence requirement in the doctrine involves a deviation from the standards of care and fairness expected under the circumstances.[91] Although it may be argued that the use of a delictual standard of care in contractual relationships is indicative of the extent to which a fiction is used to circumvent delictual difficulties, it is not as inconsistent as it may sound, the principle being expounded in such notable authority as the *Corpus iuris civilis*.[92] [93]

An analysis of these developments in *culpa in contrahendo* indicates clearly that there has been an alteration in the basis of liability. The real basis for

85 *Op cit* 90.
86 Riegert *op cit* 96–97; Schwenk *op cit* 91; Kessler *op cit* 403.
87 Schwenk *op cit* 91.
88 *Ibid* 91 93.
89 Kessler *op cit* 405.
90 *Ibid.*
91 *Ibid* 406.
92 Thomas *A textbook of Roman law* (1976) 249–250.
93 It must be stressed that the doctrine has developed to provide remedies for other situations, such as *pre-contractual vicarious liability*. However, given that the present writer is only using those aspects of the doctrine which provide a solution to our present problems in the law of contract, reference will not be made to these further developments.

liability is no longer fault. The courts and academic writers have developed two main alternatives, both with strong contractual roots. They are *reliance* and *good faith*.[94] The new basis of liability is the protection of the reliance interest of the party who in good faith has relied upon the apparent validity of the contract.[95] Writers such as Stoll fused the doctrine in its limited form with the general law of contract on the basis of its association with good faith and protective duties, and the recognition of the contractual *bona fide* relationship was used as the point of departure for development.[96]

The exposition of the modern doctrine as contained in the *BGB* with its associated judicial extension, does invite criticism from some quarters. The first criticism would be one raised by Jhering himself, namely the strict liability imposed on one who makes an essential error. The absence of the need to prove fault immediately raised the argument that it extends liability too widely and that it might have an adverse socio-economic effect, people being too reluctant to contract. The present writer is in agreement with this criticism, for it is submitted that if one is looking for a solution which is equitable to both parties, then *fault* should be the vehicle. While it certainly would be advantageous to the innocent buyer not to have to prove fault, it would be, it is submitted, irresponsible to throw open the doors of liability so widely.[97]

An attempt has already been made to deal with the criticism of granting a contractual remedy on a void contract.

A final criticism against the doctrine is raised by Patterson,[98] who argues that it fails to compensate the psychological effect of repudiation as a result of mistake, where the promisee has not overtly relied on the promise to his prejudice. For example, the promisee may have made his plans and even have altered his external conduct in innumerable ways in reliance on the promise, yet these go uncompensated. This criticism must be dismissed for no system can afford to introduce such damages. Such liability is indefensible from a socio-economic point of view, but also is totally foreign to the law of contract, both in Anglo-American and South African law.[99]

Although one cannot ignore the problems associated with the doctrine, it is submitted that the advantages of the doctrine far overshadow them. At the

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94 Kessler *op cit* 404; Schwenk *op cit* 90; Schanze *op cit* 328 357. Hoffman "The basis of the effect of mistake on contractual obligations" 1935 *SALJ* 436 suggests that instead of fault being the basis of liability, *risk* should be applied. It is submitted that this should not be followed for two reasons. Risk usually relates to acceptance of liability for reasons beyond the control of the parties, thereby placing it beyond the realm of a requirement of *fault* which *culpa in contrahendo* requires. Secondly, the focus of risk is on the incorrect party. Risks points to the bearing of liability by an aggrieved party, while the essence of *culpa in contrahendo* is to *provide* a remedy for the aggrieved party.

95 Hoff 53 *Tul LR* 378; Williston *op cit* 626.

96 Schanze *op cit* 328.

97 Riegert *op cit* is of the opinion that a 122 is not to be regarded as an instance of *culpa in contrahendo* because it does not require fault.

98 "Equitable relief for unilateral mistake" 28 *Col LR* 887–888.

99 Our law is clear on this point. The general rule is that no damages are awarded for any loss other than financial loss. No *solatium* may be claimed, *no award* is made for disappointment or inconvenience. The law of contractual damages is extremely materialistic in outlook (see *Hickman v Cape Jewish Orphanage* 1936 CPD 548; *Farmers Co-op Society v Berry* 1912 AD 351 352; *Edouard v Administrator Natal* 1989 2 SA 368 (D)). De Wet and Yeats *op cit* 202 stress the strength of this rule and reject the decision of *Jockey v Meyer* 1945 AD 354 which attempted to award damages for *bodily* discomfort.

superficial level one can convincingly argue that it provides remedies which were absent both prior to and after codification.

But what is much more important is that it provides confirmation of one crucial principle upon which all law should be predicated: that law should serve the interests of society and not *vice versa*. With particular reference to commercial law, Ehrlich[100] submits that the law as embodied in statutes and cases, involves a constant attempt to try to keep up with commercial usage, for the centre of legal gravity lies in society itself. It was these considerations which prompted Jhering to develop the doctrine.[101] The common law was not paying sufficient attention to the needs of commerce. Jhering was writing at a time when the approach to private law was one of *laissez-faire*, a hands-off approach by the courts and the law, allowing the parties to shape their own destinies. But the system was deficient in certain areas. The economic structure of the country had altered – one was no longer dealing with small-scale market economies, and the needs of commerce had changed. The system had to be modified and updated to cope with these demands. Jhering wished to maintain the *laissez-faire* contract function but realised that the concept of contract required constructive refinement – hence *culpa in contrahendo*.[102]

How then has it accommodated the needs of commerce? It aims at ensuring the security of commerce,[103] and coupled with this it introduces a fairness regime into the law of contract which was previously lacking.[104] Together these two functions have made the *laissez-faire* law of contract applicable to the needs of the 20th century.

Culpa in contrahendo as part of South African law

There can be no doubt that if *culpa in contrahendo* were to be applied to the South African law of contract, it would remedy all the deficiencies that have been referred to in this article.[105] The question to consider is whether the doctrine can be successfully absorbed into the South African common law. For reasons which will appear below, the answer must be in the affirmative.

Culpa in contrahendo and misrepresentation

For situations involving fraudulent misrepresentation our courts use the Aquilian action to provide a remedy.[106] It has been argued that in regard to fraudulent misrepresentation we are forced to use a delictual action since in Roman law *dolus* was a *delictum privatum* and hence the *actio doli* was used.[107] This is not strictly correct. All *stricti iuris* or non-consensual contracts necessitated the use of the *actio doli* in such circumstances.[108] However, when such misrepresentation

100 *Fundamental principles of sociology of law* (1936) Foreword.
101 Smith *op cit* 43; Schanze *op cit* 327 350 *et seq.*
102 Schanze *op cit* 351
103 Sabbath *op cit* 407.
104 Kessler *op cit* 815.
105 An attempt has been made to indicate how *culpa in contrahendo* has dealt with all those areas of our law which are deficient.
106 See fn 5 above.
107 De Wet and Yeats *op cit* 38 fn 151.
108 Kaser *Roman private law* (1984) 175; *D* 4 3 18 3.

was made in relation to a consensual or *bona fide* contract, the remedy was a *contractual* one based on the *actio empti*.[109]

The contractual remedy was granted on the basis of *good faith*, by virtue of the *bona fide iudicium*, which gave the praetor a discretion to grant an action against conduct which he considered *contrary to good faith*.[110] Damages which were awarded to the aggrieved party were to the extent of *quod sua interest decentum eum non esse* – the interest which the aggrieved party had in not being deceived.[111] Such definition accords with that of *negative interesse* damages. If one has regard to the famous *dictum* in *Trotman's* case relating to *negative interesse* damages which are awarded in delict, one can see that the *deceptum eum non esse* damages are identical:

> "A litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words the amount by which his patrimony has been diminished by such conduct, should be restored to him."[112]

Despite the existence of the authority at Roman law, De Wet and Yeats submit that it is no longer relevant because the distinction between contracts *stricti iuris* and contracts *bona fide* no longer applies and that we therefore use a delictual action.[113] This is where their argument falls down, for all our contracts are now *bona fide* contracts and hence the *actio empti* should be used in *all* cases of misrepresentation.[114]

In regard to Roman-Dutch law, De Wet and Yeats state that the position is not clear, but nowhere do the authors refute that damages for fraudulent misrepresentation could be claimed *via* the contractual action, by virtue of the *bona fide iudicium*. Indeed, there are certain Roman-Dutch authorities who are explicitly clear in stating that for cases of fraudulent misrepresentation inducing a *bona fide* contract (whether such fraud went to the root of the contract or was merely incidental to it), one could claim on the *actio empti* for fraudulent misrepresentation and that there was no need to bring a subsidiary action on fraud.[115] Despite the existence of such strong authority from no less an authority than Voet, our courts seem merely to ignore this and to proclaim that one is bound to use the Aquilian action. Such approach is evident in the *locus classicus* on fraudulent misrepresentation, *Trotman v Edwick*,[116] in which Van den Heever JA held that

> "the Roman-Dutch authorities are not helpful, merely stating that the plaintiff may recover his *id quod interest*, but I suppose they take the obvious for granted and imply that damages should be assessed on the same principles as in say, the Aquilian action".

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109 Kaser *Das römische Privaatrecht* 2 ed vol 1 551 citing *D* 19 1 1 1.
110 *Ibid.*
111 *Ibid.*
112 *Trotman* case *supra* (fn 5) 2 449. Wille and Millin *Mercantile law of SA* (1979) 97–98 paraphrase this as follows: "The object of the delictual remedy of damages is to put the aggrieved party in the position he would have been in but for the delict, that is, had he not been misled."
113 *Op cit* 302.
114 *Tuckers' Land and Development Corporation v Hovis* 1980 1 SA 645 (A) 652; Grotius *Inleidinge* 3 15 9; De Vos "Skadevergoeding" 1964 *Acta Juridica* 28.
115 Voet 4 3 3, 4 citing *I* 3 23 5; *D* 18 1 62 1 and *D* 4 3 7 3 *in fin*. While there may not be unanimity among the writers as to whether the action is contractual or delictual, they all agree that *negative interesse* damages are awarded (see Grotius 3 15 8; Voet 4 3 11 and Van Leeuwen *CF* 1 4 42 2).
116 *Supra* (fn 5) 448.

The most plausible explanation for this seems to be the influence of English law in this regard[117] and indeed De Wet and Yeats concede this but argue that the position is now firmly entrenched in our law.[118]

The only other stumbling block is that the basis of the doctrine of *culpa in contrahendo* is *bona fides*, as interpreted by the courts in exercising the *bona fide iudicium*. Does this still exist in our law? Once again the answer must be given in the affirmative. There is no question any longer that all our contracts are *bona fide* contracts. Coupled with this, our appellate division recently affirmed that the *bona fide iudicium* which existed at Roman law, and by which the remedies referred to in this article were applied, was part of the Roman-Dutch law and our law as well.[119] Carey Miller,[120] in his review of the *Hovis* case,[121] submits that the approach of the court was such as to herald a return to the Roman law and the adoption of very wide powers which the courts of those times enjoyed in respect of contracts *bona fides*. This being the case, the remedies discussed above can easily be implemented into our law.

It has therefore been shown that there is no impediment at common law restraining the adoption of *culpa in contrahendo* into our law in regard to fraudulent misrepresentation.

However, what of the reception of the doctrine in regard to negligent misrepresentation? It is submitted that there is sufficient authority both in terms of policy and common law to prevent any obstacle to this.

Both Kaser and Buckland[122] have extracted texts where *culpa* (negligence) has been incorporated into the concept of acting contrary to good faith. There is clear authority for the recognition of contractual liability for negligent misrepresentations in inducing a contract in Roman law.

Our Roman-Dutch writers are silent on this point, but it is submitted that this can be overcome. First of all, our reluctance to award damages for negligent misrepresentation inducing a contract is because of an English-law influence.[123] Secondly, since the remedy for fraudulent misrepresentation is based on a breach of *bona fides* in contract, and given that the concept of *bona fides* is a concept of variable contents in the light of changing mores and circumstances,[124] it is submitted that a recognition of liability for negligent misrepresentation will be neither foreign to our law nor difficult to impliment.

There is no doubt that at common law, we have the rudimentary principles of a remedy similar to *culpa in contrahendo* to deal with the negligent misrepresentation, which will enable us to escape the rigours of *Lillicrap's* case. However, the question is whether they will be resurrected after all these years. The present writer is of the opinion that it can be done.

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117 *Supra* fn 7 and 8.
118 *Op cit* 300.
119 The *Hovis* case *supra* (fn 114).
120 "Judiciae bonae fidei: a new development in contract?" 1980 *SALJ* 531 *et seq.*
121 *Supra* fn 114.
122 Kaser *Das römische Privaatrecht* 551 fn 63 citing Paul *D* 18 6 3; Buckland *"Culpa* and *bona fides* in the *actio empti"* 1932 *LQR* 228–229.
123 Boberg *op cit* 62.
124 *Meskin v Anglo-American Corp of SA* 1968 4 SA 793 (W) 799.

The main authority for the above submission is the approach taken by the appellate division in *LTA Engineering Co Ltd v Seacat Investments*, [125] in which the court resurrected a rule of the Roman law of cession, long ignored by South African courts. In coming to its decision, the court traced the entire history of this rule from Roman law, through the Glossator and Post-Glossator period and finally to Roman-Dutch law, where it was mentioned by only three authors, foremost among whom was Voet.

In coming to its conclusion, the court *rejected* the view that it was not received or applied in Holland or the fact that a number of better known Roman-Dutch writers did not mention it.[126] It also stated that the writers who did mention it were not expressing a revolutionary view, but merely restating a rule that had been recognised for centuries.[127] Thirdly, and most importantly, the court stressed that the eminent equity of the rule demanded its continued recognition unless obstacles such as *stare decisis* or abrogation by disuse applied.[128]

In dealing with *stare decisis* and its concomitant, *communis error facit ius*, the court *obiter* adopted the reasoning used by David AJA in *Union Government v Rosenberg*.[129] In this case the court held that it would be doing wrong, if it was satisfied that a mistake had been made, to perpetuate that mistake and cause an injustice to not only present litigants, but to many litigants in the future.

As far as *abrogation by disuse* is concerned, Jansen JA held that one cannot invoke such a doctrine where the courts have overlooked and are unaware of a rule of common law.[130]

There is no doubt that this entire line of reasoning can equally be applied to the issue of common-law remedies for misrepresentation. Could one argue that the *Seacat Investment* case was an isolated case of returning to Roman and Roman-Dutch law? It is submitted not. One merely has to look at the cases of *Braun v Blann and Botha*[131] where the appellate division on both occasions reverted to the Roman-Dutch law and Roman law for solutions to issues. Indeed, in *Mutual and Federal Ins Co Ltd v Oudtshoorn Municipality*[132] the court cast aside nearly a century of South African insurance law, as based on English law principles, in favour of Roman-Dutch law.

Certainly it might be argued that this is merely a resurrection of the purist element in our law to rid the system of foreign influences.[133] [134] Whatever the reasons for the return to our common law by the courts in the above cases, it

125 1974 1 SA 747 (A).
126 766E–F.
127 767B.
128 771B–C.
129 1946 AD 120 130.
130 *Seacat Investment* case *supra* (fn 125) 770H 771G–H.
131 1984 2 SA 850 (A).
132 1985 1 SA 419 (A).
133 The clash between the "purists" and the pollutionists was at the forefront of our law in the 1950s and 60s when a revivalist movement under the banner of Steyn CJ attempted to resurrect a Roman-Dutch common law, and to discard English law as foreign, merely, one suspects, for ideological reasons.
134 This was criticised by both academics and the courts, and indeed Holmes J in *Ex parte De Winnaar* 1959 1 SA 837 (N) 839 saw this as an attempt to return the oak to its acorn, as South African law had developed beyond the original confines of Roman-Dutch law. See Matthews and Milton "An English backlash?" 1965 *SALJ* 31.

is submitted that the need to recognise the remedies discussed in this article, is based on necessity and not frivolity or a desire for "purification". There is no doubt that the return to our common law in this instance will be truly advantageous, for we can escape the problems of wrongfulness and pure economic loss in delict.

Non-disclosure and mistake

As far as non-disclosure is concerned, there is clearly authority in Roman and Roman-Dutch law that where there was fraudulent non-disclosure, an aggrieved party could claim on the *actio empti negative interesse* damages, much like the situation involving fraudulent misrepresentation.[135] Our courts have not only taken cognisance of these authorities, but have recognised that the basis of the action is one of *bona fides*.[136] Despite this, they continue to apply the delictual action, and once again this can only be explained by the use of precedent and policy as based on English law.

As regards negligent non-disclosure, the arguments which have been expounded above in regard to negligent misrepresentation, are equally applicable here.

Dealing with *mistake*, both Voet and Grotius apply a remedy similar to *culpa in contrahendo*, requiring fault on the part of the mistaken party and awarding *negative interesse* damages on a contractual action.[137]

It is thus clear that at common law we have a *culpa in contrahendo* doctrine, which can cure the ills of our contract law. No doubt there are problems with this doctrine. But they are of a conceptual nature, namely whether one can have a *contractual* action in a *void* contract or whether a contractual action which awards *negative interesse* damages is strictly correct. Germany is still struggling with these conceptual difficulties,[138] but what is far more important, is that the doctrine has rendered sterling practical service. It is with this attitude that we should approach the issue in our law.[139]

THE GERMAN DOCTRINE AS PART OF SOUTH AFRICAN LAW – CONCLUDING REMARKS

The fact that all these remedies could be recognised in South African law, might prompt the argument that the German doctrine of *culpa in contrahendo* is irrelevant. For three main reasons, the present writer disagrees. From an abstractionist point of view, it is better to have one common remedy with a specified

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135 *D* 2 1 1 9; *D* 21 1 38 7; *D* 19 1 13 *pr* and 1; Voet 21 1 3 and 19 1 15.

136 *Meskin*'s case *supra* (fn 124) 799 *et seq*: "All contracts are *bona fide*. This involves good faith in ... evaluating the conduct of the parties both in respect of its performance and *its antecedent negotiation*. Where a contract is concluded, the law expressly involves the dictates of good faith. Good faith as an objective standard must rest largely on an ethical basis ... In the last resort it would be difficult to see how such conduct may be tested, save in the light of what might be ordinarily regarded as legitimate behaviour, of fair dealing between man and man, taking into account the nature and circumstances of the transaction ... The involuntary dependence of one party upon the other for information, material to his decision is a factor giving rise to a duty of disclosure; *aliter* his imprudence, supineness, or exclusive reliance on his own judgement ... *Bona fides is a concept of variable content in the light of changing mores and circumstances.*"

137 Voet 19 1 3; Grotius (*De jure belli ac pacis*) 2 63

138 Schanze *op cit* 358.

139 It was suggested earlier in this article that the doctrine should be treated as a *quasi*-contractual action to minimise the conceptual difficulties.

set of rules to deal with a myriad of similar situations. This certainly is not foreign to our law. Indeed, we have a law of contract and delict and not as in English law, actions on the case: a casuistic approach. Each of the deficiencies referred to in our law of contract, relates to a similar situation, involving a breach of *bona fides*. It would make sense to have a generic concept to apply, so that any developments can be uniform and not lead to piecemeal adaptations based on casuistry. In this regard one can learn from the approach taken by German law.

Secondly, if we should wish to develop our law in a certain direction, we can look to German law to see how it has approached the issue. Jansen JA in the *Hovis* case,[140] recognised that the concept of *bona fides* could change with time, and he referred to German law to assess to what degree the concept had expanded.

Thirdly, should our courts come across an instance where they have difficulty in applying the doctrine, they can look to German law to see how the doctrine has been utilised to solve the specific problem.

The second and third submissions rely to a large extent on whether German law has any suasive force in our law of contract. Once again the answer must be in the affirmative. In *Braun v Blann and Botha*[141] the appellate division accepted that we have a *civil law* system, in other words that our law developed from the Roman law as it was received and developed in Europe. Consequently referral to such systems in case of doubt in our common law is quite acceptable. It has been argued that the South African lawyer is not indulging in comparative study when he ranges into the depths of German law in search of a solution to a particular legal problem.[142] Roman-Dutch law, which was received in South Africa, was only an offspring of the European *ius commune* on which the German *BGB* is based. Hence the provisions of the *BGB* may be said to be threads within the fabric of our law.[143]

Coupled with this idea is the notion that the *bona fide* basis of contract is deeply entrenched in both German and South African law. Since the *bona fide iudicium* has been shown to exist in both legal systems, it follows that the approach taken by the German courts in exercising this power could provide valuable insights for our courts in the development of our existing remedies at common law.

Given the above, there is no doubt that our courts can refer to the *culpa in contrahendo* doctrine of German law to build upon the rudimentary doctrine which we have at our disposal, to enable them "to listen to their sense of justice and to the sense of justice of the community",[144] and to strive to achieve a realisation of Tillotson's view of contract mentioned in the introductory remarks

140 *Supra* (fn 114) 652.
141 *Supra* (fn131) 859B.
142 Zimmermann *Synthesis of South African private law* 17 (as yet unpublished lecture to the Law Conference, Grahamstown 1986).
143 Zimmermann "*Conjunctio verbis tantum*" 1984 *Zeitschrift der Savingy – Stiftung für Rechtsgeschichte* 268. Indeed, the court in the *Braun* and *Oudtshoorn Municipality* cases quoted wide and varied sources of the European civil-law countries to assess the development of Roman-Dutch law.
144 Kessler 43 *Col LR* 637.

to this article. There is no doubt that our common law is a living law[145] and can adapt to modern requirements. Just as the courts were able to expand the Aquilian action to incorporate liability for negligent misstatement, so too can they expand the old common-law remedies to create a unified remedy for the situations outlined above, and in so doing cure the ills of the law of contract.

145 Per Joubert JA in the *Oudtshoorn Municipality* case *supra* (fn 132) 430.

The total power exercisable in the modern State is formidable. How to place controls upon it and prevent its abuse by those in whom it is vested has been an intractable problem in the history of many countries. Unchecked authority can be a threat to freedom and justice . . . Even where despotism does not prevail, societies have felt the need to place restraints upon the organs of State, to ensure that the laws and the administration are responsive to the will of the people, and that justice is fairly dispensed (*per* Patrick J Dalton and Robina S Dexter *Constitutional law* (1976) 29).

Strafregtelike omkoping

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SUMMARY

Crime of bribery

In this article the crime of bribery is scrutinised. First of all, our common law is expounded. Thereafter the legislation in respect of bribery and the case law developed by our courts are critically commented upon. References are made throughout to the position in various other legal systems. It is submitted that the common-law crime of bribery should be abolished and the statutory crime of bribery be extended to intercept those aspects of common-law bribery not yet covered by it. Finally the various reasons presented to justify the crime of bribery are explained.

1 INLEIDING EN TERMINOLOGIE

In hierdie artikel word die problematiek ten aansien van die bestraffing van omkoping onder die loep geneem. Omkoping word in dié verband vanuit 'n regshistoriese, positiefregtelike en regsteoretiese hoek betrag.

Hoewel die term "omkopery" dikwels gebruik word, verkies ek die term "omkoping" omdat dit die normale selfstandige naamwoord vir die werkwoord "omkoop" is; daar word byvoorbeeld ook nie van "afpersery" nie, maar van "afpersing" gepraat. In die Nederlandse strafregliteratuur word die woord "omkoping" insgelyks deurgaans gebruik. Die oorsprong van die woord "omkopery" is nie aan my bekend nie.

2 HISTORIESE OORSIG

2 1 Romeinse reg

Die *Lex Julia repetundarum*[1] vorm die basis van die Romeinse reg met betrekking tot omkoping. Hierdie wet verbied die ontvangs van gelde deur enigeen wat 'n *magistratus* is, of bedeel is met een of ander vorm van gesag of administrasie, of wat die een of ander openbare werksaamheid of funksie verrig.[2] Die *lex* is ook van toepassing op die bediendes van sodanige persone. Dit is nietemin

1 *D* 48 11 1. Sien hieroor Rein *Das Kriminalrecht der Römer* (1844) 604–672; Mommsen *Römisches Strafrecht* (1899) 705–732; Strachan-Davidson *Problems of the Roman criminal law* (1912) 1–15; Benade "Afpersing" 1952 *THRHR* 141–142; Hunt en Milton *South African criminal law and procedure* vol 2 (1982) 214.

2 Sien Mommsen 710–713.

vir hierdie persone veroorloof om geld van sekere mense te ontvang, soos neefs, naverwante of gades.[3] Enigeen wat met gesag beklee is en geld ontvang om 'n sekere beslissing of bevel te gee,[4] of om meer of minder te doen as wat sy plig van hom verwag,[5] is insgelyks volgens dié *lex* aanspreeklik. Ook hulle wat geld ontvang om te getuig of nie te getuig nie is aanspreeklik.[6] In *D* 48 11 7 word verder daarop gewys dat die *lex* verbied dat iemand enigiets as beweegrede ontvang om 'n uitspraak te lewer of 'n bevel te maak, of om sy opinie te verander of te voorkom dat hy 'n beslissing gee, of om 'n persoon in die gevangenis te werp of in kettings te plaas of daarvan vry te maak, of om 'n persoon skuldig te bevind of te ontslaan of 'n straf op te lê of daarvan vry te stel. In ander tekste word egter daarop gewys dat amptenare wel toegelaat is om klein geskenke van welwillendheid te ontvang.[7] Kragtens *D* 1 18 18 mag 'n goewerneur desnietemin nie 'n geskenk of gif ontvang nie tensy dit drank of voedsel is wat binne 'n paar dae verbruik kan word.

Die straf is aan die diskresie van die regspreker oorgelaat. Dit was gewoonlik verbanning maar die doodstraf is ook soms opgelê.[8]

Ingevolge die *Lex Julia ambitus*[9] is die afkoop van 'n amp strafbaar.[10]

2 2 Die Romeins-Europese reg

In die Middeleeue het ampskending (waaronder omkoping) ampsontsetting en eerverlies tot gevolg gehad. Volgens Maes[11] is die skuldige volgens die gebruike van die stad Mechelen deur die stad op 'n slee gesleep en iedereen kon vrot eiers na hom gooi.

Damhouder[12] verklaar dat die misdaad "Omkoopinge of Corruptie" gepleeg word as 'n regter deur partye omgekoop word "om een zake haastiger of trager of op enige wijse te vonnissen". Ook word dit gepleeg as ander amptenare hulle deur geld laat beïnvloed om 'n besluit te neem wat hulle nie mag neem nie. Amptenare mag wel kleiner geskenke aanneem. Iemand wat heimlik sonder die kennis van die prins deur "giften of gaben" 'n amp trag te bekom, word vir so 'n amp gediskwalifiseer.[13] Beide die "Kooper" en "Verkooper" word in so 'n geval weens "Ambitie of koopinge der Officien" gestraf. Laasgenoemde word 'n boete opgelê en eersgenoemde word gestraf met "publijke Infamije" en 'n verklaring dat hy onbevoeg is om enige openbare amp te beklee. Opset word as vereiste vir hierdie misdaad gestel.[14]

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3 *D* 48 11 1. Sien ook oor dié *lex* Voet 48 11; Matthaeus *De criminibus* 48 8 1; Van der Keessel *Crim* 48 11.
4 *D* 48 11 3. Volgens *D* 48 11 5 kan die ondergeskiktes (*comites*) van 'n regter ook ingevolge dié *lex* aangekla word.
5 *D* 48 11 4.
6 *D* 48 11 6.
7 *D* 48 11 6 2; *D* 1 16 6 3.
8 *D* 48 11 7 3. Regters wat op korrupte wyse geld ontvang, word van hulle amp onthef (*D* 48 19 38 10; *C* 9 27 3).
9 *D* 48 16.
10 Sien ook *C* 9 26 1; *C* 9 27 6; Rein 701–733; Mommsen 865–873.
11 *Vijf eeuwen stedelijk strafrecht* (1947) 334.
12 *Practijke of gebruyk van civiele als criminele zaken* afd *Criminele zaken* hfst 118. Sien ook Boey *Woorden-tolk* sv *Curruptie*; Van Zurck *Codex Batavus* sv *Curruptie*; Kersteman *Hollandsch rechtsgeleert woorden-boek* sv *Corruptie.*
13 Hfst 119.
14 Sien Zoesius *Commentarius ad D* 48 11 1.

Die oud-Hollandse reg word in dié verband deur twee plakkate,[15] wat deur ons howe aanvaar is, gereël. Die eerste en belangrikste is dié van 1 Julie 1651.[16] Hierdie plakkaat verbied dat enigeen

> "vande meer-op-ghemelte Hooge Regieringe, ofte andere des Generaliteyts Collegien, die Hoven van Justicie, van Brabandt en Vlaenderen, aen der selver hooge Ministers, ofte Beampten respective, de magistraten ende Gerichten onder de Generaliteyt resorterende, geen uytghesondert, der selver Huysvrouwen, Kinderen, die van hare Familien, ofte yemandt anders, t'eenigen tijden te presenteren, geven ofte belooven, directelick ofte indirectelick, oock niet by eenige onderhandelinge, koop, permutatie oft andersints, enige giften ofte gheschencken van eenige dingen, hoe kleyn die souden mogen wesen, oock van Dranck ofte Eet-Waren, om t'obtineren, ofte gheobtineert te hebben, voor hem selven ofte yemandt anders, directelick ofte indirectelick, eenige Ampten, Officien, Beneficien, Octroyen, Sententien, Resolutien ofte Dispositien".

Die straf is, benewens "arbitrale correctie", eerverlies ("infamie") en die onbevoegdheid om enige openbare amp te beklee.

Die plakkaat van 10 Desember 1715[17] bevestig die vorige plakkaat se bepalings in wese, maar sluit die ontvangs van "kleynigheden van rijpe Vrughten of Vanghst, die aanstondts geconsumeert werden" van bestraffing uit. Ook geskenke wat ontvang word nadat die saak afgehandel is, val binne die trefwydte van die strafsanksie.

Ons gemeenregtelike skrywers[18] bespreek die reg basies aan die hand van dié plakkate. Van Leeuwen[19] wys daarop dat enige "giften en gaven, de welke maar eenigsins na corruptie en kuypery smaken" verbode is. Volgens Moorman[20] kan geen "grooter noch schadelyker" kwaad as omkoping bedink word nie. Hy beskryf dit as "roof van de arme gemeente". Volgens Van der Linden[21] moet die meeste amptenare die "eed van zuivering" aflê; die aanvaarding van omkoopgeskenke is 'n skending daarvan en die betrokkenes maak hulle strafbaar vir meineed.

In praktyk het omkoping nietemin dikwels voorgekom. Trouens, Ruter en Hoekema verklaar:[22]

> "Nog in de 18e eeuw behoorde ook in Nederland datgene, wat wij thans ambtelijke corruptie zouden noemen, tot de min of meer normale aspecten van het dagelijks leven. In die tijd, waarin niet slechts belastingen maar ook ambten gepacht werden, kwamen de inkomsten van die ambtenaar veelal niet van de staat, maar direct uit de zak der bestuurden. In Frankrijk werd in die tijd zelfs de rechter direct door partijen betaald. Deze vergoeding voor een niet of nauwelijks gesalarieerd ambt, werkte de omkoping sterk in de hand. Wie tòch moest betalen, betaalde gaarne iets meer om een voor hem gunstige beslissing uit te lokken. Is de ambtenaar echter eenmaal tegen betaling aangesteld om voor de overheid werkzaamheden te verrichten, dan ontvalt daarmede de grond aan de beloning door de burger privé."

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15 Sien my nota "Ons gemenereg en wetsuitleg" 1984 *De Jure* 367.
16 *GPB* 1 401.
17 *GPB* 5 686.
18 Brunnemann *Commentarius in quinquaginta libros Pandectarum* 48 11 verklaar: "Repetendarum crimen est, quo quis in officio publico constitutus, a privatis pecunias extorsit aut contra jura accepit." Sien ook Huber *HR* 6 17 9; Püttmann *Elementa iuris criminalis* par 604.
19 *RHR* 4 16 6.
20 *Verhandelinge over de misdaaden* 1 9 1.
21 *Regtsgeleerd, practicaal en koopmans handboek* 2 4 9.
22 "Omkoping van anderen dan ambtenaren" 1968 *TvS* 136. Sien ook Seidman "Why do people obey the law? The case of corruption in developing countries" 1978 *British Journal of Law and Society* 49.

Van die bestraffing van nie-amptelike omkoping was daar nog nie sprake nie. In dié verband verklaar James tereg:[23]

> "In the history of most civilised communities, sensitivity to bribery and corruption seems to arise in three stages. The first form to attract public condemnation is the corruption of the judicial and ministerial officers of the country which we may call official corruption. Then comes electoral bribery which we may call political corruption. And finally there is the corruption of persons engaged in commerce which we may call commercial corruption."[24]

In aansluiting by die gemenereg wil ek ten slotte verwys na die ou Transvaalse *Wet tegen Omkooping van Ambtenaren.*[25] Artikels 1 en 2 daarvan bepaal soos volg:

> "1. Met gevangenisstraf, met of zonder harden arbeid, van ten hoogste vijf jaren, wordt gestraft de ambtenaar:
>
> (a) die eene gift of belofte aanneemt, hetzij direct of indirect, wetende of kunnende vermoeden, dat ze hem gedaan wordt teneinde hem te bewegen, om in strijd met zijn plicht in zijne bediening iets te doen of na te laten;
>
> (b) die eene gift aanneemt, hetzij direct of indirect, wetende of kunnende vermoeden, dat ze hem gedaan wordt, tengevolge of naar aanleiding van hetgeen door hem in strijd met zijn plicht in zijne bediening is gedaan of nagelaten.
>
> 2. De rechter die eene gift of belofte aanneemt, hetzij direct of indirect, wetende of kunnende vermoeden, dat ze hem gedaan wordt, teneinde invloed uit te oefenen op de beslissing van eene aan zijn oordeel onderworpen zaak, wordt gestraft met gevangenisstraf, met of zonder harden arbeid, geen tien jaren te bovengaande."

Artikels 3 en 4 stel die aanbieder van die gif en die maker van die belofte ook strafbaar. In artikel 6 word die woord "ambtenaar" omskryf:

> "Onder ambtenaar wordt in deze verstaan, ieder die den eed van getrouwheid aan het volk en die Regeering dezer Republiek heeft afgelegd en uit 'slands schatkist wordt gesalarieerd of belooning trekt, hetzij zulke personen worden aangesteld door de Regeering of gekozen zijn bij, krachtens wettelijk voorschrift, uitgeschreven verkiezing."

Deur die eerste Volksraadbesluit van 3 Julie 1895 word die omskrywing van die woord "ambtenaar" gewysig deur byvoeging van die woorde "en eenig persoon in dienst der Republiek".[26]

3 SUID-AFRIKAANSE REG

3 1 Regspluralistiese problematiek

In dié verband kan die volgende onderskei word:

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23 "Bribery and corruption in commerce" 1962 *International and Comparative LQ* 880.

24 Sien verder *ibid* 881: "Inevitably corruption is first identified in connection with the processes of law and government administration. A corrupt legal procedure is the abnegation of law and as men are prompted to set up a machinery of law by their desire to resist tyranny and in pursuit of their conception of an ideal of justice, sensitivity to corruption among those appointed to administer the law is a natural consequence of the establishment of courts of law. Political or electoral corruption is a later conception since it is only under a democratic régime, when the organs of government are clearly defined and under a measure of public scrutiny, that the dangers of political corruption are recognised." Die omkoop van 'n parlementslid in Engeland is reeds sedert 1695 statutêr strafbaar. Sien Zellick "Bribery of members of parliament and the criminal law" 1979 *Public Law* 31.

25 10 van 1894. Dié wet is volgens Hunt en Milton 234 nog nie herroep nie.

26 Sien *R v Swemmer* 1917 TPD 455; *R v Vaunson* 1919 TPD 6; *R v Naylor* 1919 TPD 30; *R v Lavenstein* 1919 TPD 348.

3 1 1 Omkoping is 'n meerdadervatbare misdaad

Soos by 'n ander geleentheid aangetoon is, kan onderskei word tussen eendader- en meerdadervatbare misdade.[27] Die omkopingshandelinge toon sterk ooreenkoms met 'n kontrak. Albei die "kontraktante", naamlik die aanbieder (omkoper) en geadresseerde (die omgekoopde) is strafbaar. Anders as in die geval van 'n kontrak is die strafregtelike aanspreeklikheid van die betrokke partye by omkoping nie van wilsooreenstemming afhanklik nie. Soos in die loop van die verdere bespreking aangetoon word, is daar gevalle waar slegs die omkoper of slegs die omgekoopde strafregtelik aanspreeklik is.

3 1 2 Misdaadkonkurrensieproblematiek

In Suid-Afrika bestaan daar, benewens spesifieke wetgewing,[28] 'n gemeenregtelike en 'n statutêre omkopingsmisdaad. Laasgenoemde twee misdade is in 'n groot mate konkurrent, dit wil sê hulle dek dieselfde strafregtelike gebied. Hunt en Milton[29] omskryf die gemeenregtelike misdaad by wyse van twee afsonderlike definisies:

> "Bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a State official to give any consideration in return for action or inaction by him in an official capacity."

En:

> "Bribery (as a bribee) is committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity."[30]

Daar word soms na eersgenoemde as aktiewe en laasgenoemde as passiewe omkoping verwys. Die omgekoopde is egter allesbehalwe 'n passiewe party. Hy neem aktief deel aan die omkopingstransaksie. Die gemeenregtelike omkoping kan (ten aanvang) beskryf word as amptenaars- of amptelike omkoping. In Nederland[31] en Duitsland[32] bestaan daar ook afsonderlike (statutêre) misdade wat amptelike omkoping bestraf.

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27 "Brandstigting deur 'n late" 1983 *De Jure* 63.

28 Sien bv a 45 van die Wet op Gevangenisse 8 van 1959; a 80 (k)–(l) van die Doeane- en Aksynswet 19 van 1964; a 76 van die Bouverenigingswet 24 van 1965; a 12 (b) van die Wet op Statistieke 66 van 1976; a 141 van die Insolvensiewet 24 van 1936; a 73 van die Landbankwet 13 van 1944; a 17(n) van die Staatsdienswet 54 van 1957; a 45 van Ord 17 van 1939 (T). Sien ook Milton en Fuller *South African criminal law and procedure* vol 3 (1971) 256; *R v Smith* 1912 AD 386.

29 219.

30 227. In *R v Patel* 1944 AD 511 521 verwys Feetham AR na die volgende omskrywing van Gardiner en Lansdown (vol 2 985) as "a sufficient working definition" van omkoping: "[I]t is a crime at common law for any person to offer or give to an official of the State or for any such official to receive from any person any unauthorised consideration in respect of such official doing or abstaining from or having done or abstained from any act in the exercise of his official functions." In *R v Chorle* 1945 AD 487 493 wys Schreiner AR daarop dat dié omskrywing nie konklusief is nie. Sien verder *R v Libala* 1958 2 PH H265 (OK).

31 Sien a 177 van hulle Strafwetboek: "1. Met gevangenisstraf van ten hoogste twee jaren of geldboete van de vierde categorie wordt gestraft: (1) hij die een ambtenaar een gift of belofte doet met oogmerk om hem te bewegen in zijn bediening, in strijd met zijn plicht, iets te doen of na te laten; (2) hij die een ambtenaar een gift of belofte doet ten gevolge of naar aanleiding van hetgeen door deze in zijn bediening, in strijd met zijn plicht, is gedaan of nagelaten." En ook a 362: "De ambtenaar die een gift of belofte aanneemt, wetende dat zij hem gedaan wordt ten einde hem te bewegen om, zonder daardoor in strijd met zijn plicht

Artikel 2 van die Wet op Voorkoming van Korrupsie 6 van 1958,[33] soos gewysig, bepaal:

"Iemand wat

(a) in die geval van 'n agent, op korrupte wyse van iemand anders 'n geskenk of vergoeding ontvang of verkry of tot die ontvangs daarvan instem of dit probeer verkry, hetsy vir homself of vir 'n ander persoon, by wyse van aansporing of beloning vir die verrig of nalaat van 'n handeling met betrekking tot die sake of besigheid van sy prinsipaal, of omdat hy dit verrig of nagelaat het, of vir die bewys aan of weerhou van enige persoon van 'n guns of onguns met betrekking tot die sake of besigheid van sy prinsipaal; of

(b) op korrupte wyse 'n geskenk of vergoeding aan 'n agent gee of instem om dit te gee of dit aanbied, by wyse van aansporing of beloning om 'n handeling met betrekking tot sy prinsipaal se sake of besigheid te verrig of na te laat of omdat hy dit verrig of nagelaat het; of

(c) wetens 'n kwitansie, rekening of ander dokument ten opsigte waarvan 'n prinsipaal 'n belang het en waarin 'n verklaring voorkom wat in 'n wesenlike opsig vals of onjuis of gebrekkig is, en wat na sy wete bedoel is om die prinsipaal te mislei, aan 'n agent gee of, in die geval van 'n agent daarvan gebruik maak met die bedoeling om sy prinsipaal te bedrieg is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met die strawwe wat regtens vir die misdryf omkopery opgelê kan word."

Hierdie wet omvat sowel amptelike as nie-amptelike omkoping en maak die gemeenregtelike omkopingsmisdaad, behalwe in die volgende drie opsigte, oorbodig:

a Die omkoop van 'n regter is nie volgens genoemde wetgewing strafbaar nie. As gevolg van die staatsregtelike onafhanklikheid van die regtersamp sou dit onvanpas wees om 'n regter as 'n agent van enigiemand te beskou. In die Duitse,[34] Nederlandse[35] en Kanadese[36] strafwetboeke word dan ook afsonderlik vir die omkoop van regters voorsiening gemaak. Die omkoping van 'n regter is wel gemeenregtelik strafbaar.[37]

b Die gee van 'n omkoopgeskenk aan byvoorbeeld die vrou van die omgekoopde is klaarblyklik nie statutêr strafbaar nie. Kragtens die plakkaat van 1651 is dit wel gemeenregtelik strafbaar.

c Die gee van 'n omkoopgeskenk aan 'n parlementslid is moontlik[38] ook nie statutêr strafbaar nie, terwyl dit gemeenregtelik klaarblyklik (kragtens die plakkaat van 1651) strafbaar is.

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vervolg van vorige bladsy

te handelen, in zijn bediening iets te doen of na te laten, wordt gestraft met gevangenisstraf van ten hoogste drie maanden of geldboete van de vijfde categorie." Sien ook a 363.

32 Sien a 331–334. Sien ook Rudolphi-Horn-Samson *Systematischer Kommentar zum StGB* (1985) *ad* a 331–334; Stein "Die Streit um die Grenzen der Bestechungstatbestände" 1961 *NJW* 433; Dahs "Differenzierungen im subjektiven Tatbestand der aktiven Bestechung" 1962 *NJW* 177. Sien verder a 107–114 van die Kanadese Strafwetboek en *R v Arseneau* 1977 36 CCC (2d) 65; *Dore v Attorney-General of Canada* 1974 15 CCC (2d) 542.

33 Wat wesenlik ooreenkom met die herroepe a 2 van die Korruptie Verhinderings Wet 4 van 1918. Sien ook die Engelse *Prevention of Corruption Act* 1906 (Williams *Textbook of criminal law* (1978) 848) waarop die Suid-Afrikaanse wetgewing gebaseer is.

34 Sien a 331(2) 332(2) 333(2) en 334(2) van hul Strafwetboek.

35 Sien a 178 en 364 van hul Strafwetboek.

36 Sien a 108(1)(a) 108(1)(b) 109(a) en 109(b) van hul Strafwetboek. Sien ook a 103–104 van die Transkeise Strafkode.

37 Sien *S v Benson Aaron* 1893 Hertzog 125 131.

38 Sien *R v Hopf* 1954 2 SA 633 (T) 633. Sien ook par 3 2 2 hieronder waar verwys word na die betekenis van die begrip "agent".

Die wetgewer kan die probleem oplos bloot deur genoemde wet te wysig sodat dit ook hierdie gevalle insluit. Die bestaan van twee misdade wat basies dieselfde veld dek, is onnodig.

Artikel 2 omvat sowel amptelike as nie-amptelike omkoping. Na laasgenoemde word dikwels verwys as kommersiële omkoping en daar bestaan in Nederland[39] en Amerika,[40] om maar net twee voorbeelde te noem, spesifieke wetgewing wat dit strafbaar stel. Ek verkies egter om daarna te verwys as nie-amptelike omkoping aangesien daar gevalle van omkoping bestaan wat nòg amptelik nòg kommersieel is, soos blyk uit die Amerikaanse saak *State of Iowa v Di Paglia*.[41] In dié saak het die beskuldigde aan 'n kollege-basketbalspeler 'n som geld aangebied "to influence him in fixing the score of a game". Die hof moes onder andere beslis oor die konstitusionele geldigheid van 'n wet wat omkoping uitgebrei het na sportbyeenkomste. Die hof beslis dat 'n staat wel die bevoegdheid het om so 'n wet te maak.[42] Dit is 'n vraag of sodanige omkoping in ons reg strafbaar is. 'n Mens sal miskien kan argumenteer dat sportmanne agente[43] van hulle klub is. Die aangewese uitweg is egter dat die wetgewer dit uitdruklik strafbaar stel.

3 2 Die daders

Enige persoon kan, met behoud van die algemene reëls met betrekking tot strafregtelike aanspreeklikheid, 'n omkoper wees. Dit geld vir beide gemeenregtelike en statutêre omkoping. Slegs sekere persone kan egter strafregtelike aanspreeklikheid opdoen as omgekoopde.

3 2 1 Die omgekoopde volgens die gemenereg

Die eerste gerapporteerde Suid-Afrikaanse saak in dié verband is *S v Benson Aaron*.[44] Regter Morice, na bespreking van die gemenereg, wys daarop dat omkoping nie beperk is tot die omkoop van regsprekers nie "or to bribery done

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39 A 328ter van hul Strafwetboek bepaal: "1. Hij die, anders dan als ambtenaar, werkzaam zijnde in diens betrekking of optredend als lasthebber, naar aanleiding van hetgeen hij in zijn betrekking of bij de uitvoering van zijn last heeft gedaan of nagelaten dan wel zal doen of nalaten, een gift of belofte aanneemt en dit aannemen in strijd met de goede trouw verzwijgt tegenover zijn werkgever of lasthebber, wordt gestraft met gevangenisstraf van ten hoogste 1 jaar of geldboete van ten hoogste honderd-duizend gulden.

2. Met gelijke straf wordt gestraft hij die aan iemand die, anders dan als ambtenaar, werkzaam is in dienstbetrekking of optreedt als lasthebber, naar aanleiding van hetgeen deze in zijn betrekking of bij de uitvoering van zijn last heeft gedaan of nagelaten, dan wel zal doen of nalaten, een gift of belofte doet van dien aard of onder zodanige omstandigheden, dat hij redelijkerwijs moet aanneem dat deze de gift of belofte in strijd met de goede trouw zal verzwijgen tegenover zijn werkgever of lastgever."

40 A 2(c) van die Clayton Act, soos gewysig, lui: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or on behalf, or subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." Sien Yeager "Brokerage problems and commercial bribery" 1985 *Antitrust LJ* 1029; Ytreberg "Validity and construction of statutes punishing commercial bribery" 1 ALR 3d 1350.

41 49 ALR 2d 1223 (Iowa SC).

42 Sien ook Davis "Bribery in athletic contests" 49 ALR 2d 1234.

43 Sien die bespreking van die begrip "agent" in par 3 2 2 hieronder.

44 1893 Hertzog 125.

with a view to the obtaining of office". Hy haal met goedkeuring die Amerikaanse juris Wharton aan wat omkoping omskryf as[45]

> "the taking by or giving to a person in a judicial or public office of any fee, gift, reward or brocage, to influence his behaviour in his office, or the taking or giving of a reward to appoint another to a public position".

Hieruit blyk dat 'n persoon wat 'n regs- of openbare amp beklee, omgekoop kan word.

In 1897 in die saak *Friedman and Sonn v S*[46] verklaar hoofregter Kotzé:

> "We are of opinion that bribing and attempting to bribe witnesses are punishable. It is one thing merely to keep away a witness who has been summoned, which amounts to a contempt of Court, and quite another thing to induce him by means of money to do so, which constitutes bribery or an attempt at bribery."

Hieruit blyk dat gemeenregtelike omkoping nie tot amptenare of regsprekers beperk is nie want 'n getuie is nòg die een nòg die ander. Uit *R v Schapiro and Saltman*[47] blyk weer dat slegs 'n amptenaar[48] omgekoop kan word.

In *R v Muller*[49] merk waarnemende regter-president Matthews soos volg op:

> "It seems to follow, though it is perhaps unnecessary to express a definite opinion, that it is immaterial whether or not the duration of such person's appointment is regulated by law or whether or not he is remunerated for his services and, if so, whether or not such remuneration is derived from State funds. The sole test is authority recognised by law and misuse of that authority in return for material advantage."

Hiervolgens is die toets of die omgekoopde van regsweë beklee is met gesag om 'n openbare funksie te vervul.

In *R v Sacks*[50] wys appèlregter Tindall daarop dat die begrip "beampten" nie in die 1651-plakkaat omskryf word nie en dat geen Suid-Afrikaanse hof nog 'n uitputtende definisie daarvan gegee het nie. Die hof bevind nietemin dat 'n persoon wat in diens van die staat is, deur die staat betaal word en met verantwoordelike pligte en die bewaring van waardevolle staatsgoedere toevertrou is, 'n beampte van die staat is nieteenstaande die feit dat hy nie permanent in diens van die staat is nie.[51]

In *S v Makhunga*[52] verklaar regter Steyn:

> "I am of the opinion that, in view of the role played by the Executive in Scheepers' assumption of duties and the termination of his office, in view further of the nature of

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45 131. Op 132 sê Morice R: "But I must remark in addition, that even according to Van Leeuwen the bribery of officials for the purpose of obtaining a public position is a crime; and if we avail ourselves of an extensive interpretation, which Van der Linden says is permissible on the ground of perfect and obvious similarity of reasons, then we may accept the position that the bribery of officials, with the object of obtaining a contract, is similarly criminal."

46 4 Off Rep 183 184.

47 1904 TS 355 363.

48 In die Engelse saak *R v Whitaker* (1914) 3 KB 1283 1294 word verklaar: "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public."

49 1934 NPD 141 143. Sien ook *Manilall v R* 1944 NPD 32; *S v Shalem* 1982 2 PH H154 (O).

50 1943 AD 413 423.

51 426. In die Amerikaanse saak *State of Washington v London* 115 ALR 1255 1261 is beslis dat 'n *de facto*-amptenaar ook as omgekoopde omkoping kan pleeg.

52 1964 3 SA 513 (K) 516. Sien ook *R v Libala* 1958 2 PH H265 (OK).

> the duties entrusted to him and the control subject to which those duties are to be carried out, Scheepers is an official of the State."

Die toets wat die hof in die saak aanlê, staan op twee bene:

a Is die betrokke persoon deur die regering aangestel en kan hy deur hulle ontslaan word?

b Wat is die aard van die pligte aan hom opgedra en onder wie se beheer word dit uitgevoer?

Ten slotte kan opgemerk word dat daar nie eenstemmigheid bestaan oor wie gemeenregtelik as omgekoopde strafbaar is nie. In die lig van die opmerking wat in *Friedman and Sonn v S* hierbo gemaak is dat 'n getuie ook omgekoop kan word, kan selfs nie eers tot die slotsom gekom word dat gemeenregtelike omkoping 'n ampsmisdaad is nie. Dit wil voorkom of enige persoon wat in 'n openbare vertrouensposisie staan, omgekoop kan word.

In die VSA is die omkoop van 'n buitelandse amptenaar of agent ook 'n misdaad.[53] Die Suid-Afrikaanse wetgewer behoort myns insiens dié voorbeeld te volg en dit ook in Suid-Afrika strafbaar maak.

3 2 2 Die omgekoopde volgens die wettereg

Volgens artikel 2 van die Wet op Voorkoming van Korrupsie (hierna genoem die wet) is 'n agent die omgekoopde. In artikel 1 van die wet word "agent" en "prinsipaal" soos volg omskryf:

> "In hierdie Wet beteken – 'agent' ook iemand wat by 'n ander in diens is of vir hom optree, 'n kurator van 'n insolvente boedel, die boedelredder van 'n boedel wat vir die voordeel of met toestemming van skuldeisers afgestaan is, die likwidateur van 'n maatskappy wat gelikwideer word, 'n eksekuteur van die boedel van 'n oorledene, die regsverteenwoordiger van iemand wat geestelik gekrenk of minderjarig of andersins regsonbevoeg is, iemand in diens van die Staat of 'n provinsiale administrasie of 'n munisipaliteit, afdelingsraad, dorpsbestuur of ander plaaslike bestuur of 'n skoolraad, of van 'n maatskappy, vereniging of vrywillige vereniging;
>
> 'prinsipaal' ook 'n werkgewer en 'n heer soos bedoel in enige wet tot reëling van verhoudings tussen here en diensbodes en, met betrekking tot 'n kurator, boedelredder, likwidateur, eksekuteur of regsverteenwoordiger soos in die omskrywing van 'agent' bedoel, die algemene liggaam van skuldeisers of aandeelhouers of die erfgename of persone wat deur sodanige regsverteenwoordiger verteenwoordig word, na gelang van die geval."

Die frase "met betrekking tot die sake of besigheid van sy prinsipaal" wat in artikel 2(a) voorkom, het herhaaldelik die aandag van ons howe in beslag geneem. Dit is gepas om die een en ander daaroor mee te deel.

In *Maharaj v James*[54] is beslis dat artikel 2(a)[55] op twee wyses beperk word:

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53 Sien Siegel "The implication doctrine and the Foreign Corrupt Practices Act" 1979 *Columbia LR* 1113: "The legislative history is replete with the reasons why bribery had to be prevented rather than merely punished: bribery is inherently invidious; bribery is harmful to the free enterprise system because it enables corporations to obtain business on a basis other than the quality of their goods and services; and bribery is harmful to the nation because it undermines United States foreign relations, corrupts friendly governments, and casts doubts on the integrity of United States businesses and those who deal with them." Sien ook Hibey "Application of the Mail and Wire Fraud Statutes to international bribery: questionable prosecutions of questionable payments" 1979 *Georgia Journal of International and Comparative Law* 49; Wambold "Prohibiting foreign bribes: criminal sanctions for corporate payments abroad" 1977 *Cornell International LJ* 231.

54 1927 NPD 215 218.

55 Dit het hier gegaan oor a 2(a) van Wet 4 van 1918 wat wesenlik dieselfde as a 2(a) van die huidige wet is.

a Die sinsnede "sake of besigheid van sy prinsipaal" veronderstel dat daar 'n prinsipaal-agentverhouding moet bestaan. In die toonaangewende saak *R v Sesing*[56] is dié opmerking egter verwerp. Regter Van den Heever verklaar:

> "In order to appreciate the scope and extent of the prohibition I propose making an attempt to extract the legislator's intention from his words. The objects of the Act in question are widely conceived: for the better prevention of corruption. The word 'agent' as used in the Act is not intended to have its ordinary juridical connotation but is defined to embrace persons standing to others in a variety of relations of trust. What is significant in this regard is that not only is he an agent who is employed by another but also he who is 'acting for another', considerations which lead one to the conclusion that the Legislature had in mind a factual relationship of trust rather than the formal terms of a mandate creating such a relationship. It seems to me clear therefore that the Legislature had in mind also the case of a person who stands to another in a position of confidence involving a duty to protect the interests of that other; who may without antecedent authority have placed himself in such a position that a Court will not allow him to say that he did not act as agent."

b Die prinsipaal moet benadeel word en hy moet onbewus wees daarvan "or of which he disapproved when he became aware".[57]

In *R v Sibisi*[58] was S in diens van 'n paskantoor ("Pass Office"), maar hy was nie spesifiek betrokke by die uitreiking van duplikaatpasse nie. Hy het egter teen betaling van 'n bedrag geld aan Swartes inligting verskaf as gevolg waarvan hulle duplikaatpasse bekom het. In appèl is aangevoer dat S nie as agent opgetree het nie. Die hof beslis egter dat

> "when the appellant had accepted a reward for the giving of information which would enable those who gave the reward to obtain from the sub-department of State, in which the appellant was employed, something which they could not have got if the appellant had not given that information, he was 'doing an act in relation to his principal's affairs' and consequently he had been rightly convicted of a contravention of the section".[59]

In *R v Ottens*[60] was O werksaam as seiner in diens van die Suid-Afrikaanse Spoorweë. Hy en ander seiners het, volgens gebruik, verskeie besighede geskakel en inligting verskaf oor die aankomstye van skepe. Vir die diens wat hulle verrig het, het die Port Natal Shipping Association kerstyd aan hulle geskenke gegee. Hulle was egter ontevrede met die geskenke wat hulle ontvang het en het besluit om genoemde diens te onderbreek. Hulle het geëis dat maandelikse betalings aan hulle teeklub gemaak word. O is aan oortreding van artikel 2(a) van wet 4 van 1918 skuldig bevind. In appèl verklaar regter Holmes:[61]

> "[I]t seems to me clear that what the appellant did was contrary to the implications of the confidence which he owed his principals. The service which he and other signalmen – there were six or seven of them – did was done during office hours, and it directly related to the affairs of their principal, the South African Railways Administration, because it concerned the arrival of ships in the harbour."

Hiervolgens gaan dit by statutêre omkoping, soos hierbo ook ten aansien van gemeenregtelike omkoping blyk, oor die skending van 'n vertrouensposisie.

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56 1940 OPD 78 87. Sien ook *R v Ah Chong* 1951 3 SA 844 (T).
57 In die kopstuk van dié saak word dit so gestel.
58 1952 3 SA 258 (T).
59 261. Die aanhaling is uit die kopstuk. Sien egter *R v Botile* 1960 1 SA 862 (K).
60 1957 1 SA 692 (N). Sien ook *R v Miller* 1940 TPD 306 312.
61 694. Sien ook *R v Sesing* hierbo 88; *R v Manilall* 1944 NPD 32 34.

3 2 3 Medepligtigheid

Die howe is van mening dat die omgekoopde 'n medepligtige is van die omkoper en omgekeerd.[62] Hierdie beslissings het egter slegs bewysregtelike betekenis aangesien die omkoper en die omgekoopde strafregtelik beide daders is, en in die geval van statutêre omkoping oortreders van verskillende subartikels is.

3 3 Welwillendheidsgeskenke

Soos hierbo aangetoon is, het die plakkaat van 1715 klein geskenke van voedsel en drank wat binne 'n kort tydjie na ontvangs daarvan verorber word, van die omkopingsmisdaad uitgesluit.

Ten aansien van Nederland vermeld Ruter en Hoekema[63] die volgende:

> "Hierbij houde men in het oog dat de onschuldige vormen van omkoping, zoals kleine relatiegeschenken, door de zorgvuldige formulering van de nieuwe bepaling buiten het bereik van de overheidsnorm wordt gehouden."

In die toonaangewende Suid-Afrikaanse saak *R v Chorle*[64] verklaar appèlregter Schreiner:

> "Custom sanctions the payment of tips to certain classes of persons such as porters and waiters; though they be State servants there is no bribery in giving them what is a widely recognised addition to their remuneration. But the range of such permissible payments is a narrow one and they do not constitute precedents that may safely be applied in cases that are not *in pari materia*."

In *S v Deal Enterprises (Pty) Ltd*[65] wys regter Nicholas daarop dat die verskil tussen omkoping en "legitimate entertainment" in *die bedoeling van die gewer* lê en dat dit afgelei kan word uit die betrokke omstandighede

> "including the relationship between giver and recipient, their respective financial and social positions and the nature and value of the entertainment".[66]

Hierdie bedoelingstoets is myns insiens die enigste sinvolle toets wat toegepas kan word. Die grootte of aard van die geskenk of vergoeding deug nie as maatstaf nie.

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62 Sien *R v Magutu* 1946 EDL 220 223; *R v Otter* 1947 4 SA 571 (SR) 572; *S v Oosthuizen* 1982 3 SA 571 (T) 575; *R v Ingham* 1958 2 SA 37 (K) 50; *S v Gokool* 1965 3 SA 461 (N) 467. In *S v Ganie* 1967 4 SA 203 (N) 211 sê Harcourt R: "In our view, it is thus established by authority, and accords with our sense of justice, that a person who collaborates with an accused in purported furtherance of criminal conduct with the provable and proved intention of merely collecting evidence against such a criminal and revealing such evidence to the police or prosecuting authorities is not to be regarded as an accomplice. There may be difficulties of proof where the person so acting is not clothed with any official capacity or antecedent authority but, once it is proved that this was the quality of his actions, the inevitable decision must be that he is not an accomplice. Where the offence in question is the common law offence of bribery the person to whom a bribe is offered is, by definition, an official of the State and where such official is also a member of the police force, charged by statute with the detection of crime, it is *ex hypothesi* a relatively easy task to decide that his intention in pretending to entertain the offfer was to obtain evidence for the prosecution of the person offering the bribe unless by his conduct he actively participates in the wrongdoing to such an extent that he must be taken to have a guilty mind sufficient to cause him to be criminally associated with the commission of the offence." In die Amerikaanse saak *State of Minnesota v Sweeney* 73 ALR 380 (Minnesota SC) is beslis dat die omkoper nie 'n medepligtige van die omgekoopde is nie.

63 151.

64 1945 AD 487 497.

65 1978 3 SA 302 (W) 311.

66 Sien ook Hassman "Furnishing public official with meals, lodging, or travel, or receipt of such benefits, as bribery" 67 ALR 3d 1231 1235–1236.

3 4 Bevoegdheidsoorskryding en pligstrydigheid

Hoewel daar sake is waaruit afgelei kan word dat omkoping slegs gepleeg kan word as die omgekoopde pligstrydig optree,[67] blyk dit tog uit die meerderheid sake dat 'n persoon ook omgekoop kan word om sy plig te doen.[68] Dit geld myns insiens vir sowel gemeenregtelike as statutêre omkoping.[69]

Omkoping word gepleeg selfs waar daar van die omgekoopde verwag word om buite sy funksies of bevoegdhede op te tree. In *R v Chorle* verklaar appèlregter Schreiner uitdruklik:[70]

> "But the corrupt intent of the offeror would be the same whether the act fell within the sphere of the official's functions or not and so would be the corruptive effect on the official if he accepted the present. For he is a servant of the State and not of a single department of the State. The law of bribery is designed to protect the State against those who by gifts tempt its officials to use their opportunities as such to further private interests in State affairs and there is no reason why the law, which in its original form was wide enough to secure that protection, should, by restrictive interpretation, be cut down to something less than is necessary to achieve its object."

3 5 Aard van die geskenk of vergoeding

Uit die plakkaat van 1651 blyk reeds dat enigiets as geskenk of vergoeding gegee kan word, want die ongekwalifiseerde woorde "enige giften ofte geschencken van eenige dingen" word gebruik.[71] Wat statutêre omkoping betref, word die woord "Vergoeding" in artikel 1 van die Wet omskryf as "ook waardevolle vergoeding van watter aard ook al".

Dit blyk derhalwe dat die geskenk of vergoeding wat by omkoping van toepassing is, ongekwalifiseerd is. Dit kan inderdaad enigiets van (persoonlike[72]) waarde vir die omgekoopde wees.

3 6 Handeling, misdaadvoltooiing en poging

Die omkopingsmisdaad, sowel gemeenregtelik as statutêr, is voltooi, in geval van die omkoper by die maak van die omkopingsaanbod, en in geval van die omgekoopde by die aanvaarding daarvan.[73] Die geskenk of vergoeding kan egter

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67 Sien *R v Muller* 1934 NPD 141 143: "It is sufficient to say (1) that since an assistant stock inspector is a person recognised by law as holding an office and has authority by virtue of that office to act on behalf of the Executive Government in a defined matter or manner, he is for this purpose a State official; and (2) that he may commit the offence of bribery at common law if, when exercising or purporting to exercise such authority, he, in conflict with his official duty, receives in respect of an act or omission any benefit or advantage." Sien ook *R v Pamensky* 1946 EDL 68 74: *R v Charteris* 1904 SC 440; *R v Myataza* 1952 2 PH H123 (OK). Sien ook a 334 van die Duitse Strafwetboek; Ruter en Hoekema 135 en vn 31 en 39 hierbo.

68 Sien *S v Benson Aaron* hierbo 133; *R v Lavenstein* 1919 TPD 348 352; *R v Patel* 1944 AD 511 522; *S v Van der Westhuizen* 1974 4 SA 61 (K) 63; *R v Roets* 1954 3 SA 512 (A) 515; *Van Zyl v S* 1965 2 PH K61 (T).

69 Sien a 2 van die Wet op Voorkoming van Korrupsie (hierbo aangehaal) waaruit duidelik blyk dat die agent nie pligstrydig hoef op te tree nie.

70 Hierbo 496. Sien ook *Jack v S* 1963 1 PH H86 (OK). In die Amerikaanse saak *Wells v State of Tennessee* 122 ALR 948 (Tennessee SC) 950 is beslis dat 'n handeling wat "under color of office" verrig word, amptelik verrig word selfs al is dit buite die bevoegdheid van die amptenaar. Sien ook *State of North Carolina v Stanley* 73 ALR 3d 368 (Court of Appeals of North Carolina) met annotasie deur Habeeb "Criminal offence of bribery as affected by lack of authority of state public officer or employee" 73 ALR 3d 374.

71 Sien ook Hunt en Milton 224.

72 Dit kan selfs slegs sentimentele of emosionele waarde vir die omgekoopde hê.

73 Sien bv *R v Chorle* hierbo 496; *Christopher v R* 1945 2 PH H258 (N); *R v Kutboodien* 1930 CPD 191 193; Hunt en Milton 223.

eers later gegee word[74] en die prinsipaal hoef ook die benadeel te word nie.[75] Die omkopingshandelinge (aanbod en aanname) kan deur gedrag, dit wil sê by implikasie, geskied en hoef nie uitdruklik woordelik plaas te vind nie.[76]

Die vraag kan nou gevra geword of, indien die misdaad voltooi is soos hierbo genoem, daar nog ruimte vir 'n misdaad poging tot omkoping is. In *R v Heyne*[77] maak appèlregter Schreiner die volgende opmerking:

> "I can see no reason why a man who posts a letter which is not delivered should not be guilty of attempting to commit the crime, be it defamation, bribery, blackmail, fraud or any other crime, which would be constituted if the letter were received by the addressee."

Indien die misdaad voltooi is by die maak van die aanbod, soos ons positiewe reg tans staan, dan is daar myns insiens geen ruimte vir die bestaan van (strafbare) poging nie, behalwe in die geval van ondeugdelike poging.[78] Hierdie slotsom is ook (meer) versoenbaar met 'n algemene aanbeveling wat ek by 'n ander geleentheid[79] gemaak het dat voltooiingsaanspreeklikheid strafregtelik uitgeskakel behoort te word.

3 7 Opset

Die gesindheidselement by die gemeenregtelike omkopingsmisdaad is beskryf as 'n "corrupt purpose"[80] of 'n "corrupt intent".[81] Hieroor sê regter Nicholas tereg:[82]

> "These convenient shorthand expressions mean no more than that the giver of a bribe must intend to seduce the recipient into taking a price for action in an official capacity . . . The existence of a corrupt intent is something to be inferred from the facts of each particular case, and must depend upon many circumstances, involving, for example, the time and the place; the position respectively of the giver and the recipient; whether the gift is of a moderate or an immoderate amount; and whether it is given openly or secretly, underhandedly or clandestinely."

Wat statutêre omkoping betref, is die woord "corruptly" ("op korrupte wyse") wat in artikel 2 gebruik word, in *R v Lotzoff*[83] uitgelê as "with intent to induce the agent to do an act in conflict with his duty towards his principal".[84]

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74 Sien bv *R v Pamensky* 1946 EDL 68 74.

75 Sien *S v Van der Westhuizen* hierbo 63; *S v Lotzoff* 1937 AD 196 199.

76 Sien bv *R v Capitao* 1960 SA 97 (O) 100; Hunt en Milton 224; *R v Govey* 1929 CPD 58 62.

77 1956 3 SA 604 (A) 622. Sien ook *R v Visser* 1935 TPD 296 299; *R v Kok* 1960 4 SA 638 (N) 640; *S v Nkadimeng* 1962 4 SA 564 (T) 566; *S v Benson Aaron* hierbo 134.

78 Sien Hunt en Milton 224: "Presumably it could not be said that X had offered Y a bribe until the offer had been communicated to Y's mind. It would therefore be attempted bribery if X unsuccessfully endeavoured to communicate his offer to Y; for instance if a letter offering a bribe were intercepted by the police before its contents reached Y's mind." Sameswering om om te koop is wel moontlik (sien *Harris v R* 1927 NPD 330 347).

79 "Die uitskakeling van toeval by strafregtelike aanspreeklikheid" 1985 *De Jure* 155.

80 *R v Covey* hierbo 62; *R v Ingham* 1958 2 SA 37 (K) 43.

81 *R v Chorle* hierbo 496.

82 *S v Deal Enterprises (Pty) Ltd* hierbo 308. Sien ook *Panovka v S* 1970 1 PH H(S)30 (N); *S v Van der Westhuizen* hierbo 63.

83 Hierbo 199.

84 Sien ook *R v Sesing* hierbo 88: "A recipient cannot induce himself to do or to refrain from doing. It seems to me, therefore, that the Legislature could have meant nothing more than this: If you accept knowing that the giver meant to seduce." Sien verder *R v Kemp* 1942 AD 147 155; *R v Magutu* 1946 EDL 220 223; *R v Pamensky* 1946 EDL 68 72; *R v Preller* 1952 4 SA 452 (A) 461; *R v Ndobe* 1952 3 SA 562 (T) 564; *R v Roets* 1954 3 SA 512 (A) 515; *R v Smith* 1960 1 All ER 256 (CA); Hunt en Milton 234.

'n Volgende vraag wat oorweging verdien, is: wat is die effek van die gesindheid van die omkoper op die aanspreeklikheid van die omgekoopde? In *R v Durga*[85] verklaar regter Holmes in dié verband soos volg:

> "On a plain reading of sec. (2) (a) it seems to me clear that if the giver is innocent of any motive to induce or reward the agent, it cannot be said that the latter has accepted or obtained a gift or consideration as an inducement or reward."

Hierdie standpunt vind ondersteuning in verskeie sake.[86] In *S v Gouws*[87] neem appèlregter Rabie egter 'n teenoorgestelde standpunt in:

> "Waar dit dus die ampsintegriteit is wat beskerm moet word is dit moeilik om in te sien waarom die amptenaar wat 'n geskenk ontvang nie skuldig bevind sou kon word tensy die gewer van die geskenk bedoel het om hom om te koop en dus self ook aan die misdaad skuldig is nie. Gestel bv. dat iemand aan 'n amptenaar 'n geskenk gee omdat die amptenaar hom die een of ander voordeel laat toekom het sonder dat hy weet dat sy weldoener 'n amptenaar is wat in 'n uitvoering van sy pligte gehandel het. Die gewer van 'n geskenk sal in so 'n geval nie aan omkopery skuldig wees nie, maar dit is moeilik om in te sien waarom die amptenaar nie aan die misdaad skuldig sou wees indien hy weet dat die geskenk aangebied word as vergoeding vir werk wat hy as amptenaar gedoen het en indien hy weet dat hy nie geskenke mag aanvaar as vergoeding vir werk wat hy as amptenaar verrig nie."

Hierdie standpunt verteenwoordig klaarblyklik die jongste benadering van die howe[88] en kan onderskryf word aangesien dit prinsipieel-strafregtelik beter verantwoord is en die individugerigtheid van die strafreg koester.

3 8 Straf

Uit artikel 2 van die wet blyk dit dat die straf wat vir gemeenregtelike omkoping opgelê kan word, ook op statutêre omkoping[89] van toepassing is. Omkoping word beskou as 'n ernstige[90] misdaad en daar is verskeie sake waarin riglyne vir

85 1952 4 SA 619 (N).

86 Sien bv *Naidoo v R* 1927 *SALJ* 585; *R v Mithi* 1959 4 SA 287 (T) 290; *S v Pillay* 1964 2 SA 385 (N) 388; *S v Mbokatwane* 1970 3 SA 64 (OK) 66; *Panovka v S* 1970 1 PH H (S) 30 (N). In *R v Geel* 1953 2 SA 398 (A) 402 sê Hoexter AR met verwysing na o a *Durga* se saak: "I agree with the view expressed in the cases quoted to this extent that an agent can only receive something as an inducement to act or to refrain from acting if he believes that it is in the mind of the giver to induce him to act or to refrain from acting. Whether the actual state of mind of the giver is to be taken into account is not a question which it is necessary to decide in the present case. It is possible to conceive of a case in which the giver had no intention of bribing and the agent nevertheless erroneously believed that he had such an intention. In such a case it may be that the agent would be guilty of contravening the section even if the giver had no intention of bribing. But what is clear at any rate is that the agent cannot be guilty if he knows or believes that the giver has no intention of bribing." Sien ook *R v Mbata* 1954 1 SA 538 (N) 540; *Olivier v R* 1955 1 PH H37 (T); *Lebane v S* 1963 2 PH K88 (K); *S v Ernst* 1963 3 SA 666 (T) 668.

87 1975 1 SA 1 (A) 12. In dié saak het dit oor gemeenregtelike omkoping gehandel.

88 Sien bv *S v Nkadimeng* 1962 4 SA 564 (T) 566; *Hartzenberg v S* 1964 2 PH H219 (T); *S v Gokool* 1965 3 SA 461 (N) 468; *S v du Preez* 1968 2 SA 731 (T) 733; *S v Joubert* 1979 1 SA 97 (T) 101. In die *Nkadimeng*-saak (566) sê Galgut R: "In other words, a trap who gives the demanded reward and who, therefore, has no corrupt motive, nevertheless has a mental state, namely he knows that the person receiving the reward is doing so wrongly and accepting an inducement and is thereby doing wrong. That, in my view, falls within the requirements of the section." In die VSA bestaan die verweer van "entrapment" ook t a v omkoping (sien *USA v Klosterman* 69 ALR 2d 1390; Buckner "Entrapment to commit bribery or offer to bribe" 69 ALR 2d 1397). Sien ook my artikel "Die lokvink en lokvinkbetrapte in die strafregspleging" 1976 *De Jure* 23.

89 Sien *R v Swemmer* 1917 TPD 455 460 t a v vroeëre strafmaksimum vir statutêre omkoping.

90 Sien *S v Gouws* 1975 1 SA 1 (A) 16; *S v Narker* 1975 1 SA 583 (A) 586.

bestraffing daarvan neergelê is.[91] Hierop word nie verder ingegaan nie.[92]

3 9 Verskil met afpersing

Benewens sekere "tegniese"[93] verskille wat tussen afpersing en omkoping bestaan, lê die belangrikste verskil myns insiens daarin dat in geval van afpersing die inisiatief van die ontvanger van die "geskenk" of vergoeding (die afperser) uitgaan, terwyl dit in geval van omkoping van die gewer van die geskenk of vergoeding (die omkoper) uitgaan.[94] Dit is so dat in geval van omkoping die omgekoopde die omkoper subtiel kan beïnvloed om hom om te koop, maar die werklike aanbieder in die omkopingstransaksie is die omkoper. As 'n polisieman byvoorbeeld 'n persoon arresteer en hom meedeel dat as hy hom R10 betaal, hy hom nie sal aankla nie en die persoon die R10 sou betaal, is dit afpersing. Sou die gearresteeerde egter die polisieman R10 aanbied om hom vry te laat, is dit omkoping. In ons regspraak word verskeie sake aangetref waar die beskuldigde aan omkoping skuldig bevind is terwyl dit eintlik oor afpersing gegaan het.[95]

4 TEORETIESE ONDERBOU

Omkoping kom oral voor[96] en in sommige lande is dit selfs 'n lewensstyl.[97] Dit is veral in ontwikkelende lande 'n groot sosiaalpolitieke probleem.[98]

4 1 Omkoping as 'n vorm van korrupsie

In sy wydste sin kan korrupsie omskryf word as opsetlike funksie- of taakstrydige optrede. Korrupsie neem hoofsaaklik vier vorme aan, naamlik omkoping, afpersing, nepotisme (favoritisme) en opsetlike pligsversuim.[99]

4 2 Redes vir bestraffing van omkoping

In dié verband kan die volgende onderskei word:

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91 Sien bv *R v Sacks* 1943 AD 413 428; *R v Fourie* 1951 4 SA 157 (T); *R v Preller* 1952 4 SA 452 (A); *S v Hopf* 1954 2 SA 633 (T); *R v Solomon* 1954 2 SA 502 (T) 504; *R v Capitao* hierbo 102; *S v Young* 1977 1 SA 602 (A) 609.

92 In die Amerikaanse saak *Womack v Maner* 60 ALR 2d 1271 (Arkansas SC) is beslis dat die omkoper en omgekoopde *in pari delicto* is en dat die omkoopgoed nie deur die omkoper teruggevorder kan word nie. Sien verder hieroor Ludington "Receiving of money paid, or property transferred, as a bribe" 60 ALR 2d 1273; Anoniem "Garnishing graft: a strategy for recovering proceeds of bribery" 1982 *Yale LJ* 128; Tettenborn "Bribery, corruption and restitution – the strange case of Mr Maheson" 1979 *LQR* 68; Needham "Recovering the profits of bribery" 1979 *LQR* 536. In SA is die regsposisie klaarblyklik dieselfde as in die *Womack*-saak. Sien Van Jaarsveld (red) *Suid-Afrikaanse handelsreg* vol 1 (1983) 94.

93 Sien Snyman *Strafreg* (1981) 319. Sien ook *R v Muller* 1934 NPD 141 146; *R v G* 1959 4 SA 39 (T) 43; *Jack v S* 1963 1 PH H86 (OK); Hunt en Milton 218.

94 Sien my artikel "Afpersing" 1985 *De Jure* 333.

95 Sien bv *R v Magutu* hierbo; *R v Ottens* hierbo.

96 Sien Reisman *Folded lies* (1979) 123. Lachot-Heritier "Commercial bribes: the Swiss answer" 1983 *Journal of Comparative Business and Capital Market Law* 79 80 wys daarop dat kommersiële omkoping, anders as amptelike omkoping, algemeen in Switserland voorkom.

97 Sien Downey "Combating corruption: the Hong Kong solution" 1976 *HKLJ* 27; Lethbridge "Corruption, white collar crime and the ICAC" 1976 *HKLJ* 150.

98 Sien JD "Final report of the Commission of Enquiry into Bribery and Corruption" 1976 *Review of Ghana Law* 39.

99 Sien ook Seidman 48.

4 2 1 Dit is in stryd met die grondslag van demokrasie

Seidman[100] sê die volgende ten aansien van amptelike (hoëvlak-) omkoping:

> "High-level bribery introduces irrationality because it transfers the decision-making power from public officials to bribers. Public officials should exercise power and discretion to benefit the public. They should, therefore, consider only the public interest. When they accept a bribe, they permit the private interests of the giver to control the decision. The briber, not the official, in effect decides. Bribery thus becomes part of the sociology of power."

In 'n demokratiese bestel word sekere persone verkies of aangestel om sekere politieke en/of administratiewe funksies te verrig en/of beleidsriglyne daar te stel tot voordeel van die breër gemeenskap. Indien hulle nou omgekoop word, beteken dit in effek dat die omkoper (sekere of al) genoemde funksies vervul.[101]

4 2 2 Dit skend 'n elementêre vertrouensverhouding

In samehang met wat onmiddellik hierbo genoem is, belemmer (amptelike) omkoping die sinvolle funksionering van die staat en skend die vertrouensverhouding wat dit onderlê. Soos Winckler[102] bevestig:

> "When a man is elected to a public office he owes the duty to the public not to betray the trust, and one of the most despicable crimes that can be suggested is that a public officer misuses the trust that has been imposed upon him by using his office for private gain. To solicit a bribe, to accept a bribe, strikes at the very foundation of the honesty and integrity of public officers."[103]

Ook die Suid-Afrikaanse howe lê klem hierop. In *S v Narker*[104] verklaar appèlregter Holmes:

> "Bribery is a corrupt and ugly offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence."

Hierdie argumente geld ook ten aansien van nie-amptelike omkoping, want die "agent" staan ook in 'n vertrouensverhouding tot sy "prinsipaal".

4 2 3 Kommersiële omkoping benadeel mededinging

In 'n vrye markekonomie ry omkoping mededinging in die wiele. Soos Zamansky[105] tereg opmerk:

> "Competition is being adversely affected by illegal payments and other considerations given to persons in positions of authority by buyers and sellers seeking to influence such

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100 50–51.

101 Reisman 128 wys tereg daarop omkoping moreel geregverdig is as die "official policy being subverted is one that is deemed grossly immoral and the object of the bribe is to secure a result that is generally deemed to be moral or right and, for practical purposes, otherwise unattainable".

102 "Drafting an effective bribery statute" 1977 *American Journal of Criminal Law* 210 soos aangehaal in die saak *Fromm v State* 173 NE 201 204–5 (Ohio 1930).

103 Schönke-Schröder-Cramer *Strafgesetzbuch Kommentar* (1982) 1856 wys daarop dat amptelike omkoping lei tot "eine Verletzung des Treueverhältnisses zum Staat oder des Vertrauens der Öffentlichkeit in die Integrität des Beamtenapparates". Sien ook Dreher-Tröndle *Strafgesetzbuch* (1983) 1462; Lackner *Strafgesetzbuch* (1983) 118. Sien verder Hassman 1234: "Bribery, consisting as it does of an attack on the public trust, has always been viewed with repugnance by Americans. Bribery and treason are the only two crimes specifically listed in the United States Constitution as grounds for impeaching the President, Vice President, or civil officers of the United States."

104 Hierbo 586. Sien ook *S v Van der Westhuizen* hierbo 62; *S v Deal Enterprises (Pty) Ltd* hierbo 317; *S v Young* hierbo 609.

105 "Preferential treatment, payoffs and the antitrust laws: distortion of the competitive process through commercial bribery" 1978 *Commercial LJ* 558. Sien ook LST "Control of non-governmental corruption by criminal legislation" 1960 *Univ of Penn LR* 850.

persons – to give them preferential treatment or a superior business position – *vis-à-vis* their competitors;[106] such conduct, when it has as its purpose or effect the distortion of the competitive process, may violate the antitrust laws."

Ook sekere vorme van amptelike omkoping kan die kompetisieproses benadeel.

4 2 4 Omkoping bevorder ander misdaad

Omkoping kan ook ander misdaad bevorder in die sin dat 'n misdadiger wat 'n polisieman, aanklaer, regspreker of ander persoon omgekoop het om hom nie te vervolg of te straf nie, weer geneig sal wees om 'n misdaad te pleeg omdat hy nie vir die vroeëre misdaad gestraf is nie.[107]

5 SLOT

Ten slotte kan herhaal word dat die wetgewer behoort in te gryp deur die gemeenregtelike omkopingsmisdaad te skrap en die statutêre omkopingsmisdaad so te formuleer dat dit alle vorme van strafwaardige omkoping insluit.

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106 Kommersiële omkoping stel in beginsel dus ook *onregmatige mededinging* daar (sien Van Heerden en Neethling *Onregmatige mededinging* (1983) 131–132).

107 Sien Pashigian "On the control of crime and bribery" 1975 *Journal of Legal Studies* 311.

Gedagtes oor die nie-Christelike aard van menseregte*

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SUMMARY

Thoughts on the non-Christian nature of human rights

The South African Law Commission, many jurists and all the major churches support the introduction of a bill of human rights *inter alia* because it is allegedly necessitated by the Christian gospel. In reality, the doctrine of human rights has become a new religion based on faith in the dignity of man and on faith in a bill of rights as the means to attain peace, justice, freedom and prosperity in the world. The human rights "religion" is gaining ground because human nature finds it so attractive (it demands little but promises much), and because, especially after the Second World War, many churches and church leaders have succeeded in presenting the realisation of human rights as the contemporary manifestation of the gospel of Jesus Christ. The corner-stone of this misrepresentation is the argument that every human being is a bearer of the image of God, bestowing on him inherent dignity, and entitling him to inalienable human rights.

It is regrettable that the members of the law commission and most other jurists seem to accept blindly everything proclaimed by church leaders in the name of God without personally examining the validity of their statements with reference to the Bible. It is indeed incomprehensible why the opinions of church leaders should have any credibility in the political and legal spheres in view of the fact that so many of them have failed in their primary task of making true Christians out of most of their church members.

In truth, the ideology of human rights is not a Christian doctrine at all. Research proves beyond reasonable doubt that the doctrine of human rights originated outside Christianity, that Christ neither demanded human rights for Himself nor did He teach others to do so, and that any person who persists in sin does not reflect the image of God from which human rights can be derived. Therefore the human rights doctrine has no more of a Christian basis than, for example, the policy of apartheid which, until recently, was also justified on Christian grounds by certain churches which now reject it. Furthermore, the belief that a bill of rights is a cure for injustice, conflict and poverty is completely misplaced.

The so-called Christian justification of the doctrine of human rights is based on a distortion of the true Christian gospel. In terms of the true gospel every Christian should humble himself and become like Christ, whereas in terms of the human rights doctrine the position and desires of sinful man are unjustifiably enhanced and protected. God has promised eternal punishment for sinners who do not repent and a bill of rights will be powerless to prevent this tragedy.

If a bill of human rights were to be accepted in South Africa, the scope of such rights would have to be carefully limited by many other laws. Such limitations are necessitated by the fact (and no legal rule is effective in the long run unless it is based on fact) that most people are

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sinful and self-centred and must be prevented from exercising their so-called rights and freedoms in such a way that they cause harm to others (or even themselves) in the name of "fundamental" human rights.

1 INLEIDING

Menseregte het internasionaal die norm geword vir geregtigheid, die maatstaf vir 'n regverdige staatsbestel en tot 'n groot hoogte selfs die standaard vir Christelikheid.[1] Die instel van 'n handves van menseregte word dan ook op die oomblik deur die Suid-Afrikaanse Regskommissie[2] ondersoek.[3]

'n Handves van menseregte: meer as net 'n stel regsreëls Dit is by die beoordeling van die beweerde Christelike aard van menseregte noodsaaklik om daarop te let dat menseregte vir die menseregte-beweging meer geword het as 'n ideologie, en 'n handves van menseregte veel meer as net 'n stel regsreëls wat moet bydra om die samelewing vreedsaam te orden. *Menseregte het naamlik 'n saak van geloof geword: geloof* in die beweerde hoë waardigheid van die mens;[4] *geloof* dat hierdie gewaande hoë posisie van die mens bo alles beskerm moet word;[5] *geloof* by baie dat elke mens die beeld van God is en dat God self menseregte

1 Die leerstuk van menseregte word nl "gedurende die twintigste eeu wêreldwyd aanvaar ... as 'n maatstaf aan die hand waarvan regstelsels gemeet en aangeprys of veroordeel word" (Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 74–75); "[L]egal enactments for the protection of human rights ... are all more or less generally accepted by the world today as necessary, neutral instruments for orderly, just and humane government" (Wiechers "Towards a biblical view of human rights" in *Reformed Ecumenical Synod: Church and nation* (1981) 42); "Menseregte en -vryhede is die bron van 'n staatsbestel se legitimiteit" (Wiechers *'n Politieke idiotikon vir Suid-Afrika* (1988) 142); ook Van der Vyver "The concept of human rights: its history, contents and meaning" in Forsyth en Schiller *Human rights: the Cape Town conference* (1979) 10 e v; Van der Vyver *Die beskerming van menseregte in Suid-Afrika* (LLD-proefskrif UP 1975) v; sien oor die beweerde Christelike aard van menseregte hieronder by par 2 en 3.

2 Sien Suid-Afrikaanse Regskommissie *Werkstuk 25 Projek 58: Groeps- en menseregte* (1989) (hierna Regskommissie *Menseregte*-verslag).

3 Daar bestaan 'n haas onoorsigtelike literatuur oor die aard van menseregte. Benewens die reeds vermelde bronne, kan in die algemeen vir doeleindes van die onderhawige onderwerp o a die volgende geraadpleeg word: Van der Vyver *Seven lectures on human rights* (1976); "Menseregte in perspektief" Maart 1984 *Woord en Daad* 12; "The bill-of-rights issue" 1985 *TRW* 1; Stoker *Die aard en rol van die reg – 'n wysgerige besinning* (1970); Du Plessis "Menseregte en konfliksituasies" 1979 *Koers* 339; "Reg, geregtigheid en menseregte" 1980 *Obiter* 51; "Perspektief op 'n menseregtehandves vir die RSA (1) en (2) Junie 1986 *Woord en Daad* 15 en Julie 1986 *Woord en Daad* 15; Raath "Die teoretiese grondslag van menseregte volgens die wysbegeerte van die skeppingsidee" 1984 *Obiter* 29; "Skeppingsidee en menseregte: 'n handves vir menseregte?" Junie 1986 *Woord en Daad* 18; Olivier "Menseregte: oorsig en uitsig" 1986 *Koers* 502; Venter "Menseregteperspektief in perspektief" Junie 1984 *Woord en Daad* 13; "Menseregte, groepsregte en 'n proses na groter geregtigheid" 1986 *SAP* 202; Neethling "Enkele gedagtes oor die juridiese aard en inhoud van menseregte en fundamentele vryhede" 1971 *THRHR* 240; Rautenbach *Die reg op bewegingsvryheid* (LLD-proefskrif Unisa 1974) 1 e v; Heyns *Teologiese etiek* (1982) 388 e v; De Villiers "Die geskiedenis van menseregte" in Du Toit (red) *Menseregte* (1984) 9; Jonker "Christelike geloof en menseregte" in Du Toit (red) *Menseregte* (1984) 47; Du Toit *Die mens en sy regte* (1988); Duvenage "Die GES oor menseregte" Mei 1985 *Woord en Daad* 14; "Menseregte volgens die Skrif" *Die Kerkblad* 1984–10–17 6; Helberg "Die ou testament oor menseregte" 1984 vol 18 no 72 *In die Skriflig* 4.

4 Sien par 5 hieronder.

5 *Ibid.*

erken wil sien;[6] *geloof* in 'n akte van menseregte as redmiddel vir wêreldprobleme;[7] *geloof* dat 'n akte van menseregte sal sorg vir 'n regverdiger staatsbestel;[8] en *geloof* dat die verwesenliking van menseregte sal sorg vir vryheid, veiligheid, vrede, voorspoed en geregtigheid.[9] So verklaar professor Danie du Toit, 'n teoloog, dan ook dat menseregte 'n "*universele . . . geloofsbelydenis*" geword het.[10] Hy vervolg:[11]

> "[Menseregte is] die konkrete inhoud van die diepste versugting en nood van 'n koerslose en verbysterde mensdom. Die gruwels van die Tweede Wêreldoorlog, die afgryslikhede van politieke verdrukking, militêre regimes, hongersnood, armoede, en ellende oor die wêreld heen het die mensdom laat gryp na die ideaal van die regte van die mens as die finale en miskien die laaste middel wat hierdie wêreld van finale ondergang moet red."

Die ideologie van menseregte het dus in werklikheid in 'n nuwe *godsdiens* (en, soos mettertyd aangetoon sal word,[12] selfs in 'n nuwe vorm van die "Christelike" evangelie) ontaard. Hierdie filosofie of godsdiens draai om die beweerde hoë waardigheid wat elke mens sou hê en waarvolgens sy regte, aansprake, begeertes en idees buitensporig verhef word terwyl sy verpligtinge vervaag; dit is 'n filosofie wat vele voordele beloof, weinig opoffering vra en daarby so kragtig sou wees dat daarop gesteun kan word om selfs die ondergang van die wêreld te voorkom. Geen wonder dat die gewildheid van die menseregte-ideologie so vinnig toegeneem het nie. Hiertoe het "Christelike" kerke baie bygedra.[13] Vir baie wat dalk nog kon twyfel of hulle in menseregte moet glo, word die knoop naamlik deurgehak omdat kerke en kerkleiers die stempel van "Christelikheid" goedkeurend op die ideologie plaas. Die Suid-Afrikaanse Regskommissie bevind dan

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6 *Ibid.*

7 Ook in Suid-Afrika is die instel van 'n handves van menseregte al beskryf as die enigste manier waarop die heersende dilemma in die land oorkom kan word (Ackermann *Beeld* 1988-02-09 13, onder die opskrif: "Handves van menseregte – Dit is al wat SA nou kan help . . . "). Vgl Ackermann "Aspects of international human rights" in Van der Westhuizen en Viljoen *'n Menseregtehandves vir Suid-Afrika* (1988) 112; Du Toit "Teologie, kerk en menseregte" in Du Toit (red) *Menseregte* (1984) 62; par 3 en 9 hieronder.

8 Par 9 hieronder.

9 *Ibid.* Hierdie aspek word goed geïllustreer deur die geloof in die bekende "Freedom Charter" wat as 'n onverfynde voorbeeld van 'n menseregte-akte beskou kan word en as grondslag vir die ANC se 1988-grondwetlike voorstelle dien (Regskommissie *Menseregte*-verslag 223). Hierdie dokument bevat verskeie werklikheidsvreemde en onuitvoerbare bepalings (soos dat die politieke bedeling wat die dokument in die vooruitsig stel, o a gratis skoolopvoeding, mediese en hospitaaldienste vir almal sal verseker; dat huur- en ander pryse verlaag sal word; dat daar volop kos sal wees en dat niemand honger sal ly nie; dat tronkstraf net vir ernstige misdade opgelê sal word; dat daar vrede en vriendskap sal heers) en is gevolglik al aan grondige kritiek onderwerp (vgl Van der Westhuizen " 'The people shall govern!': enkele opmerkings oor die 'Freedom Charter' as moontlike menseregtehandves" 1986 *De Jure* 372; Raath Maart en Desember 1988 en Maart 1989 *Roeping en Riglyne passim*). Desnieteenstaande geniet die dokument wye steun (vgl Regskommissie *Menseregte*-verslag 217–224). Die rede hiervoor is dat die dokument vir baie nie maar net 'n versameling regsreëls is nie, maar 'n *simbool van hoop* vir 'n nuwe politieke bestel geword het (vgl o a Giliomee "The Freedom Charter and the future" in Polley (red) *The Freedom Charter and the future* (1988) 20). Meer nog: die dokument het 'n *objek van geloof* geword. So glo geestelikes soos aartsbiskop Desmond Tutu en dr Beyers Naudé (en daarom sekerlik baie ander mense ook) dat die dokument vrede in Suid-Afrika kan bring (Regskommissie *Menseregte*-verslag 220; vgl ook Kinghorn "The Freedom Charter and religious freedom" in Polley a w 117–123).

10 "Teologie, kerk en menseregte" in Du Toit *Menseregte* 62; my beklemtoning.

11 *Ibid.*

12 Par 2 en 3 hieronder.

13 *Ibid.*

ook dat al die groot kerke in Suid-Afrika menseregtebeskerming steun[14] en dat die kerk tans miskien die sterkste kampvegter vir menseregte is.[15] Daarom verbaas dit nie dat die menseregte-ideologie vandag as Christelik voorgehou word[16] en dat kritiek teen die menseregte-ideologie met al hoe meer afkeer bejeën word nie. Trouens, die regskommissie gaan selfs so ver as om te impliseer dat diegene wat menseregte as nie-Christelik beskou, nie ware Christene is nie. Die kommissie verklaar naamlik:

> "Ons meen werklikwaar dat diegene wat menseregte as onchristelik en onbybels beskou, totaal uit pas is met die ware Christendom."[17]

Die voorafgaande uiteensetting toon hoe ver daar al wegbeweeg is van menseregte as bloot 'n stel regsreëls wat die samelewing vreedsaam moet orden. Daarom voorveronderstel die instel van 'n menseregte-akte ook die aanvaarding van 'n geheel nuwe politieke, ekonomiese, juridiese, kulturele en godsdienstige bedeling wat met 'n handves van menseregte versoen kan word. So maak die regskommissie dit duidelik dat die instel van 'n menseregte-akte voorafgegaan moet word deur onder meer die afskaffing van bestaande wetgewing wat met so 'n akte bots.[18] Daarbenewens meen voorstanders van so 'n akte dat die gemeenskap eers deur 'n opvoedkundige proses ontvanklik gemaak moet word vir die filosofie onderliggend aan menseregte.[19] In werklikheid dien die stryd om menseregte dus as 'n dekmantel vir ingrypende staatkundige, politieke, maatskaplike, ekonomiese en godsdienstige verandering. Dat dit hier in wese eerder om die invoering van 'n nuwe ideologie as bloot van 'n nuwe stel regsreëls gaan, blyk ook uit die feit dat die meeste regsreëls wat gewoonlik in 'n menseregteakte vervat word, reeds deur die gemenereg beskerm word. Dit is dus nie soseer die regsreëls in 'n menseregte-akte wat nuut is nie, maar die ideologie onderliggend daaraan. Gevolglik kan die regsreëls wat in 'n menseregte-akte vervat word, nie meer in isolasie, dit wil sê sonder inagneming van die ideologiese onderbou van die menseregte-beweging, beoordeel word nie.

Die juris en die Christelike begronding van menseregte Dit is die regsgeleerde wat, via politieke gesag, regstegniese advies moet gee en die nodige regsreëls moet formuleer om 'n handves van menseregte te implementeer.[20] Aangesien regsreëls net sinvol geformuleer en toegepas kan word as dit op korrekte feite gebaseer is,[21] is dit noodsaaklik dat die regsgeleerde onder meer die geldigheid van die beweerde Christelike begronding van menseregte ondersoek. Sogenaamd Christelike argumente word naamlik as belangrike redes vir die instel van 'n menseregte-akte beskou.[22]

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14 Regskommissie *Menseregte*-verslag 314.
15 *Menseregte*-verslag 199; sien ook die bronne in par 2 en 3 hieronder vermeld.
16 Par 2 en 3 hieronder.
17 *Menseregte*-verslag 314. Op soortgelyke trant verwys Wiechers *Politieke idiotikon* 137 140 142 na teenstanders van die menseregte-gedagte as o a "bitterbekke", "giftige bitterbek[ke]", "hoogheiliges", "veragters van menseregte" en "grootmonde" wat "raas en gal afgaan oor menseregte".
18 *Menseregte*-verslag 494.
19 Vgl Regskommissie *Menseregte*-verslag 195 en 494–495. Die NG Kerk verklaar bv dat, om 'n sukses van menseregte te maak, 'n "menseregte-kultuur" eers geskep moet word (*ibid*). Deel van hierdie strategie is om teenstand teen die menseregte-leer te probeer neutraliseer deur bv kritici daarvan belaglik voor te stel (vn 17 hierbo), of as nie-ware-Christene-nie te brandmerk (*ibid*).
20 Vgl Wiechers *Biblical view of human rights* 41.
21 Sien die teks by vn 83 en 84 hieronder.
22 Sien volgende vn.

Alhoewel die Suid-Afrikaanse Regskommissie sterk op die godsdienstige begronding van menseregte steun,[23] volstaan hy met 'n uiteensetting van sodanige begronding *sonder om dit self enigsins met verwysing na die Bybel te ondersoek* en aanvaar hy klaarblyklik dat die menseregte-leer Christelik is bloot op grond van die feit dat die meerderheid kerke en teoloë dié mening toegedaan is.[24] Hierdie werkswyse moet as onjuridies afgekeur word. Die regskommissie moes naamlik rekening gehou het met die moontlikheid dat kerke en kerkleiers verkeerd kan wees deur die geldigheid van die beweerde Christelike motivering vir menseregte self deeglik te toets. 'n Sprekende voorbeeld van 'n kerk se betwyfelbare inmenging op die politieke terrein word immers deur onder meer die NG Kerk se betrokkenheid by die apartheidsbeleid gebied. Ten spyte van die regskommissie se bedenkinge oor hierdie saak,[25] bestaan daar vandag selfs binne die NG Kerk min twyfel dat die kerk waarskynlik 'n belangrike rol in die aanvaarding en implementering van die apartheidsbeleid in Suid-Afrika gespeel het.[26] Nou het hierdie politieke beleid (wat aanvanklik as Christelik beskryf is en so 'n groot invloed op die politiek en die reg gehad het) egter in onguns geraak en vandag verklaar dieselfde kerk wat apartheid eens so sterk gesteun het, dat hy 'n fout gemaak het: dat rasse-apartheid as staatkundige model nie Christelik is nie.[27]

Dit blyk dus dat kerke ernstige oordeelsfoute kan begaan en wat hulle vandag as Christelik voorhou, hulle môre as onchristelik kan verwerp. Daarbenewens is die beweerde Christelike aard van kerke en kerkleiers se uitsprake onder verdenking in die lig van die nie-Christelike lewenswyse van 'n groot deel van hulle lidmate: daar bestaan naamlik weinig rede om te glo dat kerkleiers op die terrein van die politiek en regshervorming 'n sinvolle bydrae kan maak terwyl

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23 *Menseregte*-verslag 30–36 187–201 314 324. Die kommissie verklaar o a: " 'n Baie belangrike argument ten gunste van 'n menseregte-akte is dat dit voorgeskryf word deur ongeveer elke godsdienstige oortuiging of groep wat in ons land verteenwoordig is . . . Of 'n mens Rooms-Katoliek is, en *Pacem in Terris* onderskryf, dan wel of jy lid is van die NG Kerk en 'Kerk en Samelewing' onderskryf, die resultaat is dieselfde: Menseregtebeskerming en teologiese oortuiging loop hand aan hand. Daar is dan ook baie mense in ons land wat uit 'n teologiese oogpunt op menseregtebeskerming aandring, en wat met 'n menseregte-akte tevrede gestel sal word" (*ibid* 297).

24 *Menseregte*-verslag 187–201 314–315.

25 *Menseregte*-verslag 200.

26 So verklaar prof Johan Heyns, voorsitter van die Algemene Sinodale Kommissie van die NG Kerk, o a (*Die Kerkbode* 1989–05–19 6): "Nou is dit wel waar dat die Ned Geref Kerk en verskillende teoloë aanvanklik in apartheid of afsonderlike ontwikkeling die enigste realistiese oplossing vir ons probleme gesien het, en dit selfs op Bybels-etiese gronde verdedig het." Vgl ook *Die Kerkbode* 1989–03–17; Engelbrecht *Ter wille van hierdie wêreld – politiek en Christelike heilsbelewing in Suid-Afrika* (1982) 3 28 48 100; De Villiers "Kritiek uit die ekumene" in Kinghorn (red) *Die NG kerk en apartheid* (1986) 153; Marais *Die NG kerk en die regverdiging van apartheid* (1986) 116 e v; Lombard *Die Nederduitse Gereformeerde kerke en rassepolitiek* (1981) 254 e v; Cronjé, Nicol en Groenewald *Regverdige rasse-apartheid* (1947) 40 e v; Deist *Sê God so?* 35 e v 72 e v.

27 *Kerk en samelewing* ('n getuienis van die Ned Geref Kerk soos aanvaar deur die algemene sinode van die Ned Geref Kerk) (1986) par 100 e v 302–309. Die Bybel bied nog 'n beter voorbeeld van hoe die kerk die reg verkeerd beïnvloed het. Dit was nl die destydse kerkleiers wat Christus weens godslaster ter dood veroordeel het en toe, deur beïnvloeding van die bevolking, die regsprekende gesag sover gekry het om Hom te laat teregstel (vgl Matt 26:57–68; 27:11–56). Hierdeur het God wel redding vir baie gebring. Nogtans behoef dit geen betoog nie dat die godsdiensleiers verkeerd opgetree het deur 'n totaal onskuldige man te laat doodmaak.

hulle op kerklike gebied – gemeet aan die sedelike en geestelike verval by soveel kerklidmate – grootliks misluk het.[28] Hieruit volg vanselfsprekend dat 'n juris (en gevolglik ook die regskommissie) nie die kerk blindelings op sy woord behoort te neem nie maar onafhanklik moet vasstel of wat die kerk as "Christelik" voorhou, wel volgens die Bybel Christelik is of nie.

Teen hierdie agtergrond word die beweerde Christelike aard van menseregte nou ondersoek.

2 DIE ROL VAN DIE KERK IN DIE MENSEREGTE-BEWEGING

Internasionaal Tot ongeveer die middel van die huidige eeu het kerke wêreldwyd in die algemeen afwysend teenoor menseregte gestaan.[29] Toe het die kerk egter skielik ontdek dat menseregte die oplossing vir die wêreld se probleme bied. Die lyding wat die Tweede Wêreldoorlog vir miljoene mense meegebring het, het naamlik tot gevolg gehad dat menseregte aangegryp is as geneesmiddel vir wêreldprobleme soos politieke onderdrukking, rassediskriminasie, armoede en hongersnood.[30] Sedertdien speel kerke 'n prominente rol om menseregte aanvaarbaar te maak. Die kerk het byvoorbeeld beduidende invloed gehad by die formulering van die VVO se beleid oor menseregte en by die totstandkoming van die Universele Verklaring van Menseregte in 1948.[31] Vandag word menseregte onomwonde deur die meeste kerke en die belangrikste internasionale kerkliggame aanvaar.[32]

Suid-Afrika Ook in Suid-Afrika het die kerk menseregte aanvanklik, veral op teologiese gronde, sterk teengestaan.[33] Maar vandag lyk die prentjie radikaal

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28 Amper 80% van die inwoners van Suid-Afrika maak daarop aanspraak dat hulle Christene is (Oosthuizen, De Cruchy, Hofmeyr en Lategan *Religion, intergroup relations and social justice in South Africa* (1985) (*RGN-verslag*) 19–22). Maar geoordeel aan die hoë voorkoms van o a misdaad, gewelddadige optredes, drankverslawing, egskeiding, gesinsverbrokkeling en hebsug (korrupsie) in die land, is die meeste beweerde Christene in werklikheid heidene (sien bv die Sentrale Statistiekdiens se verslag 00–11–01 (1986/87) *Statistieke van misdrywe* en verslag 03–07–01 (1986) *Huwelike en egskeidings: Blankes, Kleurlinge en Asiërs*). Volgens 'n woordvoerder van SANRA (die Suid-Afrikaanse Nasionale Raad insake Alkoholisme en Dwelmmisbruik) is een uit elke twaalf werkers in Suid-Afrika 'n alkoholis; d w s 301 000 (264 000 mans en 37 000 vroue). Alkoholisme kos die land R530 miljoen per jaar aan produktiwiteitsverlies alleen (*Huisgenoot* 1988–06–16 20). Vgl Potgieter *Aspekte van die juridiese beskerming van die godsdiensgevoel* (LLD-proefskrif Unisa 1987) 280 vn 7.

29 Daar is eerstens kerkhistoriese redes vir hierdie teenstand. Die Rooms-Katolieke kerk het die beweging bv aanvanklik teengestaan omdat menseregte nie net die aanslag op bestaande politieke stelsels regverdig het nie, maar ook die grondslag gebied het vir felle kritiek teen die ondemokratiese gesagstruktuur van die kerk (De Villiers in *Menseregte* 20 e v). Op beginselgrondslag was die kritiek van die kerk hoofsaaklik gerig op die feit dat die leer nie oorspronklik uit die kerk of die Bybel kom nie, maar die produk van die sewentiende eeuse humanistiese regsfilosofie is (vgl Jonker in *Menseregte* 48–49; par 4 hieronder).

30 De Villiers in *Menseregte* 26–27; Jonker in *Menseregte* 50 e v.

31 *Ibid.*

32 Die leer van menseregte word deur sowel die Rooms-Katolieke kerk as die Protestantse kerke aanvaar; dit geld vir ekumeniese liggame soos die Wêreldraad van Kerke, die Gereformeerde Ekumeniese Sinode, die biskopsinode van die Rooms-Katolieke kerk en die Gereformeerde en Lutherse Wêreldbonde (De Villiers in *Menseregte* 30–35; vgl Jonker in *Menseregte* 50).

33 Alhoewel daar ook politieke redes vir die aanvanklike weersin van die Afrikaanse kerke in menseregte was, was die afkeer volgens Jonker veral teologies gerig op die feit dat menseregte die produk van 'n tipies liberale en humanistiese denkorde van die sewentiende en agtiende eeu is. Daarbenewens kom die begrip "menseregte" volgens Jonker van huis

anders. Volgens Jonker beskou sommige kerke dit nou as hulle belangrikste taak om hul vir die verwesenliking van menseregte te beywer.[34] Soos reeds vermeld,[35] het die regskommissie bevind dat al die groot kerke in Suid-Afrika menseregbeskerming steun[36] en "*dat die kerk tans miskien die sterkste kampvegter vir menseregte is*".[37] So beskryf die NG Kerk in *Kerk en samelewing* sekere menseregte as noodsaaklik en verklaar dat dit die mens se regte is wat hom in staat stel om sy bestemming as mens te realiseer; dat menseregte onmisbaar is vir die verwesenliking van die mens se bestemming op aarde.[38]

3 CHRISTELIKE EVANGELIE EN MENSEREGTE: SIENING VAN DIE KERK

Hoofsaaklik vanweë die ywer van sekere kerke en kerkleiers, word die menseregteideologie tans bykans geheel en al met die Christelike evangelie vereenselwig. So bevind die regskommissie dat al die groot kerke in Suid-Afrika menseregtebeskerming "*juis vanuit die Christelike en Bybelse standpunt* steun".[39] Vandag word menseregte dan ook deur baie as Bybels[40] en Christelik[41] aanvaar en as die teenswoordige manifestasie van die gebod van God[42] en van die evangelie van Christus beskryf.[43] Die verwerkliking van menseregte word voorgehou as die vervulling van die Christen[44] en die kerk se hoogheilige roeping;[45] as die verwesenliking van die koninkryk van God op aarde;[46] as uitdrukking van die heiliging van die mens;[47] as voldoening aan die eise wat die Bybel stel.[48]

Grootse verwagtinge word dan aan menseregte gekoppel: onder meer omdat geglo word dat die verlening van menseregte aan die gebod van God voldoen,

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vervolg van vorige bladsy

uit uit 'n klimaat wat aan die Bybel vreemd is. Daarom het die kerk aanvanklik gereken dat menseregte eerder tuishoort in 'n rewolusionêre atmosfeer waarin die gesag soos dit deur God ingestel is, verwerp word. Die kerk het vroeër geoordeel dat menseregte op die verheerliking van die mens gebaseer is en daarom glad nie op grond van die Bybel geregverdig kan word nie (in *Menseregte* 48; ook De Villiers in *Menseregte* 22–23; par 4 hieronder).

34 In *Menseregte* 51.
35 Par 1 hierbo.
36 *Menseregte*-verslag 314.
37 *Menseregte*-verslag 199.
38 *Kerk en samelewing* par 178 180 183.
39 *Menseregte*-verslag 314; vgl par 1 hierbo.
40 Duvenage Mei 1985 *Woord en Daad* 15. Wiechers *Biblical view of human rights* 42–43 verklaar: "The Bible is and remains the only source of information and inspiration for the church in this respect . . . " En in *Kerk en samelewing* verklaar die NG Kerk dat die "begrip 'menseregte' . . . Bybels gevul en verantwoord [moet] word" (par 179 182).
41 Murray 1985 *SAJHR* 76.
42 Jonker in *Menseregte* 54.
43 Duvenage Mei 1985 *Woord en Daad* 15; vgl Jonker in *Menseregte* 54.
44 Wiechers *Biblical view of human rights* 46 verklaar bv: "Christians have the duty . . . to support wordly endeavours to safeguard and protect human rights. This duty to sustain worldly endeavours to promote human rights which is laid upon the church and all Christians springs from the specific commandment to do good . . . " Sien ook Jonker in *Menseregte* 53; Duvenage Mei 1985 *Woord en Daad* 15.
45 Duvenage Mei 1985 *Woord en Daad* 16; vgl Wiechers *Biblical view of human rights* 43 (ook 36).
46 Vgl Duvenage Mei 1985 *Woord en Daad* 14.
47 Velema *Discussie over mensenrechten* (1980) 30 e v; vgl Jonker in *Menseregte* 50.
48 Vn 40 hierbo.

word ook geglo dat die erkenning van menseregte vir die probleme van Suid-Afrika die geneesmiddel sal wees.[49] 'n Geloof het posgevat dat die erkenning van menseregte sal sorg vir vrede, versoening en geregtigheid; dat menseregte die einde sal beteken van armoede en hongersnood, konflik en stryd.[50]

4 DIE KERK EN DIE OORSPRONG VAN MENSEREGTE

Oorsprong van menseregte Histories word die oorspronklike leer van menseregte aan die sewentiende-eeuse Engelse humanis John Locke toegeskryf.[51] Hy het naamlik vir hom 'n voorstelling gemaak van die ideale wêreld: 'n oorspronklike natuurtoestand waarin mense sonder staatsverband in vrede saamleef. Uit hierdie droomwêreld het hy sekere natuurlike menseregte soos die reg op lewe, vryheid en eiendom afgelei wat die ideale toestand sou waarborg. Begin mens nou by die heersende onvolmaakte orde, kan mens in die rigting van die ideale toestand beweeg deur die mens se regte toenemend te erken en te beskerm.[52]

Verleentheid vir die kerk Die ontstaansbron van menseregte veroorsaak verleentheid vir die kerk. Aan die een kant erken die kerk die historiese feit dat menseregte nie uit die Bybel kom of in die kerk ontstaan het nie, maar uit die heidendom stam.[53] In *Kerk en samelewing* maak die NG Kerk byvoorbeeld die volgende erkenning:

> "Die begrip 'menseregte' kom nêrens in die Bybel voor nie. Dit is 'n relatief moderne begrip wat hoofsaaklik uit sekulêre filosofiese en veral humanistiese bronne voorkom."[54]

Maar in dieselfde asem verklaar die kerk dat die Bybel vir hom die enigste geldige bron – dus ook vir menseregte – is.[55]

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49 Vgl par 1 hierbo.

50 *Ibid.* Weer eens dien die beloftes wat in die Freedom Charter gemaak word, hier ter illustrasie: sien vn 9 hierbo. Hierdie geloof in die krag van menseregte bevestig dat dit by menseregte nie maar net om 'n stel regsreëls gaan nie, maar dat dit 'n geloofsaak geword het (par 1 hierbo). Vgl voorts Wiechers *Biblical view of human rights* 36; Heyns *Teologiese etiek* 2/1 108.

51 Van der Vyver verklaar dat die menseregte-gedagte " 'n uitvindsel van die sewentiende eeuse humanistiese regsfilosofie" is. Die leer moet volgens Van der Vyver gesien word as 'n pragmatiese uitloper van die destydse konstitusionele stryd in Engeland wat hom rondom die outokratiese optrede van die koningshuis van Stuart afgespeel het. Locke het sy leerstuk op die "humanistiese lewens- en wêreldbeskouing van sy tyd gegrondves" (*Menseregte* 1 e v); sien verder Van der Vyver *Cape Town conference* 10 11–17; De Villiers in *Menseregte* 9–38; Jonker in *Menseregte* 48 (vgl vn 33 hierbo); Olivier 1986 *Koers* 502 e v; Regskommissie *Menseregte*-verslag 24 e v.

52 Vgl De Villiers in *Menseregte* 17–18.

53 Vn 29 en 33 hierbo.

54 Par 179. Jonker in *Menseregte* 48–49 verklaar bv: "Net so is dit natuurlik ook waar dat die konsep van menseregte histories gesproke nie sy oorsprong in kerk en teologie gevind het nie, maar dat dit 'n produk van die gees van die Verligting is en dus van huis uit verbonde was aan 'n rewolusionêre tendens van die beklemtoning van die regte van individue teenoor die bestaande gesagsinstansies. Die begrip menseregte kom nie in die Bybel voor nie, en die beskouing van die mens soos dit oorspronklik deur die begrip 'menseregte' veronderstel word, is nie die Bybelse mensbeeld nie."

55 *Kerk en samelewing* par 36–44 verklaar o a: **"Die Bybel is die kerk se enigste maatstaf.** Ons glo en bely dat die Heilige Skrif die volkome en vir alle tye gesaghebbende openbaring van God is. Daarom is dit vir ons die enigste maatstaf waaraan standpunte, gesindhede en optredes in die Suid-Afrikaanse situasie getoets moet word. **Dit beteken** . . . dat ons steeds moet waak dat geen ander stem, hoe mooi en verleidelik dit ook mag klink, of dit nou dié van 'n bepaalde ideologie, geestesstroming, politieke rigting, tradisie, persoonlike vooroordeel, volksgevoel of wat ook al is, 'n beslissende woord bo of naas die Bybel sal spreek

Teenstrydigheid Hier vind mens 'n onoorkomelike teenstrydigheid. Menseregte kan nie twee moeders hê nie; dit is gebore òf uit die menslike filosofie, òf uit die Bybel. 'n Leerstuk van suiwer menslike oorsprong verander nie in 'n Bybelse leer net omdat mens dit agterna, in die woorde van *Kerk en samelewing*,[56] "Bybels vul" nie. Net so min as wat 'n suiwer politieke beleid soos apartheid Christelik geword het toe kerkleiers dit met Bybelse terminologie beklee het, net so min word die van huis uit humanistiese menseregteleer Christelik as mens dit agterna met Bybelse begrippe vul. Op so 'n wyse kan mens immers bykans enige ideologie uit dele van die Bybel "regverdig".[57]

Menseregte nie deur Christus erken Die waarheid is dat die leerstuk wat kerke vandag beskryf as die korrekte metode om die Christelike evangelie te verwesenlik, glad nie deur Christus of enige van sy diensknegte in die Bybel verkondig is nie maar eers baie eeue later uit nie-Christelike geledere gebore is. As menseregte inderdaad "*onontbeerlik*" was vir die verwesenliking van die evangelie op aarde, is dit onverklaarbaar waarom die Bybel geen melding van dié ideologie maak nie.

"Christelike" grondslae vir menseregte In weerwil van die kerk se duidelike erkenning dat menseregte vreemd is aan die Bybel en uit die heidendom stam, word tog gepoog om die leer van menseregte op verskillende beweerde Bybelse

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nie." Desnietemin word die leer van menseregte, ten spyte van sy "sekulêre filosofiese en veral humanistiese" oorsprong (*Kerk en samelewing* par 179) klaarblyklik nie deur die kerk verwerp nie. Ook Wiechers *Biblical view of human rights* 43 verklaar: "No wordly institution, no legal document or system of this world is needed – whether directly or by analogy – to prescribe to the church its attitudes and functions as far as human rights are concerned. *The Bible is and remains the only source of information and inspiration for the church in this respect*" (my beklemtoning).

56 **"Die begrip 'menseregte' moet Bybels gevul en verantwoord word"** (par 179; ook 182). Jonker in *Menseregte* 55–57 probeer die feit dat die humanisme die oënskynlike verdienste van die menseregte-leer ingesien het voordat die kerk en die teoloë dit in die Bybel kon ontdek, verklaar aan die hand van die teorie van God se beweerde "algemene genade" waardeur dit vir heidene en ateïste moontlik sou wees om sedelike en morele kwessies op dieselfde wyse as Christene te beantwoord. Hierdie verduideliking is betwyfelbaar en bloot 'n poging om *ex post facto* 'n verklaring te vind vir die feit dat die kerk 'n humanistiese ideologie aanvaar (Potgieter *Godsdiensgevoel* 354–356 368 en sien in hierdie verband vn 62 hieronder).

57 Vgl Deist *Sê God so?* 3–5 72. Dit is juis op politieke terrein waar die Bybel in Suid-Afrika veral misbruik word. Deist *ibid* verklaar bv: "Die manier waarop die Bybel deesdae gebruik word om politieke standpunte te bevestig en die waarheid van politieke ideologieë te bewys, is nie alleen verwarrend nie, maar grens aan godslasterlikheid. Elke ketter het sy letter en woeker daarmee om mense se siele . . . Of dit nou ultraregs, regserig, regs, middelweg, links, linkserig of ultralinks is, elkeen span die Bybel in om sy standpunt reg te bewys. Elkeen beskik oor die finale waarheid – as die ander tog maar net die Bybel reg uitgelê het . . . Ons het toegelaat dat denominasies met hulle politieke ondertone en godsdienstige botone steunpilare van politieke partye met godsdienstige ondertone en politieke botone geword het. Maar boweal het ons toegelaat dat die kosbaarste besitting van die kerk, naamlik die Bybel, by die hele magspel betrokke geraak het en dat politieke strukture Goddelike sanksie en ewigheidswaarde gekry het via ons Bybelgebruik. Daar is denominasies wat in die mou lag oor die probleme waarmee dié denominasies wat nog al die jare die konkrete beleid van apartheid gesteun het, nou met die verskuiwing in politieke aksente sit. En hulle verkondig met nog meer ywer as tevore die 'Bybelsheid' van die politieke party waaraan hulle hulleself verpand het, min wetend dat hulle Bybelgebruik presies dieselfde is as dié van die groepe wat nog al die jare apartheid gesteun het."

gronde te regverdig.[58] Veral een siening word feitlik algemeen aanvaar as die belangrikste, sogenaamd "diepste", beweerde Christelike grondslag van menseregte: die siening dat elke mens beelddraer van God is.

5 DIE ARGUMENT DAT ELKE MENS BEELDDRAER VAN GOD IS[59]

Volgens hierdie beskouing is *elke* mens beelddraer van God en kroon van die skepping; het hy 'n koninklike heersersfunksie as verteenwoordiger van God op aarde en is hy beklee met Godgegewe gesag, status en waardigheid. En omdat die mens so 'n hoë waardigheid in die oë van God sou hê, verleen God self aan elke mens onvervreembare menseregte as deel van die toerusting wat hy nodig het om sy Godgegewe roeping en taak te vervul.[60]

Die siening dat *elke* mens beelddraer van God is, hou egter nie rekening met die volle inhoud van die Bybel nie. Dit is wel waar dat God die mens na sy beeld geskape en oor alles aangestel het.[61] Maar weens die sondeval het die mens vanselfsprekend sy beeldskap van God verloor[62] en is alle dinge nie meer aan

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58 Sien Regskommissie *Menseregte*-verslag 187 e v vir 'n oorsig van verskillende beweerde Bybelse grondslae vir menseregte. Skynbaar handel die kerklike debat nie meer oor die vraag of die menseregte-leer Christelik is nie – dit word algemeen aanvaar (par 2 en 3 hierbo) – maar oor 'n soektog na die geskikste teologiese verklaring waarom menseregte Christelik sou wees (De Villiers in *Menseregte* 36).

59 Daar bestaan 'n groot hoeveelheid gesag vir hierdie standpunt in sowel teologiese as regsfilosofiese kringe: sien o a *Kerk en samelewing* par 160–199; Heyns *Teologiese etiek* 253 388 e v; *Dogmatiek* (1978) 124 e v; Jonker in *Menseregte* 53; Du Toit in *Menseregte* 66 e v; Duvenage Mei 1985 *Woord en Daad* 14–16; Lategan, Kinghorn, Du Plessis en De Villiers *Die keuse vir 'n inklusiewe demokrasie* ('n Teologies-etiese studie oor toepaslike gemeenskapswaardes vir Suid-Afrika) (1987) 3–4 15 e v; Van der Vyver 1975 *THRHR* 70; *Die juridiese funksie van staat en kerk* (1972) vii; Van Zyl en Van der Vyver *Inleiding* 84–85 (met verwysing na Stoker); Du Plessis *Die juridiese relevansie van Christelike geregtigheid* (LLD-proefskrif PU vir CHO 1978) 576 801–802; 1981 *Koers* 42; Junie 1986 *Woord en Daad* 18; Raath 1984 *Obiter* 33 39 44; 1986 *Koers* 458 463; Van Rooyen "Aspekte van reg en geregtigheid met betrekking tot gevangenes" 1981 *THRHR* 10 e v; Wiechers *Biblical view of human rights* 44; Rautenbach *Bewegingsvryheid* 13; Stoker *Aard en rol van die reg* 15. Sien Potgieter *Godsdiensgevoel* 429 e v vir verdere gesag.

60 *Ibid.* Die NG Kerk verklaar bv soos volg in *Kerk en samelewing*: "Die Godgegewe waardigheid en heerlikheid van die mens blyk allereers uit die unieke plek wat hy in God se skeppingswerk inneem. Hy en hy alleen is immers na die beeld van God geskep in kennis, geregtigheid en heiligheid . . . " (par 160); **"[D]ie siening van die mens as beeld van God** [is] . . . besonder belangrik . . . vir die regte bestaan en invulling van 'n Bybels verantwoorde beskouing oor 'menseregte'. God skep sy beelddraer, die mens, met bepaalde verantwoordelikhede, moontlikhede, opdragte, roepinge en verhoudinge langs die weg waarvan hy tot die volle verwesenliking van sy menswees en bestemming moet kom. Hierdie moontlikhede en noodsaaklikhede vir ware menswees sou in afgeleide sin as 'menseregte' beskryf kon word . . . " (par 182; ook par 160–199).

61 Bv Gen 1:26–27; 5:1; 9:6; Ps 8:6–10; Jak 3:9; vgl 1 Kor 11:7; Potgieter *Godsdiensgevoel* 436.

62 Volgens Calvyn *Genesis* (vert Los 1898) 45 is "door Adams val Gods Beeld in ons verwoest" en "zoo bedorven en verminkt, dat men naar waarheid kan zeggen, dat ze zijn verwoest. Want behalwe de misvorming, die overal leelijk te voorschijn komt, is er ook nog dit kwaad, dat er geen deel is, of 't is geschonden door de smet der sonde." Die beeld van God in die mens is nie net verwring en verdraai nie, maar totaal vernietig. Die argument dat daar na die sondeval tog nog "ietsie" van die beeld van God in die sondige mens oorgebly het, is verkeerd. Die rede waarom die ongelowige mens ook 'n "goeie lewe" kan lei en soms dieselfde insigte as 'n ware Christen toon (vgl Rom 2:14–16), is nie dat daar steeds 'n oorblyfsel van God se beeld in hom is nie, maar eenvoudig dat die mens (in stryd met die opdrag van God) van die boom van kennis van goed en kwaad geëet het (Gen 3:5–7), waardeur hy die vermoë verwerf het om tussen reg en onreg te onderskei (Gen 3:22; vgl Potgieter *Godsdiensgevoel* 351 e v).

hom onderworpe nie.[63] Nou is dit nie die sondige mens nie, maar Jesus Christus wat volgens die Bybel beeld van God is[64] en aan wie alle mag oorgedra is.[65] Die Christelike evangelie vereis juis dat die sondige mens sy sonde moet aflê en *in sy innerlike wese moet verander* sodat hy weer aan die beeld van God gelyk kan word.[66] Hierdie veranderde, "nuwe" mens, die een wat soos Christus is, (*nie elke mens nie*), dra weer die beeld van God.[67]

Die mens is dus nie van nature beelddraer van God nie. As hy was, sou Christus en sy evangelie wat die gevalle mens weer tot die beeld van God wil herskep, irrelevant gewees het.[68]

Mens aan Christus gelyk? Die bewering dat elke mens ongeag sy ongeloof en sonde beelddraer van God is, impliseer boonop dat hy aan die sondelose Christus, die ware beeld van God, gelyk is. Dit sou natuurlik net die geval kon wees as Christus ook die natuurlike mens se sondige eienskappe deel: beide word immers beelddraers van God genoem. 'n Kort vergelyking van enkele van die eienskappe van Christus met dié van die sondige mens maak dit egter duidelik dat Christus geen inherent sondige eienskappe met die natuurlike mens deel nie.[69] Om die sondige mens beelddraer van God te noem en die mens op dié manier met die sondelose Jesus Christus gelyk te stel, is dus verkeerd en boonop godslasterlik.[70]

6 DIE NATUURLIKE MENS AS BEELDDRAER VAN DIE DUIWEL[71]

Die waarheid is dat die natuurlike (sondige) mens nie beeld van God is nie, maar beeld van die duiwel. Die eienskappe van die natuurlike mens kom naamlik met die kenmerke van die duiwel (en nie van God nie) ooreen.[72]

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63 Heb 2:8. Die mens het trouens self 'n slaaf (van die sonde) geword (Joh 8:34).

64 "Uit Hom straal die heerlikheid van God en Hy is die ewebeeld van die wese van God" (Heb 1:3). Ook Kol 1:15: Jesus Christus "is die Beeld van die onsienlike God"; 2 Kor 4:4: "Christus . . . die beeld van God . . . ". Vgl Du Plessis *Die brief aan die Kolossense* (1978) 19–20; Groenewald *Die tweede brief aan die Korinthiërs* (1973) 62; Fensham *Die brief aan die Hebreërs* (1981) 19–21; Calvyn *The epistle of Paul the apostle to the Hebrews and the first and second epistles of St Peter* (vert Johnston 1963) 7–9; Potgieter *Godsdiensgevoel* 436–437.

65 Matt 28:18.

66 Joh 1:12–13; 2 Kor 3:18; Ef 2:1–10; 4:22–24; Kol 3:5–10; vgl Rom 6:1–23; 8:12–13; 12:1–2; Ef 2:1–10; vgl Potgieter *Godsdiensgevoel* 436 e v vir verdere gesag.

67 Kol 3:9–10; 2 Kor 3:18; vgl Potgieter *Godsdiensgevoel* 436 e v. Volgens Christus is daar egter maar min mense wat bereid is om Hom te volg (Matt 7:13–14; Luk 13:23–24; Deist *Sê God so*? 25–26 37). Die meeste mense verkies om hulle nie tot Christus te bekeer en soos Hy te word nie en is gevolglik vir die verderf bestem (*ibid*).

68 Vgl Potgieter *Godsdiensgevoel* 438–439.

69 Christus en sy Gees word nl gekenmerk deur o a waarheid, heiligheid, sagmoedigheid en nederigheid; liefde, blydskap, vrede, lankmoedigheid, vriendelikheid, goedheid, getrouheid en selfbeheersing (Joh 14: 6 17 26; Matt 11:29; Gal 5:22). Daarteenoor tabuleer Paulus enkele van die natuurlike mens se optredes en gesindhede: ongeloof, leuenagtigheid, owerspel, hoerery, onreinheid, ongebondenheid, afgodery, towery, vyandskap, twis, jaloersheid, toornigheid, naywer, tweedrag, partyskap, afguns, moord, dronkenskap, brassery en al dergelike dinge (Rom 3:4; Gal 5:19). Christus kon as ware beeld van God verklaar: "Wie My sien, sien die Vader" (Joh 14:9). Die sondige mens kan daarenteen beslis nie ook konstateer: "Wie my sien, sien God" nie. Vgl Potgieter *Godsdiensgevoel* 440–441.

70 Sien hieroor in die algemeen Potgieter *Godsdiensgevoel* 436 e v.

71 Die Regskommissie (*Menseregte*-verslag 200) wek die verkeerde indruk dat ek in my intreerede sou beweer het dat *alle* mense beelddraers van Satan is. Soos uit die voorafgaande

Die natuurlike mens is beelddraer van die duiwel selfs al wek hy die *indruk* van fatsoenlikheid en, veral deur sy skyn-heilige godsdienstige aktiwiteite, oënskynlik selfs 'n beeld van Christus.[73] Die duiwel tree immers ook as engel van die lig op waar hy sy inherente boosheid agter 'n skyn van heiligheid versteek.[74] Daarom dien die oënskynlik voortreflike en voorbeeldige lewenswyse van sekere mense wat Christus nie ken nie, hoegenaamd nie as bewys dat die natuurlike mens beelddraer van God of inherent goed is nie.[75] Gevolglik is byvoorbeeld professor Johan Heyns se stelling dat elke mens die "masker" is waaragter Christus deur die wêreld gaan,[76] 'n fundamentele misvatting: die *natuurlike mens* is die masker waaragter die bose, nie Christus nie, deur die wêreld beweeg.[77]

7 GEVOLGE VIR DIE REG VAN 'N FOUTIEWE MENSBESKOUING

Humanistiese beskouing Die denkbeeld dat elke mens beelddraer van God is, is in werklikheid die "teologiese ekwivalent" van die humanistiese uitgangspunt dat elke mens in wese goed is.[78] Die sondige mens word op ongeregverdigde wyse tot dieselfde status as Christus, en dus tot God, verhef.[79] Hierdie verheffing

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blyk, is daar egter geen onduidelikheid oor my standpunt dat diegene wat deur Christus herskep is, wel beelddraers van God is nie.

72 Volgens die Bybel sondig die duiwel van die begin af, is hy 'n leuenaar, 'n moordenaar, verwaand en hoogmoedig; 'n listige bedrieër (sien onderskeidelik 1 Joh 3:8; Joh 8:44; 1 Tim 3:6 (vgl Jes 14:10–14; Eseg 28:12–18); Gen 3:1–5 (vgl Matt 4:1–11). Dit kom ooreen met die reeds vermelde (vn 69 hierbo) eienskappe van die natuurlike mens.

73 "A beautiful appearance and lustre of holiness may indeed be found in many, who, after all, oppose the gospel; but, though they appear to be holier than the angels, there is no room to doubt that they are hypocrites, who reject the doctrine of Christ for no other reason than because they love their lurking-places by which their baseness may be concealed" (Calvyn *Commentary on the gospel according to John* bd 1 (vert Pringle 1956) 128; "For although there have often appeared in unregenerate men remarkable instances of gentleness, faithfulness, temperance and generosity, it is certain they were all only deceptive masks. Curius and Fabricius were famous for their courage, Cato for temperance, Scipio for kindness and generosity, Fabius for patience. But all this was only in the sight of men and as members of society. In the sight of God nothing is pure but what proceeds from the fountain of all purity . . . But it may be asked what judgment we are to form of wicked men and idolaters who yet displayed an extraordinary resemblance of the virtues. For from their works they seem spiritual. I reply: as not all the works of the flesh appear in a carnal man, but his carnality is shown by one or another vice, so a man cannot be considered spiritual from a single virtue. Sometimes it will be obvious from other vices that the flesh reigns in him; and this is easily seen in all those whom I have mentioned" (Calvyn *The epistles of Paul the apostle to the Galatians, Ephesians, Philippians and Colossians* (vert Parker 1965) 105–106); vgl Potgieter *Godsdiensgevoel* 334 352 442.

74 2 Kor 11:4 13–15. Vgl Calvyn *Commentary on the epistles of Paul the apostle to the Corinthians* bd 2 (vert Pringle 1959) 351; Potgieter *Godsdiensgevoel* 265 442 e v.

75 Vgl vn 62 en 73 hierbo. Judas Iskariot was van buite geoordeel 'n dissipel van Christus en die Fariseërs was op die oog af uiters vroom en godsdienstig. Nietemin noem Christus vir Judas 'n duiwel en verwys Hy na die Fariseërs as kinders van die duiwel (Joh 6:70 (vgl Matt 16:23); Joh 8:44; vgl Potgieter *Godsdiensgevoel* 441 vn 642). Beskou mens hierdie verraaier van Christus en diegene wat Hom ter dood veroordeel het as beelddraers van God, stel mens 'n duiwel met Christus gelyk. Dit is klaarblyklik verkeerd; maar net so verkeerd is dit om die sondeverslaafde mens met Christus gelyk te stel.

76 *Teologiese etiek* 253.

77 Vgl Potgieter *Godsdiensgevoel* 441–442.

78 In effek is die uitgangspunt dat alle mense beelddraers van God is, dus presies dieselfde as die een waarop die humanisme berus, met die enigste verskil dat eg met 'n skyn–Christelike kleed bedek word.

79 Par 5 hierbo.

van die sondige mens kom op afgodediens neer en die reg behoort dit nie te bevorder nie.

Juridiese fiksie Juridies is die beskouing dat die mens beelddraer van God is, 'n onrealistiese en gevaarlike fiksie. As die reg sonder voorbehoud sou aanvaar dat elke mens beeld van God is, aanvaar hy verkeerdelik dat elke mens soos Christus is. Maar as elke mens soos Hy was, sou soveel regsreëls onnodig gewees het want die reg is juis daar omdat mense byvoorbeeld haatdraend, gierig, selfsugtig, onbetroubaar, onverstandig en onversigtig is. Die blote bestaan van regsreëls bewys dat die natuurlike mens nie beelddraer van God is nie.

Noodsaaklikheid van korrekte mensbeskouing Gevolglik behoort mens nie regsreëls te skep op grond van die wanopvatting dat elke mens die beeld van God is en daarvolgens behandel moet word nie. Om doeltreffend orde te handhaaf, moet die reg van die korrekte mensbeskouing uitgaan, naamlik dat die mens inherent sleg is. Met die mens se natuurlike ongeregtigheid voor oë, moet realistiese regsreëls geformuleer en toegepas word om die mens se geneigdheid om skadelik op te tree, in bedwang te hou.

In die lig hiervan is die standpunt verkeerd dat byvoorbeeld subjektiewe regte (soos die reg op die fisiese integriteit, goeie naam en privaatheid[80]) berus op die mens se hoë waardigheid; op die aanname dat die mens "die kroon van die skepping is, na die ewebeeld van God geskape".[81] Regsreëls, insluitend die juridiese erkenning van subjektiewe regte, is noodsaaklik nie omdat die mens so goed sou wees nie, maar is onontbeerlik om orde te handhaaf en mense te beskerm juis omdat die sondige mens fundamenteel verdorwe en van nature geneig is om sy medemens skade te berokken. Daarom is dit nie so dat die verlening van subjektiewe regte (en onvervreembare menseregte) Christelik is omdat God self sodanige regte sou verleen vanweë die beweerde hoë waardigheid van die mens nie.[82]

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80 Sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* (1989) 39 e v.

81 Pienaar baseer subjektiewe regte op hierdie foutiewe aanname (*Die gemeenregtelike regspersoon in die Suid-Afrikaanse privaatreg* (LLD-proefskrif PU vir CHO 1982) 141–143; "Regsubjektiwiteit: 'n prinsipiële benadering" 1983 *Koers* 11–12). In aansluiting hierby verklaar Stoker bv dat "die aanspraak op die naam [wat aantasting van die naam van die mens verbied] . . . 'n reg [is] wat gegee is met die status van die mens as beeld van God; wie 'n mens se naam aantas, tas die beeld van God aan" (*Aard en rol van die reg* 22–23).

82 Dit is dus ook nie geldig om bv te betoog dat Christus en Christene wel menseregte het (sien par 8 hieronder) maar dat hulle desondanks as martelare inbreuk op sodanige regte moet verduur nie (vgl Du Plessis *Geregtigheid* 801–802). Regte wat nie afgedwing kan word nie, is juridies onbestaanbaar. As die Christelike evangelie inderdaad onvervreembare menseregte verleen het, sou dit ook voorsiening gemaak het vir remedies om sodanige regte af te dwing. Wat help bv 'n beweerde Godgegewe reg op die liggaam en waardigheid terwyl Christus voorskryf dat jy 'n slegte persoon nie moet teëgaan nie en eerder die ander wang moet draai? (Matt 5:39). Of hoe is die reg op die lewe te rym met Christus se woorde dat elkeen wat sy lewe wil red, dit sal verloor? (Matt 16:24–26). Waarom het Christus, as beelddraer van God, Hom nie op "onvervreembare, Godgegewe regte" beroep toe Hy voor Pilatus tereggestaan het nie? (Matt 27:11–31). Daarby vermaan Paulus Christene om mekaar nie hof toe te sleep nie (1 Kor 6:1–11). As die afdwing van menseregte dan so belangrik sou wees vir die manifestasie van die evangelie, hoekom wil Paulus juis die normale regsproses uitskakel? Op die koop toe leer Paulus Christene dat hulle met Christus moet sterf (Rom 6:5 8; 2 Kor 4:10; 2 Tim 2:11) en sê o a van homself dat hy wat hierdie lewe betref, dood is (Gal 2:19–20; 6:14). Hoe moeilik dit ook al is om te aanvaar, is 'n Christen dood vir hierdie wêreld om vir Christus te lewe (*ibid*; vgl Rom 6:1–23; 1 Joh 2:15–17); "[w]ie dan 'n vriend van die wêreld wil wees, word 'n vyand van God" (Jak 4:4). Nou weet selfs

Enige voorgestelde regswysiging moet dus op die werklikheid – dat die mens in beginsel sondig is – gebaseer word anders sal die reg dit nie suksesvol kan implementeer nie. Daar is 'n klassieke voorbeeld in hierdie verband. Die ou Romeine het naamlik geglo dat marmer in sekere groewe in Gallië en Asië telkens weer aangroei nadat dit ontgin is. Op hierdie opregte maar foutiewe geloof is sekere regsreëls geskoei. En omdat marmer nie groei nie, het dié regsreëls tot gevolg gehad dat die vruggebruiker op onbillike wyse bo die eienaar bevoordeel is. Regsreëls wat op onware beskouings gebaseer is, is onware reg,[83] wreek hul onvermydelik in die praktyk en lei noodwendig tot inkonsekwensies en onbillikheid.[84] Hieruit moet mens leer: regsreëls, insluitende mens se beskouing van 'n menseregte-akte, moet nie gebaseer word op die foutiewe siening dat alle mense beelddraers van God is nie.

Eerder strenger beheer Die fundamenteel sondige aard van die mens vereis eerder strenger beheer as die groter vryheid waarvoor 'n handves van menseregte normaalweg voorsiening maak.[85] Maak mens regsreëls op grond van die foutiewe

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'n junior regstudent dat 'n dooie mens geen regte het nie en daarom is dit des te meer onvanpas om in die Naam van Christus op absolute en onvervreembare regte aanspraak te maak.

Al hierdie feite dui daarop dat die Christelike evangelie nie in die eerste plek bedoel is om as oënskynlike gesagsbron te dien vir, of om aansien te verleen aan, mensgemaakte regsreëls wat primêr gerig is op die regulering van die onderlinge verkeer in 'n sondige samelewing nie. Die kern van die Christelike evangelie is gemik op die verwesenliking van die koninkryk van God binne-in dié mens wat hom inderdaad tot Christus bekeer het (Luk 17:21); 'n koninkryk wat volgens Christus "nie van hierdie wêreld" is nie (Joh 18:36). Die Christelike evangelie (ingevolge waarvan mense o a met hulle sondes moet breek) is derhalwe nie geskik om 'n samelewing te orden waarvan die meeste lede eenvoudig aanhou met sondig en nie werklik in Christus glo nie. Daarom is dit onvanpas om van 'n "Christelike staat" te praat en ook nie korrek om menseregte, wat net om die mens in sy tydelike staat draai, Christelik te probeer inklee nie. Daar bestaan dan ook onoorbrugbare verskille tussen Goddelike wette en mensgemaakte regsreëls (vgl Potgieter *Godsdiensgevoel* 356 e v).

83 Stoker *Aard en rol van die reg* 9 54; Van Zyl en Van der Vyver *Inleiding* 107–108 245 258–259 400; Van Rensburg *Juridiese kousaliteit en aspekte van aanspreeklikheidsbegrensing by die onregmatige daad* (LLD-proefskrif Unisa 1970) 134; Neethling *Persoonlikheidsreg* (1985) 37; vgl Potgieter *Godsdiensgevoel* 384 e v.

84 Van Rensburg *Juridiese kousaliteit* 134; Neethling *Persoonlikheidsreg* 26; vgl Van Zyl en Van der Vyver *Inleiding* 400. Du Plessis *Geregtigheid* 829 stel hierdie vereiste so: "Dit beteken in wese dat 'n regverdige regsnorm nie werklikheidsvreemd nie maar *realisties* is: dat dit op die konkrete situasies soos wat hulle hul inderdaad in die werklikheid voordoen, bedag is." Ook Van der Walt "Ongewenste publikasies: 'n juridiese benadering" 1973 1 *Aambeeld* (RAU) 9–10; vorige vn.

85 Daarom is die Bybel se beklemtoning van die noodsaaklikheid van die swaardmag van die owerheid om ongeregtigheid te beheer (Rom 13:1–7), volkome in ooreenstemming met die eise van die werklikheid. Aangesien die oorgrote meerderheid inwoners van 'n staat Christus nie gehoorsaam nie, is dit vir 'n owerheid nie moontlik om op 'n "Christelike" wyse (wat dit ook al presies mag beteken), te regeer nie. Dus moet 'n staat in 'n sin funksioneer met behulp van reëls soos mens dit in die Ou Testament aantref: volgens doeltreffende wette en strawwe om die mens wat van nature ongeregtigheid wil bedryf, in toom te hou en, waar nodig, te straf. So maak Rom 13 dit duidelik dat die owerheid 'n dienaar van God is en sowel die *reg* as die *plig* het om kwaaddoeners te straf. Die opdrag van Christus dat mens bv 'n slegte mens nie moet weerstaan nie (Matt 5:39), geld dus nie vir die owerheid nie: die "Christelike" opdrag van Rom 13 aan die owerheid vereis dat die owerheid kwaaddoeners moet teengaan en straf. Diegene wat "goed doen" (Rom 13:3), hoef egter geen vrees vir die owerheid te hê nie maar sal inteendeel deur die owerheid geprys word (*ibid*). Gevolglik behoort die verlening van menseregte nie die staat enigsins te strem in sy Goddelike plig (Rom 13; 1 Pet 2:13–14) om kwaaddoeners aan bande te lê nie.

uitgangspunt dat die mens goed is, word die mens nog meer geleentheid gebied om sy inherente ongeregtigheid te verwesenlik; word aan die mens as 't ware "die reg om te sondig" verleen. So gee die beweerde Godgegewe reg op die vryheid van spraak die mens na bewering die reg om onbehoorlikheid kwyt te raak.[86] Dit is egter klaarblyklik verkeerd om te beweer dat God mens 'n reg gee om onwelvoeglikheid te versprei.

Verdagmaking van regsinstellings en die algemene gees van verset Waarskynlik hou ook die teenswoordige ongeregverdigde verdagmakery van die land se regstelsel en veiligheidsmagte en die algemene gees van verset teen enige vorm van gesag wat op die oomblik heers, verband met die wanbeskouing dat die mens inherent goed is en daarom so min moontlik deur regsreëls of enige ander vorm van beheer geïnhibeer behoort te word. Hierdie verkeerde mensbeskouing lei noodwendig tot oordrewe beheptheid met die vryheid van die mens. As almal liewer die waarheid aanvaar het, naamlik dat die mens fundamenteel verdorwe is en daarom noodgedwonge onder gesag moet staan, sou daar nie vandag soveel aanmatigende opstand teen gesag gewees het nie.

Opstand teen die staatsgesag Die nie-Christelike aard van die leerstuk van menseregte blyk dan ook uit die feit dat die stryd om menseregte gekenmerk word deur toenemende weerstand en opstand van die onderdaan teen die staatsgesag. Die beweerde waardigheid van die mens word oordryf; gevolglik word die aanspraak op die vryheid van die mens oorbeklemtoon. Daarteenoor word die verdorwenheid van die mens onderskat; gevolglik word die noodsaaklikheid vir die staat om orde te handhaaf, onder meer deur 'n doeltreffende polisiemag, onderbeklemtoon: gesien die misdadige en gewelddadige aard van die mens, is die beste waarborg vir 'n ordelike samelewing en vir die regte van die individu sterk staatsgesag, doeltreffende regsreëls, 'n onafhanklike regbank en effektiewe polisie- en veiligheidsmagte.[87]

Die onderbeklemtoning deur die menseregtebeweging van die noodsaaklikheid om staatsgesag streng af te dwing, vind sy laagtepunt in die sogenaamde bevrydingsteologie wat as logiese uiteinde selfs misdaad onder die dekmantel

86 Die Appèlraad oor Publikasies vind nl regverdiging vir sy uitgangspunt dat geen onbetaamlikheid duskant walglikheid ongewens is nie, tot 'n groot hoogte in die sg mensereg op die vryheid van spraak. Die raad verklaar bv dat die vereiste dat stof minstens walglik moet wees voor dit verbied kan word, "ruimte laat" vir vryheid van spraak en van gewete (*Heartland* 43/82 add 35; *Purple Hearts* 135/84 3; *Audrey Rose* 75/81; Van Rooyen *Publikasiebeheer in Suid-Afrika* 63; vgl Potgieter "Vryheid van spraak en publikasiebeheer" April 1988 *Woord en Daad* 12–14; Potgieter en Visser "Die korrekte norm by publikasiebeheer" 1988 *THRHR* 361–372). Die appèlraad het o g v dié argument soveel onbehoorlike publikasies en rolprente die lig laat sien dat die owerheid nou opnuut stappe moet oorweeg om dit te stuit. Die Minister van Binnelandse Sake het nl onlangs aangekondig dat die regering stappe oorweeg om die "steeds groeiende vlaag van permissiwiteit" in die land te probeer bekamp en sedelike verval te keer en 'n "ernstige beroep" op "veral kerkleiers" gedoen om saam te werk in hierdie verband (*Beeld* 1988-02-08 1). (Dit is verbasend dat dit in 'n "Christelike land" vir 'n regeringsamptenaar nodig moet wees om kerke op te roep om sedelike verval te bestry.)

87 Die Suid-Afrikaanse Polisie word dikwels op eensydige wyse van menseregteskending beskuldig terwyl nagelaat word om aan te toon dat die polisiemag in werklikheid die grootste beskermer van menseregte is: misdaad maak nl die meeste en ernstigste menseregteskendings uit (sien par 9 hieronder), en in sy bekamping en voorkoming van misdaad is die polisie die effektiefste beskermer van menseregte. Sonder 'n doeltreffende polisiemag is die voortreflikste regs- en menseregte-bepalings min werd.

van Christelikheid goedkeur. Daarenteen bied die Nuwe Testament, ten spyte van die onderdrukkende en ondemokratiese staatsbestel waarin Christus en sy navolgers moes lewe, geen enkele aanduiding van geregverdigde weerstand teen die staat of dat by die owerheid aangedring moet word om iets soos 'n handves van menseregte of 'n alternatiewe politieke bestel nie. Al weerstand teen gesag waarvan mens in die Nuwe Testament lees, is dié van Petrus en Johannes teen die *godsdiensleiers*. Hulle het naamlik die godsdiensleiers meegedeel dat hulle God meer sal gehoorsaam as mense.[88] Gemeentes is egter beveel om landswette te gehoorsaam.[89] Daarom is dit so eienaardig dat om te agiteer vir sogenaamde onvervreembare regte vandag skielik so deel van die evangelie geword het dat dit die hooftaak van party kerke en kerkleiers uitmaak. Die werklike rede vir sodanige optrede is dat die ware Christelike evangelie wat onder meer onderwerping aan die owerheid en selfvernedering vereis, vir baie sogenaamde Christene verwerplik geword het omdat dit bots met hulle politieke of ander beskouings en ideale.

8 DIE MENSEREGTE-LEERSTUK IN DIE LIG VAN DIE LEWE EN EVANGELIE VAN CHRISTUS

Die nie-Christelike aard van die menseregte-leerstuk kan verder aangetoon word met verwysing na die lewe en evangelie van Christus.

Christus en menseregte As dit waar was dat dit die mens se beweerde hoë waardigheid en beeldskap van God is wat hom aanspraak op menseregte gee, dan was Christus, as ware beeld van God,[90] by uitnemendheid geregtig om op menseregte aan te dring. Tog het Hy, ondanks die groot onreg wat Hom aangedoen is,[91] Hom nie op een van die beweerde onvervreembare menseregte beroep nie.

Volgelinge van Christus en menseregte Nou kan mens nie betoog dat Christus die enigste uitsondering op die reël is (byvoorbeeld omdat Hy 'n Goddelike roeping moes vervul) en dat sy navolgers (byvoorbeeld omdat hulle maar net skepsels is) wel menseregte kan toeëien al het Christus dit nie gedoen nie: *Christus verwag van sy volgelinge om net soos Hy op te tree.*[92] Daarom leer Hy hulle nie om op eie waardigheid of posisie aan te dring nie, maar om hulleself te verneder: om vervolging en verdrukking te verduur, om bereid te wees om alles wat hulle het, selfs hulle lewens, prys te gee.[93] *Hierdie voorskrifte lyk na presies*

88 Hand 4:1–20; 5:28–29.

89 Vgl Rom 13:1–7; Tit 3:1; 1 Pet 2:13; Spr 24:21; Pred 8; vn 85 hierbo.

90 Vn 64 hierbo.

91 Hy is o a bespot, gemartel en vals beskuldig; Hy is weens sy godsdiensbeskouing op grond van valse getuienis deur die destydse kerkleiers ter dood veroordeel en onskuldig tereggestel (vgl Matt 26:47–27:50; Luk 22:47–23:46).

92 Vgl o a Joh 13:14–17; 1 Joh 2:6. Trouens, Christus verklaar dat diegene wat in Hom glo, selfs groter dinge as Hy sal doen (Joh 14:12). Ook dring Paulus daarop aan dat daar in Christene "[d]ieselfde gesindheid moet . . . wees wat daar ook in Christus Jesus was" (Fil 2:5), waarmee hy spesifiek Christus se nederigheid, selfopoffering en gehoorsaamheid aan God in gedagte het (Fil 2:6–8).

93 Let in hierdie verband op o a die volgende Skrifgedeeltes: Matt 6:19–34; 16:24–26; Luk 9:61–62; 12:22–33; 14:33; 18:22–24; 21:12–17; Joh 16:33; 2 Kor 6:4–10; 11:23–33; Fil 2:3–16. Die apostel Paulus is 'n voorbeeld van die lyding en verdrukking wat 'n navolger van Christus bereid moet wees om te verduur (vgl bv 2 Kor 4:8–10; 6:3–10) en van iemand wat nie op regte wat hy sou kon hê, aanspraak gemaak het nie (vgl bv 1 Kor 9:1–15). Paulus

die teenoorgestelde as die bepalings wat 'n menseregte-handves gewoonlik bevat. As God die mens werklik van menseregte voorsien het wat hy regtens teenoor andere moet afdwing, sou Christus nie sy volgelinge direk in stryd met wat God hulle sou verleen het, beveel het om hulle eerder tot die dood toe te verneder nie.

Kortom: *niemand* wat bely dat hy Christus volg, kan hom op die voorbeeld van Christus beroep as hy op menseregte wil aanspraak maak nie. Wie beweer dat hy Christus volg, behoort self te lewe soos Christus gelewe het.[94] Gehoorsaamheid aan Christus se opdrag om jou te verneder en die aandrang op menseregte sluit mekaar wedersyds uit; om op menseregte aan te dring, is dus lynreg in stryd met die Christelike evangelie.

Die menseregte-ideologie, die Christelike evangelie en mensbeskouing 'n Kernverskil tussen die menseregte-ideologie en die evangelie van Christus blyk uit die teenoorgestelde wyses waarop die sondige mens en sy begeertes hanteer word. Die menseregte-ideologie is opgetoë met die natuurlike mens en wil dié se begeertes verander in onvervreembare, permanente Godgegewe regte en aansprake. Daar word naamlik gepoog om die betrokke begeertes met 'n beroep op die hoogste gesag wat daar is, te erken, aan te wakker, op te bou, te versterk, te regverdig en uiteindelik te laat regeer. *In direkte teenstelling* met die menseregteleer vereis die Christelike evangelie dat die mens in navolging van Christus die natuurlike begeertes in homself moet aftakel, misken, verloën en hom geensins daardeur moet laat beheers nie: "[M]aak *geen* voorsorg vir die vlees om sy begeerlikhede te bevredig nie", verklaar die apostel Paulus in Romeine 13:14.[95]

In werklikheid bied die menseregte-ideologie aan die mens regverdiging waarom hy nie van sy natuurlike aansprake afstand hoef te doen nie, maar dit eerder moet beskerm. Omdat dié siening presies die teenoorgestelde is as die eis wat die Christelike evangelie stel, is dit in der waarheid die *anti*-evangelie wat deur sommige[96] in die naam van die ware evangelie verkondig word en, soos Christus self in hierdie verband teenoor Petrus opgemerk het, van die duiwel omdat dit die denkwyse van mense en nie van God is nie.[97]

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het weliswaar by geleentheid géseling vrygespring deur die vraag te stel of dit geoorloof is om 'n Romeinse burger in stryd met die reg onveroordeeld te slaan (Hand 22:25–29); en by 'n ander geleentheid, nadat hy wel wederregtelik geslaan is sonder dat hy teenstand gebied het, daarop aangedring om deur die regters wat oortree het, uit die gevangenis gelei te word (Hand 16:36–37). Dit sou egter te ver gaan om uit die vermelde twee voorvalle af te lei dat Paulus om menseregte geagiteer het. So 'n afleiding word uitgeskakel deur o a die klem wat Paulus deurgaans geplaas het op die noodsaaklikheid dat die mens se natuurlike begeertes gekruisig moet word (bv Rom 6; Gal 2:20; Kol 2:20; 3:3) en deur sy verklaring dat hy 'n behae het in swakhede, mishandelinge, node, vervolginge en benoudhede, om Christus wil (2 Kor 12:10).

94 Vn 92 hierbo.

95 My beklemtoning. Paulus sê ook dat daar *niks* goed in die sondige mens is nie (Rom 7:18), dat wat hy bedink, op die dood uitloop (Rom 8:6–7) en dat hy God nie kan behaag nie (Rom 8:8). Daarom maak Paulus dit duidelik dat diegene wat werklik aan Christus behoort, hul sondige natuur met al sy hartstogte en begeertes gekruisig het (Gal 5:24; vgl Rom 6; Kol 3:1–17).

96 Par 2 en 3 hierbo.

97 Matt 16:23. Daarby verteenwoordig die menseregte-ideologie allermins die koninkryk van God (vgl vn 46 hierbo) omdat volgens eg die mens en sy begeertes regeer, en in lg die wil van Christus. Hieruit volg voorts dat elke individu se benadering tot die ideologie van

Christelike liefde en menseregte Voorts vervul mens nie die Christelike liefdesgebod deur die verlening en beskerming van menseregte nie.[98] Die menseregteleer is op die gelykheidsbeginsel gebaseer. Hiervolgens kan almal op gelyke regte aanspraak maak.[99] Elkeen gun die ander dus, oënskynlik grootmoedig, dieselfde regte as wat hy self het – op voorwaarde, natuurlik, dat hy nie van sy eie regte hoef prys te gee nie. Daarteenoor is die Christelike liefde 'n selfopofferende liefde: dit eis die prysgawe van alles, selfs die eie lewe, ter wille van ander.[100] Die liefde wat die verlening van menseregte verg, is dus goedkoop in vergelyking met die eise van die Christelike liefde; dit laat die liefhebber met minstens net soveel as wat hy ander gun terwyl die Christelike liefde alles van hom vra. Bloot om hierdie rede is die verlening van menseregte nie die benaming "Christelike" liefde werd nie.[101]

Samevatting Reeds in die lig van die voorafgaande blyk dit onweerlegbaar dat die ideologie van menseregte nie Christelik is nie: dit ontstaan buite die Christendom en is onbekend aan die Bybel; die hoofargument waarop dié aanspraak berus, naamlik dat elke mens beelddraer van God is, is vals; dit is in stryd met sowel die voorbeeld van Christus as die eise wat Hy aan sy volgelinge stel; en dit voldoen nie aan die eise van die Christelike liefdesgebod nie.

9 ENKELE NIE-CHRISTELIKE AANSPRAKE VAN DIE MENSEREGTE-LEERSTUK

Die opvatting dat menseregte Christelik is, word verder gebaseer op sekere oënskynlik Bybelse aansprake. Daar word naamlik geglo dat die erkenning van menseregte geregtigheid, vrede, versoening, sekuriteit en voorspoed tot gevolg sal hê.[102]

Geregtigheid? Daar bestaan 'n opvatting dat die menseregte-leer Christelik is onder meer omdat dit groter geregtigheid tot gevolg sal hê. Die geregtigheid wat uit die erkenning van menseregte vloei, kan egter nie Christelike geregtigheid wees nie. Die minimumvereiste vir Christelike geregtigheid is dat die mens hom

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menseregte ook sy houding t o v die Christelike evangelie demonstreer: steun hy die ideologie van menseregte wat aan die mens se aansprake hoë aansien verleen, verwerp hy noodwendig die Christelike evangelie wat die totale totnietmaking van die sondige mens se aansprake eis. So ingrypend is hierdie teenstelling dat daar geen middeweg is nie. In werklikheid stel dit die mens voor die radikale keuse tussen twee gode: *die verhewe mens* as god van die menseregte-ideologie, en *Jesus Christus* as die Een aan wie alle mag in die hemel en op aarde gegee is (Matt 28:18) en wat as beginpunt die volkome kruisiging van die mens se begeertes, "aansprake" en "regte" verg.

98 Vgl *Kerk en samelewing* par 181.

99 Vgl Lategan e a *Inklusiewe demokrasie* 3–4.

100 Vgl Joh 15:13.

101 Naasteliefde (en selfs liefde vir vyande (Matt 5:44)) word deur 'n Christen betoon omdat God dit van hom eis, nie omdat mense weens hul gewaande goedheid 'n reg daarop sou hê nie. Gevolglik beteken naasteliefde ook nie groter erkenning van andere se menseregte nie omdat die verlening van groter vryheid aan die sondige mens om sy sondige natuur ongekontroleerd uit te leef, nie as 'n Christelike liefdesdaad bestempel kan word nie. (Ewemin staan Christelikheid vir 'n tipe permissiewe houding om andere geleentheid te bied om feitlik enigiets te doen wat hulle wil.) Naasteliefde vind ook nie uitdrukking in die reg nie: regsreëls is nodig juis omdat meeste mense mekaar nie werklik liefhet nie en om mense derhalwe te probeer verhinder om mekaar nadeel te berokken; regsreëls is dus nodig om die gevolge van die *gebrek aan naasteliefde* te reël.

102 Par 1 hierbo.

moet bekeer van sy sonde, in Christus moet glo en Hom moet gehoorsaam.[103] Geen menseregte-handves dring egter dáárop aan nie. Dit verbaas dan ook nie dat die menseregte-leer groot aanhang by heidene geniet terwyl die Christelike evangelie self, waarvan die menseregte-leer kwansuis 'n manifestasie is, uitdruklik deur heidene verwerp word.[104]

Ook die geloof dat 'n handves van menseregte steun verdien omdat dit minstens sal bydra tot 'n "regverdiger" samelewing en staatsbestel,[105] berus op 'n wanbegrip van geregtigheid en 'n ooreenvoudige siening van die oorsake van ongeregtigheid:

Menseregte is hoofsaaklik gerig op die uitskakeling van diskresionêre staatsoptrede en diskriminerende praktyke en het gevolglik die verkryging van groter individuele vryheid ten doel. Die menseregte-beweging plaas egter oordrewe klem op die beperking van die staatsgesag sonder om voldoende rekening te hou met die feit dat die sondige mens groter vryheid eerder misbruik as om dit tot voordeel van andere (en homself) aan te wend. Groter individuele vryheid sou geregtigheid kon bevorder slegs as die basiese veronderstelling waarop die menseregte-ideologie berus, naamlik dat die mens wesenlik goed is, korrek was. Maar omdat, soos reeds aangetoon is,[106] die mens in wese nie goed is nie, beteken verminderde staatsgesag en die gepaardgaande groter individuele vryheid gewoonlik groter geleentheid vir die mens om sy sondige geaardheid ongehinderd tot nadeel van sy medemens uit te leef, met as resultaat eerder 'n toename as 'n afname in ongeregtigheid. Die sondige mens kan dus eenvoudig nie met toenemende ongekontroleerde vryheid vertrou word nie en daarom is dit wensdenkery dat ongeregtigheid sal verminder as die staatsgesag deur middel van 'n menseregte-akte beperk word terwyl versuim word om terselfdertyd individuele vryheid op die een of ander wyse doeltreffend aan bande te lê.

Daarbenewens is dit besonder kortsigtig om ongeregtigheid hoofsaaklik te sien as die ongelyke behandeling van mense, die onoordeelkundige uitoefening van owerheidsgesag en die beperking van individuele vryhede, met as skynbare oplossing daarvoor die erkenning van menseregte. Die hoofoorsaak van ongeregtigheid is die mens se afval van God; die gevolge waarvan in die "ernstig

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103 Sien hieroor Potgieter *Godsdiensgevoel* 400 e v.

104 Joh 3:19–21; 8:43–47.

105 Soms kry mens die indruk dat daar 'n geloof bestaan dat bykans volkome geregtigheid in Suid-Afrika haalbaar is as apartheid maar net uitgeroei en "volle demokrasie" en 'n handves van menseregte ingevoer kan word. Die menseregte-ideologie word nl al hoe dringender in die plek van die apartheidsbeleid voorgehou as die nuwe "Christelike" oplossing vir die politieke dilemma waarin die land hom bevind (vgl bv Oosthuizen e a *RGN-verslag* 66). Dit is 'n besonder eensydige en simplistiese beskouing wat net voordeel in die afskaffing van sekere apartheidsmaatreëls sien, maar nie rekening hou met die nadele wat die volle verwesenliking van menseregte vir die gemeenskap kan meebring nie. Meer vryheid vir staatsonderdane beteken dikwels net meer vryheid om te sondig en daar is dus niks inherent goeds in die verlening van meer vryheid opgesluit nie. Daarby maak die erkenning van menseregte en volle demokrasie 'n staat nie "meer Christelik" nie. 'n Algemene kenmerk van hierdie tipe state is dat die onderdane hul vryheid om te sondig ten volle benut. In bv Swede wat 'n toonbeeld van persoonlike vryheid is, word blykbaar selfs so ver gegaan om homoseksuele "huwelike" te erken. Waarom sal 'n toekomstige sg "post-apartheid"-Suid-Afrika groter Christelike geregtigheid weerspieël as die bevolking, o a as gevolg van die groter vryheid wat die erkenning van menseregte meebring, sedelik en moreel nog meer dekadent raak? 'n "Meer Christelike" samelewing is net moontlik as meer individue hulle van hul ongeloof en sonde bekeer en Christus begin gehoorsaam.

106 Par 6 en 7 hierbo.

siek"[107] Suid-Afrikaanse samelewing duidelik manifesteer as onder meer misdaad, geweld, huweliksontrou, gesinsverbrokkeling, seksuele kindermishandeling, korrupsie en 'n groot verskeidenheid ander euwels. Geen menseregte-akte spreek die kernoorsaak van ongeregtigheid aan deur byvoorbeeld te vereis dat die mens hom tot God moet keer en Hom moet gehoorsaam nie. Daarom is die geloof dat so 'n akte ongeregtigheid sal beperk, grootliks misplaas. Bewys hiervan vind mens in sommige lande waar menseregte prominente erkenning geniet, maar waar misdaad, sedelike verval en geestelike bankrotskap desnieteenstaande botvier.

Ewemin sal die verwesenliking van menseregte een van die belangrikste bronne van ongeregtigheid, *misdaad*,[108] uitskakel. Trouens, die groter vryheid en minder beperkings wat die menseregtebeweging vir die mens opeis, sal in die geheel gesien waarskynlik tot meer ongeregtigheid, onder meer in die vorm van toenemende misdaad, aanleiding gee as wat die geval tans is. Die menseregte-ideologie bied immers aan die mens groter vryheid om sy sondige natuur ongekontroleerd uit te leef.

In aansluiting hierby sal menseregte ook nie die ongeregtigheid wat deur die hoë voorkoms van egskeiding veroorsaak word, elimineer nie.[109] Weliswaar is een van die regte wat die regskommissie in sy voorgestelde menseregte-akte beskerm wil sien, die sogenaamde "reg op die integriteit van die gesin, vryheid van huweliksluiting en die instandhouding van die huweliksinstelling".[110] Hoe 'n menseregte-akte dit kan bewerkstellig, is egter nie duidelik nie. Gesien die beheptheid van die menseregte-ideologie met die vryheid van die individu, is dit kwalik denkbaar dat egskeiding byvoorbeeld verbied sal word om die mensereg op die "instandhouding van die huweliksinstelling" te beskerm. (Egskeiding is vandag in Suid-Afrika so te sê op aanvraag beskikbaar onder meer juis vanweë die regskommissie se bydrae tot die inhoud van die Wet op Egskeiding 70 van 1979.) Nog minder het die regskommissie waarskynlik in gedagte om byvoorbeeld aan te beveel dat owerspel, wat die "integriteit van die gesin" en die "instandhouding van die huweliksinstelling" so wesenlik skend, as misdaad strafbaar gestel moet word. Sodanige optrede sou eenvoudig te sterk in stryd

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107 In 'n artikel onder die opskrif " 'n Siek samelewing?" (*Beeld* 1989-06-06 8) waarin hy die Suid-Afrikaanse samelewing (waarvan amper 80% op Christenskap aanspraak maak! – vn 28 hierbo) ontleed, antwoord prof Johan Heyns tereg: "Ja, ons samelewing is siek. Ernstig siek. Miskien só siek dat ons geleidelik daaraan begin gewoond raak het en nie agterkom dat dit die geval is nie."

108 Jaarliks word daar bv ongeveer 500 000 vervolgings weens ernstige misdaad soos moord, verkragting en roof, sodomie en besit van pornografie, bedrog, korrupsie en diefstal, roekelose en dronkbestuur, kindermishandeling en vele meer in Suid-Afrika ingestel (vgl Sentrale Statistiekdiens verslag 00-11-01 (1986/87) *Statistieke van misdrywe* 14). Onlangs het die Minister van Wet en Orde bekendgemaak dat daar in die land gedurende 1988 bv daagliks gemiddeld 30 mense vermoor en 344 mense ernstig aangerand is (*The Citizen* 1989-06-03 6).

109 Gedurende 1986 is daar net meer as 41 000 huwelike tussen blankes in die land voltrek (meer as 30 000 in die kerk) (Sentrale Statistiekdiens verslag 03-07-01 (1986) *Huwelike en egskeidings: Blankes, Kleurlinge en Asiërs* 2 32). Maar in dieselfde jaar het meer as 18 000 blanke huwelikspare in die skeihof beland (*ibid* 53). Meer as 22 000 minderjarige kinders is hierdeur geraak (*ibid* 73). By sommige skole in Pretoria kom tot 45% van die kinders uit enkelouergesinne (*Beeld* 1986-11-04 13). Ons gesinsverbrokkelingsyfer is van die hoogste ter wêreld (Van Rensburg *Pornografie* (1985) 116-117).

110 *Menseregte*-verslag 478.

met die individuele vryheidsgedagte onderliggend aan die menseregte-ideologie wees en daarom is die voorgestelde bepaling grootliks nuttelose skyn.

In die lig van die voorafgaande is die beweerde geregtigheid wat uit die afdwing van menseregte vloei, hoogstens 'n namaaksel van Christelike geregtigheid. By die wesenlike ongeregtigheid binne die mens se gedagtes wat volg op ongehoorsaamheid aan God, kom dit nie uit nie. Daarby is dit vanuit Christelike perspektief totaal verouderd om ware geregtigheid in 'n paar uiterlike reëls soos die verlening van menseregte te soek terwyl Christus so duidelik verklaar dat 'n beker wat net aan die buitekant skoon is, niks help nie.[111]

Vrede, versoening, sekuriteit en voorspoed? Daar word ook geglo dat die verwesenliking van menseregte Christelik is onder meer omdat dit vrede, versoening, sekuriteit en ekonomiese voorspoed sou verseker.[112] Ook hierdie beskouing is heeltemal ongegrond. Ware Christelike liefde, vrede en versoening is die gevolg van daadwerklike bekering tot en stipte navolging van Christus en is nie buite Hom te vind nie. Hierdie voorwaardes figureer natuurlik nie in die menseregte-ideologie nie en daarom is die oënskynlike vrede, versoening ensovoorts wat moontlik op die erkenning van menseregte kan volg, nie van 'n Christelike aard nie. Boonop stel Christus dit onomwonde dat daar in die wêreld buite Hom geen ware vrede en versoening sal wees nie, maar toenemende oorlog, verdeeldheid en haat.[113]

Aan hierdie feite sal geen menseregteleer een jota of tittel verander nie. Mens hoef nie eers die Bybel te glo om dit te weet nie; die vermeerderende sedelike en geestelike terugval, misdaad, geweld en onvrede is reeds duidelik waarneembaar selfs in lande waar menseregte ten volle afgedwing word. Om dus mens se hoop te stel op 'n ideologie wat te kenne gee dat dit die wêreld se probleme kan oplos terwyl daarteenoor Christus self die tenietgaan van die wêreld aankondig, is net so vrugteloos as om 'n afgodsbeeld te aanbid in die hoop dat dit sal help. Van John Locke se visioen, 'n paradys op aarde waarin die ganse mensdom in vrede, sekuriteit en voorspoed leef, gaan niks kom nie. Daarom is menseregte op die duur waardeloos. Nie net bied dit geen blywende oplossing vir die wêreld

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111 Christus het trouens 'n afkeer van uiterlike fatsoenlikheid en godsdienstige vroomheid wat innerlike sonde bedek (Matt 23:25 27–28). Daarom vereis Christus dat die innerlike *eers* gereinig moet word waarna die uiterlike ook skoon sal word (Matt 23:26).

112 Par 1 hierbo. Kinghorn, 'n teoloog, verklaar bv in Polley a w 117–123 dat die Freedom Charter ('n voorbeeld van 'n menseregte-handves; vgl vn 9 hierbo), "in closest accord with true and generally accepted (i.e. 'mainstream') Christian guidelines" en "commensurate with Christianity" is omdat die dokument o a "sharing, peace, friendship and charity" beklemtoon, 'n beroep op "real freedom" (d w s "reconciliation") doen en omdat "real peace" net op hierdie grondslag moontlik is.

113 Christus verklaar bv dat Hy nie vrede en versoening tussen mense bring nie, maar vuur, verdeeldheid en die swaard; dat mense mekaar nie sal liefhê nie maar sal verraai en haat; dat die liefde by baie sal verkoel weens die toenemende minagting van die wet van God (Luk 12:49–53; Matt 24:10–12). Ook konstateer Christus dat daar nie vrede op aarde sal wees nie, maar oorlog, opstand en stryd tussen die nasies (Luk 12:9); voorspel Hy nie sekuriteit en voorspoed nie, maar groot vrees, epidemies, hongersnood en aardbewings (Luk 21:10–11). Die apostel Paulus voeg daaraan toe nie dat een mens aan 'n ander al hoe meer regte en vryhede gaan gun nie, maar dat die mense al hoe meer liefhebbers van hulself en van genot sal word; geldgierig, grootpraterig en verwaand; beledigend, ongehoorsaam aan gesag, liefdeloos, roekeloos en hooghartig; dat hulle die uiterlike skyn van godsdienstigheid sal hê, maar die krag daarvan nie sal ken nie (2 Tim 3:1–5 13).

se probleme nie, maar synde nie-Christelik kan dit ook niemand red nie.[114] Hoe omvattend 'n mens se beweerde regte ook al beskerm word, en hoe noukeurig hy ook al die beweerde regte van ander erken, is hy steeds vir die verderf bestem as hy hom nie tot Christus bekeer en Hom gehoorsaam nie.

10 SLOTSOM

In die lig van die onvermydelike gevolgtrekking dat die menseregte-leer nie Christelik is nie, kan mens by wyse van konklusie die volgende sê:

a Die moontlike implementering van 'n handves van menseregte dui geensins daarop dat 'n Christelike benadering uiteindelik sy verskyning in die reg gemaak het nie; inteendeel: hoe meer regsreëls in 'n land nodig word, hoe meer bewys dit dat die invloed van die Christelike evangelie 'n *laagtepunt* bereik het. As die kerk daarin sou geslaag het om sy lidmate – amper 80% van die bevolking[115] – met die gesindheid van Christus toe te rus, sou waarskynlik nòg die streng veiligheidswetgewing, nòg 'n handves van menseregte nodig gewees het. Maar die kerk het klaarblyklik misluk om die meerderheid van sy lidmate werklik Christene te maak. Daarom is al oplossing wat oënskynlik oorbly om op 'n nuwe suiwer mensgemaakte manier deur regsreëls – deur 'n handves van menseregte – 'n uiterlike fatsoenlikheid te probeer skep in die misplaaste geloof dat dit Christelike vrede en geregtigheid sal bevorder. Kerkleiers behoort egter in geen omstandighede met 'n skyn van Christelikheid te probeer om gesag te verleen aan 'n ideologie wat allermins Christelik is nie.

b Die politikus of juris in Suid-Afrika wat gekonfronteer word met die moontlike instelling van 'n handves vir menseregte, behoort die aangeleentheid objektief te oorweeg in die lig van alle relevante feite. In die besonder moet hy hom nie laat meevoer deur die agterliggende nie-Christelike (skyn-Christelike) ideologie waarop menseregte-aktes normaalweg berus nie en moet hy die menseregte-leer stroop van die mites wat daaraan kleef:

i Ten eerste is die menseregte-leer *nie Christelik nie.* Geen ideologie wat as grondslag die verheffing van die sondige mens het, kan Christelik wees nie. Die regsgeleerde moet hom dus nie onder druk laat plaas deur die valse aanspraak dat die erkenning van menseregte die korrekte wyse is waarop die evangelie van Christus vandag verwesenlik moet word nie. 'n Gemene deler tussen die menseregte-ideologie en 'n beleid soos apartheid is dat nie een volledig op Christelike gesag berus nie. Die menseregte-leer het dus nie 'n beter gesagsbron as die apartheidsbeleid nie en is dus net so min of net soveel Christelik as die apartheidsbeleid wat dit as 't ware moet vervang.[116]

ii Tweedens moet 'n handves van menseregte nie gesien word as die beskerming van die gewaande hoë waardigheid en inherente goedheid van die mens nie, maar eerder as die juridiese beskerming van die verdorwe aard van die mens – hy kry as 't ware "die reg om te sondig" en groter vryheid om sy sondige natuur ongestraf uit te leef. In die algemeen is dit meer realisties om van regsweë

114 In teenstelling met die siening dat die menseregte-leer "die enigste en miskien die laaste middel [is] wat hierdie wêreld van finale ondergang moet red" (Du Toit in *Menseregte* 62; vgl par 1 hierbo).
115 Vn 28 hierbo.
116 Sien vn 57 hierbo.

nie die klem te plaas op meer vryheid nie, maar op die beperkings wat noodsaaklik is vanweë die meeste mense se geneigdheid om hulle sondige natuur te laat botvier.

iii Derdens moet die regsgeleerde nie mislei word deur die naïewe beskouing dat 'n handves van menseregte die korrekte manier is waarop die politieke dilemma in Suid-Afrika op die duur oorkom, en geregtigheid verseker kan word nie.[117] Die leerstuk van menseregte, synde ewemin Christelik as enige ander politieke beleid en inaggenome die fundamenteel verdorwe aard van die meeste mense, kan nooit voldoen aan die hoë verwagtinge vir geregtigheid en vrede wat deur die kampvegters daarvoor gewek word nie en sal uiteindelik ook die weg van alle mensgemaakte ideologieë gaan.

Indien 'n handves van menseregte kragtens politieke besluit dan regtens geïmplementeer moet word, moet die juris nie net die mites rondom die menseregteleer ignoreer nie maar verder by die formulering van die regsreëls wat in so 'n handves opgeneem word, rekening hou met realiteite soos die wil van die politieke maghebber, die aard en begeertes van die bevolking en die wyse waarop hulle groter vryheid waarskynlik sal benut. Ook moet hy let op die maatskaplike en bevolkingsamestelling van die gemeenskap, op enige bedreiging van die veiligheid van die staat en op die ekonomiese haalbaarheid van so 'n handves. In die besonder moet hy voor oë hou dat die menseregte-ideologie die klem plaas op die inkorting van staatsgesag en die verkryging van maksimum individuele vryheid *sonder om terselfdertyd voldoende aandag te gee aan die voorkoming van die nadelige gevolge wat groter individuele vryheid noodwendig vir die gemeenskap meebring.* 'n Realistiese benadering tot 'n akte van menseregte sal gevolglik doeltreffende juridiese maatreëls buite-om 'n menseregte-akte daarstel om effektiewe grense neer te lê vir die optrede van meeste mense wat weens hul grondliggend sondige aard noodwendig geneig sal wees om in die naam van "fundamentele menseregte" hul vryheid tot nadeel van hul medemens (en selfs hulself) te misbruik.[118]

Hou die juris nie rekening met hierdie feite nie, sal dit net so kortsigtig wees as om weer regsreëls te skep in die valse geloof dat marmer groei[119] – maar met oneindig ernstiger gevolge.

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117 Vgl par 1 en 3 hierbo.

118 Die Suid-Afrikaanse Regskommissie (*Menseregte*-verslag 433 e v) verklaar dat menseregte ter wille van o a die "veiligheid van die Staat" beperk behoort te kan word. As maatstaf waaraan bv veiligheidswetgewing moet beantwoord, beveel die kommissie dan aan dat "veiligheidsmaatreëls van so 'n aard moet wees dat dit voldoen aan *die norme wat gangbaar is in 'n demokratiese gemeenskap*" (440 484; my beklemtoning). Daarby moet wetgewing wat nie aan die gestelde kriterium voldoen nie, volgens die kommissie deur die hooggeregshof ongeldig verklaar kan word (484). Die voorgestelde norm is egter vaag en vatbaar vir totaal uiteenlopende vertolkings. Dit is ooglopend wyd geformuleer om so min moontlik afbreuk te doen aan die individuele vryheid waarvoor die menseregte-beweging hom beywer. Ook is dit onbillik en onwys om van die hooggeregshof te verwag om as 't ware die hoofsaaklik politieke rol van "super-parlement" te vervul deur wetgewing aan so 'n onbruikbaar vae norm te moet toets. Gevolglik is die voorgestelde norm en prosedure hoegenaamd nie geskik om die nadelige gevolge van die menseregte-ideologie teë te werk nie. Veel duideliker en strenger maatreëls sal nodig wees om die uitwerking van die nie-Christelike menseregte-ideologie te neutraliseer en om persoonlike vryhede in belang en ter beskerming van individue en die gemeenskap te begrens.

119 Vgl par 7 hierbo.

AANTEKENINGE

DIE GRONDSLAG VAN MAATSKAPPY-GEBONDENHEID AAN DIE AKTE VAN OPRIGTING EN DIE STATUTE EN IN VERBAND DAARMEE REKTIFIKASIE

In die lig van die toenemende belangstelling wat daar tans in ons reg jeens die analitiese benadering heers, skyn die tyd aangewese te wees om die kwessie van die grondslag van die gebondenheid van 'n maatskappy aan sy akte van oprigting en statute van nader te beskou. Ek doen dit aan die hand van 'n praktiese probleem, naamlik die rektifikasie van die akte en statute.

1 Die aard van die akte van oprigting en die statute van 'n maatskappy

Die akte van oprigting en statute vorm saam die konstitusie van 'n maatskappy en beide is onontbeerlik vir die totstandkoming en registrasie van 'n maatskappy.

Die *akte van oprigting* bevat die naam van die maatskappy, die doel en hoofdoelstelling daarvan, die bedrag van die aandelekapitaal en die getal aandele, spesiale voorwaardes en 'n oprigtingsklousule (a 52 en 53 Maatskappywet 61 van 1973). Dit moet onderteken word, in die geval van 'n publieke maatskappy deur minstens sewe ondertekenaars, en in geval van 'n private maatskappy deur minstens een ondertekenaar. Elke ondertekenaar moet minstens een aandeel in die maatskappy opneem (a 52(2)(b) en 54).

Die *statute* is die reglement of uiteensetting van reëls wat sal geld by die bestuur en interne ordening van die maatskappy se sake. Aspekte wat gewoonlik daarin gereël word, sluit in: 'n beskrywing van die aandele en van die aandeelsertifikate en -bewyse; uitreiking, oordrag en registrasie van aandele; vergaderings van aandeelhouers en vergaderingsprosedures; stemreg en die wyse van stemming; verkiesing, aanstelling, bevoegdhede en pligte van direkteure; reëls ten aansien van dividende en kapitaal; en aanstelling van publieke amptenare en ouditeure.

Die Maatskappywet skryf nie 'n vaste inhoud aan die statute voor nie. Die oprigters kan dus, onderworpe aan vereistes van die reg en goeie sedes, ooreenkom soos hulle verkies. As daar nie op besondere statute ooreengekom word nie, geld, in geval van 'n publieke maatskappy, Tabel A van Bylae 1 tot die Maatskappywet en in geval van 'n private maatskappy Tabel B in Bylae 1 as die maatskappy se statute. Indien die maatskappy se eie statute niks oor 'n bepaalde punt bevat nie, geld die statute soos voorgestel in die Tabelle, na gelang van die geval, om die leemte aan te vul (a 59(2)).

Artikel 65(2) bepaal dat die akte en statute die maatskappy en sy lede bind in dieselfde mate asof dit onderskeidelik deur elke lid onderteken is, tot nakoming, "behoudens die bepalings van hierdie Wet", van al die bepalings van die akte en die statute.

Hierdie artikel is die nasaat van 'n hele aantal voorgangers in die maatskappywette van Engeland en ons eie land. Op grond van gemelde bepalings is in Engeland en hier te lande deur die howe beslis dat die akte en statute gesamentlik kontraktuele verhoudings daarstel. Daar is naamlik eerstens 'n kontraktuele verhouding tussen die maatskappy aan die een kant en die lede aan die ander kant. Tweedens is daar 'n kontraktuele verhouding tussen die lede onderling.

Ter stawing van bogemelde tradisionele uitgangspunte kan verwys word na die insiggewende uiteensetting van appèlregter Trollip in *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 2 SA 685 (A) 692E–693A. Die appèlregter verwys na artikel 16 van die SWA Maatskappy Ordonnansie 19 van 1928, wat in wese gelykluidend was aan artikel 64(2) van ons Maatskappywet. Die passasie lui soos volg:

> "In substance it is the same as the corresponding section in our Act and in the successive English Companies' Acts. We are not concerned here with the memorandum for which the Ordinance elsewhere makes special provision. As to the articles, it will be immediately apparent that the section does not render them absolutely binding on the company and its members as though they were statutory enactments, which the Court *a quo* seems to have assumed. The company and its members are bound only to the same extent as if the articles had been signed by each member, that is, as if they had contracted in terms of the articles. The articles, therefore, merely have the same force as a contract between the company and each and every member as such to observe their provisions (see *Hickman v Kent or Romney Marsh Sheepbreeders' Association*, (1915) 1 Ch.D. 881, the *locus classicus* on the point, and *de Villiers v Jacobsdal Saltworks (Michaelis and de Villiers) (Pty.) Ltd.*, 1959 (3) SA 873 (O) at pp 876–7). Now that contract is not made immutable or indefeasible by the Ordinance in any respect relevant here. Consequently, I can see no reason why, as with any other contract, it cannot be departed from by a *bona fide* agreement concluded between the company and all its members to do something *intra vires* of the company's memorandum but in a manner contrary to the articles, and why that agreement should not bind them, at least for as long as they remain the only members. Of course, for it to bind new members and affect outsiders, the agreement would probably have to be incorporated into the articles by a special resolution which would have to be registered (see sec. 15(1), which provides for the alteration of articles by a special resolution, and sec. 65(1), which says that a special resolution is not effective until it has been registered by the Registrar). That situation does not arise and need not be considered here. Consequently, even if clause 8 is contrary to the articles, I think that it is nevertheless binding on all the parties to it."

Die kontraktuele aard van die statute soos tussen die maatskappy en elkeen van die lede kan beswaarlik duideliker of sterker gestel word. (Vgl ook *Borman en De Vos v Potgietersrusse Tabak-korporasie Bpk* 1976 3 SA 489 (A) 508A.) Mens moet dan ook aflei dat persone wat later lede van die maatskappy word, partye tot die kontrak deur aanvaarding van die bepalings daarvan word.

Dat die akte en statute 'n kontrak tussen die lede onderling daarstel, is bevestig in die Engelse beslissing van *Rayfield v Hands* 1960 Ch 1. In hierdie saak word met goedkeuring verwys na die volgende passasie uit *Hickman v Kent or Romney Marsh Sheepbreeders' Association* 1915 1 Ch 881:

> "[T]he articles of association are simply a contract as between the shareholders inter se in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree inter se."

Hieruit volg ook dat latere lede wat by die maatskappy aansluit, partye tot dié kontrak word deur aanvaarding van die bepalings daarvan.

Alles wat hierbo gesê is, moet egter in 'n mate gekwalifiseer word. Volgens artikel 32 van die Maatskappywet hoef 'n private maatskappy slegs een lid te hê en soos reeds genoem, hoef die akte van oprigting en die statute slegs deur een lid onderteken te wees. Gestel daar is in 'n bepaalde geval slegs een lid wat die akte en statute onderteken het. Kan mens dan nog van kontraktuele verhoudings praat?

Die vraag moet sowel bevestigend as ontkennend beantwoord word. Volgens die regspraak skep die akte en statute in die eerste plek by registrasie 'n kontrak tussen die maatskappy en die lede. As daar maar net een lid is, is daar nog steeds twee partye, naamlik die maatskappy en die lid en kan met reg van 'n kontrak volgens die tradisionele beskouing gepraat word. Nuwe lede wat later bykom, word partye tot die kontrak weens aanvaarding van die bepalings daarvan.

Indien daar egter net een lid is, kan daar nie sprake van 'n kontraktuele verhouding van lede onderling wees nie. Wanneer ander lede in 'n latere stadium bykom, aanvaar hulle die akte en oprigting asof dit 'n aanbod is wat aan hulle gemaak word. Deur aanvaarding word hulle dan partye tot 'n kontrak, die inhoud waarvan uit die akte en statute blyk.

2 Rektifikasie in die algemeen

Rektifikasie behels die verbetering en regstelling van 'n dokument waarin 'n ooreenkoms foutief weergegee is (De Wet en Van Wyk *De Wet en Yeats kontraktereg en handelsreg* (1978) 26; *Weinerlein v Goch Buildings Ltd* 1925 AD 282 291).

Die grondslag van rektifikasie is dat die waarheid oor vergissing moet seëvier (aldus De Villiers AR in *Weinerlein v Goch Buildings Ltd supra* 289). Die erkenning van rektifikasie as 'n regsmiddel is deur die erkenning in ons reg van die Engelsregtelike integrasiereël genoodsaak (*Meyer v Merchants' Trust* 1942 AD 244 253).

In ons reg, anders as in die Engelse reg, is dit nie 'n voorvereiste vir 'n geslaagde beroep op rektifikasie dat daar 'n voorafgaande (mondelinge) ooreenkoms moet wees nie. Dit is voldoende indien bewys word dat die partye 'n gemeenskaplike bedoeling gehad het wat hulle in 'n skriftelike stuk wou uitdruk, maar nie daarin geslaag het nie (*Meyer v Merchants' Trust Ltd supra* 258).

3 Rektifikasie van die akte van oprigting en die statute van 'n maatskappy binne die tradisionele raamwerk

Indien die stelling dat die akte en statute 'n kontrak tussen die maatskappy en die lede en tussen die lede onderling daarstel, waar en korrek is, behoort daar geen logiese beswaar te wees teen die rektifikasie van 'n akte of statute as dit nie die stigters se bedoeling korrek weergee nie.

Tog is dit nie tans die posisie in ons reg nie. In *Ex parte Premier Paper Ltd* 1981 2 SA 612 (W) wys regter Coetzee (soos hy toe was) 'n aansoek om rektifikasie van die statute van die applikant-maatskappy in die volgende omstandighede van die hand: die statute van die maatskappy is in 1979 deur twee spesiale besluite, wat behoorlik geregistreer is, gewysig. Die wysiging het vir die bepalings waarvolgens sekere aandele uitgereik kon word, voorsiening gemaak.

'n Nuwe artikel 183 tot die statute is geskep. In subklousule D.01 daarvan is bepaal dat die stemreg van houers van sekere voorkeuraandele opgeskort word tensy die dividende meer as twaalf maande agterstallig was. Die twaalf maande-termyn was egter strydig met artikel 194 van die Maatskappywet, wat opskorting van die stemreg toelaat slegs tensy die dividende meer as ses maande agterstallig was. Dié fout het eers agterna onder die aandag van die direkteure gekom. Die aansoek is volgens regter Coetzee (614A) in effek "an amendment of article D.01 . . . to conform to the six month period in sec. 194". Dit is ook relevant om te meld dat artikel 97(1) van die Maatskappywet bepaal dat indien aandele geskep, toegewys of uitgereik is op 'n ongeldige wyse of die voorwaardes van die skepping, toewysing of uitreiking onbestaanbaar is met of nie gemagtig is deur die Maatskappywet of enige ander wet of die statute van die maatskappy nie, die hof op aansoek die gemelde skepping, toewysing of uitreiking geldig kan verklaar ("validating the creation") of die voorwaardes kan bekragtig ("confirming the terms") onderworpe aan die voorwaardes deur die hof opgelê.

Voordat hy na die betekenis van artikel 9 verwys, neem regter Coetzee fundamenteel standpunt oor die kwessie van verandering of rektifikasie van die statute in. Hy aanvaar (615C–D) dat die statute van 'n maatskappy analoog aan 'n kontrak is. Die bevoegdhede van die hof met betrekking tot die verandering van kontraktuele regte is baie beperk (615D–E). Hy verklaar:

> "This is enshrined in the Companies Act itself. The only way in which the articles of association can be altered is by special resolution in terms of s 62. That means that only members of the company functioning as an organ of the company can alter the contractual relationship between themselves and the company. Compare in this regard the decision of the Appellate Division in *Gohlke & Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 where this fundamental principle is affirmed and applied. At 692 Trollip JA says the following: 'The company and its members are bound only to the same extent as if the articles had been signed by each member, that is, as if they had contracted in terms of the articles. The articles therefore merely have the same force as a contract between the company and each and every member as such to observe their provisions . . . Now that contract is not made immutable or indefeasible by the Ordinance in any respect relevant here. Consequently I can see no reason why, as with any other contract, it cannot be departed from by a *bona fide* agreement concluded between the company and all its members to do something *intra vires* of the company's memorandum but in a manner contrary to the articles, and why that agreement should not bind them, at least for as long as they remain the only members. Of course, *for it to bind new members and affect outsiders*, the agreement would probably have to be incorporated into the articles by a special resolution which would have to be registered . . .' It is also fundamental that the Court has not even power to interpret articles in such a fashion as to give effect to a proved intention of the contracting parties. Nor does the Court have power to *rectify* the articles of association of a company if these articles do not accord with what is shown to have been the concurrent intention of the signatories. See *Konyn v Viedge Bros (Pty) Ltd and Others* 1961 (2) SA 816 (E) at 825 and *Scott v Frank F Scott (London) Ltd and Others* 1940 Ch.794. Expressions conveying the notion of *rectifying* articles are inapposite. Such a power does not exist in our law, and it will be noted that the suggested order which I have quoted, although using the words 'on condition that' as if it is merely in consonance with the provisions of s 97, indeed amends the articles of association. I refer to that part reading 'on condition that the figure and word 12 in that sub-article are replaced by the figure and word 6'. Such an amendment is in line with [the] suggestion that the Court has a power to rectify, which it clearly has not."

Teen hierdie agtergrond interpreteer die regter artikel 97 van die Maatskappywet en bevind dat daaruit nie bevoegdhede om te wysig voortvloei nie maar slegs om iets by te voeg (616F–G). Die hof kan selfs die skepping, uitreiking en toewysing van aandele bekragtig, onderworpe daaraan dat die maatskappy deur

spesiale besluit 'n fout in die bewoording van die wysigende spesiale besluit (en dus in die gewysigde statute) regstel (617A–B),

> "[b]ut the Court cannot to my mind, by its own order directly change the articles or . . . 'rectify' it, which is the same thing" (617B).

Die eerste punt wat in die uitspraak opval, is dat hier nie van egte rektifikasie sprake kan wees nie. Daar was nooit aangevoer dat die lede bedoel het om na 'n termyn van ses maande te verwys en dat die spesiale resolusie foutiewelik, wat die lede se bedoeling betref, na twaalf maande verwys het nie. Die regter verwys self na hierdie aspek (616B–C) en dit laat die vraag ontstaan of alles wat oor rektifikasie gesê is nie as *obiter* aangemerk moet word nie.

Die belangrikste aspek wat vermelding verdien, is egter die siening dat die hof nie die bevoegdheid het om statute te rektifiseer nie selfs al is bewys dat die statute nie met die bedoeling van die ondertekenaars ooreenstem nie (615H). Regter Coetzee se motivering vir gemelde siening berus op die volgende uitgangspunte:

a Die moontlikheid van wysiging van die akte en statute van 'n maatskappy is opgesluit in die Maatskappywet; dit kan naamlik slegs by wyse van spesiale besluit ingevolge artikel 62 geskied (615D–H). Die regter beroep hom voorts as gesag vir hierdie stelling op die uitspraak van appèlregter Trollip in *Gohlke and Schneider v Westies Minerale (Edms) Bpk supra.*

Ek meen dat die vraag of 'n akte of die statute gerektifiseer kan word, glad nie deur die Maatskappywet aangespreek word nie. Die wet handel nêrens met rektifikasie nie. Artikel 55 en 56 handel met die *aanvulling* en *wysiging* van die akte van oprigting en vereis in die algemeen 'n spesiale besluit daarvoor. Artikel 62 handel met die *aanvulling* of *wysiging* van die statute en vereis daarvoor 'n spesiale besluit.

Aanvulling of *wysiging* verskil hemelsbreed van rektifikasie. Eersgenoemde twee figure veronderstel 'n korrekte akte of statute wat *ex nunc* verander wil word. Laasgenoemde figuur veronderstel 'n akte of statute wat die ware bedoeling van die partye nie korrek weergee nie en *ex tunc* reggestel moet word.

Genoemde bepalings in die wet handel dus nie met rektifikasie nie. Selfs die woorde in artikel 62(1) dat 'n maatskappy sy statute kan wysig of aanvul "behoudens die bepalings van hierdie Wet en die voorwaardes vervat in sy akte" staan rektifikasie nie in die weg nie, want dit handel met heeltemal ander onderwerpe, naamlik wysiging of aanvulling.

Ek stem saam met die mening uitgespreek deur McLennan (1981 *SALJ* 458) dat as dit die bedoeling van die wetgewer was om die bekende gemeenregtelike regsmiddel van rektifikasie by die maatskappyreg uit te skakel, die wetgewer dit uitdruklik moes gestel het.

Myns insiens is die probleem dat regter Coetzee verkeerdelik *wysiging* en *rektifikasie* vereenselwig het en die bepalings van die Maatskappywet met betrekking tot *wysiging* op rektifikasie van toepassing gemaak het. Die vereenselwiging blyk uit die passasie op 617B waar 'n "change" in die akte en rektifikasie uitdruklik vereenselwig word.

Daar word dus aan die hand gedoen dat die hof se gemeenregtelike bevoegdheid om te rektifiseer nie deur enige bepaling van die Maatskappywet geraak is nie.

b As stawing vir sy standpunt beroep die regter hom op die uitspraak van appèlregter Trollip in die *Gohlke and Schneider*-beslissing. Feit is dat die uitspraak hoegenaamd nie met rektifikasie nie, maar met latere wysigings van die statute handel. Juis in hierdie uitspraak word daarop gewys dat die lede onderling op 'n wysiging van die statute kan ooreenkom sonder enige formaliteite. Slegs ten einde geldig te wees teenoor nuwe lede en buitestaanders word 'n geregistreerde spesiale besluit vereis.

c Regter Coetzee sê voorts (615H) dat die hof nie eens die bevoegdheid het om die statute te interpreteer ten einde gevolg te gee aan die bewese bedoeling van die kontrakterende partye nie.

Daar is geen bepaling in die Maatskappywet wat enigsins handel met die interpretasie van die akte of die statute nie, of wat 'n beletsel op die interpretasie volgens die bedoeling van die partye plaas nie.

Sowel in die Engelse reg (*Egyptian and Soda Co Ltd v Port Said Salt Association Ltd* 1931 AC 677 682) as in ons eie reg (*Liquidators Shoshana Investments (Pty) Ltd v Plein & Co (Cape) Ltd* 1954 3 SA 672 (K) 676D–G; *Mendonides v Mendonides* 1962 2 SA 190 (D) 192E–F) geld die reël dat die akte van oprigting en statute van 'n maatskappy interpreteer moet word volgens die beginsels van toepassing op alle skriftelike kontrakte. Die uitlegproses behels in die eerste plek die vasstelling van die bedoeling van die kontraktante. In *Union Government v Smith* 1935 AD 232 241 sê hoofregter Wessels:

> "It is our first duty to see what the parties intended by the language they used. *In conventionibus contrahentium voluntas potius quam verba spectari placuit.* D 50 16 219."

En in *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 326 sê waarnemende appèlregter Watermeyer (soos hy toe was):

> "It is not, however, necessary to investigate in any detail the views of Roman-Dutch writers because this Court has accepted the proposition that in the interpretation of contracts what is being sought is the common intention of the parties."

Slegs om praktiese redes en in die lig van die integrasiereël word direkte getuienis van die subjektiewe, onuitgesproke bedoeling van die partye nie as bewysmateriaal toegelaat nie, maar word die bedoeling gesoek uit die woorde, die konteks en die omringende omstandighede van die kontrak (*Worman v Hughes* 1948 3 SA 495 (A) 505 en gesag aangehaal in Christie *The law of contract in South Africa* (1983) 201 e v).

Dit is dus verkeerd om te sê dat die hof nie die statute van 'n maatskappy mag interpreteer ten einde uitvoering te gee aan die bewese bedoeling van die partye nie. As die bedoeling op bewysregtelik geoorloofde wyse bewys is, moet die hof daaraan gevolg gee.

Hoe dit ook al sy, die kern van die saak is dat daar regtens 'n groot verskil is wat betref die behandeling van die bedoeling van die partye by die proses van rektifikasie enersyds en by interpretasie andersyds. Om redes reeds hierbo genoem, is daar bewysregtelike beperkinge op die bewys van subjektiewe bedoelings by interpretasie. By rektifikasie is daar geen sodanige beperkings nie en kan die subjektiewe bedoelings van die kontraktante vrylik bewys word:

> "When rectification is claimed the claimant is entitled to lead evidence of the term, agreed upon by the parties which he alleges to have been omitted from the written document, and the parol evidence gives way to the more potent requirements of the equitable principle of rectification"

(per Roper R in *Venter v Liebenberg* 1954 3 SA 333 (T) 338. Sien ook *Van Aswegen v Fourie* 1964 3 SA 94 (O) 96H–97D; *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 327; Christie a w 330 en gesag aldaar).

Dit wil dus voorkom of die regter ten onregte 'n beperking wat geld by die interpretasie van kontrakte gesien het as regverdiging om afsydig teenoor rektifikasie te staan.

d Regter Coetzee verklaar dan voorts kategories dat die hof nie die bevoegdheid het om die statute te rektifiseer nie en verwys na *Konyn v Viedge Bros (Pty) Ltd* 1961 2 SA 816 (OK) 825 en *Scott v Frank F Scott (London) Ltd* 1940 Ch 794. In die *Konyn*-saak word ook gesê dat statute nie gerektifiseer kan word nie. Geen argumente word aangevoer nie en daar word bloot na die *Scott*-saak verwys. Dit bring 'n mens dan by 'n evaluasie van die *Scott*-saak.

In hierdie saak het die verhoorhof as feit bevind dat die statute nie in ooreenstemming met die ondertekenaars se bedoeling was nie. Die verhoorregter het egter bevind dat hy nie die bevoegdheid het om rektifikasie te beveel nie. Hierdie standpunt word in appèl gehandhaaf. Regter Luxmoore lewer die uitspraak van die hof. Alhoewel die regter onderskei tussen wysiging en aanvulling van die statute en rektifikasie daarvan, skyn sy uitgangspunt te wees dat aangesien rektifikasie nie statutêr genoem en toegelaat word ten aansien van die statute van 'n maatskappy nie, die hof nie so 'n bevel kan verleen nie. Hy beskou die statute blykbaar as 'n "statutêre" dokument wat net deur statutêre magtiging gerektifiseer kan word. Rektifikasie van die akte en statute kan nie beveel word nie:

> "[F]or it is the document in its actual form which is delivered to the registrar and is retained and registered by him, and it is that form, and no other, which constitutes the charter of the company and becomes binding on it and its members. The legal entity only comes into existence as a corporate body distinct from the subscribers to the memorandum and articles registered upon registration.... In all cases, any change in the name or constitution of the company must be registered with the registrar... Further, the effect of registration of the memorandum and articles of a company under sect. 14 of the 1929 Act is to bind the company (which, as already stated, only comes into existence after the registration is effected) and the members thereof to the same extent and in the same manner as if they had respectively been signed and sealed by each member and contained covenants on the part of each member, his heirs, executors and administrators to observe all the provisions of the memorandum and of the articles, subject to the provisions of the Act. It seems plain that this section does not admit of any rectification of the memorandum and articles, apart from alterations under the express powers of the Act, for the only contract is a statutory contract in which the company is included by reference to the registered documents, and to no other documents. Further, as Bennett, J, pointed out, there is no machinery either in the 1908 Act or in the 1929 Act for compelling the registrar to register any rectification of the memorandum or articles if the court should think fit to make such an order."

Regter Luxmoore haal dan met goedkeuring aan uit *Evans v Chapman* 1902 WN 78 waar gesê is dat die statute slegs 'n statutêre effek het en slegs deur statutêre bevoegdheid gerektifiseer kan word. Hy gee toe dat dié resultaat baie onbillik kan werk. Hy noem die voorbeeld van statute wat weens 'n tikfout aan voorkeuraandele 'n dividend van 70% in plaas van 7% toeskryf. Wysiging van die statute kan nie bewerkstellig word nie, aangesien die nodige meerderheid vir die neem van 'n spesiale besluit nie verkry kan word nie. Sy oplossing is dat die maatskappy in likwidasie gaan (518A) – 'n oplossing wat werklikwaar nie aanvaarbaar is nie.

Daar word aan die hand gedoen dat regter Luxmoore tog nie kon wegkom van die vormvereistes vir die daarstel en registrasie van spesiale besluite nie en dat dit die benadering tot rektifikasie gekontamineer het. Ek stem saam met McLennan (a w 458) dat hierdie fout uitgeloop het op die *non sequitur* dat omdat mens hier met 'n "statutory contract" te doen het, rektifikasie uitgesluit is. Die Engelse Maatskappywet het nog nooit rektifikasie uitgesluit nie en daar is geen aanduiding dat die Registrateur van Maatskappye in Engeland nie 'n hofbevel wat rektifikasie beveel, sal registreer nie.

Trouens, in ons reg is dit duidelik dat selfs waar 'n kontrak uitloop op formele registrasie, nie alleen die kontrak nie maar ook die geregistreerde regshandeling gerektifiseer sal word. In *Weinerlein v Goch Buildings Ltd supra* is beslis dat sowel die koopkontrak van grond as die gevolglike transportakte gerektifiseer kan word. Appèlregter Wessels verklaar dat die rektifikasie van die akteskantoorregisters beveel sal word om bedrog te verhoed en:

> "I think this right is an inherent right of our courts and is well within their traditional equitable jurisdiction" (293).

Ek meen dus dat die hof in *Ex parte Premier Paper Ltd supra* verkeerdelik die *Scott*-beslissing gevolg het.

Bogemelde ontleding dui daarop dat rektifikasie van die akte van oprigting en statute van 'n maatskappy in beginsel regtens geoorloof is. Die teenoorgestelde standpunt resulteer in die onbillikhede waarop regters Luxmoore en Coetzee onderskeidelik wys.

Ongelukkig kan nie met hierdie gevolgtrekking volstaan word nie. Daar is dieperliggende probleme in verband met die rektifikasie van 'n akte van oprigting en statute wat onder oë geneem moet word.

Die eerste probleem raak die hele siening van die kontraktuele aard van die akte van oprigting en die statute. Ter illustrasie kan die geval geneem word waar daar twee ondertekenaars (A en B) van die akte en die statute is, ingevolge waarvan maatskappy C tot stand sal kom. A en B kom ooreen op 'n bepaalde klousule in die statute ("die ware ooreenkoms") maar dit word foutiewelik op skrif gestel en onderteken ("die foutiewe statute"). Die foutiewe statute word saam met die akte van oprigting ingedien en maatskappy C kom tot stand.

Wat het nou juridies hier gebeur? Die ware ooreenkoms tussen A en B is klaarblyklik 'n ooreenkoms onderworpe aan 'n opskortende voorwaarde, naamlik dat die dokument wat die ooreenkoms beliggaam, die statute, geregistreer sal word as deel van die konstitusie van die te stigte maatskappy, as gevolg waarvan die maatskappy in die lewe geroep word.

Voor registrasie van die akte en statute is daar dus wel reeds 'n ooreenkoms tussen A en B, onderworpe aan 'n opskortende voorwaarde. Gestel die foutiewe opskrifstelling van die ooreenkoms word *voor* die registrasie daarvan ontdek. A ontken nou die ware ooreenkoms en weier sy samewerking tot regstelling van die ondertekende statute.

Daar is geen rede waarom B nie 'n aksie sou kon instel vir rektifikasie van die ondertekende statute nie – die gesag is immers dat vir rektifikasie bewys van 'n afdwingbare ooreenkoms nie nodig is nie; al wat nodig is, is bewys van die gemeenskaplike bedoeling (*Meyer v Merchants' Trust supra* 253 258).

Wat gebeur by registrasie? In die eerste plek word genoemde voorwaarde vervul; tweedens kom maatskappy C as regspersoon tot stand en derdens word

C 'n kontraktant met A en B op die basis van die geregistreerde statute (aldus ons howe).

Die vraag is: hoe kan daar nou, na registrasie, rektifikasie van die geregistreerde statute wees sodat dit ooreenstem met A en B se ware bedoeling? Die geregistreerde (maar foutiewe) statute is immers die basis van 'n kontrak, nie tussen A en B nie, maar tussen A, B en C (volgens ons howe). Rektifikasie van die geregistreerde statute kan nooit plaasvind nie eenvoudig omdat nooit beweer of bewys kan word dat maatskappy C dieselfde bedoeling as A en B gehad het toe hulle die ware ooreenkoms gesluit het nie. C se enigste "bedoeling" was, met sy totstandkoming, om party te word tot 'n kontrak op die basis van die geregistreerde statute – aldus die konstruksie van ons howe, logies deurgevoer.

Mens skyn nou hier op die horings van 'n dilemma te wees: die billikheidsgevoel sê dat rektifikasie van die foutiewe statute moontlik moet wees, maar die konstruksie wat ons reg aan die registrasie van die statute gee, staan in die weg daarvan. Hierdie resultaat toon dat ons regsteorie waarskynlik verkeerd is en prysgegee moet word – die reg is immers daar om billikheid en geregtigheid te bewerkstellig, nie om teorieë en konstruksies te handhaaf nie.

Dit laat die fundamentele vraag onstaan of dit regskundig die waarheid is dat maatskappy C, wat deur die registrasie tot stand kom, op die oomblik van die registrasie van die akte en statute 'n kontraksparty *vis-à-vis* die ondertekenaars (A en B) daarvan word.

Dit is ietwat geforseerd om die akte en statute te konstrueer as 'n aanbod aan die te stigte maatskappy. Dit lyk veel meer realisties om te sê dat die ondertekenaars van die akte en statute bedoel om mekaar te bind op 'n konsensuele basis en om 'n regspersoon, die maatskappy, te skep wat dan gebonde is aan die akte, die statute en die Maatskappywet – nie omdat die maatskappy dit wil nie, maar omdat hy *van regsweë* tot stand kom en bestaan op die basis van gebondenheid aan die akte, statute en die Maatskappywet.

Dit is nog meer geforseerd om 'n aanname of wilsverklaring van die maatskappy, naamlik om kontraktant te word op die basis van die akte en statute, te konstrueer. Die maatskappy as regspersoon aanvaar of bekragtig nooit die akte en statute nie, maar is eenvoudig *van regsweë* gebonde om uitvoering daaraan te gee.

Maar nog meer: kontraksluiting veronderstel wilsvryheid, wat minstens die bevoegdheid inhou om 'n aanbod of te aanvaar of te weier. Die maatskappy het geen bevoegdheid of geleentheid om te weier om 'n kontraktant te word nie. Op sy ontstaansoomblik word hy onwillekeurig kontraksparty. Voorwaar 'n eienaardige kontrak!

'n Verdere eienaardigheid van die beweerde kontrak lê in die wysiging daarvan. Volgens die *Gohlke and Schneider*-saak *supra* kan die statute deur die lede onderling op informele wyse en bloot deur konsensus gewysig word. So 'n wysiging is geldig al is geen spesiale besluit geneem nie en al is die dokument waaruit die wysiging blyk, as daar een is, nie geregistreer nie. Dit is duidelik dat die maatskappy nie 'n party tot so 'n wysiging is nie. Tog is die maatskappy volgens gemelde beslissing daaraan gebonde. Kan 'n mens dan nog werklik volhou dat die maatskappy 'n kontraksparty is?

Maar selfs in die geval van wysigings van die akte of statute deur middel van spesiale besluite is die maatskappy, as regspersoon, nie 'n kontrakterende party

nie. Dit is die lede wat die besluit neem. Niemand verteenwoordig die regspersoon nie. Nogtans is die wysiging bindend op die maatskappy – selfs, indien die lede dit so wil hê, met terugwerkende krag tot op die oomblik van registrasie.

Na my mening is die werklikheid dat die objektiewe reg, wat die Maatskappywet insluit, aan mense die bevoegdheid gee om op 'n bepaalde voorgeskrewe wyse 'n regspersoon tot stand te bring. Die grondslag vir die skepping van die regspersoon is konsensus oor die akte van oprigting en die statute van die te stigte regspersoon. Tussen die lede is die akte en die statute dus wel 'n kontrak, (as daar twee of meer ondertekenaars is – ek kom hieronder op die posisie terug as daar net een ondertekenaar is). Wanneer die maatskappy tot stand kom deur registrasie van die akte en statute, word dit nie 'n mede-kontraktant nie en is dit nie *ex contractu* nie, maar *ex lege* aan die akte en statute gebonde.

Hieruit volg dat daar geen beswaar kan wees teen die rektifikasie van die akte en statute as dokumente wat die konsensus van die ondertekenaars, en slegs van die ondertekenaars, weergee nie. Die *Scott*-saak is dus verkeerd beslis en die argumente in die *Premier Paper Ltd*-saak bly dus steeds onaanvaarbaar.

Daar moet ook beklemtoon word dat die feit dat die regspersoon tot stand gekom het op die basis van 'n foutiewe akte en statute, nie rektifikasie in die weg staan nie. Dit is 'n suggestie wat deurskemer in die *Scott*-saak. Die *raison d'être* en "karakter" van die maatskappy is nie die formaliteit van registrasie nie, maar die bedoeling van die ondertekenaar-lede. As die siening is dat die regspersoon met 'n onveranderlike "karakter" tot stand kom en net so moet voortbestaan, sou wysigings met terugwerkende krag tot die oomblik van sy geboorte ook nie moontlik gewees het nie.

Wat wel voor oë gehou moet word by elke aansoek om rektifikasie van die akte en statute, is die reël dat derdes nie deur rektifikasie tussen A en B benadeel mag word nie (*Weinerlein v Goch Buildings Ltd supra* 291; *Meyer v Merchants' Trust Ltd supra* 254). Of daar sodanige benadeling vir die maatskappy gaan wees, is 'n feitelike vraag van geval tot geval. Dit is moeilik om in te sien hoe daar benadeling kan wees *van die maatskappy* – in beide die *Scott*- en die *Premier Paper Ltd*-saak sou rektifikasie geensins die maatskappy benadeel het nie. Die reël wat derdes beskerm, geld in elk geval nie net vir die maatskappy nie, maar dek ook alle buitestaanders, insluitende persone wat na die registrasie van die matskappy lede daarvan geword het.

Dit bring my by die geval waar die akte en statute slegs deur een lid onderteken is. Op die konstruksie wat ek hierin aan die hand gedoen het, is daar geen sprake van enige kontrak nie. Die enkel-lid word regtens toegelaat om op die basis van 'n akte en statute wat hy willekeurig kan bepaal, 'n regspersoon tot stand te bring. Die gestigte maatskappy is daaraan – maar ook aan baie ander bepalings van die reg en die Maatskappywet – van regsweë gebonde.

Wat van rektifikasie in hierdie geval?

Solank as wat die lid wat die akte en statute onderteken het, die enigste lid van die maatskappy is, sal rektifikasie weens praktiese oorwegings gewoonlik nie ter sprake kom nie. Eerder as om die koste van 'n hofaansoek aan te gaan, sal die lid eenvoudig 'n spesiale besluit neem om die akte of statute, na gelang van die geval, te wysig ten einde dit met sy aanvanklike bedoeling in ooreenstemming te bring.

Indien daar intussen egter ander lede bygekom het wat 'n wysiging deur spesiale besluit wil en kan afweer, is daar geen rede waarom die oorspronklike lid nie 'n aksie vir rektifikasie sal kan instel nie. 'n Eensydige wilsverklaring kan ook gerektifiseer word.

In 'n geval soos hierdie sal die hof natuurlik bedag wees op die geloofwaardigheid van die applikant en die moontlike benadeling van ander persone wat later lede van die maatskappy geword het. Op sy beste is 'n eis om rektifikasie nie maklik bewysbaar nie (*Bardopoulas and Macrides v Miltiadous* 1947 4 SA 860 (W) 863–4).

Ek meen dus dat die geykte "konstruksie", naamlik dat die maatskappy 'n mede-kontraktant *vis-à-vis* die lid of lede word, onhoudbaar is en prysgegee moet word. In hierdie opsig is ek nie 'n stem roepende in die woestyn nie.

De Wet en Van Wyk (a w 542) se konstruksie is dat

> "deur registrasie van die akte en statute word as't ware objektiewe reg geskep vir 'n bepaalde regsgemeenskap, bestaande uit die maatskappy en al sy lede. Hierdie objektiewe reg is alleen op 'n bepaalde gebied van toepassing en het slegs betrekking op persone wat hulle op daardie gebied beweeg, d.w.s. die maatskappy en sy lede. Buitestaanders en lede in enige ander hoedanigheid (bv. as direkteur, ens.) word nie geraak deur hierdie objektiewe reg nie".

Hierdie konstruksie is na aan die waarheid maar regskundig ietwat lomp. Uit 'n wederkerige kontrak ontstaan regte en verpligtinge vir elkeen van die kontraktante. Die subjektiewe reg wat *ex contractu* geskep word, word gewoonlik 'n vorderingsreg of persoonlike reg genoem. Die objektiewe reg, dit wil sê die reg van ons land, verleen erkenning aan die vorderingsregte aldus geskep, onderworpe aan die beperkings en voorwaardes wat die objektiewe reg daarstel, byvoorbeeld met betrekking tot formaliteite, geoorloofdheid, ensovoorts. Dit is dus totaal onnodig en verkeerd om die vorderingsreg met die objektiewe reg te vereenselwig.

In elk geval verklaar De Wet en Van Wyk se kontruksie nog nie waarom die akte en statute dan nou objektiewe reg word nie. Regskrag word tog sekerlik aan die akte en statute verleen omdat daaruit blyk dat die lede konsensus bereik het om 'n maatskappy op ooreengekome bedinge tot stand te bring. Deur die proses van registrasie verleen die objektiewe reg erkenning en sanksie aan dié ooreenkoms. Die grondslag van gebondenheid is dus steeds die wilsuiting van die partye.

'n Suid-Afrikaanse skrywer wat dieper op die kontraktuele aard van die maatskappy se konstitusie ingegaan het, is Fredman. In sy ongepubliseerde LLM-verhandeling (*The company constitution as a contract with emphasis on the outsider rule* Unisa 1979) aanvaar hy die tradisionele siening. Sy navorsing toon egter kinkels in die kabel. Dit blyk onder andere dat die idee van 'n maatskappy histories ontwikkel het uit die Engelse "joint stock association", 'n tipe vennootskap wat konsensueel deur 'n "deed of settlement" tot stand gebring is. Volgens die *common law* (*Kelner v Baxter* (1866) LR 2 CP 174) kon die maatskappy voor die inkorporasie nie verteenwoordig word nie. Die maatskappy as regspersoon kon dus volgens die *common law* nòg 'n party tot sy eie konstitusie word, nòg dit ratifiseer of aanvaar (Fredman a w 15). Om hierdie rede het die eerste Engelse Maatskappywet, die Joint Stock Companies Act van 1844, die "deed of settlement" as 'n geldige kontrak *tussen die lede* erken. Dit het ook bepaal dat die konstitusie ondernemings moet bevat tussen elke aandeelhouer

en *trustees* namens die maatskappy om vir sy aandele te betaal en "to perform the several engagements in the Deed on the part of the shareholders". Voorts is bepaal dat na die inkorporasie van die maatskappy, die ondernemings tussen die aandeelhouers en die maatskappy afgedwing kon word *asof dit aangegaan is met die maatskappy na die inkorporasie daarvan.* Dié wet het dus 'n duidelike uitsondering op die *common law* geskep – myns insiens in die vorm van 'n duidelike fiktiewe kontrak tussen die maatskappy en sy lede.

Gemelde wet is vervang deur die Joint Stock Companies Act van 1856 wat die "deed of settlement" deur 'n akte van oprigting en statute vervang het. *Dit het ook die fiktiewe kontrak uit die prentjie gelaat.* Die 1856-wet is vervang deur die Companies Act van 1862. Artikel 11 daarvan het bepaal:

> "The memorandum of association . . . shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto . . ."

Artikel 16 het presies dieselfde formule bevat ten aansien van die statute. Weer eens is daar geen sprake van die fiksie dat die maatskappy 'n kontraksparty word, soos in die 1844-wet nie.

Hierdie patroon is voortgesit in artikel 20(1) van die Companies Act van 1948 wat soos volg lui:

> "Subject to the provisions of this Act, the memorandum and articles, shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

Die Engelse skrywer Gower het reeds in 1958 gewys op die weglating sedert 1856 van die fiksie dat die maatskappy 'n kontraksparty is. Ten aansien van die siening dat die maatskappy wel 'n kontraksparty is, sê hy:

> "Unhappily, full account was not taken of the vital new factor, namely, the fact that the incorporated company was a separate legal entity, and the words 'as if . . . signed and sealed by each member', did not have added to them 'and by the company' " (*The contractual effect of articles of association* 1958 *MLR* 401).

Alhoewel, soos Fredman (a w 5–11) aantoon, die meeste Engelse beslissings aanvaar dat die maatskappy kontraktueel gebonde is, is daar myns insiens geen basis vir so 'n aanvaarding nie. So 'n aanname is, soos reeds geïllustreer, 'n opsigtelike fiksie. Dit is sedert 1856 nie eens meer 'n statutêr-voorgeskrewe fiksie nie. Maar selfs die Engelse beslissings wat die maatskappy se gebondenheid nie uit en uit as kontraktueel wil aanmerk nie, kan nie heeltemal van dié denkbeeld wegbreek nie. In byvoorbeeld *Salmon v Quin and Axten Ltd* 1909 1 Ch 311 word die verhouding beskryf as gelykstaande aan kontrak en in *Hickman v Kent or Romney Marsh Sheepbreeders' Association* 1915 1 Ch 881 weer word van 'n statutêre kontrak gepraat.

Myns insiens het die Engelse reg op onkritiese wyse aan voor-1856 opvattings bly vasklou. Die onderliggende feitelike situasie word nie ontleed en met die algemeen-geldende regsbeginsels in verband gebring nie. Die toevlug tot die kontrakskonstruksie het waarskynlik ook nog 'n ander rede, en dit is die onwilligheid van die Engelse reg om eenvoudig die regskrag van die positiewe reg te erken. Daar word eerder 'n toevlug tot 'n fiktiewe kontrak geneem (Meijers "Goede trouw en stilzwijgende wilsverklaring" in *Verzamelde Privaatrechtelijke Opstellen* (1955) deel 3 279 298–299).

In ons land het die statutêre fiksie dat die maatskappy weens 'n kontrak aan die akte en statute gebonde is, nooit gegeld nie. Die Kaapse Companies Act van

1892 was gebaseer op artikels 11 en 16 van die Britse Companies Act van 1862, wat hierbo aangehaal is en wat in artikels 19 en 27 van die Kaapse wet herhaal is. Dit het geen bepaling bevat dat die maatskappy *ex contractu* gebonde is nie.

Die Kaapse wet was weer die model vir die Transvaalse Maatskappywet van 1909 wat in artikel 16(1) verwys het na die ondertekening deur die lede maar nie deur die maatskappy nie. Dit is opgevolg deur die gelykluidende artikel 16 van die Maatskappywet van 1926 en artikel 65 (2) van die huidige Maatskappywet van 1973.

In die Suid-Afrikaanse reg was daar dus nooit 'n statutêr-gefingeerde kontrak tussen die maatskappy en die lede nie en het ons howe en skrywers ongelukkig bloot die Engelse regspraak onkrities nagevolg (sien ook Van Rooyen "Die bevoegdheid van 'n lid om die nakoming van die maatskappy-konstitusie af te dwing" 1986 *TSAR* 70 e v 195 e v).

Daar word egter aan die hand gedoen dat dit nog nie te laat is om die fiksie van 'n kontrak tussen die maatskappy en die lede te ontmasker en die maatskappy-gebondenheid *ex lege* te erken nie.

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Regter van die Hooggeregshof van Suid-Afrika

GLOSSES TO THE WORKING PAPER OF THE SOUTH AFRICAN LAW COMMISSION ON GROUP AND HUMAN RIGHTS (WITH PARTICULAR REFERENCE TO THE ISSUE OF GROUP RIGHTS)

1 Introductory remarks

The South African Law Commission's study of *Group and human rights* (Working Paper 25; Project 58), compiled by researchers of the commission under the direction of Mr Justice PJJ Olivier, is a timely contribution to the bill of rights debate in South Africa. It deals with this issue, and with group and human rights in general, thoughtfully, insightfully and – bearing in mind that it professes to be nothing but a *working paper* – quite incisively. It is comprehensive and tries to be sensitive to the needs and views of the widest possible spectrum of people in South Africa.

The document will probably enjoy credibility and legitimacy among a substantial segment of at least the white population in South Africa. First of all, it comes from – what in a sense is – a governmental body and it was indeed commissioned by the government. This is likely to propitiate supporters of the regime. Secondly, it considers the widest possible spectrum of views and argues issues in a level-headed, judicial way without, however, thereby compromising basic liberal-democratic values. This will most likely find favour with many liberal opponents of the regime.

According to the chairman of the law commission, Mr Justice HJO van Heerden, article 2 of the commission's proposed bill of rights is its most important provision (*Die Transvaler* 1989-03-23 2). This article recognises and safeguards as a fundamental right of every person in the Republic of South Africa:

> "The right to human dignity and equality before the law, which means that there shall be no discrimination on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other views or any disability or other natural characteristic: Provided that such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged, shall be permissible."

According to Mr Justice Van Heerden, article 31, which provides for the justiciability of the proposed bill of rights, is also of paramount importance.

The *Working paper*, though liberal-democratic in substance, is therefore truly transformative in effect. Article 2 is not merely aimed at "reforming" the racial basis of the present legal and political dispensation in South Africa. If implemented, it will uproot and replace it with its exact opposite: non-racialism. Article 2 goes as far as authorising affirmative action to the end of undoing the effects of racialism. Article 31 moreover substitutes legal sovereignty for legislative or parliamentary sovereignty. This means that a drastically new legal and political context for the realisation and protection of basic human rights is envisaged.

During the weekend of 21–23 April 1989, a group of mainly public lawyers discussed the *Working paper* at a workshop in Gordon's Bay. The workshop was hosted by the Harry Oppenheimer Chair of Human Rights at Stellenbosch. The group identified certain problem areas which I shall mention briefly (2 *infra*) before taking a closer look at the issue of group rights (3 *infra*).

2 A bird's eye view of problematic aspects of the paper

The Gordon's Bay group, after applauding the paper as a pioneering document and welcoming it as a significant contribution to the advancement of human rights and the constitutional future in South Africa, observed that the following aspects give rise to concern and merit further attention:

a While the law commission endorses the notion that a bill of rights ought to be formally neutral as between economic systems such as capitalism and socialism, articles 14 and 15 reveal a commitment to a rigid form of capitalism, which constitutes a serious stumbling block to the acceptance of the proposed bill of rights. These two articles also constitute an unjustifiable obstacle to a future government's freedom to choose and implement methods of socio-economic reform.

b The question of group rights is dealt with ambivalently. More about this in 3 *infra*.

c Existing security and emergency measures are dealt with inadequately in several respects:

i They are not recognised as incompatible with a meaningful bill of rights.

ii From paragraph 1446 it seems as if the commission endorses current state attitudes towards state security. This is remarkable in view of the general concern for human rights reflected in the *Working paper* as a whole.

iii The commission has failed to find a satisfactory formula for containing security measures and encroachment on human rights. This is mainly due to the too vague and too wide terms in which article 30 is couched. Article 30 provides for the limitation by legislation of the rights granted by the proposed bill

> "to the extent that is reasonably necessary in the interests of the security of the state, the public order, the public interest, good morals, public health, the administration of justice, the rights of others and the prevention of disorder and crime, but only in such measure and in such a manner as is *acceptable in a democratic society*" (my italics).

Especially the requirement of *acceptability in a democratic society* is – apart from being vague and wide – so easy to satisfy that it is potentially subversive of the whole principle of a bill of rights.

d Article 30 fails to distinguish between a permanent limitation on particular rights which is inevitable in every stable and free society on the one hand and temporary derogation from certain rights in a democracy under threat on the other. Articles 30 and 33 furthermore fail to secure certain core rights, such as the right to life as well as freedom from torture, slavery and discrimination, from derogation. The provision for the suspension of the bill of rights in article 33 is also not justified.

e The participants were not unanimous as to whether a bill of rights should be enforced by a constitutional court or by the ordinary judiciary. They nevertheless agreed that the educational process recommended as part of the implementation strategy (see paragraph 16 32), would also have to address current attitudes and practices in the legal profession and especially in the judiciary.

f The question of the legitimacy of a bill of rights which the paper strongly emphasises, also evoked considerable discussion among the group. There were divergent views but the meeting nevertheless agreed that it is urgently necessary to enact measures to give effect to certain core principles contained in the proposed bill of rights. Moreover, the negotiation process envisaged by the commission in paragraphs 16 33 to 16 35, should not delay the enactment of such legislation.

3 The issue of group rights

The issue of recognising and protecting group rights in South Africa is not only controversial but also emotional. This must be understood in the light of both the ideological roots and the practical effects of the idea of group rights protection in our country which, in turn, can best be explained as a subversion of the principle of equality.

Equality does not necessarily mean (or imply) *similarity*. In social relations it is an essentially *relational* concept. Relational or geometrical equality underpins proportionality among *people* while numerical or arithmetical equality is applied with reference to the similarity of *things* (for instance performance and counter-performance in contract).

The principle of equality is therefore not necessarily violated if and when people are not treated alike, that is to say when they are treated *differentially*. Such treatment is warranted as long as it is based on differences in the personal qualities or merits of people relative to a relevant object or purpose. However,

differential treatment based on personal qualities (or merits) unrelated to a relevant purpose is unjust, that is to say *discriminatory.*

A government which metes out differential treatment based on race, is bound to violate this principle of geometrical equality, since race is not a personal quality intrinsically related to a person's status in law. It merely refers to certain of a person's biological qualities displayed as physical features. Of these features skin pigmentation has become the decisive token. Race discrimination becomes institutionalised and indeed entrenched when, as in the case of South Africa, it is written into the legal system. This is bound to have a long term (and "regularly") damaging effect on the maintenance of the principle of equality.

Laws that make racial distinctions premise that generalisations along racial lines are valid and justified. Such laws therefore institutionalise irrational racial prejudices, so that differentiating along racial lines is inevitably discriminatory and unjust *per se.*

In an attempt to escape from the injustices of race discrimination, intellectual supporters of grand apartheid (or separate development) advance a basis of distinction which allows for the differential treatment of people belonging to groups more "natural", closely-knit or cohesive than artificial racial categories. *Ethnos theory* premises the existence of such groups as basic determinants of the social dynamism in plural societies. The *ethnos* is seen as the primary group within which the individual experiences and realises his or her culture. "Culture" is understood extensively so as to include all forms of expression of human existence and therefore also the political and economic needs and aspirations of individuals (and groups).

The individual's personal identity is, according to this view, to a large extent determined by his or her membership of the group and therefore certain forms of justified differentiation are believed to be consequential upon ethnic (in contradistinction to racial) distinctions. These distinctions, so it is argued, do not merely pertain to the physical attributes of people but to their cultural experiences and forms of expression, lifestyles, world views, religious beliefs, socio-economic and -political aspirations etcetera as well.

I do not propose to discuss fully the merits or demerits of ethnos theory. Suffice it to say that some social anthropologists are strongly opposed to the notion that ethnicity should hold a key position in analysing and understanding social relations, and they doubt whether ethnic phenomena can be studied. But even the very proponents of ethnos theory have themselves failed to come up with anything better than vague and ambiguous definitions of "the ethnic group". Some of them go as far as maintaining that "ethnos" refers to a process in which a group is involved rather than to the group itself. This explains why "ethnic group" is too permeable a criterion to use for the legal classification of people.

Race and *ethnicity* have therefore constantly been confused in the legal and political thinking of the proponents of "separate development". These architects of grand apartheid have professed not to accept race *but rather ethnicity* as the decisive factor in making basic socio-political distinctions and in enacting laws to execute what they have thought to be an essentially just and eventually egalitarian policy. However, negligibly few of these laws group people into ethnic units. They differentiate on an untenable racial basis simply because a person's race is much more readily determinable than his or her ethnic affiliations. The

tricameral parliamentary system provided for by the Republic of South Africa Constitution Act 110 of 1983 is also premised upon a racial categorisation.

Against this background the law commission's treatment of group rights is a marked and rather progressive break with the traditional ethnos ideology. This is not so obvious at first glance, owing to the commission's strong emphasis on – and decided preference for – the protection of group or minority (cultural, religious and linguistic) interests (see for example paragraphs 13 3–13 4; 13 16; 13 21–13 34). Article 21 of the draft bill of rights therefore also provides for the "right of every person, individually or together with others, freely to practise his culture and religion and use his language". Article 22 safeguards a person from discrimination against his or her culture, religion or language subject to two provisos: legislation may determine the official languages of a region; and the court shall, in adjudicating allegations of such discrimination, have regard to the (similar) interests of other individuals or groups of individuals.

However, what distinguishes this proposed protection from what ethnos theorists have in mind with the safeguarding of group rights, is that these interests are recognised as *rights of the individual.* There may therefore be an identifiable group of individuals who share these interests but when it comes to their enforcement, the individual is the one who must act – only he or she has the *locus standi* to take effective steps. The individual and not the (ethnic) group is recognised as the primary "entity".

The commission bases its notion of minority interest protection on (*inter alia*) due consideration of examples of similar protection on the international front. It should furthermore be noted that both the *Freedom charter* (under the headings "All national groups shall have equal rights!" and "There shall be peace and friendship!") and the *African charter on human and peoples' rights* (in for instance articles 17(2) and (3) and 22(1)) recognise the need for the protection of such interests. Why then would the Gordon's Bay group conclude that the commission's treatment of group rights is ambivalent? The sting lies in the commission's treatment or, rather, non-treatment of the protection of *political* group rights.

The commission is quite correct in assuming, at the outset, that political group rights are to be distinguished from other group or minority interests. The assertion that these political group rights need not and should not be protected in a bill of rights is laudable too (see paragraph 13 16). But then the *Working paper* concludes (paragraph 13 70(e); also see paragraph 13 16):

> "Political group rights, that is to say, the question of the legislature's composition should be protected in the constitution itself, subject to the principle of equality."

The first question this conclusion raises is: what are "political groups"? The commission seems to think that a political group can be "a political party, an ethnic or a linguistic or a cultural group" (paragraph 13 14). Particular emphasis is laid on *ethnicity* and it is foreseen that

> "for *constitutional purposes* – for example, the composition of the legislature – it may be necessary to identify the politically relevant groups. This may ultimately mean that there has to be an ethnic classification" (paragraph 13 14).

In effect, the commission reasons as follows: It endorses the view that ethnic groups cannot be defined or recognised as substantive entities or *personae* in law for purposes of protecting group interests in a bill of rights (paragraphs

13 4–13 11 and 13 70(d)). At the same time it foresees, by necessary implication, that such definition and recognition will be possible for political purposes in the future constitution itself (paragraphs 13 13–13 16). Such reasoning is inherently contradictory.

What is even more disconcerting is what appears to be the commission's view of an ethnic group for political and constitutional purposes (paragraph 13 15). A direct definition is not given but the commission states that "in South Africa we have ... an ethnic classification". This is of course not true. As pointed out earlier the primary (political) classification in South Africa is a racial one. The commission then points out that the present system of classification has been the target of a great deal of criticism, particularly because the "black population" is left out of the highest legislature and classification is enforced. (Note that it is assumed that the "black population" is an ethnic group.)

The present system has indeed been the target of severe criticism and resistance, but the commission overlooks the root cause for this, namely the fact that *classification is based on race.* This causes the system to be inherently and inevitably racist, because (as pointed out earlier) legal classification based on race is unjust and discriminatory *per se.* Race is (supposed to be) irrelevant as far as a person's legal status is concerned. By accepting (and at least implicitly condoning) the present system of race classification as an ethnic classification that can serve as a basis for political group rights, the commission fails to address the redress of perhaps the most crucial constitutional controversy in South Africa.

To say that the commission did the right thing by not lending support to any overt or covert forms of race classification in the proposed bill of rights itself, is but scant consolation. If a justiciable bill of rights is to operate alongside and, indeed, in support of, a constitution allowing for race classification, it would mean that the non-discrimination clauses of the former would somehow have to be restricted or qualified. In the case of the commisssion's proposed bill of rights this would result in the political liquidation of the very crucial article 2 (see 1 *supra*).

Fortunately, the way out of the commission's dilemma is contained in principle in both the report and the proposed bill themselves. Articles 16, 17 and 18 provide for free association (also see paragraphs 13 35–13 51). For purposes of the present argument article 18 is particularly relevant in that it recognises

> "the right of citizens freely to form political parties, to be members of such parties, to practise their political convictions in a peaceful manner and to be nominated and elected to legislative, executive and administrative office, and to form trade unions: Provided that no person shall be compelled to be a member of a political party or a trade union".

The only juridically recognisable collectivities in politics are political parties, founded neither on ethnicity nor on race but rather on shared political conviction. "Conviction" may well include certain views about the role of ethnicity in general (or a particular ethnic group) in political processes. It may also include beliefs in respect of race and politics. This may in certain instances also result in political parties with an ethnically or racially restricted membership. But then ethnic (or racial) convictions have to be put into political practice via the political channels of the party and not because they are written into the constitution.

A constitution can protect a diversity of (party) political interests by, for instance, providing for a multi-party dispensation with proportional representation. This particular issue indeed falls outside the terms of reference of the

commission. The commission should, however, have made it clear that the possibility which it recognises in passing (namely that the constitution could provide for the recognition of ethnic or racial groups as agents in the political process) should indeed not be an option if the non-discrimination clause (article 2) in the bill of rights is to function properly.

This is an important and necessary observation in view not only of the shortcomings of the present racially biased constitutional dispensation in South Africa, but also of the commission's own rather decided preference for non-racialism.

The Gordon's Bay group expressed reservations about the recognition in article 17 of the proposed bill of a right of dissociation, the argument being that since articles 16 and 18 entertain the right of association, reference to a right to dissociate "is unwarranted and unnecessary and invites the perpetuation of discriminatory practices". I agree with this criticism. It is true that the recognised right to dissociate is qualified by a proviso to the effect that if dissociation should constitute discrimination *inter se*, "no public or state funds shall be granted directly or indirectly to promote the interests of the person who or groups which . . . discriminates". However, the proper place for a provision such as the latter would rather be article 2 which, in general, prohibits any discrimination by the state.

Of course it could also be argued that people should not be forced to associate against their will – but this is exactly the reason why articles 16 and 18 provide for *free* association.

Reference has already been made to the fact that both the *Freedom charter* and *The African charter on human and peoples' rights* provide for the recognition of what the commission refers to as group interests. Under the heading "All national groups shall have equal rights!" the *Freedom charter* does so in the following terms:

> "There shall be equal status in the bodies of the state, in the courts and in the schools for all national groups and races;
>
> All national groups shall be protected by law against insults to their race and national pride;
>
> All people shall have equal rights to use their own language and to develop their own folk culture and customs;
>
> The preaching and practice of national, race or colour discrimination and contempt shall be a punishable crime;
>
> All apartheid laws and practices shall be set aside."

I cannot agree with the commission where (in paragraph 13 68 of the *Working paper*) it says that it is a "striking feature" of this formulation "that it takes ethnic groups as its point of departure". This is reading these provisions out of context and through ethnocentric spectacles. If rights with an ethnic and/or cultural (group) basis are recognised, that in itself does not mean that ethnic groups have to serve as a point of departure in protecting those rights. As I have pointed out, the commission itself has shown that these rights can and should be protected as *individual rights*, and there is nothing in the *Freedom charter* ruling out this possibility. The *Charter* is merely not dealing with the technicalities involved in protecting these rights.

A fair and properly contextualised reading of the quoted sections of the *Freedom charter* will to my mind be the following:

Contemporary, post-colonial Africans readily admit that ethnic and even tribal affiliations are politically relevant. Generally speaking, an African's ethnic identity is quite important to him or to her – as is his or her very "African-ness". Ethnic diversity is, however, not a principle on which the organisation of state and society is seen to rest. It is much rather a state of affairs or a fact of life which ought to be taken into account in organising a society. This is also how the *Charter* proposes to deal with it:

- not as a basis for ethnocentrism or racialism, but as a factual reality which necessitates (i) the meticulous protection of a particular category of individual rights, to wit cultural rights (or group interests as the commission prefers to call them), and (ii) the prevention of situations which might fuel interethnic friction;

- not as an excuse for keeping people apart, but as a reason to emphasise the need for the equal protection of the rights of each and every member of the nation as a unity.

From this it is clear that national unity is a priority, but that it does not rule out effective recognition of – and respect for – cultural rights and the diversity associated with them in a plural society like ours.

It is noteworthy that there is no reference in the *Working paper* to this issue of national unity. This omission is understandable in view of the fact that a bill of rights cannot really contain a provision (effectively) prescribing the promotion of national unity. And yet a bill of rights itself may be a binding factor serving the purpose of unifying the nation. This is done effectively *inter alia* through the proper protection of group interests. Therefore, even if nothing can be said about this issue in the bill of rights itself, the commission should nevertheless consider the possibility of including in its report a section on the role which a bill of rights can play in promoting national unity. Since national unity is a priority with the majority of South Africans, its promotion by means of a bill of rights will enhance the legitimacy of such a bill – a consideration which appears to weigh rather heavily with the law commission.

4 Concluding remarks

I have commented critically on certain aspects of the *Working paper on group and human rights* mainly because I think that they might thwart the predominantly noble and non-racialistic intentions of its drafters. My appreciation for this thorough, incisive and thoughtful endeavour of the law commission nevertheless still predominates.

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'n JURIDIESE RAAISEL IN DIE SUIDELIKE AFRIKAANSE KONVENSIE MET BETREKKING TOT ASPEKTE VAN DIE JURISDIKSIE VAN MUNISIPALE HOWE OOR VREEMDE STATE

Die raaisel

Die konvensie met betrekking tot aspekte van die jurisdiksie van munisipale howe oor vreemde state wat tussen Suid-Afrika en die TBVC-state gesluit is, bepaal kortom:

> Die partye stem tot die jurisdiksie van mekaar se howe toe indien die howe jurisdiksie oor hulle het maar indien die howe nie jurisdiksie oor hulle het nie, stem hulle nie tot die jurisdiksie toe nie.

Wat is die betekenis van hierdie bepaling?

Die bepalings van die konvensie

Hierdie konvensie is op 5 November 1987 deur Suid-Afrika en die TBVC-state aangegaan en het ook op daardie datum in werking getree. (Die konvensie is in die Ciskeise Staatskoerant van 1988-11-25, no 99 vol 16, Regeringskennisgewing 102 van 1988 gepubliseer: sien a 5 en 10. Sover vasgestel kon word, is die konvensie nog nie in Suid-Afrika gepubliseer nie.) Die doel van die konvensie volgens sy voorrede is om voorsiening te maak vir onderwerping deur die partye aan die jurisdiksie van die munisipale howe van die ander partye vir sover as wat die partye nie op immuniteit van die jurisdiksie van daardie howe geregtig is nie.

In artikel 2 van die konvensie kom die partye ooreen om hulle aan die siviele jurisdiksie van die ander partye se laer en hoër howe te onderwerp in verrigtinge wat teen hulle ingestel word deur 'n persoon wat 'n *incola* van daardie hof se gebied is. Die partye onderneem ook om te voldoen aan enige finale vonnis of bevel, insluitende 'n kostebevel, wat teen hulle in sodanige verrigtinge gegee word. Hierdie artikel geld nie indien eersgenoemde staat vrygestel is van die jurisdiksie van die ander party se howe ingevolge laasgenoemde se reg met betrekking tot staatsimmuniteit nie (eerste voorbehoud). 'n Mens kan nou met reg vra wat die sin van hierdie bepaling is want dit kom daarop neer dat die state toestem tot die jurisdiksie van die howe indien die hof in elk geval jurisdiksie oor die ander staat het. Die artikel bevat nog 'n verdere voorbehoud, naamlik dat dit slegs geld indien die aangeleentheid in elk geval deur die hof beregbaar is; dit toon aan dat die hof nie net jurisdiksie oor die vreemde staat moet hê nie, maar ook oor die onderwerp van die geskil alvorens die artikel aanwending vind.

As gevolg hiervan ontstaan die juridiese raaisel: die partye stem tot die jurisdiksie van die hof toe indien die hof jurisdiksie het maar indien die hof nie jurisdiksie het nie, stem hulle nie tot die jurisdiksie toe nie.

Die artikel bevat nog twee verdere bepalings: eerstens, dat die artikel slegs geld indien die staat wat aangespreek word, by die verrigtinge verteenwoordig word, of indien die staat behoorlik gedien is met die kennisgewing van die verrigtinge; en tweedens, dat die artikel slegs geld indien die verrigtinge nie betrekking het op enige aangeleentheid ten opsigte waarvan 'n skriftelike kontrak

bestaan waarin voorsiening gemaak word vir die verwysing van enige geskil oor so 'n aangeleentheid na die howe van 'n staat anders as dié van die ander party nie, of 'n verwysing bevat na arbitrasie in 'n staat anders as die ander party nie. Hierdie twee bepalings werp nie werklik lig op die raaisel nie.

Die konvensie maak dit duidelik dat die reg met betrekking tot die immuniteit van vreemde state ingevolge waarvan die aangespreekte staat nie immuniteit moet geniet nie, die munisipale reg van elke staat is. Dit is dus nie die volkereg nie (sien a 2 van die konvensie).

Moontlike oplossings

Die eerste moontlike oplossing is om die normale betekenis aan die artikel en sy vermelde twee voorbehoude te gee. Volgens die eerste voorbehoud stem die partye tot jurisdiksie toe indien hulle nie immuniteit – in die geval van die Suid-Afrikaanse howe – volgens die Wet op die Immuniteite van Vreemde State 87 van 1981 (hierna die WIVS genoem) geniet nie. Die tweede voorbehoud, naamlik dat die aangeleentheid andersins beregbaar moet wees, voer die saak nie verder nie. Hierdie voorbehoud kan ook beteken dat terugverwys word na die WIVS wat uitdruklik ook aangeleenthede uiteensit wat deur 'n hof beregbaar is en argumentshalwe ook as 'n jurisdiksieverlenende wet beskou kan word (sien Booysen "Procedural and jurisdictional uncertainties in the Foreign States Immunity Act" 1987–8 *SAYIL* 139 e v). Dit lei weer tot die sirkelgang dat die partye tot die jurisdiksie toestem indien die hof jurisdiksie volgens die WIVS het. Nietemin kom dit voor of die tweede voorbehoud eerder betrekking het op aangeleenthede waaroor 'n hof volgens die normale burgerlike prosesregreëls jurisdiksie het – uitgesonderd dus die bepalings van die WIVS – aangesien dié voorbehoud nie soos die eerste uitdruklik na die WIVS verwys nie. Maar selfs al word hierdie betekenis aanvaar, word die raaisel nie opgelos nie want die artikel beteken dan dat die partye toestem tot die jurisdiksie van die hof indien hulle nie volgens die WIVS van jurisdiksie vrygestel is nie (d w s indien die hof wel jurisdiksie het) en indien die normale gronde van onderwerp-jurisdiksie teenwoordig is. Die toestemming van die partye speel in hierdie geval geen rol nie.

Die tweede moontlike oplossing is dat 'n mens hier te doen het met 'n algemene toestemming tot die jurisdiksie van ander state se howe ten opsigte van verrigtinge wat deur 'n *incola* van 'n bepaalde hof aanhangig gemaak word. Die voorbehoud dat die aangeleentheid andersins deur die hof beregbaar moet wees, sal dan slaan op die normale sivielregtelike gronde van jurisdiksie wat aanwesig moet wees. 'n Hof se jurisdiksie in die geval van verrigtinge wat deur 'n *incola* aanhangig gemaak word, vestig deur blote beslaglegging van die bates van die *peregrinus*-staat (sien Herbstein en Van Winsen *The civil practice of the superior courts in South Africa* (1979) 783 e v). Dit is egter twyfelagtig of blote beslaglegging aan die vereiste van hierdie voorbehoud sal voldoen aangesien beslaglegging jurisdiksie oor die persoon verleen en nie oor die aangeleentheid soos wat die voorbehoud vereis nie. Die eerste voorbehoud vereis dat die staat nie – indien die aangeleentheid vanuit 'n Suid-Afrikaanse oogpunt benader word – ingevolge die Suid-Afrikaanse reg op immuniteit geregtig moet wees nie. Volgens artikel 3 van die WIVS geniet 'n staat nie immuniteit van die jurisdiksie van die howe in verrigtinge waarvan die vreemde staat uitdruklik van sy immuniteit afstand gedoen het nie. Indien die toestemming in artikel 2 van die

konvensie as afstanddoening beskou word, het die vreemde staat natuurlik nie immuniteit nie en is daar aan hierdie voorbehoud voldoen. Die probleem is dan egter dat hierdie voorbehoud nie werklik 'n onafhanklike betekenis het nie. Die voordeel van hierdie oplossing is dat 'n voornemende litigant nie telkens hoef vas te stel of sy saak onder een van die kasuïstiese formulerings in die WIVS val nie. Die grootste voordeel is egter dat die TBVC-state, wat Suid-Afrika betref, net so aanspreeklik word in ons howe soos enige vreemdeling en soos Suid-Afrika as staat. Die nadeel met hierdie oplossing is egter dat, omdat die toestemming as onderwerping aan jurisdiksie beskou word, die onderskeid tussen handelinge *jure imperii* en *jure gestionis* nie maklik gehandhaaf kan word nie; dit sal tot gevolg hê dat hierdie state selfs vir owerheidshandelinge – en nie net vir kommersiële handelinge nie – in ons howe aanspreeklik gehou kan word. 'n Groot nadeel is dit egter nie: eerstens sal die territorialiteitsbeginsel wat ons jurisdiksie ten grondslag lê, verhoed dat 'n ander staat in ons howe aanspreeklik word vir dade wat in sy eie gebied verrig word; tweedens word die onderskeid tussen soewereine en kommersiële handelinge ook nie altyd in die WIVS gehandhaaf nie en kan soewereine handelinge wel volgens daardie wet beregbaar word (sien bv a 6).

Die derde moontlike oplossing is dat die doel met die partye se toestemming tot jurisdiksie was om dit onnodig te maak dat daar telkens beslaglegging op die kommersiële bates van die state moet wees alvorens verrigtinge teen hulle aanhangig gemaak kan word soos die praktyk vereis (sien bv *Parkin v Government of the Republique Democratique du Congo* 1971 1 SA 259 (W) 260; *Lendalease Finance Co v Corporation De Mercadeo Agricola* 1975 4 SA 397 (K); *Prentice, Shaw & Schiess Incorporated v Government of the Republic of Bolivia* 1978 3 SA 938 (T); *Inter-Science Research and Development Services v Republica Popular de Mocambique* 1980 2 SA 111 (T); *Kaffraria Property Co v Government of the Republic of Zambia* 1980 2 SA 709 (OK)). Indien die standpunt aanvaar word dat die WIVS ook 'n jurisdiksieverlenende wet is, verval die vereiste van beslaglegging op die kommersiële bates van 'n staat om jurisdiksie te bevestig (sien Booysen 143). Die konvensie is dus uit hierdie oogpunt onnodig. Die konvensie het egter, soos reeds gesê, blykbaar die geval in gedagte waar jurisdiksie op ander gronde as die WIVS gebaseer is en waar beslaglegging *ad confirmandam jurisdictionem* praktyk is. Die vraag is of onderwerping aan jurisdiksie beslaglegging nie net onnodig maak nie maar ook verbied. Die konvensie gee hierop geen duidelike antwoord nie. As dit die bedoeling van die partye was, kon hulle dit duideliker uitgedruk het. Beslaglegging *ad fundandam jurisdictionem* is uit die aard van die saak onnodig aangesien die hof reeds jurisdiksie oor die persoon as gevolg van die toestemming vervat in die konvensie, asook oor die saak, het. Die vraag is net of beslaglegging *ad confirmandam jurisdictionem* nodig is. Die konvensie verbied dit nie uitdruklik nie. Die feit dat die konvensie uitdruklik bepaal dat die partye onderneem om enige finale hofbevel, insluitende 'n kostebevel, na te kom, skep egter die indruk dat die bedoeling was om weg te doen met die vereiste van beslaglegging *ad confirmandam jurisdictionem*. Indien 'n staat sodanige beslaglegging egter nog toelaat, is dit twyfelagtig of dit werklik in stryd met die konvensie se bedoeling, soos uit die woorde afgelei, is. Indien die konvensie egter uitgelê word teen die agtergrond van die Suid-Afrikaanse reg, het toestemming tot die jurisdiksie deur 'n *peregrinus* in die geval van verrigtinge ingestel deur 'n *incola* tot gevolg dat beslaglegging *ad*

confirmandam jurisdictionem nie meer nodig is nie (sien Kelbrick "The doctrine of consent" 1986 *CILSA* 136). Hiervolgens het artikel 2 van die konvensie die effek dat daar nie meer op die bates van die TBVC-state in Suid-Afrika beslag gelê word om jurisdiksie te bevestig nie. Dit bly egter 'n eienaardigheid dat 'n internasionale konvensie op sodanige wyse opgestel word dat dit verstaan en gelees moet word in die lig van 'n staat se staatlike reg en in die veronderstelling dat die verskillende partye se staatlike regstelsels dieselfde is.

Die interne regskrag van die partye se onderwerping

Artikel 3 van die konvensie bepaal dat elke party sodanige wetgewende en ander maatreëls moet tref as wat nodig is om effek aan die bepalings van die konvensie in hulle gebiede te gee. Die partye onderneem ook om 'n afskrif van elke wet wat hulle met betrekking tot die immuniteit van vreemde state maak, aan mekaar te stuur. Alhoewel dit in 1988 gewysig is, maak artikel 14 van die WIVS steeds voorsiening dat daar op die goedere van 'n vreemde staat wat vir handelsdoeleindes bedoel is, beslag gelê kan word om jurisdiksie te vestig of te bevestig. Selfs al word die reëls in gedagte gehou dat 'n internasionale konvensie in die afwesigheid van wetgewende inkorporasie geen interne regskrag in die Suid-Afrikaanse reg het nie en allermins wetgewing kan wysig (sien bv *Tshwete v Minister of Home Affairs* 1988 4 SA 586 (A) 606; *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co* 1965 3 SA 150 (A) 161), ontstaan die vraag steeds of 'n hof bloot uit die konvensie toestemming tot die jurisdiksie deur die bepaalde state kan aflei. Die partye kan normaalweg stilswyend – dit wil sê deur gedrag – of uitdruklik toestemming tot jurisdiksie verleen (sien Kelbrick 134). Indien sodanige toestemming verleen is, bepaal ons reg dat daar nie meer beslag op die goedere om jurisdiksie te bevestig, mag plaasvind nie en geen wysiging of verandering van ons reg is dus ter sprake nie. Die konvensie word ook nie as sodanig toegepas indien 'n hof slegs die toestemming tot jurisdiksie daaruit aflei nie. Normaalweg lei die howe egter nie regte vir onderdane uit die onderhandelings tussen state af nie (sien *Civilian War Claimants Association v R* 1932 AC 14 27; *Rustomjee v R* 1876 1 QB 487). Hierdie reël skyn ook nie van toepassing te wees nie want dit is nie regte vir individue wat hier uit die konvensie afgelei word nie maar bloot algemene toestemming tot die jurisdiksie van die hof – dit wil sê toestemming aan slegs 'n ander orgaan van dieselfde regspersoon, die staat. Die howe het wel by geleentheid die bedoeling van die uitvoerende gesag uit 'n verdrag afgelei indien dit gegaan het oor 'n aangeleentheid wat binne die uitsluitlike bevoegdheid – prerogatief – van die uitvoerende gesag val (sien bv *Post Office v Estuary Radio* 1968 2 QB 740 (CA) 753). Indien die howe hulle eie uitvoerende gesag se bedoeling uit 'n verdrag kan aflei, is daar geen rede waarom die howe nie ook die toestemming tot hulle jurisdiksie uit die bepaalde konvensie kan aflei nie. Dit lyk dus nie of wetgewing in Suid-Afrika nodig is om effek te gee aan die konvensie se bepaling dat die state toestem tot die jurisdiksie van mekaar se howe nie. As hierdie toestemming deur die hof vasgestel is, is beslaglegging op die bates van een van die state om jurisdiksie te bevestig ook nie meer toelaatbaar nie en is die bedoeling met die konvensie bereik.

Slotsom

Die slotsom is dat die TBVC-state en Suid-Afrika, deur tot die jurisdiksie van mekaar se howe toe te stem in die geval van verrigtinge ingestel deur 'n *incola* in gevalle waar die howe in elk geval jurisdiksie oor die state ingevolge die WIVS

en ook oor die onderwerp het, bedoel het om beslaglegging op mekaar se bates in die ander state te verhoed. Die bedoeling van die state om hulle aan mekaar se jurisdiksie te onderwerp, kan direk uit die konvensie afgelei word en geen wetgewing is dus nodig om die konvensie in die Suid-Afrikaanse reg te inkorporeer nie.

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LANDOWNERSHIP AND NATURAL LAW

> "The land shall not be sold for ever: for the land is mine; for ye are strangers and sojourners with me."
>
> *Leviticus 25:23*
>
> "Land, which is a necessity of human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position – land, I say, differs from all other forms of property, and the immemorial customs of nearly every modern state have placed the tenure, transfer and obligations of land in a wholly different category from other classes of property. Nothing is more amusing than to watch the efforts of [the land] monopolists to prove that other forms of property and increment are similar in all respects to land and the unearned increment on land."
>
> *Winston Churchill*[1]

Recent years have brought an abundance of South African academic writing on the subject of private ownership of land.[2] Given the fundamental and enduring importance of landownership in any legal system, it is hardly surprising that this topic continues to attract attention.

In an editorial preface of the 1985 *Acta Juridica* the question is posed:

> "[I]s the idea of 'absolute' ownership appropriate in a modern legal system, and should land be separated from other forms of property and subjected to a different legal regime?"

The contributions which follow on from that question deal largely with landownership in the context of one or other system of positive law, for example: the "absoluteness" of ownership in Roman, Roman-Dutch and South African law; ownership in the context of group areas legislation; land law in the Soviet Union and in African rural areas; and the erosion of the classical Roman concept of ownership in modern South Africa. Planning law, environmental conservation, rent control, ownership on sectional title and time-sharing also receive

1 From a speech in the House of Commons 1909.

2 A fair, though far from exhaustive, sampling of recent literature would include the following: Feenstra 1976 *Acta Juridica* 269; the various contributions to the 1985 *Acta Juridica*, which is devoted entirely to the exploration of the theme "Land ownership: a changing concept"; Cowen *New patterns of landownership: the transformation of the concept of ownership as plena in re potestas* Trust Bank Series of Continuing Legal Education Lectures University of Witwatersrand (1984); Van der Walt "The effect of environmental conservation measures on the concept of landownership" 1987 *SALJ* 469; Lewis "Real rights in land: a new look at an old subject" 1987 *SALJ* 614–615.

attention. Only one contribution[3] deals directly with the jurisprudential question of the relationship between the concept of ownership and natural law, but the emphasis there is placed more on ownership of property in general than on landownership as such.

This article takes the form of an argument: the proposition is advanced that the notion of private, individual ownership of land,[4] which the West has derived from the classical Roman law, is in conflict with natural justice. It will be shown that in the Western tradition alone, there are many since Moses who, over the centuries, have spoken out against the permanent, private appropriation of land.

First of all, though, one may well ask why land is special. Why should ownership of land be treated any differently from ownership of other species of property? It is quite remarkable that the vital distinction which natural justice draws between ownership of the products of human exertion on the one hand, and ownership of natural resources such as land on the other, appears to be unknown to our law.[5] Nowhere has that natural distinction been more clearly and poignantly explained than in the writings of the nineteenth-century American economic philosopher, Henry George.[6] He is worth quoting at some length:[7]

> "What most prevents the realization of the injustice of private property in land is the habit of including all the things that are made the subject of ownership in one category, as property, or, if any distinction is made, drawing the line, according to the unphilosophical distinction of the lawyers, between personal property and real estate, or things movable and things immovable. The real and natural distinction is between things which are the produce of labour and things which are the gratuitous offerings of nature; or, to adopt the terms of political economy, between wealth and land. These two classes of things are in essence and relation widely different, and to class them together as property is to confuse all thought when we come to consider the justice or the injustice, the right or the wrong of property. A house and the land on which it stands are alike property, as being the subject of ownership, and are alike classified by lawyers as real estate. Yet in nature and relations they differ widely. The one is produced by human labor, and belongs to the class in political economy styled wealth. The other is a part of nature, and belongs to the class in political economy styled land.
>
> The essential character of the one class of things is that they embody labor, are brought into being by human exertion, their existence or non-existence, their increase or diminution, depending on man. The essential character of the other class of things is that they do not embody labor, and exist irrespective of human exertion and irrespective of man; they are the field or environment in which man finds himself; the storehouse from which his needs must be supplied, the raw material upon which and the forces with which alone his labor can act.
>
> The moment this distinction is realized, that moment is it seen that the sanction which natural justice gives to one species of property is denied to the other; that the rightfulness which attaches to individual property in the produce of labor implies the wrongfulness

3 Van der Vyver "Ownership in Constitutional and International Law" 1985 *Acta Juridica* 119.

4 In this article the term "land" is used generically to denote all natural resources.

5 See the classification of things given by Van der Merwe "Things" 27 *LAWSA* par 21–37; Silberberg and Schoeman *The law of property* (1983) 25–37.

6 John Dewey said of George: "It would require less than the fingers of the two hands to enumerate those who, from Plato down, rank with him . . ." Tolstoy, Einstein, GB Shaw and many others paid similar homage to George. Karl Marx did not: he poured scorn on *Progress and poverty,* calling it "the capitalist's last ditch", but Frederick Engels predicted a "meteoric role" for George. It is regrettable that Cowen's thought-provoking monograph (*supra* fn 2) disposes of George's teachings in rather cursory fashion.

7 *Progress and poverty* (1975) Book VII Ch 1.

> of individual property in land;[8] that whereas the recognition of the one places all men upon equal terms, securing to each the due reward of his labor, the recognition of the other is the denial of the equal rights of men, permitting those who do not labor to take the natural reward of those who do. Whatever may be said for the institution of private property in land, it is therefore plain that it cannot be defended on the score of justice.
>
> The equal right of all men to the use of land is as clear as their equal right to breathe the air[9] – it is a right proclaimed by the fact of their existence. For we cannot suppose that some men have a right to be in this world and others no right."

This passage raises important questions. For example, even if it is accepted that private ownership of land is indefensible in natural law, how does Henry George propose to divest landowners of their titles? How, if at all, would he then compensate them? It is not the purpose of this article to explore such questions in detail: the interested reader is referred to George's own lucid and persuasive answers in *Progress and poverty*.[10]

It is important to note, however, that George is not tempted by such heavy-handed measures as expropriation or nationalisation of privately-owned land; on the contrary, his remedy, by enabling the landowner to retain possession of the land on certain conditions, recognises that security of tenure of land is vital to the economic and political stability of society.[11]

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8 Thus, in terms of natural justice an improvement, such as a house erected on land, may be privately owned for it represents the product of human effort; but the land itself may not. It would follow that the Roman maxim *superficies solo cedit*, the basis of our law of *inaedificatio*, is in conflict with natural justice. A detailed analysis of this interesting question, however, falls outside the ambit of the present study.

9 South African law, somewhat illogically, treats air and running water, but not land, as *res omnium communes*. Van der Merwe 27 *LAWSA* par 23 fn 5 states: "Common things (*res omnium communes*) are things which by natural law are common to mankind and therefore unsusceptible of private ownership. Examples are the air and running water. These things are to be enjoyed in common by all living persons by virtue of their existence and are thus an incident of personality rather than of property." For purposes of this classification, no natural distinction can be made between air and water on the one hand, and land on the other: all three are essential to man's existence on earth. Van der Vyver's observation (*supra* fn 3 131) that "in present times the notion of *res omnium communes* as a legal conception no longer has any relevance within the domestic system of South African law" does not detract from the force of this argument.

10 *Supra* fn 7 Book VI Ch 2 *et seq.*

11 A concise explanation of George's remedy is given by Fred Harrison *The power in the land* (1983) 35: "The only way of eliminating monopoly power in the land market is to compel owners to compete with each other on a continuous basis. The only efficient method of accomplishing this is to impose an annual tax on the value of all land that is capable of yielding rental income. Owners would thus be obliged to put their land to good use, within the framework of existing social and economic needs, and legal constraints (eg zoning). By doing so, they would acquire an income out of which to pay their tax dues. Thus they would not be able to hold valuable land vacant. Sites that were needed for recreation, housing, industry, commerce, and so on, would be released, thereby removing the eye-sores of derelict sites in the middle of our great cities. This . . . tax, which becomes a cost on the right to possess and use land, effectively neutralizes the power of the monopolist to withhold it from use for no better reason than the wish to cash in – at some future date – on the needs of society for a finite resource . . . Not only would the tax have a dynamic impact on the land market *per se*, but it would also generate a higher level of activity generally. For the tax ought not to be an additional one, but ought to be a substitute for existing taxes." Before such fiscal reform can be introduced, however, legal titles have to be registered and a survey of values undertaken. Henry George's remedy would therefore appear to be ideally suited to South Africa, with its widely-admired system of land registration. Thus it is hardly surprising to find that taxation of land values has already been with us for a long time, albeit at the municipal level only. Harrison (*ibid* 214–215) describes how Johannesburg has, since 1919, successfully applied a system of site value rating. A notable proponent of a tax on the value of land in this country was the supreme court judge, Frank W Lucas.

George, however, was by no means the first Western thinker to point out that unrestricted private ownership of land offends against natural justice. In fact, George was restating for his own age certain precepts of natural law which may be traced back to antiquity. In the historical survey which follows, the point of departure must inevitably be the resounding injunction contained in the book of Leviticus[12] which enshrines the Mosaic law. That principle is restated in other biblical texts.[13]

In another ancient teaching, the Apocalypse of Peter in the Apocryphal New Testament, we find the following description of the perfect economic state under natural law:

> "And the earth, common to all, not parted out with walls or fences, shall then bring forth of her own accord much fruit, and life and wealth shall be common and undistributed. For there shall be no poor man, nor rich, nor tyrant, nor slave, none great nor small any longer, no kings, no princes; but all men shall be together in common."

No enquiry into natural law dare overlook the views of Socrates and Plato, two of the greatest figures in the Western philosophical tradition. It is tempting, but incorrect, to conclude that modern Western legal systems have derived the notion of the individual's entitlement to private property directly from the conception of justice which is presented in the fourth book of Plato's *Republic*. According to that conception, justice means "having and doing what is a man's own, and belongs to him".[14] But was Plato really referring to private ownership of property? Van der Vyver has pointed out that Plato himself

> "never really afforded particular prominence to the institution and protection of private ownership as a norm of natural law, but his passing reference to the safeguarding of one's own provided the opening for eclectic philosophers in the ranks of the Roman Stoics to do just that".[15]

(The latter point is significant in the present context and will be referred to again below in the discussion of the Roman jurists.)

This comment, if anything, understates the position: it appears, in fact, that Plato was opposed to the institution of private ownership. In the *Laws* Plato deals expressly with the question of private ownership of property in the ideal state, and dispels any doubt about his attitude towards that institution:

> "The first and highest form of the state and of the government and of the law is that in which there prevails most widely the ancient saying, that 'Friends have all things in common'. Whether there is anywhere now, or will ever be, this communion of women and children and of property, in which the private and individual is altogether banished from life, and things which are by nature private, such as eyes and ears and hands, have become common, and in some way see and hear and act in common, and all men express praise and blame and feel joy and sorrow on the same occasions, and whatever laws there are unite the city to the utmost – whether all this is possible or not, I say that no man, acting upon any other principle, will ever constitute a state which will be truer or better or more exalted in virtue. Whether such a state is governed by Gods or sons of Gods, one, or more than one, happy are the men who, living after this manner, dwell

12 Leviticus 25:23, quoted at the head of this article.

13 Eg, Psalm 24:1: "The earth is the Lord's, and the fulness thereof." Any doubt about reliance on the Bible, in particular the Old Testament, as a repository of natural law must yield to the impeccable authority of De Groot. He states (*De jure belli ac pacis* prol 48) that the Old Testament sets forth the Divine law, which is never in conflict with the true law of nature; and to this extent the Old Testament can be used as a source of natural law.

14 *The republic* IV 433 in *The dialogues of Plato* (translated by B Jowett (1892)).

15 *Supra* fn 3 120.

there; and therefore to this we are to look for the pattern of the state, and to cling to this, and to seek with all our might for one which is like this." [16]

This view is consonant with the Mosaic law of property; if anything, Plato goes further.

Turning to consider the Roman law, one should at the outset distinguish between the classical law, to which our own legal system owes so much, and the early law. A number of eminent scholars, among then Mommsen, Maine, Kaser and Diosdi, incline to the view that in earliest Roman times, much of the land was common property. (This, of course, accords well with the property regime portrayed in the last two passages quoted.) But by the time of the Twelve Tables, private, individual ownership of land was already recognised at Rome.

Maine treats common ownership of property as a characteristic feature of early societies in general. His prime model is not Rome, but India, where the institution of co-proprietorship has survived intact until modern times:

> "The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights ... The Village Community is known to be of immense antiquity. Conquests and revolution seem to have swept over it without disturbing or displacing it, and the most beneficent systems of government in India have always been those which have recognised it as the basis of administration.
>
> The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitus detineri* ('no one can be kept in co-proprietorship against his will'). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common."[17]

Closer to home, we have the example of African customary law. While every member of a tribe is entitled to residential, agricultural and pastoral land, there is no individual ownership of land: all land vests in the tribe, and is allocated by the highest authority (the paramount chief) to lesser authorities for ultimate distribution amongst the family heads of each village.[18]

How, then, could the Roman jurists of the late Republic have departed so radically from the scriptural and Platonic teachings on natural law, as to lend their authority to the institution of private ownership of land, and thereby set the trend for all subsequent Western legal thinking?

The point was made earlier that Plato's passing reference to the safeguarding of one's own provided the pretext for the Roman Stoics to treat private ownership of property as a norm of natural law.[19] They were moved by considerations

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16 *The laws* V 739 in *The dialogues of Plato* (*supra* fn 14).

17 Sir Henry Maine *Ancient law* (Everyman's Library edition (1974)) 153–154.

18 Hosten, Edwards, Nathan and Bosman *Introduction to South African law and legal theory* (1983) 701.

19 Roman Stoic philosophers like Cicero and Seneca were, of course, very well aware of the ancient teachings of natural law. If evidence were needed of this, we have Cicero's own celebrated formulation of natural law (*De republica* III 22). Seneca has this description of the ideal state under the rule of nature (*Epistulae morales* XIV 2): "In this primitive state men lived together in peace and happiness, having all things in common; there was no private property. We may infer that there could have been no slavery, and there was no coercive government. Order there was of the best kind, for men followed nature without fail and the best and wisest men were their rulers. They guided and directed men for their good, and were gladly obeyed as they commanded wisely and justly... As time passed, the primitive innocence disappeared; men became avaricious and dissatisfied with the common enjoyment of the good things of this world, and desired to hold them in their private possession. Avarice rent the first happy society asunder... and the kingship of the wise gave place to tyranny, so than men had to create laws which should control their rulers."

of expediency, by the need to confer legitimacy on a *de facto* situation which they observed everywhere around them.[20] Their recognition of individual, absolute ownership of property is thus, perhaps, understandable,[21] but that they should have chosen the device of invoking natural law to cloak with legal respectability the permanent appropriation of land is supremely ironic!

What means did they use to accomplish this (apart from their perversion of Plato's teaching on justice)? According to Maine, it was precisely the "natural" principle of *occupatio* of a *res nullius* that was chosen by the Roman jurists of the late republic in order to confer legitimacy upon the acquisition of private ownership, first in movables and later in land. In reality, this principle is entirely alien to natural justice: it appears to have been plucked rather conveniently by the Romans from the *ius gentium*, in the sense of the law common to all nations. Maine mentions the widely-held theory that

> "in the beginning of things, occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual."[22]

This theory, he explains, enabled writers to reconcile the doctrine that ownership of a *res nullius* was acquired by *occupatio*, with the scriptural prohibition on the permanent private appropriation of land. Thus it is exactly the Roman jurisprudence which, under the guise of natural law, has, in Maine's words,

> "bequeathed to the moderns the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only the exception to a general rule".[23]

How powerful has been the Roman influence across the long centuries! Under that influence, the great Dutch jurists of the seventeenth century, De Groot and Pufendorf, held that individual ownership of land, acquired by means of *occupatio*, does not offend against natural law.[24] Our legal system, of course, is equally comfortable with the notion of private ownership of property in general and of land in particular.

The Roman jurists, therefore, must face the charge of having betrayed the original teaching of natural law on landownership. Such an accusation, of course, might well have astonished the jurists themselves in view of their eclectic attitude towards *ius naturale*.[25] That does not exonerate them.

Few, if any, of those jurists were given to the habit of thinking deeply about fundamental legal concepts such as ownership. To quote Peter Birks:

> "[T]hose who look for the kind of explicit reflection on the nature and function of legal concepts which goes on in modern jurisprudence will not find Roman law admirable . . . [T]here is no attempt to articulate a concept of ownership. In particular, there is no attempt to explain and justify the phenomenon of ownership, as for instance there is in

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20 The point is well expressed by Hosten *et al supra* fn 18 34: "As professional lawyers the Roman jurists sought a rule corresponding to the factual state of affairs – they looked always to the concrete situations in life. Thus, and this is the crux of our case, *ius naturale* to the Roman jurist meant a means of interpretation and not an a priori and fixed standard."

21 But it may be noted in passing that, according to Stein and Shand *Legal values in western society* (1974) 116, "the alleged 'absolute' character of Roman *dominium* has largely been read into the Roman texts by later generations of jurists imbued with non-Roman ideas".

22 *Supra* 17 149.

23 *Ibid* 153.

24 De Groot *Inleidinge tot de Hollandsche rechtsgeleertheyd* 2 3 2 (translated by Lee); *De jure belli ac pacis* 2 2 2 5 (translated Kelsey (1925)).

25 See the passage quoted in fn 20.

Grotius, Pufendorf and Locke ... On the contrary, ownership is taken for granted, continually in issue but undefined and unexamined."[26]

So much for the Romans. In more recent times we find William Shakespeare, a central figure in the Western tradition, describing what happens to a nation that ignores the bibical prohibition on private property in land:

"This land of such dear souls, this dear dear land
Dear for her reputation through the world,
Is now leas'd out (I die pronouncing it),
Like to a tenement or pelting farm:
England, bound in with the triumphant sea,
Whose rocky shore beats back the envious siege
of watery Neptune, is now bound in with shame,
With inky blots and rotten parchment bonds;
That England that was wont to conquer others,
Hath made a shameful conquest of itself."[27]

In the seventeenth century, Spinoza maintained that the whole soil should be public property; and in the writings of his contemporary, John Locke, there are to be found clear statements of the vital distinction underlying the natural law of property, namely that between land and the products of human endeavour. In this, Locke anticipated Henry George, who was to elaborate that distinction so lucidly two centuries later. Said Locke:

"God gave the world in common to all mankind. Whenever, in any country, the proprietor ceases to be the improver, political economy has nothing to say in defence of landed property. When the 'sacredness' of property is talked of, it should be remembered that any such sacredness does not belong in the same degree to landed property."[28]

Another passage betrays the influence of the theory of natural rights, with which Locke is often associated:

"Now of those good things which Nature hath provided in common, every one hath a right ... to as much as he could use, and had a property in all he could effect with his Labour; all that his industry could extend to, to alter from the state Nature had put it in, was his."[29]

The commentaries on the law of property of the eighteenth-century English jurist, Sir William Blackstone, require detailed scrutiny at this point. In his majestic prose, Blackstone restated the age-old principles of natural justice:

"There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision or the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death bed and no longer

26 Birks "The Roman law concept of *dominium* and the idea of absolute ownership" 1985 *Acta Juridica* 2–3.
27 Richard II Act II Scene I Lines 57–66.
28 *Two treatises of civil government* (1689) 2 5.
29 *Ibid.*

> able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him."[30]

He adds:

> "The earth, therefore, and all things therein, are the general property of mankind, exclusive of other beings, from the immediate gift of the creator."[31]

How then, in the face of the natural law, does permanent individual ownership of land emerge in a community? According to Blackstone, with increase in population unoccupied land became scarce. Continual occupation of the same land tended to exhaust its natural produce, so that it became necessary for men to pursue some regular method of producing food in sufficient quantities: thus was born the art of agriculture. But who would bother to till the ground, if others were simply awaiting the opportunity to seize the product of his effort and skill? Had separate ownership of land not been vested in him who worked it, the world would have remained a forest and men mere animals of prey. Thus necessity begat private property, and in order to secure that right, recourse was had to civil society, which brought with it a long train of inseparable concomitants: states, governments, laws, punishments and the public exercise of religious duties.

How convincing is this account of the origins of private ownership of land? It certainly represents the conventional view, as also does the account given by De Groot in the third chapter of his *Inleidinge*. Henry George,[32] however, presents a very different picture. According to that writer, the causes which operated to supplant the original idea of the equal right to the use of land by the idea of exclusive and unequal rights, were fourfold: the concentration of power in the hands of chieftains and the military class during times of war, enabling them to monopolise common lands; the effect of conquest in reducing the conquered to slavery and dividing their lands among the conquerors; the influence of a sacerdotal class; and the influence of a class of professional lawyers, whose interests were served by the substitution of exclusive for common property in land. (The influence of the lawyers, sad to say, has been very marked in Europe, both on the Continent and in Britain, in destroying all vestiges of the ancient tenure and replacing it by the Roman idea of exclusive ownership.)

Having explained the practical necessity which, in his view, drove early man to depart from observance of the natural law, Blackstone proceeds to consider the legal arguments advanced to justify claims to permanent, individual ownership of land:

> "[A]s we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy also gave the original right to the permanent property in the substance of the earth itself; which excludes everyone else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Pufendorf insisting that this right of occupancy is founded upon a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr Locke, and others, holding, that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that favours too much of nice and scholastic refinement! However, both sides agree in this that

30 *Commentaries on the laws of England* Book Two Ch 1.
31 *Ibid.*
32 *Supra* fn 7 Book VII Ch 4.

occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by anyone else." [33]

All the writers mentioned by Blackstone in this passage expressly or impliedly treat the doctrine of *occupatio* as being *in accordance* with natural law. That attitude clearly betrays the pervasive influence of the Roman jurists on later ages. Blackstone himself (like Plato) makes it clear in the passages quoted earlier that in the ideal state under the rule of natural justice, the land is the general property of all.

Adam Smith, economic philosopher and contemporary of Blackstone, wrote *The wealth of nations*, one of the most influential books of modern times. Smith explains why private ownership of land has become a cornerstone of Western economic policies:

"As soon as the land of any country has all become private property, the landlords, like all other men, love to reap where they have never sowed, and demand a rent even for its natural produce. The wood of the forest, the grass of the field, and all the natural fruits of the earth, which, when land was in common, cost the labourer only the trouble of gathering them, come, even to him, to have an additional price fixed upon them. He must then pay for the licence to gather them; and must give up to the landlord a portion of what his labour either collects or produces. The price of this portion constitutes the rent of land . . ."[34]

At about the same time, Tom Paine reminded his contemporaries that men did not make the earth. It was the value of the improvement only, he said, and not the earth itself, that was individual property. Every proprietor owed to the community a ground rent for the land which he held.

Thomas Jefferson, one of the authors of the Declaration of Independence, and fourth President of the United States of America, saw the earth as a common stock, given for men to work and live on:

"That the lands within the limits assumed by a nation belong to the nation as a body, has probably been the law of every people on earth at some period of their history. A right of property in movable things is admitted before the establishment of government, a separate property in lands not till after that establishment. The right to movables is acknowledged by hordes of Indians surrounding us. Yet by no one of them has a separate property in lands been yielded to individuals."

And John Stuart Mill accused landlords of growing richer in their sleep without working, risking or economising. The increase in the value of land, arising as it did from the efforts of an entire community, should belong to the community and not to the individual who might hold title.

Another American President, Abraham Lincoln, had this to say of land-ownership:

"The land, the earth God gave to man for his home, sustenance and support, should never be the possession of any man, corporation, society, or unfriendly government, any more than the air or water, if as much. An individual, or company, or enterprise requiring land should hold no more than is required for their home and sustenance, and never more than they have in actual use in the prudent management of their legitimate business, and (even) this much should not be permitted when it creates an exclusive monopoly. All that is not used should be held for the free use of every family to make homesteads and to hold them as long as they are so occupied."

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33 *Supra* fn 30.

34 *The wealth of nations* (Modern Library Edition) 49, quoted in *The wisdom of Adam Smith* (1976) 105.

Even a confirmed positivist like Herbert Spencer proclaimed that equity does not permit private property in land. He wrote:

> "For if *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held; and eventually the whole of the earth's surface may be so held; and our planet may thus lapse altogether into private hands. Observe now the dilemma to which this leads. Suppose the entire habitable globe to be enclosed; it follows that if the landowners have a valid right to its surface, all who are not landowners have no right at all to its surface. Hence, such can exist on the earth by sufferance only. They are all trespassers. Save by the permission of the lords of the soil, they can have no room for the soles of their feet . . . Passing from the consideration of the possible to that of the actual, we find yet another reason to deny the rectitude of property in land. It can never be pretended that the existing titles to such property are legitimate. Should anyone think so, let him look in the chronicles. Violence, fraud, the prerogative of force, claims of superior cunning – these are the sources to which those titles may be traced. The original deeds were written with the sword rather than with the pen . . . Could valid claims be thus constituted? Hardly, and if not, what becomes of the pretensions of all subsequent holders of estates so obtained? Does sale or bequest generate a right where it does not previously exist? Would the original claimants be nonsuited at the bar of reason because the thing stolen from them had changed hands? Certainly not. And if one act of transfer can give no title, can many? No: though *nothing* be multiplied forever, it will not produce *one*. Even the law recognizes this principle."[35]

Shades of Blackstone! The principle referred to at the end of this passage is the *nemo plus iuris* rule, which is, of course, very much part of South African law. Spencer adds that it is futile for the landowner to call in aid the laws of prescription, in order to legitimate his title, for "how long does it take for what was originally a wrong to grow into a right?"

Leo Tolstoy, an ardent champion of Henry George, wrote that the possession of land by people who do not use it is immoral – just like the possession of slaves. Here Tolstoy directly echoes George's own view that, in allowing one man to own the land on which and from which other men must live, we have made them his bondsmen in a degree which increases as material progress goes on. It is this, according to George, that turns the blessings of material progress into a curse.

No one in the twentieth century has been more outspoken in his condemnation of land monopoly and speculation than Winston Churchill. The passage quoted at the head of this article amply illustrates his views. Churchill, however, was careful to qualify his words:

> "[W]hen I speak of the land monopolist, I am dealing more with the process than with the individual land owner who, in most cases, is a worthy person utterly unconscious of the character of the methods by which he is enriched. I have no wish to hold any class up to public disapprobation. I do not think that the man who makes money by unearned increment in land is morally worse than anyone else who gathers his profit where he finds it in his hard world under the law and according to common usage. It is not the individual I attack; it is the system. It is not the man who is bad; it is the law which is bad. It is not the man who is blameworthy for doing what the law allows and what other men do; it is the State which would be blameworthy were it not to endeavour to reform the law and correct the practice. We do not want to punish the landlord. We want to change the law."[36]

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35 *Social statics* (1850).

36 From a speech in the House of Commons 1909.

It is time to draw conclusions. The views presented in this article plainly suggest that from earliest antiquity until the present day, there has existed in natural law a prohibition on the permanent, individual appropriation of land. That prohibition is founded on the fact that land is not a product of human exertion. It follows that other grounds must be found to justify individual ownership of land. Those most commonly advanced are priority of occupation (*occupatio*), conquest, inheritance, donation, purchase, custom and the making of improvements. None of these grounds has the validity of self-evident truth, yet for reasons of practical necessity (as explained, for example, by Blackstone) they are frequently invoked in systems of positive law to legitimate ownership of land by individuals.

Contrary perhaps to the dominant trend of modern juristic thinking, it is taken for granted in this article that natural law is immutable and inexorable: when her precepts are obeyed, we flourish; when they are ignored, we suffer. Thus, in the late twentieth century, we witness the plight of millions who in vain seek access to land. The land is there all right, but much of it lies idle in private hands. The fruits of this violation of natural justice are widespread starvation and misery. For that situation, as Churchill points out, the system is more to blame than the landowner himself. Should not, then, the primary responsibility for the plight of the landless be borne, even at a distance of two thousand years, by the Roman jurists who bestowed their sanction on the private ownership of land?

While natural justice frowns on private ownership of land, there is no objection to private possession or private occupation of land – indeed this is vitally necessary in order to safeguard the right to improvements. Henry George, it is submitted, is right in asserting that the only effective way to achieve justice among men in relation to land is to require each landholder to pay the community for the privilege of exclusive possession and use.[37] Fundamental legal reform of this nature can, of course, be brought about only by means of legislation.

But let Rudyard Kipling have the last, flippant word:

"Georgii Quinti Anno Sexto, I, who won the
River – field,
Am fortified with title-deeds, attested,
signed and sealed,
Guaranteeing me, my assigns, my executors
and heirs,
All sorts of powers and profits which – are
neither mine nor theirs."

A DOMANSKI
University of the Witwatersrand

37 See fn 11.

VONNISSE

DIE MANDAMENT VAN SPOLIE EN *QUASI*-BESIT

Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 1 SA 508 (A)

1 Inleiding

Sedert die uitsprake in beslissings soos *Jansen v Madden* 1968 1 SA 81 (GW), *Van Wyk v Kleynhans* 1969 1 SA 221 (GW) en *Beukes v Crous* 1975 4 SA 215 (NK) het die toepassing van die mandament van spolie in gevalle waar die uitoefening of sogenaamde *quasi*-besit van 'n reg ter sprake was heelwat belangstelling en kommentaar uitgelok. (Sien bv uitsprake soos *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 1 SA 230 (OK); *Naidoo v Moodley* 1982 4 SA 82 (T); *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W); *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 3 SA 218 (K); asook Van der Walt "Three cases on the mandament van spolie" 1983 *SALJ* 689–699; Van der Walt "Vonnisbespreking: *Naidoo v Moodley* 1982 4 SA 82 (T)" 1983 *THRHR* 237–240; De Waal "Vonnisbespreking: *Naidoo v Moodley* 1982 4 SA 82 (T)" 1984 *THRHR* 115–118; Van der Walt "Nog eens *Naidoo v Moodley* – 'n repliek" 1984 *THRHR* 429–439; Sonnekus "Mandament van spolie – kragtige remedie by kragonderbreking?" 1985 *TSAR* 331–338; Van der Walt "Toepassing van die mandament van spolie op onroerende sake" 1986 *TSAR* 223–232; Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (LLD-proefskrif UP 1986) 390–396; Van der Walt *Die ontwikkeling van houerskap* (LLD-proefskrif PU vir CHO 1986) 682–684; Kleyn "Die betekenis van die begrip 'spolie' " 1986 *De Jure* 279–292; Van der Merwe *The law of things 27 LAWSA* par 78 71–72; Olivier, Pienaar en Van der Walt *Sakereg studentehandboek* (1989) 236–238.) Die ingewikkeldheid en betekenis van hierdie probleemgeval is onlangs opnuut beklemtoon deur die uitspraak van die appèlafdeling in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A). In die lig van hierdie uitspraak is dit geregverdig om die kwessie weer onder die loep te neem.

2 Feite

Die feite in hierdie saak is nogal tipies van die gevalle waarin die onderhawige probleem gewoonlik na vore kom. Die munisipaliteit van Otavi het vir etlike dekades voor 1986 water uit die Otavifontein na 'n opgaartenk gepomp, vanwaar dit na die dorp gelei en aan die inwoners van die dorp voorsien is. Die fontein is op 'n plaas naby die dorp geleë. Gedurende 1986 het die appellant, aan wie die plaas sedert 1982 behoort, die vloei van die water na die opgaartenk afgesny.

Die munisipaliteit het aansoek gedoen om 'n bevel waardeur die appellant gelas sou word om "onmiddellik en *ante omnia*" die vloei van water na die opgaartenk te herstel. So 'n bevel is deur die hof *a quo* verleen. Die uitspraak onder bespreking is gegee nadat die appellant teen die bevel geappelleer het.

3 Uitspraak

In sy uitspraak wys appèlregter Hefer (511G–H) daarop dat die betoë van die regsverteenwoordigers vir doeleindes van die appèl grotendeels oor die bewys van 'n serwituut gehandel het. Appellant se regsverteenwoordiger het aangevoer dat die respondent die bestaan van 'n serwituut moes bewys alvorens die bevel aan hom verleen kon word, terwyl die advokaat van die respondent geargumenteer het dat bewys van sodanige serwituut nie nodig was nie. In die loop van sy uitspraak laat appèlregter Hefer hom oor verskeie aspekte van hierdie geskil uit, die belangrikste waarvan soos volg opgesom kan word:

a Die hof aanvaar "dat 'n reg, hoewel onliggaamlik, nogtans vatbaar is vir besit – wat natuurlik as *quasie*-besit verstaan moet word" (514D). Daar word ook aanvaar "dat die begrip van die besit van 'n reg in die vorm van *quasie possessio* vir eeue reeds aanvaar word en ook deur hierdie Hof aanvaar is" (515C). Die hof benadruk dat hierdie benadering histories regverdigbaar is, dat dit deur die Suid-Afrikaanse howe gevolg word, en dat daar eintlik nie verder hieroor gedebatteer kan word nie (515C–516C). In hierdie verband word die teenoorgestelde standpunt, soos ingeneem deur Sonnekus (*Sakereg vonnisbundel* (1980) 54; 1985 *TSAR* 335), uitdruklik verwerp.

b Die hof verwerp die standpunt dat die applikant die bestaan van 'n serwituut moet bewys alvorens hy op die verlening van 'n herstelbevel geregtig is (513B e v). Dit word duidelik gestel dat aandrang op bewys van die bestaan van 'n serwituut 'n "drastiese afwyking van aanvaarde beginsels behels" (513G). Dit sal naamlik meebring dat die hof op die meriete van die geskil moet ingaan, 'n benadering wat in die lig van die aard en karakter van die remedie onaanvaarbaar is. In hierdie verband word die teenoorgestelde standpunt, soos dit in *Jansen v Madden* 1968 1 SA 81 (GW) en *Beukes v Crous* 1975 4 SA 215 (NK) ingeneem is, uitdruklik verwerp (514C).

c Oor die praktiese toepassing van hierdie benadering bevind die hof dat "die daadwerklike gebruik van 'n beweerde serwituut die plek van die besit van 'n liggaamlike saak" neem (514I). Hierdie aanpassing word genoodsaak deur die feit dat 'n sogenaamde onliggaamlike saak (of 'n reg), soos 'n serwituut, nie vatbaar is vir fisiese "besit" in dieselfde sin as wat gewoonlik ten aansien van liggaamlike sake bedoel word nie – vandaar ook die uitdrukking "*quasi*-besit". In hierdie verband word die teenoorgestelde benadering, soos gevolg in die *Jansen*- en *Beukes*-beslissing hierbo, verwerp ten gunste van die benadering wat in *Van Wyk v Kleynhans* 1969 1 SA 221 (GW) en *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 3 SA 218 (K) gevolg is.

Op grond van bogenoemde oorwegings kom die hof tot die gevolgtrekking dat dit in hierdie omstandighede nie vir die applikant nodig is om die bestaan van 'n serwituut te bewys nie, en dat die *status quo* wat met behulp van die mandament van spolie herstel moet word, bestaan in die daadwerklike uitoefening van "die bevoegdhede van 'n serwituuthouer" (516G). Verskeie aspekte

van hierdie baie interessante en belangrike uitspraak verdien verdere aandag en kommentaar.

4 Kommentaar

4 1 Inleiding

In beginsel kan daar nie met hierdie uitspraak enige fout gevind word nie; die appèlafdeling se gesaghebbende uitspraak oor hierdie omstrede kwessie moet verwelkom word (vgl Van der Walt 1983 *SALJ* 690–691; 1986 *TSAR* 230–232; Olivier, Pienaar en Van der Walt 236–238). Nogtans is daar 'n aantal teoretiese en terminologiese aspekte van die uitspraak wat, al is dit bloot ter opheldering of ter wille van duidelikheid, nader toegelig moet word.

*4 2 Historiese aanvaarbaarheid van die begrip "*quasi-*besit"*

In sy uitspraak aanvaar appèlregter Hefer tereg dat die kwessie van sogenaamde *quasi*-besit van regte (of sogenaamde onliggaamlike sake) vir die aanvaarbaarheid en praktiese hantering van hierdie vraagstuk fundamenteel is (514D). Die uitspraak beliggaam, soos hierbo reeds aangedui is, die appèlafdeling se gesaghebbende bevinding oor hierdie vraagstuk: die gedagte dat (sekere) regte as onliggaamlike sake beskou kan word en as sodanig die voorwerp van *quasi*-besit vir doeleindes van die mandament van spolie kan wees, is histories geregverdig, deeglik in die Suid-Afrikaanse regspraak ingeburger, en daarom nie eintlik vir verdere debat vatbaar nie (515C-516C). Op grond van die bronne deur die hof aangehaal, en meer spesifiek op gesag van Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (1986) 390–396 se bevindinge met betrekking tot die beskerming van *quasi*-besit deur middel van die mandament van spolie, moet hierdie aspek van die hof se uitspraak onderskryf word. (Sien in hierdie verband verder Wesener "Zur Dogmengeschichte des Rechtsbesitzes" in *Festschrift für Walter Wilburg zum 70. Geburtstag* (1975) 453–476, waarin die geskiedenis en ontwikkeling van *quasi possessio* volledig ondersoek word. Kleyn se gevolgtrekkings word hierdeur gestaaf.) Op grond van die uitspraak onder bespreking kan daar dus tans aanvaar word dat die konsep "*quasi*-besit" ten aansien van regte (of sogenaamde onliggaamlike sake) vir doeleindes van die mandament van spolie in die Suid-Afrikaanse reg ingeburger is. In die volgende afdeling van hierdie bespreking sal egter geargumenteer word dat die presiese inhoud en omskrywing van die sogenaamde *quasi*-besit van onliggaamlike sake wat hier ter sprake is nog onduidelik is, en dat dit wel verdere analise en debat regverdig.

*4 3 Die inhoud van die konsep "*quasi-*besit"*

Dit is een ding om te aanvaar dat regte of sogenaamde onliggaamlike sake vir doeleindes van die mandament van spolie "besit" kan word (in die vorm van *quasi*-besit), maar dit is 'n ander saak om presies te verduidelik wat die *quasi*-besit van onliggaamlike sake inhou. In hierdie verband bestaan daar in die Suid-Afrikaanse reg 'n lang tradisie van swak formulering en onakkurate omskrywing.

Die belangrikste voorbeeld van swak formulering hou verband met die *regte* en *bevoegdhede* waarop *quasi*-besit betrekking sou hê. Hierdie formulering berus grotendeels op gemeenregtelike terminologie. Die *locus classicus* oor die mandament van spolie (*Nino Bonino v De Lange* 1906 TS 120 122) kan as die

beginpunt van hierdie tradisie beskou word. In hierdie uitspraak is Leyser (*Meditationes ad pandectas* (1772–1973) vol 7 *specimen* 504 par 1) se definisie van e mandament van spolie as gesaghebbend aangehaal ("id actum illicitum, quo possessio aliena sive rei mobilis, sive immobilis, sive juris, quocunque modo intervertitur"), en hoofregter Innes se interpretasie daarvan ("any illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property or even in regard to a legal right") moet gesien word as die bron van die terminologiese onsuiwerheid wat tot vandag toe op hierdie gebied heers. In hoofregter Innes se omskrywing kom die woord "right" tweemaal voor: eers met verwysing na die applikant se sogenaamde "right of possession" en dan met verwysing na sy sogenaamde besit van 'n "legal right". In die eerste geval is die woord "right" natuurlik heeltemal onvanpas, aangesien dit by die toepassing van die mandament van spolie juis nie om die handhawing van regte (op besit) gaan nie, maar oor die herstel van 'n onregmatig versteurde *feitelike* besit (beheer), ongeag die vraag of die applikant 'n reg op die versteurde besit gehad het of nog steeds het (sien die bekende aanhaling van Innes HR self op dieselfde bladsy van die betrokke uitspraak:

> "It is a fundamental principal 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* and will do that as a preliminary to any inquiry or investigation into the merits of the dispute").

Die tweede verwysing na "legal rights" het betrekking op die regte wat deur middel van *quasi possessio* "besit" kan word. In die *Nino Bonino*-saak is daar nie verder oor hierdie regte uitgebrei nie, maar in al die belangrike beslissings wat sedertdien oor hierdie onderwerp gehandel het, is hoofregter Innes se formulering as uitgangspunt geneem.

In *Nienaber v Stuckey* 1946 AD 1049 1055 is die riglyne vir die toepassing van die mandament van spolie op *quasi*-besit van regte neergelê: die uitspraak in die *Nino Bonino*-saak (en gemeenregtelike skrywers soos Wassenaer en Voet) word aangehaal as gesag vir die stelling dat "the possession of incorporeal rights is protected against spoliation" (1056). Die belang van hierdie interpretasie is daarin geleë dat dit nie op die kwessie van daadwerklike fisiese beheer oor 'n liggaamlike saak fokus nie, maar op die sogenaamde *quasi*-besit van 'n reg. In *Nienaber v Stuckey* het appèlregter Greenberg (1056–1057) weliswaar in sy toepassing na daadwerklike beheer oor 'n liggaamlike saak verwys, en die kwessie van *quasi*-besit van 'n reg eintlik net gebruik om aan te voer dat die beheer ten aansien van die liggaamlike saak nie eksklusief hoef te wees nie. In sy gevolgtrekking keer hy egter na die terminologie van hoofregter Innes terug om te bevind dat "the appellant was in possession of the right of access through the gate of which he has been deprived, and the remedy is therefore available" (1059). Hierdie benadering word daarna teruggevind in beslissings soos *Sebastian v Malelane Irrigation Board* 1950 2 SA 690 (T) 693 694 ("possession of the use of water", "possession of an incorporeal right"); *Painter v Strauss* 1951 3 SA 307 (O) 312A 318H ("peaceful and undisturbed possession of the property and rights above referred to", "unlawful deprivation of applicant's possession of a right"); *Jansen v Madden* 1968 1 SA 81 (GW) 83H–84A ("the servitutal right which is protected against dispossession"); *Van Wyk v Kleynhans* 1969 1 SA 221 (GW) 222H ("ongestoorde besit van die reg . . . om die pad te gebruik"); *Beukes v Crous* 1975 4 SA 215 (NK) 218F ("by onliggaamlike sake ontstaan

verwarring soms tussen 'n onbetwisde reg, en wat slegs aanspraak op 'n reg is"); *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 1 SA 230 (OK) 233E ("Deprivation of possession may found a spoliation order even where an incorporeal right is invaded"); *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W) 610I ("deprivation of applicant's right to obtain water and electricity"); *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 3 SA 218 (K) 221F 222A ("*quasi*-possession of the incorporeal right to occupy part of the land"); asook in die beslissing onder bespreking ("aanvaar word dat 'n reg, hoewel onliggaamlik, nogtans vatbaar is vir besit – wat natuurlik as *quasie*-besit verstaan moet word" (514D)).

Samevattend kan gesê word dat die howe sedert die *Nino Bonino*- en *Nienaber*-saak 'n tradisie gevestig het waarvolgens die toepassing van die mandament van spolie in sekere gevalle verduidelik word ooreenkomstig die beskerming van sogenaamde *quasi*-besit van regte of sogenaamde onliggaamlike sake. Terminologies gesproke word daar in hierdie gevalle nie na die daadwerklike fisiese gebruik of okkupasie van 'n (liggaamlike) saak verwys nie, maar slegs na die sogenaamde *quasi*-besit van die reg (of onliggaamlike saak) waarmee die tersaaklike gebruiks- of okkupasiehandelinge gewoonlik geassosieer word. Die benadering in sommige hofsake waarvolgens die hof bewys van die bestaan van die betrokke reg geverg het (vgl veral *Jansen v Madden* 1968 1 SA 81 (GW) 83H-84C en *Beukes v Crous* 1975 4 SA 215 (NK) 218G–219A) moet teen die agtergrond van hierdie terminologies verwarrende en onsuiwer verklaring gesien word, en berus eintlik op die verwarring wat deur die howe se onakkurate formulering veroorsaak word.

Die korrekte benadering, wat inhou dat die applikant nie die bestaan van die reg nie maar bloot die daadwerklike uitoefening van die handelinge wat gewoonlik met sodanige reg gepaard gaan, moet bewys, is deur die uitspraak onder bespreking gevolg (516E–G). Hierdie benadering is egter steeds nie in ondubbelsinnige terminologie uitgedruk nie. Selfs in die enkele uitsprake waarin die benadering min of meer korrek verduidelik is, bestaan daar 'n mate van terminologiese verwarring en onduidelikheid. Daar is reeds hierbo verwys na die voorbeeld in *Nienaber v Stuckey*, waar die hof in feite heeltemal korrek ondersoek instel na die applikant se daadwerklike uitoefening van beheershandelinge ten aansien van die betrokke saak, waardeur sy feitelike gebruik van die "reg" aangedui word. Nogtans klee die hof sy uiteindelike bevinding in die gebruiklike terminologie in deur te stel dat die applikant "in besit van die reg" was. In *Painter v Strauss* word daar ook vasgestel dat die applikant die betrokke sake inderdaad feitelik gebruik het, maar weer word die gebruik uiteindelik as "besit van 'n reg" beskryf. Die een duidelike beslissing in hierdie verband is *Bennett Pringle v Adelaide Municipality*, waarin die feite waardeur *quasi*-besit aangedui word met heelwat groter omsigtigheid omskryf word: die applikant se sogenaamde *quasi*-besit van 'n reg word naamlik deur die hof herlei na fisiese handelinge en *gebruik van die liggaamlike saak* waarop die betrokke reg normaalweg betrekking het (sien veral 237B–D, F–G). Dieselfde meer genuanseerde benadering word in die *Ntshwaqela*-saak aangetref, waar die daadwerklike okkupasie en *gebruik van 'n liggaamlike saak* die uitgangspunt is.

In enkele gevalle is die terminologiese onsuiwerheid en verwarring selfs nog verder gevoer as wat voorheen die geval was. In hierdie sake word die toepassing van die mandament van spolie nie net een keer van die werklikheid van fisiese

beheer verwyder deur dit *quasi*-besit van onliggaamlike sake te noem nie, maar word die verwydering in werklikheid verdubbel deur te verwys na die bevoegdhede van die reghebbende (sien die uitspraak onder besprekking 514D 516G). Bevoegdhede is handelinge wat 'n regsubjek ten opsigte van 'n regsobjek kan uitvoer op grond van sy subjektiewe reg op daardie saak, en sonder die bestaan van die reg kan daar geen sprake van bevoegdhede wees nie. Om te sê dat die applikant die bevoegdhede van 'n serwituuthouer uitgeoefen het, versterk dus die verkeerde indruk dat die applikant die bestaan van die reg sal moet bewys. Die stelling dat die applikant die bevoegdhede van die serwituuthouer uitgeoefen het "onder die indruk dat hy dit uit hoofde van 'n serwituut doen" (516G in die uitspraak onder bespreking) beteken natuurlik ook nie dat die applikant se *bona fide* misvatting in hierdie verband enigiets met die verlening van die remedie te make het nie. Inteendeel, die aan- of afwesigheid van *bona fides* is vir die verlening van die mandament irrelevant, en die applikant sou die remedie ook kon bekom selfs al was hy daarvan bewus dat hy nie oor die betrokke serwituut beskik nie (sien daaroor verder Van der Walt "Defences in spoliation proceedings" 1985 *SALJ* 172–180, veral 174–175). Daarom behoort enige verwysings na bevoegdhede in uitsprake soos hierdie absoluut vermy te word.

Bogenoemde beswaar teen die gebruik van die term "bevoegdheid" geld streng gesproke egter ook teen die gebruik van die term "regte" of "onliggaamlike sake" in dieselfde konteks. In werklikheid bestaan daar nie iets soos onliggaamlike sake nie; die begrip word slegs gebruik om aan te dui dat bepaalde kenmerke of funksies van regte op (liggaamlike) sake oordragtelik ten aansien van ander regte (en veral vorderingsregte) gebruik word. (Vgl in hierdie verband die pandkonstruksie by sessie *in securitatem debiti*, wat 'n duidelike voorbeeld van sodanige oordragtelike gebruik van sakeregtelike terminologie bied: sien Scott "Verpanding van vorderingsregte - uiteindelik sekerheid?" 1987 *THRHR* 175–194.) By nadere analise blyk egter dat dit nie ten aansien van die beskerming van *quasi*-besit van sogenaamde onliggaamlike sake die geval is nie. Indien beskerming van *quasi*-besit van regte deur middel van die mandament van spolie werklik 'n uitbreiding van die sakeregtelike beginsels ten aansien van daadwerklike saakbeheer na *quasi*-besit van vorderingsregte was, sou Sonnekus (1985 *TSAR* 333 337) se besware daarteen inderdaad geregverdig wees, en dan sou sy besware ook nie so summier van die tafel gevee kon word as wat in die onderhawige uitspraak gedoen is nie (515C 516E). Dit sou naamlik impliseer dat die mandament van spolie uitgebrei word om die beskerming van vorderingsregte in te sluit – 'n gevolg waarteen daar grondige besware bestaan. Daar is egter net enkele uitsprake waarin die mandament van spolie werklik vir die beskerming van vorderings- of ander nie-sakeregtelike regte, sonder enige sprake van 'n onderliggende fisiese beheersverhouding, aangewend is (twee sodanige uitsprake word in die hofsaak onder bespreking aangehaal: sien *Shapiro v South African Savings & Credit Bank* 1949 4 SA 985 (W); *Guman v Latib* 1965 4 SA 715 (A)). Hierdie uitsonderlike sake is ook, vir sover dit werklik die mandament verleen vir die beskerming van regte waarby geen onderliggende fisiese beheersverhouding ter sprake is nie, verkeerd beslis. Dit blyk duidelik uit die meerderheid toepaslike uitsprake dat dit in die sogenaamde *quasi*-besit-gevalle nie werklik om die handhawing van *quasi*-besit van 'n reg handel nie, maar om die

handhawing van daadwerklike fisiese beheer van 'n (liggaamlike) saak in omstandighede en in 'n vorm waarin die betrokke beheer normaalweg met die bestaan van 'n reg (meesal 'n serwituut) geassosieer word.

Die bewys vir hierdie stelling, en die aanknopingspunt vir oplossing van die probleem, is in die onderhawige uitspraak aanwesig. In sy uitspraak maak appèlregter Hefer naamlik die volgende stelling:

> "In die samehang van die mandament van spolie neem, soos later sal blyk, die daadwerklike gebruik van 'n beweerde serwituut die plek van die besit van 'n liggaamlike saak" (514I).

Hierdie stelling ontbloot die onakkurate formulering wat hierdie hele probleem ten grondslag lê. 'n Oomblik se nadenke sal bewys dat 'n serwituut nie in die gewone sin van die woord "gebruik" kan word nie, maar dat 'n serwituut juis 'n reg is wat aan die reghebbende die bevoegdheid verleen om 'n saak (die objek van die serwituut) te gebruik. Dit suggereer terselfdertyd die oplossing vir die verwarring: in al hierdie sake waarin die mandament van spolie sogenaamd vir die beskerming van *quasi*-besit van regte verleen is, het dit eintlik ten diepste oor die beskerming van werklike besit (beheer) oor werklike (liggaamlike) sake gegaan; die kwessie van regte of onliggaamlike sake is net bygesleep om uitdrukking te gee aan die feit dat die beheer wat ter sprake was uitsonderlik is: dit gaan inderwaarheid hier nie oor die gewone beheer wat 'n gebruiker oor 'n saak het nie, maar oor die onderbroke en beperkte beheer wat gewoonlik by die gebruik van die dienende saak deur 'n serwituuthouer aangetref word. 'n Serwituuthouer beheer die pad wat hy kragtens die serwituut gebruik naamlik nie so deurlopend of omvattend soos die eienaar of die huurder van die grond nie – hy gebruik maar van tyd tot tyd een deel van die grond vir 'n beperkte doel. Dit is om hierdie onderskeid aan te dui dat die howe (en skrywers) in hierdie omstandighede nie na die beheer oor of gebruik van die pad (of die grond) verwys nie, maar na die gebruik van die reg wat met die serwituuthouer geassosieer word.

Dit wil egter nie sê dat die serwituuthouer, of enigiemand anders wat die pad of ander serwituutobjek op dieselfde manier gebruik, nie daadwerklike beheer oor die (liggaamlike) saak uitoefen nie. Dit staan immers vas dat die beheer wat vir doeleindes van die mandament van spolie vereis word nòg eksklusief nòg omvattend moet wees (sien daaroor die beslissing in *Nienaber v Stuckey supra*; Olivier, Pienaar en Van der Walt 209–216 236–238 en gesag daar aangehaal). Die gewone regsbeginsels wat in hierdie verband geld, bepaal dat die betrokke beheer vir die doel waarvoor dit bestem is (in hierdie geval die verkryging van die mandament van spolie, in teenstelling met ander doeleindes soos eiendomsverkryging of saaklike sekerheid) effektief of voldoende moet wees, en onderbroke gebruik van een deel van 'n saak vir een beperkte doel kan volgens alle aanduidings vir doeleindes van die mandament van spolie effektief wees - dit is juis die strekking van die beslissing in *Nienaber v Stuckey*. Wat dus eintlik deur die gemenereg en die presedente aangedui word, is streng gesproke nie dat *quasi*-besit (daadwerklike uitoefening) van regte deur die mandament van spolie beskerm word nie. Die opvatting is eerder dat die beperkte en onderbroke beheer oor 'n gedeelte van 'n saak wat gewoonlik met die uitoefening van 'n serwituuthouer se serwituutreg geassosieer word voldoende is om vir die beskerming van die mandament van spolie te kwalifiseer, afgesien daarvan of die betrokke handelinge wat daarmee gepaard gaan ook inderdaad in enige besondere geval deur 'n bestaande serwituut gerugsteun word.

So geformuleer, het hierdie stelling bepaalde implikasies vir die toepassing van die mandament van spolie in hierdie gevalle. Die belangrikste implikasies kan soos volg saamgevat word:

a In die eerste plek kan die effektiewe *ratio decidendi* van die uitspraak onder bespreking, naamlik dat dit vir die applikant in sake soos hierdie nie nodig is om die bestaan van die serwituut te bewys nie, onderskryf word. Die bestaan van die serwituut hoef, om die waarheid te sê, nie eers vermeld te word nie aangesien dit die meriete van die geskil ten onregte te berde sou bring (513G).

b Die tweede implikasie is dat die toepassing van die mandament van spolie tot die handhawing van daadwerklike fisiese beheer beperk bly, en dat daar telkens steeds vir die bestaan van 'n onderliggende fisiese beheersverhouding gesoek moet word. In hierdie verband kan appèlregter Hefer se mening dat "die uitoefening van 'n reg" nie altyd "so nou verbonde [is] aan die besit van 'n liggaamlike saak, dat die verlies daarvan beskou kan word as inbreuk op die besit van die saak self" nie, nie ondersteun word nie. Inteendeel, as die nodige onderliggende fisiese beheersverhouding nie bestaan nie is die mandament van spolie nie die korrekte remedie nie. Dit kan nie gebruik word om die handhawing van vorderingsregte (wat geheel en al los van enige onderliggende saakbeheer bestaan) teen inbreukmaking te bewerkstellig nie – daarvoor bestaan daar werklik geen gemeenregtelike gesag of gesaghebbende presedente nie. Dit sou byvoorbeelde ondenkbaar wees dat die mandament van spolie in die onlangse beslissing in *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) gebruik kon word om die respondent se inbreukmaking op die appellant se vorderingsreg te herstel, siende dat die appellant se vorderingsreg nog nooit met enige daadwerklike okkupasie gepaard gegaan het nie (394H). Die lang lys uitsprake en die gemeenregtelike gesag wat in appèlregter Hefer se uitspraak aangehaal word, bied ook net gesag vir die aanwending van die mandament van spolie in gevalle waar die sogenaamde *quasi*-besit van die betrokke reg op daadwerklike fisiese beheers- of gebruikshandelinge ten aansien van 'n (liggaamlike) saak berus.

c In dieselfde konteks is die tersaaklike toepassing van die mandament van spolie streng gesproke geen "uitbreiding" van die normale beginsels nie – dit kan hoogstens as 'n spesifieke kategorie van gevalle gesien word waarin die normale beginsels normaalweg toegepas word. Die gewone vereiste van fisiese beheer (soos hierbo omskryf) met die nodige bedoeling verseker trouens dat daar sprake van 'n onderliggende beheersverhouding moet wees alvorens die remedie gebruik kan word.

d Ten einde die onnodige verwarring en terminologiese onsuiwerheid te vermy, is dit gewens om die regsfiguur wat hier ter sprake is by sy naam te noem; daarom kan die gebruiklike verwysing na *quasi*-besit van regte of onliggaamlike sake gerus laat vaar word. Terwyl die toepassing van die remedie klaarblyklik die bestaan van 'n onderliggende beheersverhouding verg, en terwyl die onderliggende verhouding in alle opsigte aan die gewone beheervereiste van die mandament moet voldoen, kan die toepassing van die mandament in hierdie gevalle net sowel omskryf word vir wat dit is: die beskerming van 'n spesifieke kategorie daadwerklike beheer oor liggaamlike sake (naamlik die kategorie onderbroke en beperkte fisiese beheer wat gewoonlik met die uitoefening van 'n serwituut op grond geassosieer word) teen onregmatige spolie, afgesien van die vraag of die

handelinge wat met die beheer gepaard gaan deur die bestaan van 'n reg ondersteun word of nie.

4.4 Probleemgevalle

Ongelukkig los bogaande analise nie alle probleme op nie. In sommige gevalle bestaan daar 'n verdere probleem waardeur die saak nog verder gekompliseer word. Spesifiek ten aansien van die gebruik van water (wat in die saak onder bespreking aan die orde was) en elektrisiteit ontstaan die vraag waarop die onderliggende beheersverhouding betrekking het. Op die oog af is die geval van water nog makliker, aangesien water (anders as elektrisiteit: sien bv Sonnekus 1985 *TSAR* 337) maklik genoeg as 'n liggaamlike saak beskou kan word. Hierdie oplossing is egter nie so goed as wat dit met die eerste oogopslag voorkom nie, aangesien dit in hierdie gevalle nie oor die spolie van water handel nie (dit sou op een afgesonderde volume water betrek moes word), maar oor die spolie van watervoorsiening. Dieselfde geld in die geval waar elektrisiteitsvoorsiening gespolieer word (vgl die beslissings in *Naidoo v Moodley* 1982 4 SA 82 (T); *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W)). Die oplossing wat tot nog toe deur die howe gevolg is, en wat ook aanvaarbaar voorkom, is om die betrokke versteuring te benader in die konteks van beheer oor die perseel met inbegrip van die toebehore daarvan soos water- en elektrisiteitstoevoer (*Naidoo v Moodley* 1982 4 SA 82 (T) 84B). Hierdie oplossing kan aanvaar word juis omdat dit die saak benader vanuit die vertrekpunt dat dit om die daadwerklike fisiese beheer van 'n liggaamlike saak (die perseel) gaan, en nie om die besit of *quasi*-besit van die reg op water- of elektrisiteitstoevoer nie (*Naidoo v Moodley* 1982 4 SA 82 (T) 84C).

5 Slot

Hoewel daar uiteindelik met die resultaat van die uitspraak onder bespreking saamgestem word, kontinueer die uitspraak ongelukkig die terminologiese en begripsverwarring oor hierdie onderwerp. Dit is dalk onbillik en onrealisties om absolute begripshelderheid en terminologiese suiwerheid van die howe te verwag, maar aan die ander kant kan sommige (oënskynlike) regsprobleme net effektief uit die weg geruim word as die (terminologiese) oorsaak daarvan uitgeskakel word. Daar word gevolglik aan die hand gedoen dat hierdie probleem ter wille van terminologiese duidelikheid suiwerder omskryf en verklaar word. Dit behels dat die begrip "*quasi*-besit van regte" laat vaar en vervang word deur (of ten minste reg verstaan word as) "daadwerklike fisiese beheer in 'n spesifieke vorm, naamlik die beperkte en onderbroke beheer wat gewoonlik met uitoefening van 'n serwituut geassosieer word". Dit impliseer terselfdertyd dat dit baie duidelik gestel moet word dat hierdie begrip slegs vir doeleindes van die mandament van spolie ontwikkel is, en dat dit nie sonder meer in ander kontekste bruikbaar sal wees nie. Daar moet eweneens duidelikheid daaroor bestaan dat die aanvaarbaarheid van hierdie begrip (en die gesag van die uitspraak onder bespreking) nie beteken dat vorderingsregte wat op geen onderliggende fisiese

beheersverhouding (ten aansien van liggaamlike sake) betrekking het nie vir *quasi*-besit vatbaar is en sodoende deur die mandament van spolie beskerm kan word nie.

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NOODTOESTAND OF DWANG: ONDERSKEIBARE BEGRIPPE AS VERWEER BY MOORD

S v Mbanjwa 1988 2 SA 738 (TkAD)

Reeds met die deurlees van die kopstuk in *S v Mbanjwa* word dit duidelik dat die posisie rakende noodtoestand in die Transkei totaal verskil van die posisie in Suid-Afrika. Dit is onder andere die doel van hierdie bespreking om lig op hierdie verskil te werp. Die kwessie rondom noodtoestand word in die Transkei deur wetgewing gereël. Die tersaaklike statutêre bepalings sal aan die hand van die onderhawige appèlhofuitspraak uiteengesit word, waarna die posisie in die Suid-Afrikaanse reg kortliks weergegee sal word. 'n Verdere punt wat ook bespreking noodsaak, is die stand van die Engelse reg in verband met noodtoestand. Die Engelse reg sal onder die soeklig geplaas word om te bepaal in welke mate die Transkeise en die Suid-Afrikaanse reg daarmee ooreenstem. Daar is drie redes waarom die Engelse reg in hierdie verband so belangrik is. Eerstens het die appèlhof in *S v Mbanjwa* (742H–I) daarop gewys dat die Engelse gemenereg ten tyde van die Suid-Afrikaanse beslissing *S v Goliath* 1972 3 SA 1 (A) steeds geweier het om die verweer van noodtoestand by die misdade moord en hoogverraad toe te laat. Tweedens het daar in die Engelse reg oor die afgelope aantal jare heelwat verwikkelinge rondom hierdie kwessie plaasgevind. Derdens bestaan daar 'n duidelike verbintenis tussen die Transkeise strafreg en sowel die Suid-Afrikaanse as die Engelse strafreg. Die statutêre bepalings ten opsigte van onder andere noodtoestand is naamlik afkomstig van die Suid-Afrikaanse Wet 24 van 1886, ook bekend as die Native Territories Penal Code of die Transkeian Penal Code.

Burchell en Hunt *South African criminal law and procedure* (1983) 37 e v wys daarop dat die meerderheid van die bepalings in hierdie kode woordeliks oorgeneem is van die bepalings van 'n kode wat deur Sir James Stephen opgestel is. (Laasgenoemde werk was 'n kodifikasie van die Engelse strafreg wat nooit in Engeland self in werking getree het nie.) Die Engelse strafreg het gevolglik 'n aansienlike invloed op die strafreg in die Transkei gehad.

Voordat die regsposisie in die Transkei bespreek word, moet op 'n belangrike onderskeid gewys word. Die Engelse reg onderskei uitdruklik tussen noodtoestand ("necessity") en dwang ("duress"). "Duress" word beskou as die situasie waar 'n persoon weens die wederregtelike dreigemente van 'n ander 'n misdaad pleeg uit vrees vir sy eie lewe of die lewe van 'n ander, òf uit vrees vir ernstige liggaamlike leed aan homself of 'n ander. Hierteenoor word onder "necessity" verstaan dat 'n persoon in staat is

> "to choose between two courses, one of which involves breaking the criminal law and the other some evil to himself and others of such magnitude that it may be thought to justify the infraction of the criminal law" (Smith en Hogan *Criminal law* (1988) 222).

"Duress" volg egter altyd as gevolg van die *wederregtelike* dreigemente van 'n persoon om 'n ander leed aan te doen. Dit kan in werklikheid beskou word as 'n spesiale verskyningsvorm van "necessity". Alhoewel dwang ook 'n erkende term in die Suid-Afrikaanse reg is, word daar normaalweg deurlopend van noodtoestand gepraat en word noodtoestand en dwang op 'n gelyke basis behandel. Daar sal egter vir doeleindes van hierdie bespreking ook, waar nodig, tussen noodtoestand en dwang onderskei word.

Die feite van *S v Mbanjwa* is kortliks dat die beskuldigde en vier ander daarvan aangekla is dat hulle op 27 Mei 1983 'n vrou vermoor het. Die verhoorhof het die beskuldigde vrygespreek op grond van sy verweer dat hy weens dreigemente teen sy eie lewe en dus as gevolg van dwang aan die moord meegedoen het. Die staat het nie met hierdie beslissing saamgestem nie en die saak het voor die appèlhof van die Transkei verskyn. Die kern van die appèlhof se uitspraak het om twee statutêre bepalings gedraai, naamlik artikel 29 van die Transkeian Penal Code 24 van 1886 (waarna hierbo reeds verwys is) en sy opvolger, artikel 10 van die Criminal Procedure and Evidence Act 9 van 1983 (Tk). Beide die bepalings beperk die toepassingsgebied van die verweer van noodtoestand (met inbegrip van dwang). In die ou artikel 29 is agt misdade gelys waarby die verweer nie toegelaat is nie, onder andere moord, hoogverraad, poging tot moord, roof en brandstigting. (Interessantheidshalwe kan genoem word dat alhoewel "assisting in rape" (bystand by verkragting) in die lys voorkom, verkragting self nie genoem word nie.) In 1983 is die toepassingsgebied van die verweer egter met behulp van die nuwe artikel 10 aansienlik uitgebrei. Dié artikel bevat nou slegs twee misdade waarby die verweer van noodtoestand en dwang nie toegelaat word nie, te wete moord en hoogverraad. Die artikel lui soos volg:

> "No person shall be criminally liable for any offence *other than treason or murder* if the act was done or committed in circumstances of *necessity*."

In sy poging om die bepalings van artikel 10 te omseil, het die verhoorhof van die standpunt uitgegaan dat dit onlogies is om te beweer dat die wetgewer noodtoestand in geval van moord uitsluit, maar dit aan die ander kant toelaat by ewe ernstige misdade soos roof, verkragting en terrorisme. Die bedoeling van die wetgewer was volgens die hof dus nie dat persone wat van moord of hoogverraad aangekla word, beperk moet word tot die verweer van noodtoestand soos omskryf in artikel 10 nie, maar eerder dat sodanige persone ook die verweer ingevolge die gemenereg kan opwerp. Op grond van die verweer soos dit in die gemenereg staan, is die beskuldigde dus deur die verhoorhof vrygespreek. Die appèlhof het hierdie standpunt egter verwerp. Die bewoording van artikel 10 is volgens die appèlhof duidelik en ondubbelsinnig (714H) en daar is verder geen verskil tussen die omskrywing van noodtoestand in artikel 10 en die omskrywing van die verweer in die gemenereg nie (742F). Die bepaling is geensins onlogies nie, veral in die lig van die feit dat die gemenereg van Engeland in 1972 (ten tyde van *S v Goliath* 1972 3 SA 1 (A)) steeds geweier het om die verweer by hierdie misdade te erken (742H–I). Die appèlhof het gevolglik beslis dat die beskuldigde nie vrygespreek moes geword het nie. Na aanleiding van hierdie uitspraak kan die posisie in die Transkei soos volg saamgevat word: noodtoestand (met inbegrip van dwang) word wel as verweer erken, behalwe by aanklagte van moord en hoogverraad. Word 'n persoon dus, soos die beskuldigde in *S v*

Mbanjwa, van moord of hoogverraad aangekla, kan hy nie die feit dat hy byvoorbeeld uit vrees vir sy eie lewe opgetree het as verweer teen die aanklag opwerp nie.

Wat die Suid-Afrikaanse strafreg betref is daar danksy *S v Goliath* 1972 3 SA 1 (A) geen onsekerheid nie. Voor 1972 was die regsposisie in 'n mate onseker en dit wil voorkom of die howe geneig was om nie noodtoestand of dwang as verweer by 'n aanklag van moord te aanvaar nie (vgl *S v Bradbury* 1967 1 SA 387 (A)). In 1972 het die appèlhof egter in *Goliath supra* beslis dat dwang in bepaalde omstandighede wel as 'n volkome verweer op 'n aanklag van moord kan geld (27D–E). Alhoewel regter Rumpff hom in sy uitspraak nie uitdruklik uitgelaat het oor die vraag of dwang 'n regverdigingsgrond (wat wederregtelikheid uitsluit) dan wel 'n skulduitsluitingsgrond is nie, is daar 'n ooglopende ooreenkoms tussen die algemene toets vir wederregtelikheid en die maatstawwe wat hy gebruik om by die uiteindelike bevinding uit te kom (vgl 11E–F 25A–E 25H) Dit is 'n goed gemotiveerde uitspraak wat selfs in die buiteland heelwat aansien geniet: die uitspraak is onder andere met goedkeuring in sake soos *DPP v Lynch* 1975 AC 635 en *R v Graham* 1982 1 All ER 801 805 aangehaal. Ten spyte van kritiek (vgl Pauw "Doodslag en noodtoestand - die Suid-Afrikaanse en Engelse reg" 1977 *De Jure* 77–78), is die *Goliath*-saak hoofsaaklik verwelkom (vgl bv Snyman *Strafreg* (1983) 99 e v) en onlangs weer in *S v Peterson* 1980 1 SA 938 (A) bevestig. Daar kan egter nie van die Suid-Afrikaanse reg afgestap word sonder 'n verwysing na *S v Bailey* 1982 3 SA 772 (A) nie. Hierdie was 'n klassieke tronkmoord-geval. Die beskuldigde is egter aan strafbare manslag skuldig bevind aangesien hy opgetree het onder dwang wat van so 'n aard was dat 'n redelike persoon nie daaronder sou geswig het nie. Die verhoorhof het bevind dat alhoewel die beskuldige *bona fide* geglo het dat sy lewe in onmiddellike gevaar was, hierdie vrees nie redelik was nie en dat hy gevolglik nalatig was. Die appèlhof meld dat in sekere omstandighede daar wel 'n afwesigheid van wederregtelikheidsbewussyn kan wees by 'n persoon wat onder dwang optree, maar bevind dat dit nie in die beskuldigde se geval so was nie (796H). Die beskuldigde het dus ondanks sy vrees wel wederregtelikheidsbewussyn gehad. Verder weier die hof om doodslag met opset (waarby wederregtelikheidsbewussyn dus ingesluit is) anders as moord te beskou of om vir doeleindes van skuldigbevinding grade van verwytbaarheid by sodanige opset te onderskei (799B). Die appèlhof bevind dus dat aangesien die beskuldigde opsetlik (d w s ook met wederregtelikheidsbewussyn) opgetree het, hy aan moord skuldig bevind moet gewees het (799D). Die hof bevestig egter ook dat wanneer 'n persoon as gevolg van dwang sonder wederregtelikheidsbewussyn 'n ander se lewe neem, hy wel soms aan strafbare manslag skuldig bevind kan word. Dit sal klaarblyklik die geval wees waar die beskuldigde nalatig was. In die Suid-Afrikaanse strafreg kan noodtoestand, met inbegrip van dwang, dus as volkome verweer by *enige* misdaad geld.

Die Engelse strafreg het volgens die Transkeise appèlhof in die *Mbanjwa*-saak (742H–I) in die stadium toe die *Goliath*-saak *supra* beslis is, geweier om dwang as verweer by moord en hoogverraad te aanvaar. Aangesien dit egter 'n aanduiding van die posisie in 1972 is, het die vraag ontstaan of dit steeds die stand van sake is. Kom die Engelse strafreg met ander woorde steeds ooreen met die posisie in Transkei, soos hierbo uiteengesit, of het daar sedertdien 'n verandering in die Engelse reg in hierdie verband plaasgevind? Dat daar wel tot 1979 heelwat verwikkelinge rondom die kwessie van doodslag weens dwang was, blyk duidelik

uit Van der Westhuizen se proefskrif *Noodtoestand as regverdigingsgrond in die strafreg* (1979) 637-660. Uit sy volledige uiteensetting van die posisie in die Engelse reg blyk duidelik dat die Engelse reg besig was om in 'n rigting te beweeg waarin dwang wel as verweer aanvaar sou word op 'n aanklag van moord. Die hooftrekke van hierdie ontwikkeling tot in 1979 is kortliks soos volg: Alhoewel daar geen direkte gesag van die House of Lords was oor die vraag of dwang as verweer beskikbaar is vir die persoon wat die daad veroorsaak het (die dader) nie, was daar tog twee belangrike uitsprake. In *DDP v Lynch* 1975 AC 653 is die beskuldigde aan moord skuldig bevind as 'n "principal in the second degree", dit wil sê 'n persoon wat *teenwoordig* is tydens die pleging van die moord en daarmee *behulpsaam* is alhoewel hy die dood nie regstreeks veroorsaak nie. (Afhangende van die omstandighede kan so 'n persoon in die Suid-Afrikaanse reg selfs as mededader skuldig bevind word.) Die House of Lords het met 'n skrale meerderheid beslis dat die verweer van dwang wel tot die beskuldigde se beskikking was. Die Geheime Raad was egter nie bereid om in *Abbot v The Queen* 1977 AC 755 die beskikbaarheid van die verweer uit te brei na die beskuldigde wat as "principal in the first degree", oftewel as dader, by die moord betrokke was nie. Baie stemme het ná hierdie uitspraak opgegaan omdat die posisie allesbehalwe helder en ondubbelsinnig was. Die belangrikste pleidooi vir 'n algemene aanvaarding van die verweer is deur die Britse regskommissie gelewer. Reeds in 1974 het hulle voorgestel dat die verweer so gedefinieer behoort te word dat dit ook beskikbaar kan wees vir persone wat andersins aan moord of hoogverraad skuldig sal wees (*Working Paper No 55* (1974) 18). Hierdie standpunt het hulle weer in 1977 herhaal ten spyte van die uitspraak in die *Abbott*-saak *supra* (*Law Commission Report No 83* (1977) par 2 42). In 1979 was die posisie in die Engelse strafreg dus dat die verweer by moord wel beskikbaar was vir die "principal in the second degree", maar nog nie vir die werklike dader nie. Na die verskyning van Van der Westhuizen se proefskrif *supra* het die posisie soos daarin uiteengesit egter nie onveranderd gebly nie. Baie kritiek is gelewer teen die standpunt dat, vir die toelaatbaarheid van dié verweer by moord, 'n onderskeid tussen die dader en "medepligtige" gemaak moet word. Dennis ("Duress, murder and criminal responsibility" 1980 *LQR* 208) beskryf die situasie soos volg:

> "In England, at least, these issues have been judicially resolved to produce what can only be described as a remarkable state of law."

In sy bespreking van die *Abbott*-saak *supra* kom Dennis tot die gevolgtrekking dat die redes wat deur die hof aangevoer is waarom die uitspraak in *Lynch supra* nie verder uitgebrei behoort te word nie, nie steek hou nie. Die redes waarom die verweer toegelaat word by 'n "principal in the second degree", geld volgens hom ewegoed vir die "principal in the first degree". Hy lewer verder 'n oortuigende pleidooi dat die verweer algemeen aanvaar behoort te word. Hierdie benadering het ook in die praktyk inslag begin vind. In *R v Graham* 1982 1 All ER 801 word 'n aanduiding gegee dat die uitspraak in *Lynch supra* (verweer toegelaat) verkies behoort te word. Die feite van die saak was kortliks dat die beskuldigde, nadat hy sy vrou op bedrieglike wyse na hulle woonstel gelok het, sy homoseksuele vriend gehelp het om haar met 'n koord te verwurg. Elkeen van hulle het aan 'n punt van die koord getrek en was dus mededaders. Die staat het toegegee dat die beskuldigde die verweer van dwang kon opper en het nie aangevoer dat dit nie beskikbaar is vir die dader by moord nie. Die beskuldigde is egter wel deur die jurie aan moord skuldig bevind aangesien hy nie

voldoen het aan die redelikheidsmaatstawwe wat by die verweer van toepassing is nie. Alhoewel die appèlhof van mening was dat daar op die feite moontlik nie werklik dwang was nie (806g-h), spreek die hof hom nêrens uit teen die staat se siening dat die verweer ook vir die dader by moord beskikbaar is nie. Soos in die *Lynch*-saak *supra*, verwys die hof ook met klaarblyklike goedkeuring na *S v Goliath supra* (805a–b). Die enigste beperking wat die hof uitdruklik op die verweer plaas, is dat die toets of die verweer slaag al dan nie, 'n objektiewe maatstaf in die vorm van redelikheid moet bevat (806c). Die beskuldigde se appèl is van die hand gewys.

Alhoewel Williams (*Textbook of criminal law* (1983) 631) nie uitdruklik standpunt inneem ten gunste van die aanvaarding van dwang as algemene verweer nie, wys hy tog op die onregverdigheid van die situasie. Hy noem onder andere dat alhoewel die vonnis by 'n klag van poging tot moord diskresionêr is en die vonnis by 'n klag van moord verpligtend is (lewenslange gevangenisstraf), die verweer wel by poging tot moord toelaatbaar is maar nie by moord nie. Dit is volgens hom ook eienaardig dat 'n persoon wat ernstige liggaamlike leed veroorsaak en vir wie die verweer dus toeganklik is, die verweer ontneem word wanneer die slagoffer later sterf. Smith en Hogan (*Criminal law* (1988) 232 e v) kritiseer die uitspraak in die *Abbott*-saak *supra* en is hulle klaarblyklik eerder ten gunste van die uitspraak in die *Graham*-saak *supra*. Nog 'n skrywer wat hom beywer vir die aanvaarding van dwang as algemene verweer is Alldridge. In 'n artikel ("The coherence of defences" 1983 *Crim LR* 668) verklaar hy soos volg:

> "Hence, in so far as the 'murder exception' is part of English law, it rests upon an incoherent conception of the defence of duress. Once it is realised that the defence must be an excuse, the 'murder exception' has no place in the defence."

Die afleiding kan dus gemaak word dat daar teen 1983 (die jaar waarin die vermelde artikel 10 in Transkei in werking getree het) reeds 'n sterk neiging in die Engelse reg bestaan het ten gunste van die aanvaarding van dwang as algemene verweer.

In 1987 is bogenoemde neiging egter in die kiem gesmoor deur die House of Lords se uitspraak in *R v Howe and Bannister* 1987 AC 417. In dié saak het die House of Lords eenparig beslis dat dwang *nooit* 'n verweer by moord kan wees nie. Die *Lynch*-uitspraak *supra*, wat as deel van die gemenereg vir twaalf jaar bly staan het, is nou "consigned to the legal scrapheap" (Milgate "Duress and the criminal law: another about turn by the House of Lords" 1988 *CLJ* 61). Die House of Lords het bevind dat die onderskeid tussen daders en medepligtiges (soos in die *Lynch*-saak *supra* gemaak) nie by die verweer van dwang kan geld nie. Dwang moet òf altyd 'n verweer wees, òf nooit. Daar is besluit om laasgenoemde uitweg te volg en die besluit is met 'n aansienlike aantal argumente geregverdig. Die volgende argumente is onder andere aangevoer: (a) dat die gewone man, indien hy gevra sou word om 'n onskuldige lewe te neem ten einde sy eie te red, nie noodwendig sal toegee nie; (b) dat alhoewel "necessity" in die Engelse reg van dwang ("duress") onderskei word, hulle tog ook baie ooreenstem en aangesien eersgenoemde nie as verweer aanvaar word nie, behoort dwang ook nie as verweer by moord erken te word nie; (c) dat die parlement nog nooit die regskommissie se pleidooi – dat dwang in die algemeen aanvaar behoort te word – geïmplementeer het nie; (d) dat alhoewel die dader by moord lewenslange gevangenisstraf opgelê moet word, die vonnisse tog van tyd tot tyd deur die

paroolraad hersien word; (e) dat dit dalk kan veroorsaak dat 'n terroristeleier wat bekend is vir geweld, homself kan vrywaar van vervolging deur middel van sy organisasie (die sogenaamde "charter for terrorists"-argument); en (f) dat dit te veel onsekerheid sal veroorsaak indien dwang beskikbaar is as verweer by moord. Na 'n bespreking van en heftige kritiek teen hierdie argumente, sluit Milgate *ibid* sy artikel soos volg af:

> "The decision in *Howe* does nothing to improve the House of Lords' disappointing record in the field of criminal law in recent years."

Die huidige posisie in die Engelse strafreg blyk dus te wees dat dwang geensins as verweer kan dien teen 'n klag van moord nie.

Dit is ten slotte dus duidelik dat die kwessie rondom noodtoestand en dwang in die Suid-Afrikaanse strafreg taamlik verskil van die posisie in die Transkeise strafreg. In Suid-Afrika is die verweer beskikbaar by enige misdaad, terwyl die Transkei moord en hoogverraad deur middel van wetgewing uitsluit van die werking van die verweer. Die Engelse reg het, wat dwang betref, 'n pad geloop wat aanvanklik met die posisie in Transkei ooreengestem het, daarna geleidelik begin neig het in die rigting van die Suid-Afrikaanse reg en nou weer geëindig het by 'n posisie soortgelyk aan dié in Transkei. Die posisie in die Suid-Afrikaanse reg sedert 1972 is myns insiens te verkies aangesien dit geen rigiede en onbuigsame reël daarstel nie; en solank die verweer met die nodige versigtigheid hanteer word, kan dit slegs tot billike regspraak aanleiding gee. Die vraag kan tereg met betrekking tot die Engelse en Transkeise strafreg gestel word waarom dié stelsels aan die gewone man hoër vereistes stel as wat van die deursneemens verwag kan word. Kan daar van die gewone man verwag word om sy lewe op te offer vir 'n ander? Hierop antwoord regter Rumpff in *S v Goliath supra* 25B-E treffend:

> "Alleen hy wat met 'n kwaliteit van heroïsme bedeeld is, sal doelbewus sy lewe vir 'n ander offer."

Die verweer leen homself daartoe dat persone wat daarvan misbruik wil maak, deur die howe gestuit kan word, maar ook dat die werklik onskuldige persoon die voordele daarvan kan benut:

> "While the defence will not often succeed, its existence will ensure that justice is seen to be done in cases where it requires to be done" (Dennis 1980 *LQR* 208 238).

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PLEDGE OF PERSONAL RIGHTS AND THE PRINCIPLE OF PUBLICITY

Britz v Sniegocki, Hawthorne and Hoffman 1987 case no 1799 (D) unreported*

In this decision the court addressed the very important issue of publicity of a pledge of personal rights. As I have indicated (1987 *THRHR* 180) this requirement has wrongly been neglected by the courts in those cases where a cession of personal rights has been construed as a pledge of those rights.

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* See also 1989 *THRHR* 245 *et seq* (editor).

The relevant facts of the case are briefly as follows: on 7 November 1986 X pledged and delivered the original share certificate in respect of a share block to Y. On or about 10 April 1987 he handed Z a declaration to the effect that the original share certificate had been lost, mislaid or destroyed, together with a completed share transfer form relating to the said share certificate signed by him as transferor, a written cession of his claims against the company in question and a written consent by the directors of the company to the transfer of the said share block. Until 13 April Y had no knowledge of the dealings between X and Z, and Z and the company had no knowledge of the dealings between X and Y.

In the interpleader proceedings before the court the deputy sheriff was the applicant, Y the execution creditor and Z the second interpleader claimant, her husband being the first interpleader claimant. The claimants sought an order that the attachment (of the original share certificate effected by the applicant on 19 June) be set aside and that Z was entitled to the share block concerned. Y sought orders declaring that X's shares in respect of the share block remain effectively pledged to him and that these shares may lawfully be attached and sold in execution, dismissing the claims of Z and her husband and directing the latter to pay the costs of the proceedings.

The court dismissed Y's claim, declared that Z was entitled to the share block concerned, ordered Y to pay the applicant's and Z's costs and Z's husband to pay any costs incurred by Y solely due to Z's husband having joined Z in the proceedings.

The court based its decision on the *pactum de non cedendo* in the memorandum and articles of association of the share block company which contained a conditional prohibition against transfer of the shares of the company. In terms of this prohibition, X could not pledge his shares to Y without the prior consent of the directors of the company. X did not obtain this consent for the pledge to Y but only for the cession to Z and therefore the latter was valid and the former not.

The undesirability of the situation with which the court was confronted in this case is clearly expressed by the judge in the following words:

> "I am afraid that this is another of those cases, which occur far too often, in which a Court has to decide which one of two honest and law-abiding persons has to suffer the consequences of the fraudulent conduct of a third person who has used the opportunities created by one of the defects in our legal system."

The defect to which the court refers in this case is the lack of publicity of the existence of a pledge of personal rights. As I have already clearly indicated (1987 *THRHR* 180) this state of affairs is unacceptable and should be rectified as soon as possible. This case also shows that delivery of the document evidencing the right is insufficient to constitute the necessary publicity of the pledge. Publicity of the pledge of a personal right should fulfil exactly the same function as publicity of a pledge of a corporeal, that is, it should prevent the pledgor from exercising his right and it should inform those who are bound to respect the pledgee's right of the existence of such right. In the case of a corporeal the right of the pledgee should be respected by the world at large, that is, by those who know that the thing is in the possession of the pledgee; but in the case of an incorporeal, a personal right, the nature of the object of the right is such that there is basically only one person who is obliged to respect the creditor's

(pledgor's) right and that is the debtor. Therefore notice of the pledge of a personal right should be given to the debtor to enable him to respect the right of the pledgee (Asser *Zakenrecht Zekerheidsrechten* (1986) 114; Baur *Lehrbuch* (1987) 614; *Münchener Kommentar* section 1280).

I am therefore in full agreement with the judge where he states:

> "I must confess that I find it quite unacceptable that this state of affairs in which this type of unscrupulous conduct occurs daily should be permitted to continue."

I also agree that this problem can be resolved only by means of legislation, but I do not agree that this can be achieved only " by providing for a mechanism for registration of ownership of movable corporeal property, and also rights *in personam* and of transfer or cessions thereof whether it be *in securitatem debiti* or otherwise".

In this discussion I shall address my criticism to that part of this statement which relates to the law of cession. It appears as if the judge is advocating a system of registration whereby not only the cession (transfer) or pledge of personal rights should be registered but also the very existence of such rights. To go this far, to my mind, is not only practically unattainable but also unnecessary. The impracticability of such an approach is quite evident if one only thinks of all the cessions of personal rights effected every day, let alone the millions of personal rights being created and extinguished daily. Even in those countries where considerable progress has been made in the field of computerised registration, provision for such a procedure has not been made. This is quite understandable, as such a procedure would be very expensive and would also unnecessarily restrict commercial dealings in this field.

Two issues are being confused here, namely the requirement of publicity for the proper vesting of a real right and registration as a means of preventing double cessions of the same right to different parties. Registration of the existence of a personal right and of the transfer of such a right is a very formal requirement which has, as far as I know, never been advocated in our courts, by any of the legal writers in this field or, for that matter, in any of the European legal systems which I have examined. It seems a very rigid requirement for a legal system which at the moment does not even require a deed of cession.

What the judge has in mind here is a requirement for all cessions aimed at preventing the cedent from acting in a fraudulent manner. This, however, is not the point in issue as we are here concerned with the requirement of publicity for the vesting of a real right. If the courts accept the notion of a pledge of a personal right, which they have done in the latest appellate division cases (*Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy* 1985 2 SA 769 (A); *Marais v Ruskin* 1985 4 SA 659 (A); *Bank of Lisbon and SA Ltd v The Master* 1987 1 276 (A); *Sasfin v Beukes* 1989 1 SA 1 (A)) and in the case under discussion, the requirement of publicity should be adhered to. This requirement cannot be met by means of delivery of the document evidencing the right to the cessionary, as none of the objects of publicity is attained in this way: the cedent (pledgor) is not prevented from exercising his right and the person who is bound to respect the pledgee's right is not informed of the existence of this right.The same objection can be levelled at the registration procedure favoured by the judge *in casu*. It should be borne in mind that the nature of the object of a personal right is different from that of a real right and that other considerations come into play where a personal right is the object of a pledge. The debtor who is obliged

to pay his creditor should be informed of the fact that the pledgee now has a stronger right to performance than the cedent (pledgor). Notice in this case has nothing to do with the protection of the debtor against double payment, but rather constitutes the real right of the cessionary (pledgee). In ceding his power to institute action, the cedent (pledgor) restricts himself in the exercise of his right and by giving notice to the debtor, the pledgee is vested with a real right.

If the basic principles of the law of cession had been applied correctly to the facts of the case under discussion, the position would have been as follows: after the pledge of the shares by X to Y, the company should have been notified of the pledge to constitute Y's real right. In the absence of such notice, however, no pledge was constituted and Y acquired no real security. On the other hand, if the company were duly notified of the pledge, it would have informed Y of the existence of the *pactum de non cedendo* and Y could then have obtained the necessary consent from the company's directors and obliged X to comply with the other requirements as set out in the memorandum and articles of association. Therefore, Y's case should basically have failed on the principle that no notice was given and consequently that no pledge had been constituted in his favour.

To my mind notice of the pledge to the debtor is sufficient to comply with the requirement of publicity in constituting a pledge. Registration of the pledge, however, is insufficient notice to the debtor of the existence of the pledge. If registration of the pledge were to be regarded as adherence to the principle of publicity, the debtor's position is burdened by this requirement as it entails that he must from time to time ascertain whether his creditor has not ceded or pledged his right against the debtor. Apart from the impracticability of such a system of registration of personal rights and the fact that it does not fulfil one of the functions of publicity, namely to inform the debtor of the existence of the real right, it is also contrary to one of the basic principles of the law of cession, namely that the cession should not burden the position of the debtor.

The requirement of notice to the debtor as a means of constituting a pledge of personal rights has, however, never been part of our law and this unsatisfactory situation can only be remedied by legislation. On the other hand, it should be borne in mind that those legal systems which do require notice of the pledge to the debtor, have experienced this requirement to be detrimental to the needs of practice, as most creditors (pledgors) do not wish their debtors to know what their credit position is (this is especially so in the case where a client cedes his rights to a bank as security for overdraft facilities). In order to avoid having to give notice the so-called security cession developed in Germany (1987 *THRHR* 180; 1988 *THRHR* 436). This legal phenomenon has its own peculiar problems (1988 *THRHR* 434; 1989 *THRHR* 45) and thusfar the South African courts have been reluctant to recognise this type of cession.

The law commission is at present working on a project (project 46, working paper 23, November 1987) for the reform of the law relating to cessions *in securitatem debiti* and has recommended that the only way in which such cessions can be effected is by means of a pledge. Without going into the detail of the recommendations, with which I disagree in many respects, I would like to stress here that the only aspect of the pledge of personal rights which really gives rise to problems in the courts, namely the principle of publicity, unfortunately has not been dealt with properly in these recommendations. Although much

more research and thinking need to be done before the final word on this topic can be said, I regard it as of the utmost importance that legislation should be introduced to remedy the present situation regarding the principle of publicity.

I cannot agree with the view expressed by the court that registration of the very existence of personal rights and the cession thereof should be required in order to eliminate the type of unscrupulous conduct which occurred in the case under discussion. As I have already indicated, I find this approach impracticable and unnecessary. In the case under discussion the court is not so much concerned with compliance with the principle of publicity in order to constitute a pledge, as with advocating a system in which the requirements of cession are such that it would be impossible for an unscrupulous cedent to make a double cession. Thusfar the South African law has found little need for very stringent and formal requirements for the validity of cessions; for instance neither a deed of cession, nor notice to the debtor of the cession is required. It is not even clear that delivery of the document evidencing the right is required in all cases. Although there is room for improvement in this regard, the requirements for effecting a valid cession seem to afford relatively few problems in practice and it therefore appears rather unnecessary to introduce such stringent requirements into a system which functions quite satisfactorily in most instances, merely in order to counteract the relatively few fraudulent acts of unscrupulous people. In any event, by implementing the requirement of publicity correctly, unfortunate situations such as the one which arose in the case under discussion can be avoided. It is therefore imperative that the legislature should remedy the existing unsatisfactory position as soon as possible.

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GESAMENTLIKE BEWARING VAN KINDERS

Schlebusch v Schlebusch 1988 4 SA 548 (OK)

Artikel 6 (3) van die Wet op Egskeiding 70 van 1979 verleen aan die hof die bevoegdheid om by 'n egskeidingsgeding enige bevel te maak wat hy goeddink ten aansien van onder andere die bewaring van die kinders. Gewoonlik word die bewaring van die kinders aan net een ouer toegeken. *Kastan v Kastan* 1985 3 SA 235 (K) is die eerste gerapporteerde beslissing waarin die bewaring van die kinders aan beide ouers toegeken is. Hierdie uitspraak is veral deur akademici as toonaangewend beskou (sien in die algemeen Schäfer "Joint custody" 1987 *SALJ* 149; Joubert "Gesamentlike bewaring" 1986 *De Jure* 353).

In die saak onder bespreking het die kwessie van gesamentlike bewaring weer eens onder die loep gekom. Die feite was kortliks die volgende: Die eiser en die verweerderes is in 1963 buite gemeenskap van goed getroud. Uit die huwelik is vier kinders – almal nog minderjarig – gebore. Die drie jongste kinders is in Lady Grey op skool. Die eiser is 'n boer wat tien kilometer buite Lady Grey woonagtig is en die verweerderes 'n verpleegsuster wat elke tweede week in

Zastron, tagtig kilometer van Lady Grey af, moet werk. Die eiser en verweerderes bly sedert Augustus 1987 apart.

In 'n onbetwiste aansoek om egskeiding wou die partye ook 'n skikkingsooreenkoms 'n bevel van die hof laat maak. Die eerste drie paragrawe van die ooreenkoms het betrekking op die kinders en lui soos volg:

> "1. That the custody of the minor children, Candace and Stephanie born of the marriage between the parties shall be awarded to the parties jointly. It is recorded that the said children shall reside with the plaintiff until such time as the said minor children shall have completed their school education. In the event of the above honourable Court not granting joint custody to the parties, custody of the said minor children is to be awarded to the plaintiff.
>
> 2. In the event of the Court refusing an order for joint custody the parent not having control and custody of the children shall be entitled to visit and to be visited by the children at all reasonable times and for any reasonable period.
>
> 3. The non-custodian parent shall also be entitled to have the children spend such school holidays with such non-custodian parent when such parent is able to accommodate the children for such holiday or part of such holiday."

Uit die getuienis van die eiser blyk dat dit die bedoeling van die partye is dat bogenoemde bepalings ook op die twee ouer kinders van toepassing moet wees. Noemenswaardig is ook dat die partye nie kwaaivriende is nie en dat die kinders die verweerderes gereeld besoek in die week wat sy nie in Zastron werksaam is nie (552E–G).

Die hof staan die aansoek om egskeiding op grond van onherstelbare verbrokkeling toe, maar is nie bereid om paragrawe 1 en 2 van die skikkingsooreenkoms 'n bevel van die hof te maak nie. Die hof beslis dat die belange van die kinders vereis dat hul bewaring aan die eiser toegeken word onderworpe aan die verweerderes se reg tot toegang soos in paragraaf 3 van die skikkingsooreenkoms bepaal. Die volgende redes word vir die beslissing gegee:

a Regter Mullins is van mening dat die Suid-Afrikaanse howe as 'n algemene reël nie ten gunste van gesamentlik bewaringsbevele is nie (549H–I).

b Daar is voldoende positiefregtelike gesag wat dit wenslik ag dat net een ouer vir die bewaring van die kind verantwoordelik moet wees (*Heimann v Heimann* 1948 4 SA 926 (W); *Marais v Marais* 1960 1 SA 844 (K); *Edwards v Edwards* 1960 2 SA 523 (D)). Die feit dat net een ouer die dag tot dag bestaan van 'n kind beheer en besluite neem rakende sy opvoeding en versorging, is 'n uitvloeisel van die beginsel dat die hof in die beste belang van die kind optree; dit is naamlik belangrik vir 'n kind om te weet dat 'n bepaalde persoon hierdie besluite vir hom neem (*Whiteley v Leyshon* 1957 1 PH B9 (D)).

c Die hof erken die bestaan van die beginsel van gesamentlike bewaring (550G–H), maar voel dat sulke bevele so skaars is en met soveel inherente risiko's gepaard gaan dat die *Kastan*-saak *supra* nie as 'n beweging weg van die "algemene reël" beskou kan word nie (551C–D).

d Ondanks die feit dat daar veral in Engeland en in die Verenigde State van Amerika 'n neiging na gesamentlike bewaringsbevele is (sien in die algemeen Spiro "Joint custody" 1981 *THRHR* 163; Joubert 1986 *De Jure* 353; Schäfer 1987 *SALJ* 149), spreek die regter sy kommer oor enige sodanige neiging uit. Hy is van mening dat 'n gesamentlike bewaringsbevel nie 'n voortgesette verhouding tussen 'n kind en beide sy ouers sal kan verseker nie. In ons moderne samelewing is die kind deeglik bewus van die gevolge van 'n egskeiding en besef

maar alte goed dat daar 'n verandering in die beheer en dissipline van die huishouding gaan plaasvind (553B–D).

Die volgende kommentaar kan op die uitspraak gelewer word:

Alhoewel die term "gesamentlike bewaring" ("joint custody") in verskeie regstelsels gebruik word, verskil die betekenis daarvan van land tot land. In die Verenigde State van Amerika word 'n duidelike onderskeid tussen gesamentlike fisiese bewaring en gesamentlike regsbewaring getref (sien Joubert 1986 *De Jure* 356; Schäfer 1987 *SALJ* 155). Gesamentlike fisiese bewaring beteken dat die kind in werklikheid twee ouerhuise het. Die kind bly vir 'n tydperk by die een ouer en dan weer by die ander. Gesamentlike regsbewaring beteken dat die kind by een van die ouers woon, maar dat beide ouers gesamentlik besluite oor belangrike aangeleenthede soos die opvoeding, godsdiens en versorging van die kind neem. In die Amerikaanse en Nederlandse reg word die term "gesamentlike bewaring" dikwels gebruik om gesamentlike fisiese *en* gesamentlike regsbewaring aan te dui. In die Engelse reg behels gesamentlike bewaring slegs gesamentlike regsbewaring (Schäfer 1987 *SALJ* 157).

Die Suid-Afrikaanse reg onderskei nie tussen fisiese en regsbewaring nie. Uit die *Kastan*-saak *supra* blyk dit ook nie duidelik of fisiese of regsbewaring bedoel word nie. Weens die praktiese probleme betrokke by 'n geval waar 'n kind twee ouerhuise het en die feit dat gesamentlike fisiese bewaring slegs in uitsonderingsgevalle verleen word (sien in die algemeen Folberg *Joint custody and shared parenting* (1984); Joubert 1986 *De Jure* 357–358), is ek van mening dat met gesamentlike bewaring in die Suid-Afrikaanse reg gesamentlike regsbewaring bedoel word. *In casu* het dit in elk geval oor gesamentlike regsbewaring gehandel aangesien die kinders ingevolge die skikkingsooreenkoms by die eiser sou bly (549E–F). Die feit dat gesamentlike fisiese bewaring hoogs uitsonderlik is, beteken myns insiens nietemin nie dat so 'n bevel nooit in die Suid-Afrikaanse reg toegestaan sal word nie. Indien so 'n bevel in die beste belang van die kind en prakties uitvoerbaar is, behoort die hof dit toe te staan.

Die belangrikste voordeel van gesamentlike regsbewaring is dat die kind 'n aktiewe band met beide sy ouers behou. Die kind besef dat sy ouers mekaar in besluite rakende sy opvoeding en versorging ken. In die geval waar bewaring slegs aan een ouer toegeken word, is daar dikwels die gevoel dat die een ouer "wen" en die ander een "verloor". Deur 'n bevel vir gesamentlike bewaring word die gedagte van wen en verloor in 'n groot mate uit die weg geruim. Alhoewel die kind se fisiese bewaring aan die een ouer toegeken word, is daar steeds 'n voortgesette verhouding met die ander ouer aangesien dié ouer medeverantwoordelik vir besluite rakende die kind se opvoeding en versorging is (sien Gardner "Joint custody is not for everyone" in *Joint custody and shared parenting* 63 e v). Die feit dat twee mense skei, beteken nie noodwendig dat hulle as ouers ook gefaal het nie. Met 'n bevel ingevolge waarvan die bewaring van die kind net aan een ouer toegeken word, kan dit gebeur dat 'n persoon wat oor al die eienskappe van 'n goeie ouer beskik, van die opvoedingsproses van sy kind uitgesluit word, terwyl so 'n persoon in die geval van gesamentlike bewaring voortgaan om 'n wesenlike rol te vervul.

Een van die grootste besware teen 'n bevel vir gesamentlike bewaring is dat ouers wat gedurende 'n huwelik nie kon saamwerk nie, dit nog minder na 'n egskeiding sal kan doen. Hierdie beswaar gaan nie op nie. Die hof sal, voordat

'n bevel vir gesamentlike bewaring verleen word, oortuig moet wees van die ouers se liefde vir die kind en hul vermoë en bereidwilligheid *om ten aansien van die kind se opvoeding en versorging saam te werk.* Die partye sal ook tot 'n groot hoogte dieselfde waardes, lewensbeskouing en godsdienstige oortuiging moet hê (Schäfer 1987 *SALJ* 161). Om 'n gesamentlike bewaringsbevel te weier bloot omdat die partye moontlik in die toekoms oor 'n sekere aangeleentheid met betrekking tot die kinders kan verskil, is om jou oë vir die werklikheid te sluit. Selfs in die gelukkigste huwelike kan daar verskille ontstaan. Dit is egter die partye se vermoë om sulke verskille in belang van die kind op te los wat die deurslag behoort te gee. Indien daar ten spyte hiervan steeds 'n skaakmatsituasie ontstaan, kan die partye hulle tot die hof wend (Joubert 1986 *De Jure* 357). 'n Ander moontlikheid om sulke verskille op te los, sou wees om 'n derde persoon as arbiter aan te stel. In byvoorbeeld die *Kastan*-saak *supra* is 'n sielkundige en 'n psigiater as gesamentlike arbiters aangestel. 'n Verdere beswaar wat geopper word, is dat daar oor alledaagse aangeleenthede soos speelmaats, televisie, slaaptyd, ensovoorts botsings kan ontstaan. Hierdie beswaar hou ook nie steek nie aangesien die ouer aan wie die fisiese beheer toegeken is, die dag tot dag aktiwiteite van die kind reël terwyl gesamentlike bewaring gesamentlike besluitneming oor *belangrike* aangeleenthede soos opvoeding, godsdiens en versorging ten doel het (Schäfer 1987 *SALJ* 156).

'n Vraag wat dikwels gevra word, is waarom gesamentlike bewaring hoegenaamd nodig is indien die ouers in werklikheid so goed kan saamwerk. Myns insiens gee so 'n bevel formele erkenning aan die bestaan van 'n feitelike situasie, naamlik dat die ouer wat nie die fisiese beheer en toesig van die kind het nie regtens steeds erken word as die ouer van die kind wat 'n voortgesette rol ten aansien van die kind se opvoeding en versorging te speel het.

Die feit dat bevele vir gesamentlike bewaring skaars is, regverdig nie die stelling dat daar 'n "algemene reël" teen die uitreiking van sulke bevele bestaan nie. In die praktyk gebeur dit dikwels dat die partye tot 'n egskeiding geadviseer word dat hulle albei die ouers van die kind bly en dat dit in die beste belang van die kind is indien hulle mekaar steeds in besluite rakende die kind ken. Die idee van gesamentlike bewaring word dus in die praktyk gepropageer sonder om dit by name te noem.

Myns insiens het die feite *in casu* 'n vollediger ondersoek na die wenslikheid al dan nie van 'n bevel vir gesamentlike bewaring geregverdig. Volgens die eiser is die partye nie kwaaivriende nie. Die partye het *ooreengekom* om aansoek om 'n bevel vir gesamentlike bewaring te doen. Die ooreenkoms dat die kinders tot by die voltooiing van hul skoolloopbaan by die eiser sal bly, het myns insiens reeds 'n belangrike moontlikheid vir konflik uit die weg geruim; voorts dui die inhoud van die skikkingsooreenkoms daarop dat die partye inderdaad bereid en in staat is om *gesamentlik* besluite rakende die kinders te neem.

'n Mens kry die indruk dat die regter in beginsel teen 'n bevel vir gesamentlike bewaring gekant is. Die gesag wat hy ter ondersteuning van sy standpunt aanhaal, is klaarblyklik verouderd aangesien die "jongste" van die beslissings reeds van 1960 dagteken (*Edwards v Edwards* 1960 2 SA 523 (D)). Daar word slegs sydelings na professor Schäfer se artikel oor gesamentlike bewaring verwys. Uit hierdie artikel blyk dit dat daar in verskeie oorsese regstelsels 'n neiging is om bevele vir gesamentlike bewaring meer geredelik toe te staan. In Engeland het sulke bevele in die tydperk van 1974 tot 1985 meer as verdubbel (Bromley and

Lowe *Bromley's family law* (1987) 333). Hierbenewens behoort die reg ook kennis te neem van navorsing op die gebied van die sielkunde en maatskaplike werk oor die uitwerking van egskeiding op die ouers en die kind (sien in die algemeen Folberg 87 e v). In die lig hiervan kan daar nie met die regter saamgestem word nie waar hy sê dat die hedendaagse kind besef wat 'n egskeiding behels en dat daar 'n verandering in die huishoudelike beheer en dissipline gaan plaasvind (552B–C).

Die houding van die kinders ten opsigte van gesamentlike bewaring blyk nie uit die feite *in casu* nie. Die regter kon navraag na die kinders se houding gedoen het en indien daar steeds twyfel bestaan het, kon die hof van sy bevoegdheid ingevolge artikel 6(2) van die Wet op Egskeiding 70 van 1979 gebruik gemaak het om verder ondersoek na die wenslikheid al dan nie van 'n gesamentlike bewaringsbevel in te stel. So 'n ondersoek kan ook die inwin van deskundige getuienis behels, soos in die *Kastan*-saak *supra* waar daar van 'n sielkundige en 'n psigiater se advies gebruik gemaak is.

Dit is wel so dat daar 'n risiko bestaan dat die ouers oor 'n aangeleentheid kan verskil. So 'n moontlikheid behoort egter nie die deurslaggewende faktor by die oorweging van 'n bevel vir gesamentlike bewaring te wees nie. Wat wel in ag geneem moet word, is die houding van die ouers en die kind; die ouers se vermoë om geskille op 'n verantwoordelike wyse te kan oplos; die ouers se vermoë om ten aansien van die kind gesamentlike besluite te kan neem; en of so 'n bevel in die lig van die omstandighede in die beste belang van die kind is.

Hiermee word nie aan die hand gedoen dat bevele vir gesamentlike bewaring deur die bank toegestaan moet word nie. Sulke bevele sal steeds die uitsondering eerder as die reël wees. Wat wel bepleit word, is dat indien die prognose van so 'n bevel gunstig is, die howe dit behoort toe te staan met dié belangrike voorbehoud: die bevel vir gesamentlike bewaring moet in die betrokke omstandighede altyd in die beste belang van die kind wees.

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AMPTELIKE BEVOEGDHEID: DIE AANSPREEKLIKHEID VAN 'N REGTERLIKE BEAMPTE VIR ONREGMATIGE VRYHEIDSBEROWING

Moeketsi v Minister van Justisie 1988 4 SA 707 (T)

'n Streeklanddros het gedurende hofverrigtinge gelas dat 'n polisiebeampte (die eiser) wat in die hof was en die verrigtinge met sy optrede gesteur het, gearresteer en na die hofselle verwyder moet word waar hy vir 'n kort tyd aangehou is. Die eiser eis vergoeding van die staat en die landdros vir beweerde onregmatige arrestasie en aanhouding.

Regter van Zyl beslis dat die landdros se optrede *onredelik en ongeregverdig* was. Hy verklaar (710–711):

> "Daar is dus by my weinig twyfel dat die tweede verweerder [landdros] se optrede ondeurdag en onverstandig was ... Hy het self gekies om die hofverrigtinge te onderbreek

> [deur die arrestasie ingevolge a 178(2) Wet 51 van 1977 te gelas] en of sodanige onderbreking een minuut of vyf minute geduur het, sou weinig verskil aan die verloop van die verrigtinge gemaak het. Indien hy van die minagtingsprosedure gebruik gemaak het, soos hy toegee hy kon gedoen het, sou die eiser minstens 'n geleentheid gekry het om sy kant van die saak te stel. Deur van die ingrypende magte van a 178(2) egter gebruik te maak, het die tweede verweerder die eiser die reg van *audi alteram partem* ontneem, en dit nogal waar die eiser 'n senior ondersoekbeampte was met hoë aansien.
>
> Kortom meen ek dat die tweede verweerder se optrede onredelik en ongeregverdig was."

Hierdie slotsom beteken volgens die regter egter nie dat die landdros 'n delik begaan het nie. Na 'n grondige ondersoek van die gemeenregtelike bronne kom hy tot die slotsom (711–713) dat 'n regterlike beampte nie bloot op grond van onbedrewenheid of onkunde vir 'n foutiewe vonnis aanspreeklik gehou kan word nie; aanspreeklikheid volg slegs indien sy gewraakte optrede ook met *mala fides*, kwaadwilligheid of bedrieglikheid gepaard gegaan het (sien ook *Penrice v Dickenson* 1945 AD 6 14–15):

> "Die rede hiervoor is [volgens Groenewegen] duidelik, aangesien onervare persone ook die regtersamp beklee sonder dat hulle hoegenaamd behoort te vrees dat hulle deur hulle onkunde in baie sake aanspreeklikheid sal opdoen nie. Dit sou hoogs onbillik wees en regters sou maar sleg vaar, veral dié wat nog die laer range beklee, indien hulle in die moeilike wetenskap van die reg en regspraktyk waarin daar so 'n verskeidenheid menings bestaan en waar soveel sake geen vertraging duld nie, sodat daar nie genoegsame tyd vir oorweging verleen word nie, aan die risiko van aanspreeklikheid blootgestel word in elke saak waarin hulle per abuis iets oor die hoof gesien het as gevolg van onkunde of onbedrewenheid."

Op grond van die voorgaande beslis regter Van Zyl soos volg (714):

> "Om terug te keer na die gedrag van die tweede verweerder is dit reeds bevind dat hy onredelik en ongeregverdig opgetree het. Onredelikheid lê die skuldvorm van nalatigheid ten grondslag en sou onder normale omstandighede tot deliktuele aanspreeklikheid aanleiding kon gee. In die geval van 'n regterlike beampte soos die tweede verweerder is nalatigheid in die uitvoering van sy judisiële bevoegdhede egter nie voldoende om hom met deliktuele aanspreeklikheid te belas nie. Die gesag is duidelik dat daar *mala fides*, kwaadwilligheid of bedrieglike optrede aanwesig moet wees. Die getuienis het nie bewys dat die tweede verweerder hom aan enige sodanige optrede skuldig gemaak het nie, hoe onredelik sy optrede ook al mag gewees het. Dit volg dan dat die eiser se vordering nie kan slaag nie."

Alhoewel nou met die resultaat van die uitspraak saamgestem word, is daar tog enkele aspekte wat vir kritiek vatbaar is.

As gevolg van die hoë waarde wat die howe aan die liggaamlike vryheid van die individu heg (*Shoba v Minister van Justisie* 1982 3 SA 555 (K) 559), word iedere krenking daarvan of inwerking daarop in beginsel of *prima facie* as onregmatig geag (sien bv *Ingram v Minister of Justice* 1962 3 SA 225 (W) 227; *Boland Bank Bpk v Bellville Munisipaliteit* 1981 2 SA 437 (K) 444; Neethling *Persoonlikheidsreg* (1985) 112–113). Die *onus* is dan op die verweerder om aan te toon dat daar 'n regverdigingsgrond vir sy optrede aanwesig was (*ibid*). Nou is die regverdigingsgrond wat *in casu* ter sprake kom, *amptelike bevoegdheid* (sien hieroor Neethling, Potgieter en Visser *Deliktereg* (1989) 92; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 106–107). Hierdie regverdigingsgrond beteken dat waar 'n persoon uit hoofde van 'n bepaalde openbare amp wat hy beklee (soos 'n regterlike beampte) gemeenregtelik of statutêr veroorloof word om 'n sekere handeling te verrig en hy in die proses nadeel vir 'n ander teweegbring, sy optrede geregverdig word en dus nie onregmatig is nie. Die verweerder moet vanselfsprekend binne die perke van die

regverdigingsgrond handel. Dit is die geval indien sy optrede as *redelik* beskou kan word (Van der Merwe en Olivier 106); en in hierdie verband is 'n *onbehoorlike* of *kwaadwillige motief* by die beampte 'n belangrike aanduiding van onredelike gedrag aan sy kant (*ibid* 106–107; Neethling, Potgieter en Visser 92). Ten aansien van regterlike beamptes kry mens trouens die indruk dat 'n kwaadwillige motief of *mala fides* noodsaaklik is om hulle optrede as onredelik en bygevolg ongeregverdig te kan bestempel. In *Penrice v Dickenson supra* word byvoorbeeld verklaar (15–16):

> "It follows, therefore, that the defendant was entitled to rely on the defence open to him under the common law, namely, that he was performing judicial functions and could not be held liable unless the plaintiff proved that he had acted without good faith. The test, therefore, which we must apply is whether the plaintiff proved that the defendant acted in bad faith . . ."

Mens kan dus tot die slotsom kom dat 'n regterlike beampte wat *bona fide* sy judisiële funksies uitoefen, binne die perke van die regverdigingsgrond amptelike bevoegdheid optree en dus redelik (regmatig) handel al is sy optrede ook hoe onverstandig, ondeurdag, onkundig of onbedrewe. Die rede vir hierdie wye beskerming is, soos hierbo blyk, klaarblyklik om regterlike beamptes teen 'n te groot risiko van aanspreeklikheid te vrywaar sodat hulle met vrymoedigheid hulle bevoegdhede kan uitoefen.

Hierdie benadering blyk ook met betrekking tot die regverdigingsgrond relatiewe privilegie ten aansien van regsgedinge of *quasi*-judisiële verrigtinge by laster (Neethling 143–145). In die reël word die perke van hierdie regverdigingsgrond oorskry indien die lasterlike bewerings van enige van die deelnemers aan die geding nie relevant tot die geding was of deur redelike gronde gerugsteun word nie (sien bv *Joubert v Venter* 1985 1 SA 654 (A) 702–704). Die kwalifikasies van relevansie of redelike gronde geld egter nie met betrekking tot die optrede van die regterlike beampte nie. Die rede is dat

> "public interest in the due administration of justice requires that a judicial officer, in the exercise of his judicial functions, should be able to speak his mind freely without fear of incurring liability for damages for defamation" (*May v Udwin* 1981 1 SA 1 (A) 19).

Dit beteken egter nie dat die regterlike beampte volkome vryheid van spraak geniet nie. Net soos in die geval van amptelike bevoegdheid hierbo, oorskry hy wel die perke van sy privilegie indien hy met "malice" of 'n kwaadwillige motief in die uitvoering van sy funksies gehandel het (*ibid* 19 20; vgl Neethling, Potgieter en Visser 92 vn 387 389).

Uit bostaande blyk myns insiens duidelik dat regter Van Zyl fouteer vir sover hy die *bona fide* optrede van die landdros as onredelik en bygevolg ongeregverdig (onregmatig) beoordeel het. In die afwesigheid van *mala fides* moes die hof eenvoudig bevind het dat die landdros binne die perke van sy amptelike bevoegdheid opgetree het en om daardie rede vry uitgaan.

Soos blyk uit die *dictum* hierbo, begaan regter Van Zyl (714) egter ook nog twee verdere ongelukkige foute. Eerstens is hy van mening dat die redelikheidskriterium by *onregmatigheid* (vgl sy woorde "onredelik en *ongeregverdig*" (my kursivering) op 711 714) "die skuldvorm *nalatigheid* [my kursivering] ten grondslag" (714) lê. Sodoende misken hy die prinsipiële onderskeid tussen nalatigheid en onregmatigheid as delikselemente (sien hieroor Neethling, Potgieter en Visser 129–132). Tweedens kom dit voor of hy skuld (in die vorm van opset?) as vereiste vir onregmatige arrestasie en aanhouding as *iniuria* stel (714). Ten onregte. Onder invloed van die Engelse reg is trouens nòg opset, nòg nalatigheid nodig om

aanspreeklikheid te fundeer – die onregmatigheid van die vryheidsberowing is daarvoor voldoende (sien bv *Donono v Minister of Prisons* 1973 4 SA 259 (K) 262; die *Shoba*-saak *supra* 559; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818–819; Neethling 116–117).

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BOEKE

SPORT INJURIES IN THE CIVIL LAW
deur SK PARMANAND
Lex Patria Johannesburg Kaapstad 1987; xv en 377 bl
Prys R45,00 + AVB (hardeband)

Hierdie boek is in 'n groot mate gebaseer op die skrywer se doktorale proefskrif *Volenti non fit iniuria and delictual liability for injuries in sport* (Universiteit van Natal 1984).

In sy inleidende hoofstuk vestig die skrywer die aandag op die betreurenswaardige verskynsel van toenemende geweld wat in sport voorkom. Hy maak ook gewag van die feit dat daar in die verlede betreklik min gedinge uit sportbeserings voortgevloei het. Na sy mening is daar 'n ernstige behoefte aan omvattende en geordende riglyne vir die reëling van deliktuele aanspreeklikheid vanweë beserings opgedoen tydens sportbedrywighede. Hy meen dat daar 'n behoefte aan 'n behoorlike "sportreg" is en sy studie was daarop gerig om in hierdie behoefte te voorsien.

Die werk omvat 'n bespreking van die leerstuk *volenti non fit iniuria*, die maatstaf vir die bepaling van nalatigheid, bewysprobleme by gedinge voortvloeiend uit sportbeserings, skuldlose aanspreeklikheid, versekering teen sportaanspreeklikheid en die wenslikheid van die daarstelling van "sporthowe". Die skrywer maak selfs aanbevelings oor hoe om veiligheid in die beoefening van sport te bevorder. Dit is nogal 'n ambisieuse spektrum, gesien die wye verskeidenheid van komplekse regsvrae wat by die gemelde aspekte betrek word. Dit is derhalwe nouliks verbasend dat Parmanand se juridiese ontleding nie deurgaans deur dieselfde mate van diepte gekenmerk word met betrekking tot al hierdie onderwerpe nie. Heelwat meer sou gesê kon word oor sommige van hulle, soos die problematiek rondom skuldlose aanspreeklikheid en die instelling van spesiale howe. Gedagtes uitgespreek deur die skrywer is egter prikkelend en verskaf interessante leesstof.

Soos die leser sou verwag het, was Parmanand se navorsing in 'n groot mate op die leerstuk van *volenti non fit iniuria* toegespits. Hy het indringende ondersoek ingestel na die geskiedkundige herkoms van die leerstuk en die hedendaagse dogmatiek daarvan. Dusdoende het hy tot 'n sekere hoogte 'n gebied bestryk wat ook deur ander ondersoekers nagevors is. Vroeëre studies is egter ten dele reeds verouderd en Parmanand het die jongste regspraak en akademiese denke bygewerk. Vanselfsprekend het die skrywer sy aandag in 'n groot mate toegespits op regspraak en die standpunte van juriste oor die aanwending van die *volenti*-leerstuk in verband met beserings voortvloeiend uit sportbedrywighede. Naas die Romeins-Hollandse en die Suid-Afrikaanse reg het hy grondige regsvergelykende ondersoeke ingestel na die

volgende buitelandse regstelsels: die Amerikaanse, Kanadese, Engelse, Skotse, Australiese en Nieu-Seelandse. Hy het ook interessante "uitstappies" – 'n mens kan dit nie juis as meer as dit beskryf nie – na die Wes-Duitse, Franse, Quebecse en selfs Poolse reg onderneem.

Parmanand vestig die aandag op die groot verskeidenheid begrippe wat vandag in die reg onder die *volenti*-leerstuk tuisgebring word. 'n Mens kry die indruk uit sommige hofbeslissings en akademiese standpunte dat *volenti non fit iniuria* in 'n mate 'n gerieflike spreuk geword het waarin begrippe wat wyd uiteenloop en soms geen verwantskap openbaar nie, tuisgebring word. In 'n sekere sin het die leerstuk 'n "stop-maar-in" bevatter geword. Tereg betoog die skrywer dat dit vir die juris belangrik is om te verklaar wat hy as die bestek van die leerstuk beskou. Met omsigtigheid trag hy dan ook sy eie terminologie te omskryf. Hy is egter beskeie genoeg om die leser in te lig dat sy benadering "certainly far from perfect" is (52).

In die dae toe die *volenti*-leer sy hoogtepunt beleef het, is dit beskou as 'n vergestalting van 'n gees van individualisme in die reg: die gedagte dat 'n mens die gevolge van sy eie persoonlikheid moet verduur, met inbegrip van sy hardkoppigheid en die gewilligheid om hom aan gevare bloot te stel met welke oogmerk ook al, en dat dit nie vir die reg is om iemand teen homself te beskerm nie. Hierdie filosofie lê menige beslissing waarin *volenti* as verweer gehandhaaf is, ten grondslag. Teenoor die individualistiese opvatting staan die filosofie van paternalisme (*quaere*: met 'n element van sosialisme?). Parmanand kon moontlik ietwat meer aandag gegee het aan dié onderliggende gedagterigtings wat tot uiting gekom het onder meer in die deliktereg. Inderdaad het *volenti* in die vorm van vrywillige aanvaarding van risiko selde in die moderne Suid-Afrikaanse reg as verweer geslaag, soos Parmanand (126–127) ook tereg opmerk. Is die rede hiervoor dalk te vinde in 'n paternalistiese inslag by ons howe?

Wanneer dit by sport kom, is dit aan die ander kant 'n feit dat die beoefening van sport in ons samelewing – soos in ander samelewings – hoog aangeslaan word as 'n aanvaarbare bedrywigheid: ja, in der waarheid nie net aanvaarbaar nie, maar prysenswaardig. Daar is minstens 'n onuitgesproke vooropstelling dat die beoefening van sport nie regtens ontmoedig behoort te word deur 'n oordrewe streng aanspreeklikheid vir beserings aan mede-spelers en sportbevorderaars op te lê nie. Die gemeenskap is, met ander woorde, bereid om 'n bepaalde prys vir sport te betaal in die vorm van beseerde spelers, en soms ook beseerde toeskouers. Moontlik is dit 'n rede waarom daar so min gerapporteerde hofgedinge en selfs strafregtelike vervolgings voortvloeiend uit sportbeserings is. Ons aanvaar vandag weliswaar nie meer swaardgevegte tot die dood as geoorloof en eerbaar nie, maar sportsoorte soos boks en rugby lewer steeds sterfgevalle, breinbeserings en gevalle van verlamming op wat nie tot aanspreeklikheid lei nie. Ek kan derhalwe nie volkome met Parmanand saamstem nie as hy sê (15) dat

> "[t]he *quia gloriae causa et virtutis rationale* of Roman law has long received its quietus with the last of the Roman gladiators".

Die aard van die verweer van *volenti non fit iniuria* kan nie betekenisvol ontleed word sonder verwysing na die onregmatigheidsbegrip nie. By 'n ondersoek na die omvang van 'n verweer in die deliktereg, is dit altyd 'n vraag hoe diep 'n mens tot die dogmatiese kern van hierdie bestanddeel van aanspreeklikheid moet probeer deurdring. Die skrywer bestee wel beperkte aandag aan die maatstaf van die *boni mores* in verband met die *volenti*-leer, maar 'n ietwat volledige oorsig van verteenwoordigende standpunte oor die onregmatigheidsbegrip sou nie onvanpas gewees het nie.

Die skrywer behandel ook kortliks in verband met die *volenti*-leerstuk die verweer van bydraende opset. Dit was klaarblyklik nie vir hom nodig om afdoende standpunt in te neem oor die vrae rondom hierdie begrip nie en dit

staan tot sy krediet dat hy hierdie kwessie nie ontwyk het nie. Die skrywer sal egter ongetwyfeld toegee dat die laaste woord oor die onderwerp nog gespreek moet word.

Parmanand se werk is besonder ryk aan kasuïstiek. Hy het 'n massa gegewens oor die hoogs interessante onderwerp van privaatregtelike sportaanspreeklikheid versamel en netjies verwerk. Baie van die stof – literatuur en gewysdes – waarna hy verwys, is nie maklik bekombaar vir die Suid-Afrikaanse juris nie. Deur dit op 'n sistematiese en kritiese wyse uiteen te sit, en deur nuttige aanbevelings *de lege ferenda* te maak, het hy 'n belangrike bydrae tot 'n beter begrip van die onderwerp gemaak. Sy boek dien ook as 'n vingerwysing in die rigting van groter maatskaplike verantwoordelikheid by die beoefening en bevordering van sport. Dit kan met groot vrug geraadpleeg word ook deur sportlui en -administrateurs.

'n Laaste opmerking: ofskoon die skrywer se inhoudsopgawe baie volledig is, sou 'n saakregister agter in die boek die gebruik daarvan – veral vir die regspraktisyn wat haastig op soek na gesag is – soveel makliker gemaak het.

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DIE WISSELVERRYKINGSEIS EN DIE EUROTJEK IN DIE DUITSE REG

deur AN OELOFSE

Sentrum vir Belasting- en Besigheidsreg Monograafreeks Departement Handelsreg Universiteit van Suid-Afrika 1988; 115bl

Prys nie vermeld nie

Soos uit die titel van die boek duidelik blyk, handel dit oor twee afsonderlike onderwerpe.

Die eerste deel van die werk behandel die wisselverrykingseis in die Duitse reg. Die skrywer gee die noodsaaklike raamwerk van Bylae II tot die Geneefse Konvensie oor 'n eenvormige wisselwet, waarbinne artikel 89 van die Duitse Wechselgesetz, asook verbandhoudende bepalings in die wetgewing van ander verdragstate, vertolk moet word.

Artikel 15 van vermelde Bylae II skep die moontlikheid om sowel die verlies van die houer se regresregte teen die trekker en endossante, as die verlies van sy primêre aanspraak teen die akseptant weens verjaring of nie-nakoming van sy pligte as houer, ietwat te temper. Die skrywer fokus daarna op die wyse waarop die verskillende verdragstate, veral Wes-Duitsland, die ruimte wat gelaat word deur middel van wetgewing vul.

Hierdie uiteensetting is besonder insiggewend, veral omdat sodanige maatreëls vir die Anglo-Amerikaanse regstelsels vreemd is. Die ontleding van die Europese ervaring en die bespreking van die bekende problematiek wat daarom ontstaan het, bied belangrike agtergrondkennis aan die leser met die oog op plaaslike regshervorming. In hierdie verband is die bespreking van die regsaard van die aksie – die vraag of die oorspronklike wisselvordering bly voortbestaan of uitgewis is – van

besondere betekenis. Hierdie agtergrondkennis gee sinvolle begeleiding aan die leser ten aansien van die beoordeling van artikel 72 van die Wisselwet 34 van 1964.

Waar die wisselverrykingsaksie in Wes-Duitsland en Nederland veral daarop gerig is om aan die houer verligting te bied wat sy wisselregtelike aanspraak weens verjaring verloor het, kom die skrywer wat die Suid-Afrikaanse situasie betref tot die standpunt dat verjaring geen rede bied vir die invoering van 'n wisselverrykingsaksie nie. In Suid-Afrika is relatief langer verjaringstermyne vir wisselregtelike aanspreeklikheid van toepassing, terwyl argumente oor die onbillike effek van die werking van verjaring teenoor skuldeisers in 'n regstelsel wat die verjaringsinstelling ken, nie besondere entoesiasme opwek nie.

Standpunte oor die verlies van regresregte teen die trekker weens die nie-nakoming van die houer se formele pligte moet, wat die Suid-Afrikaanse reg betref, geformuleer word na beoordeling van die bestaande artikel 72 van die Wisselwet. Soos die wisselverrykingsaksie poog hierdie bepaling om die gevolge daarvan teen te werk, maar op 'n ander wyse en op 'n beperkter skaal. Hoewel die Suid-Afrikaanse benadering beperkter tegemoetkoming bied, kies die skrywer tog ten gunste van hierdie benadering veral omdat die wisselverrykingsaksie onlogies is, in die sin dat die houer se regte eers toegelaat word om te verval en hierdie gevolg dan weer teengewerk word. Daarby is die wisselverrykingseis dikwels 'n eiesoortige eis waaroor baie twispunte kan bestaan.

Artikel 72 van die Wisselwet word tereg nie kritiekloos aanvaar nie. Die betoog vir die uitbreiding na gewone wissels en die opheffing van die beperking tot 'n versuim om vir betaling aan te bied, word aanbeveel. 'n Belangrike aspek, waarna die skrywer ook verwys, is dat die standpunte oor maatreëls waardeur aan die houer verligting verleen word, medebepaal word deur die siening oor die belangrikheid van die verpligting van die houer om sy formele verpligtinge na te kom. Hierop moet 'n belangrike premie geplaas word ten einde balans te behou in die blootstelling van wisselskuldenare aan voortdurende aanspreeklikheid.

Die tweede deel van die werk handel oor die eurotjek in die Duitse reg.

Dit is bekend dat die weerstand teen die aanvaarding van 'n gewone tjek ter betaling van 'n geldskuld grootliks voortspruit uit die feit dat die nemer nie sekerheid het dat die tjek betaal sal word nie. Die redes hiervoor is oorbekend. Die ontwikkeling van die eurotjek in samehang met die eurotjekkaart is 'n poging om hierdie belangrike knelpunt uit te skakel en so die tjek as betalingsinstrument te bevorder.

Die skrywer skets kortliks die ontwikkelingsgang wat in hierdie verband waarneembaar is en noodsaaklik is om die werking en aard van die regsverhoudinge by die eurotjek te begryp. Met verwysing na die vorm van die eurotjek en gepaardgaande tjekkaart bespreek die skrywer die tersaaklike regsvrae wat ontstaan. Aandag word veral gegee aan die vraag of die onderneming van die betrokke bank geldig is teen die agtergrond van die statutêre verbod op die akseptasie van 'n tjek. Ander vrae soos die grondslag van die bank se verpligting, die formele aanspreeklikheidsvereistes, die verwere wat teen aanspreeklikheid geopper kan word en die debiteringsbevoegdheid van die bank na betaling geniet ook aandag.

Net soos by die eerste deel van die werk, is hierdie voorafontleding noodsaaklik ten einde 'n verantwoorde bydrae tot plaaslike regsontwikkeling te kan maak. Met die oog hierop is die ontleding deur die skrywer van kernregsvrae besonder waardevol, veral as in gedagte gehou word dat daar in Suid-Afrika nie 'n eenvormige wyse bestaan waarop banke poog om tjeks meer aanvaarbaar te maak nie.

Hoewel in hierdie werk hoofsaaklik op die Duitse reg gefokus word, word die ondersoek ook gebou op 'n omvattender regsvergelykende basis. Die regsvergelykende ondersoek is veral noodsaaklik ten einde verantwoorde voorstelle vir die hersiening van die Wisselwet te kan maak.

Die skrywer se perspektiewe oor die Suid-Afrikaanse reg bevat belangrike teoretiese kontoere wat regsontwikkeling kan stimuleer.

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CONTRACT AND MERCANTILE LAW THROUGH THE CASES

Band I deur ELLISON KAHN CAROLE LEWIS en COENRAAD VISSER; Band II deur ELLISON KAHN DAVID ZEFFERTT JT PRETORIUS en COENRAAD VISSER

Tweede uitgawe; Juta Kaapstad Wetton Johannesburg (Band I 1988; lix en 926 bl); (Band II 1985; lix en 970 bl)

Prys Band I R142,00 + AVB (hardeband) R112,00 + AVB (sagteband); Band II R98,00 + AVB (hardeband) R78,00 + AVB (sagteband)

In 1971 was die Suid-Afrikaanse regsgemeenskap bevoorreg om die eerste uitgawe van *Contract and mercantile law through the cases* te kon verwelkom. Dit was die beste boek in sy soort wat tot in daardie stadium oor enige gebied van die Suid-Afrikaanse reg verskyn het. Alhoewel dit volgens die voorwoord eintlik vir gebruik deur studente bedoel was, was dit ook van besondere waarde vir dosente en praktisyns; nie alleen vanweë die rykdom van uittreksels uit die vonnisverslae en ander bronne van ons reg wat dit bevat het nie maar veral ook vanweë die uitvoerige en deurgaans uitstekende kommentaar op die uittreksels. Die waarde van die werk is bevestig deur die feit dat dit verskeie herdrukke beleef het.

Nou het 'n tweede uitgawe van hierdie uitnemende "source book" verskyn, heelwat omvattender en gevolglik nog beter as die eerste. Waar die eerste uitgawe een band van 1101 bladsye beslaan het, beslaan die tweede uitgawe twee bande wat in totaal 2014 bladsye beloop. In band 1 word die algemene beginsels van die kontraktereg en die verteenwoordigingsreg behandel en in band 2 'n aantal besondere kontrakte, aspekte van die handelsreg en sekerheidstelling. (Band 2 het inderdaad reeds in 1985 verskyn.)

'n Mens kan 'n "case book" eintlik slegs kritiseer op grond van die seleksie van die materiaal wat daarin opgeneem is en die gehalte van die bygaande redaksionele aantekeninge. Ek kan geen fout vind met die materiaal wat die redaksie van *Contract and mercantile law* uitgesoek het vir opname nie en die aantekeninge is van dieselfde hoogstaande gehalte as dié in die eerste uitgawe. As studente egter die eerste uitgawe "gehaat" het (kyk die voorwoord van die tweede uitgawe) weet ek nie wat hulle van die tweede gaan sê nie. Gelukkig geld die enigste besware wat studente moontlik teen die werk kan hê – te wete die omvang daarvan – darem nie vir dosente en praktisyns nie; laasgenoemdes hoef immers nie die inhoud te probeer memoriseer nie. Ek is in elk geval daarvan oortuig dat die gemiddelde student ook baie gou sal besef hoe gelukkig hy is om 'n boek soos *Contract and mercantile law* tot sy beskikking te hê.

Wat die werk besonder waardevol maak vir dosente en praktisyns is die uitvoerige verwysings in die aantekeninge na ander literatuur oor bepaalde onderwerpe. Vanselfsprekend is die literatuur oor sommige onderwerpe so omvangryk dat dit onmoontlik is om na alles te verwys en hier en daar sal 'n mens miskien 'n verwysing

mis wat na jou mening ingesluit behoort te gewees het. (Ek is byvoorbeeld jammer dat daar in die laaste paragraaf van die aantekening by *Wells v South African Alumenite Company* (36) nie 'n verwysing is na die artikel "In defense of unconscionability" deur MP Ellinghaus in 1969 *Yale LJ* nie, veral aangesien daar wel een is na die artikel "Unconscionability and the code – the emperor's new clause" deur AA Leff in 1967 *University of Pennsylvania LR*. Ellinghaus se artikel word deur professor JP Dawson in 1976 *Harvard LR* 1041 vn 1 beskryf as "much the best of the numerous articles on the subject" (van a 2-302 van die *UCC*) en professor Leff s'n as "the silliest of them all".) Enigeen wat verder navorsing wil doen oor enige van die onderwerpe wat behandel word, sal egter genoeg verwysings vind om hom goed aan die gang te sit.

Om die twee bande saam te stel, was klaarblyklik 'n enorme taak – een wat professor Kahn volgens sy eie verklaring in die voorwoord nie alleen kon behartig nie. Hy was egter gelukkig genoeg om bekende deskundiges soos professore David Zeffertt, JT Pretorius, Carole Lewis en mnr Coenraad Visser as medewerkers te hê. Tesame het hulle 'n werk gelewer waarop elkeen van hulle met reg trots kan wees en waarvoor almal wat belangstel in die Suid-Afrikaanse kontraktereg en handelsreg hulle opreg dankbaar behoort te wees.

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THE LAW OF THINGS
by CG VAN DER MERWE
Butterworths Durban 1987; 266pp
Price R39,00 + GST (soft cover)

This publication is an overprint of the title *Things* in *The law of South Africa* volume 27, together with a subject index and an extract from the original bibliography. The main sections of the work are those dealing with the nature, scope, origin and principles of the law of things (introduction); the nature, classification and components of things; real rights; possession; ownership; and co-ownership and common ownership. As a result of the structure of the *LAWSA* series the principles concerning servitudes and real security are dealt with in other titles (servitude, which has not yet been published; lien in vol 15 and mortgage and pledge in vol 17).

According to the publisher's foreword this title has been published separately in an inexpensive edition to bring it within reach of students. The style both of *LAWSA* in general (being a brief and simple explanation of the law as it stands) and of the author of this title does make it a useful teaching tool and an invaluable study source, as was envisaged by the publishers, because the title is at once brief, simple and to the point but also quite comprehensive and more than adequately documented in the footnotes. The only drawback as far as students and law teachers are concerned is the fact that servitude and real security are not included, which would force the teacher and the student to use at least one other book or reference work, thereby detracting from both the practical and the economic value of this publication.

Publication of this title must, even in the absence of the sections of servitude and real security, be welcomed by practitioners and academics alike. It is a well-known

fact that the law of things in general and the law of property in particular has developed almost dramatically over the last years, and standard works such as Silberberg-Schoeman's *Law of property* (1983) are already outdated to a large extent. A new publication in which the large number of new cases and journal articles are dealt with or referred to is therefore more than welcome. The developments in question, with reference to both the legal principles in question and the literature dealing with it, are reflected clearly in the numerous ways in which this title may be said to improve on the older textbooks. Paragraphs dealing with the defences against the *mandament van spolie*, the *exceptio spolii*, compensation for improvements and limitations on the *rei vindicatio* are all examples of improvements that serve to explain the topic or problem in question much better than was the case in the older textbooks.

It may, however, perhaps be said that Van der Merwe has not yet succeeded in this title in clarifying the terminology surrounding the definition and functions of possession (and holdership or detention) to any greater extent than was the case in *Sakereg* (1979). The question of terminology is, on the other hand, still a contentious one, and therefore this remark should be treated as a suggestion for further thought and debate rather than criticism. (See Van der Walt 1988 *THRHR* 276-296 in this regard.) In conclusion both Butterworths and Van der Merwe must be congratulated on a publication that will surely advance the development of the South African law of things. The book is recommended to all practitioners and academics involved in this branch of private law, and to law students as well.

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KORPORATIEWE REG

Redakteurs HS CILLIERS en ML BENADE

Outeurs DH BOTHA MJ OOSTHUIZEN en EM DE LA REY

Butterworths Durban 1987; xiv en 659 bl

Prys R95,00 + AVB (hardeband) R65,00 + AVB (sagteband)

Korporatiewe reg word deur die outeurs in hulle voorwoord as 'n logiese en noodsaaklike opvolger van die vierde uitgawe van *Maatskappyereg* (1982) deur Cilliers en Benade bestempel. Hoewel dit 'n opvolger van *Maatskappyereg* is, blyk uit navraag by die uitgewers dat hierdie werk eerder as 'n selfstandige publikasie naas, en nie as 'n verdere uitgawe van, *Maatskappyereg* beskou moet word nie.

Sedert 1982 het enkele ontwikkelinge op die terrein van die maatskappyereg plaasgevind, maar dit was die daarstelling van die beslote korporasie in 1985 wat die Suid-Afrikaanse ondernemingsreg ingrypend gewysig het. Deur middel van twee noteerders het die skrywers *Maatskappyereg* tred laat hou met die ontwikkelinge op die gebied van die maatskappyereg. In die laaste noteerder, wat in 1985 verskyn het, is die maatskappyeregterrein verlaat deurdat kommentaar ook op die Wet op Beslote Korporasies 69 van 1984 gelewer is. Hierdie breër benadering van die outeurs vind neerslag in *Korporatiewe reg* aangesien dit 'n bespreking van sowel die Suid-Afrikaanse maatskappyereg as die beslote korporasiereg bevat.

Inhoudelik is daar 'n noue samehang tussen die teks van *Korporatiewe reg* en dié van *Maatskappyereg*, die twee noteerders en die studente-uitgawe *Inleiding tot die maatskappyereg* (1985) wat onder dieselfde redaksie verskyn het. Dit vorm dus duidelik deel van hierdie groep publikasies. Ten opsigte van die maatskappyereg bied die werk inhoudelik minder as *Maatskappyereg*. Sekere prosedures, misdrywe en teorieë wat in *Maatskappyereg* en die noteerders bespreek is, word hier bloot oorsigtelik met 'n terugverwysing na die vroeëre, meer volledige bespreking aangeraak. In vergelyking met *Inleiding tot die maatskappyereg* bevat *Korporatiewe reg* egter 'n meer omvattende uiteensetting van die maatskappyereg. Hierdie publikasie bied dus vir die leser die kern van die bekende teks soos bygewerk tot Junie 1987 tesame met 'n bespreking van die reg met betrekking tot besloté korporasies.

Die outeurs slaag voortreflik daarin om die maatskappyereg en beslote korporasiereg vir sowel die praktisyn as die student in een hanteerbare volume saam te voeg. In die bestek van die eerste ses en dertig hoofstukke word die maatskappyereg sistematies en helder uiteengesit. Die sewe en dertigste en omvangrykste hoofstuk word aan die beslote korporasie gewy. Die uiteensetting van die reg met betrekking tot beslote korporasies is meerendeels 'n weergawe van die bepalings van die Wet op Beslote Korporasies soos bespreek in die 1985 noteerder. 'n Konsepsamewerkingsooreenkoms en nuttige voorbeelde van die finansiële jaarstate van 'n korporasie dra tot die waarde van hierdie bondige bespreking by.

Die tegniese en taalkundige versorging komplementeer die hoë standaard van die inhoud. Die waarde van die werk as naslaanbron word verhoog deur die omvattende indeks en 'n vonnisregister wat 23 bladsye beslaan. Hoewel die nuttige vergelykende tabel van ooreenstemmende artikels van die Maatskappywette van 1926 en 1973 in hierdie uitgawe weggelaat is, is die register van verwysings na besprekings van artikels van die Maatskappywet gelukkig behou en aangevul deur soortgelyke verwysings na die bepalings van die Wet op Beslote Korporasies.

Korporatiewe reg, beskikbaar in sagte- en hardeband in sowel Afrikaans as Engels, is 'n handige publikasie wat 'n gewaardeerde metgesel in die ontsluiting en bestudering van hierdie dinamiese vakgebied sal wees.

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THE CLOISTERED VIRTUE: FREEDOM OF SPEECH AND THE ADMINISTRATION OF JUSTICE IN THE WESTERN WORLD

by BAREND VAN NIEKERK

Praeger New York Connecticut London 1987; pp ix and 399

The Cloistered Virtue by the late Professor Barend van Niekerk, published posthumously, comprises in the main that author's writings on freedom of speech. The subject was one on which he was to focus a great deal of attention in the years before his death. The espousal of this cause came in the wake of three trials in which he was involved for vigorous and outspoken campaigning on other causes which he had singled out as meriting attention. The seeming injustice of the prosecutions –

which apparently outweighed their outcome – was assumed and reiterated in most of his subsequent writings; so too, in the present work.

A recurring refrain in the writings of Van Niekerk – and those of others in certain circles – was the peril ostensibly involved in the investigation of sensitive issues surrounding the administration of justice and the apparent aura of silence which enveloped the judicial process after the trials. In the ensuing years, however, the realities squared less and less with the spate of condemning criticism which continued to issue regularly from his pen. In the work under review, therefore, the insistent harping on the dangers apparently attached to criticism of the judiciary is even less explicable.

The work is a comparative examination of the formal and informal restrictions relating to critical probing of the administration of justice in Western democracies. The author analyses certain premises on which free speech in general rests or ought to rest and applies them to free speech in the legal domain. Within the ambit of these premises the use or restriction of outspoken criticism of the judiciary is assessed specifically in so far as it affects the lawyer and journalist. The effect of the contempt institution in legal systems inspired by English law and those devices approximating to the contempt power in civil law systems and also informal restrictions of a societal nature comprise the substantial part of the work; so, too, the alleged profound reluctance to allow free speech in the West and a concomitant failure to use free speech.

Because *The Cloistered Virtue* is virtually a compendium of its author's previous views, some of the points of criticism which follow have been levelled by the present reviewer on a previous occasion.

As was to become customary in the author's writings, the topic of freedom of speech in the present work is discussed against the backdrop of the three trials against him. The perceived restrictive approach in the judgments to free speech concerning the administration of justice is represented by the author not to have its counterpart anywhere in the Western world. Here it seems, in the first instance, issue must be taken with the author: the author was acquitted on both charges which turned on scandalisation contempt. Admittedly, as is pointed out by Van Niekerk (and by Dugard in a foreword to the work), in the first *Van Niekerk* decision the court did convey that he might well have been found guilty of this kind of contempt if he had not been found to lack the requisite *mens rea*. However, as Claassen J pointed out at length, and as one writer who initially committed himself to a critical view of the decision, later conceded it was the all-embracing nature of Van Niekerk's criticism – the fact that it took into its sweep all judges and all superior courts indiscriminately – which excluded it from the category of "fair and legitimate" criticism (see Milton's edition of Hunt *South African criminal law and procedure* Vol II (1982) 187 fn 77). Moreover, the fact that the above commentator was not the only one to break rank would seem to signify that the criticism of Van Niekerk in this decision was less innocuous than represented by Van Niekerk. Thus the late Professor Hahlo, a prominent South African academic, who one can presume would incline sympathetically to Van Niekerk, referring to the latter's implication of a "conscious and deliberate" differentiation in the meting out of justice to white and black, wrote: "What more serious accusation, short of venality, could be directed against the judiciary of any country?" That Van Niekerk's attempt in the present work to underplay the court's acquittal of him on the second scandalisation charge (his call upon the judges to "speak out" on unjust laws) is also uncharitable, is underscored by an *obiter dictum* of Mr Justice Milne (a judge generally regarded as being of impeccably liberal persuasion) in *S v Gibson* 1979 4 SA 115 (D). This judge, though approving the acquittal of Van Niekerk, nevertheless conceded (128) that

> "[it] might be thought that this [the criticism of Van Niekerk which gave rise to the second prosecution and acquittal of him] would constitute the imputing of improper motives to those taking part in the administration of justice . . ."

According to Van Niekerk, the conviction on the charge of infringing the *sub judice* rule, is "unique in the annals of contempt in the English-speaking world . . ." (14). Again the assertion cannot be allowed to go unchallenged. The need for restriction on trial publicity is forcefully attested to by the fact that it is still observed in those countries in which the contempt institution holds sway; and in other countries, *sub judice* restrictions have either been introduced or their introduction mooted. Indeed, the rationale behind the restriction against scandalising the courts is far more controversial because it is regarded as being elitist in nature, conferring as it does distinct protection on the judiciary over and above that which is given to other members of society. It seems, therefore, that in this regard the decision would not fall outside the mainstream premise that nothing extraneous should be allowed to affect the courts' decisions and, less remotely, that such an impression should not be created in the public mind. Presumably as a result of his zeal to represent the seemingly onerous foreclosure on free speech by the decision, the author ignores this distinction in the present work.

With regard to the conviction of attempting to defeat or obstruct the course of justice (Van Niekerk's exhortation to judges to disregard the evidence given by persons detained in accordance with the Terrorism Act), Van Niekerk claims that the ire of the court was generated by the "awkward publicity" of his appeal rather than by its import (15). Perhaps this speculation provided a balm for seared feelings. Frankly, however, it seems oversimplistic. The appellate division's finding on this charge was that Van Niekerk had called upon judges to act injudiciously by ignoring admissible evidence; not that *all* calls, for example, those which do not urge an improper course of action, constitute contempt. Section 6 of the Terrorism Act 83 of 1967 and, today, section 29 of the Internal Security Act 74 of 1982, explicitly provide for indefinite confinement with substantial scope for isolation until the detainee has replied satisfactorily to all questions. In the face of such legislative intention it is simply not open, on a frank and reasoned approach, to the courts to infer irresistibly or automatically that every statement made is not freely or voluntarily made. Looked at from this perspective, the call of Van Niekerk upon the courts in effect to apply a *general* exclusionary rule relating to detainee evidence is not only naive but unjustifiably injurious to the image of the bench. It could arouse the misconception that more could be done, and may propagate a belief in certain widespread circles that the judiciary rather than Parliament is responsible for the shackling of fundamental freedoms. If looked at in this light the court's decision to convict cannot be regarded as overly restrictive.

In the work under review the statements of Fannin J and Ogilvie Thompson JA in the court *a quo* and on appeal respectively in the second *Van Niekerk* decision – that the call of Van Niekerk for judicial protest and condemnation of South Africa's security laws was misguided because it represented a misunderstanding of the functions of a judge – provided Van Niekerk (and others) with evidence of the judicial reluctance to intervene on questions of high governmental policy. So, too, the classification by Steyn CJ of curial condemnation of security legislation as a political matter, and therefore not the task of a judge, is castigated by Van Niekerk:

> "[N]o doubt, judges in the Third Reich and Uganda would have no difficulty in hiding behind the same argument. We know what history's verdict on such attempts was" (186).

Here certain observations seem called for. First, the need for judicial reticence on controversial issues has always been recognised in legal systems structured on the Westminster model. Judges are expected to act in a politically neutral manner because of the democratic theory that "government" by the judiciary, consisting as it does of non-elected persons, is illegitimate. In England today, tradition is being broken and the trend of judges there to descend into the public arena as a consequence of popular pressure, has caused a great deal of disquiet and has even been regarded as

a departure from constitutional convention with potentially far-reaching consequences. Secondly, and related to the above, judicial silence in the face of harsh enactments as opposed to exonerating statements of the limitations of judges, does not provide evidence of judicial sympathy for the executive, because the system enjoins a non-political judicial role. Thirdly, again within such a constitutional structure, the demand for critical judicial censure of inequitable laws detracts attention from the cases where the censure has come – not in a political broadcast (although there are classical instances of these) or in exculpatory statements – in the attempts to mitigate the harsh effects of the legislation in a practical way. Finally, and most importantly, it seems explicit to the present reviewer that the verbal excess in the statement which equates the alleged South African judicial aloofness with that of Nazi Germany, tragically understates the grimness of that period, while the hyperbole detracts from the author's credibility.

The claim for R30 000 damages for defamation issued against Van Niekerk and the *Sunday Times* by the Minister of Justice and the appellate division's holding on exception, that Van Niekerk's allegation of racial bias on the part of the executive on a plea of mercy could be found defamatory of the minister, is represented in the present work to be yet a further tactic to control free speech – this time by enforcing public respect for the government. In the event, however, it appeared on the facts before the court *a quo* that there were in fact valid grounds for distinguishing between the black man and the white man in the cases in point and thus that the executive's decision was not racially motivated; that, as one author has pointed out, Van Niekerk had "again rushed in precipitately" (see Kahn "In Memoriam: Barend van Niekerk" 1981 *SALJ* 408). On another occasion too, it seems that Van Niekerk had jumped the gun. Thus Mr Justice Coetzee tells how, as chairman of the General Bar Council, his efforts to persuade the Minister of Justice, Mr Pelser, to charge a number of students who had been detained, were nearly ruined by Van Niekerk's public allegations of judicial apathy which, it will be remembered, had led to the second trial. (See the unpublished address of Mr Justice GA Coetzee delivered to the Witwatersrand Regional Committee of Lawyers for Human Rights 1981-11-27.)

According to Van Niekerk the contempt institution, familiarly known as scandalisation contempt, was still "largely dormant" in South Africa in 1955. He refers to its "discovery" in the first *Van Niekerk* decision. Yet the precise opposite is true – the more liberal stance in fact being indicated for the latter half of the present century. Thus the last successful prosecution for scandalisation contempt was instituted twenty-one years ago (in a recent case of *S v Harber* the appellate division held that the statements alleged to be in contempt did not constitute scandalisation contempt: see the unreported judgment in 1988-03-30 case no 341/1986). The fact that there has not been a dearth of prosecutions since (in fact there have been six) would tend to negate an overly inhibitive effect of the institution on critical comment. Although it is true that the only prosecutions of an academic were instituted during this period, in both the charges of scandalisation contempt failed, despite the possibly greater potential for comment emanating from this quarter to shake the public confidence in the administration of justice by the courts. On the other hand in the late nineteenth century and first half of the present century, there were, of a total thirteen prosecutions, only three acquittals. Indeed the assumption in an early appellate division decision, *In re Mackenzie* 1933 AD 367, of a kind of judicial immunity from criticism and scrutiny by the public, reflects the temper of the court in this early period. On this occasion the court stated:

> "[T]here can be no justification before us of the opprobrious terms used and opinions expressed. We are not, under our constitution, the tribunal to judge of our own fitness for the position we hold, *nor can the public or the public press constitute itself such a tribunal*" (my emphasis).

An afterword to the work of Van Niekerk is written by Gilbert Marcus. Here too the attempt to show the restrictive approach to speech concerning the judiciary is unconvincing. Thus the fact that in the court cases turning on scandalisation contempt, decided after the *Van Niekerk* cases, the prosecution failed, is glossed over by Marcus when he states:

> "Since the death of Barend van Niekerk, there have been few reported cases that have a bearing on freedom of speech and the administration of justice. The dearth of cases on the subject is indicative of the stifling effect of the judgement in the second Van Niekerk case . . . The extremely restrictive test for contempt laid down by the Appellate Division in that case has probably caused many commentators to think twice before making pronouncements on matters affecting the administration of justice" (353).

As an example of the alleged virtual taboo on critical comment relating to the judiciary, Van Niekerk singles out, in particular, comment (or an alleged lack of it) concerning judicial appointments. So, according to Van Niekerk, "only the Johannesburg *Sunday Times* has at times gingerly entered this thicket with mild criticism" (201). While the allegation of the English media's reluctance to lock horns with the judiciary undoubtedly holds true of the English press in the period before the present government came to power, it cannot be asserted, as in the work under discussion, that this has been the position since. Thus before 1948, although the established pattern of appointing judges had been breached on occasion and overtly political appointments made, the English public media did not seem to have been unduly dismayed. So, too, the same media were largely uncritical of the heavy involvement of many of the early incumbents of the bench in political office before appointment and of the proclivity of such incumbents again to eschew the bench for a career in politics. Compellingly indicative of this leaning of the English dailies, for example, was the lack of concern over the elevation of Centlivres to the highest court over the head of Greenberg, although it was freely rumoured that the move was occasioned by the opposition to a future Jewish Chief Justice (see Broome *Not the Whole Truth* 175-176). Other promotions, too, could have elicited a less complacent attitude. Thus in this regard Schreiner's admission of his own luck under the old order ought to be noted:

> "[I] am only as senior as I am by having lucky appointments at earlier stages. In front of Phillip [Millin] to the TPD, in front of RPB Davis to the AD . . . Helped by this advancement I certainly was, by the fears of governments that their followers were more anti-Semitic than themselves" (see Kahn in *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* 50).

The English legal press also reflected the smug consensus. Thus in 1932 the *South African Law Times* even sounded a note of disapproval over the Bar Council's dissent on the overt political appointments of Beyers and Roos straight from public office to the appellate division. "The Appellate Division", it said, "had been in existence for too short a period – twenty-two years – for any tradition to have hardened in this connection" (see Anon 1932 *The South African Law Times* 213).

One suspects that a major reason for the general attitude of complacency of the English section of the press over judicial appointments before 1948 was the degree of "Anglicism" which characterised the bench during the period, although many of the incumbents were Afrikaans-speaking. Thus the vast majority of the judges of the time had strong links with the Cape, were educated or received their professional training in England and tended to write their judgments in English. The extent of anglicisation on the South African bench at the time is underscored by the reaction of the Afrikaans press to the elevation of Wessels to the Chief Justiceship in 1932. In this regard the leading Afrikaans newspaper, *Ons Vaderland*, criticised the appointment on the grounds that Wessels was "hostile to the Afrikaans language and, by inference, to the people who were Afrikaans speaking". Other contemporary incidents and reactions were indicative of the pervasive atmosphere of English leadership. So it was only in 1939, that the jurymen were hailed for the first time by the

usher of the supreme court in Cape Town in Afrikaans; to the surprise and astonishment of the presiding judge (see the *Star* of 1939-08-04). And as late as 1945 the *Transvaler* commented on the small proportion of Afrikaans advocates at the Transvaal Bar, which, it said, would soon resemble "a Jewish Sanhedrin" (see the *Transvaler* of 1945-06-14).

During the last three decades – contrary to Van Niekerk's allegation – criticism in relation to judicial appointments stands in stark contrast to the conspicuous lack of it before the 1950s. Thus the appointment of LC Steyn from public office in 1951 to the Transvaal provincial bench, despite the precedent which had been set on five occasions before 1948 – and with which there had been no quarrel – was widely condemned in the press; so, too, was Steyn's elevation to the appellate division in 1955. The appointment of Steyn to the Chief Justiceship over the head of Schreiner was indignantly reported in the English press. Nor has the criticism always been free from apparent bias. Thus the appointment of Mr Justice Cillié to the Transvaal Bench after he had taken silk only a few weeks previously was widely criticised by the press (see *ia* the *Rand Daily Mail* of 1985-11-01) while the appointment of Mr Justice Williamson, also to the Transvaal provincial division, only one week after having taken silk, elicited no censure; indeed it was predicted that the appointment would cause no controversy (see the *Rand Daily Mail* of 1975-02-01). Other appointments also have not been allowed to go unnoticed. Thus widespread opposition has been expressed when appointments to the bench were made from the post of Attorney-General or when such an appointment was mooted. Nor can it be said that the flame of critique has not been kept burning as regards the country's successive Chief Justices. So, the appointment of Mr Justice Rumpff has always been controversial; to the Judge Presidency over the head of Mr Justice Dowling (see the *Sunday Times* of 1959-11-01); to the Appellate Division and Chief Justiceship amidst the concern of members of the Johannesburg Bar and the press (see the *Rand Daily Mail* of 1960-12-02). Press concern with the appointment of Mr Justice Rabie related to the alleged authoritarian approach of the new Chief Justice, which was reflected, it was said at the time, in the Report of the Commission of Inquiry into Security Legislation under the judge's chairmanship (see the *Rand Daily Mail* of 1982-04-23). All the above criticism predates the publication of Van Niekerk's work.

But it is perhaps with Van Niekerk's allegation of the apparent risks run by the academic who ventures outspoken comment that real issue must be taken. Thus there are that author's own articles following on the ill-fated one which earned for him the prosecution – and acquittal. In these, which followed in short succession, the statistics produced by him to show the seemingly racial bias were to become a recurring theme, both at home and abroad. Often the same figures were simply reproduced and often, too, the data were imprecise to say the least, bolstered as they were by probabilities, possibilities and assumptions, as the following example indicates:

> "*Probably* 95 percent of all executions since 1910 have been of Blacks; since 1910 there have *apparently* only been five executions of Whites for the murder of Blacks. Concerning the capital crime of rape there have since 1910 been *about* 150 executions for rape, all but two being of Blacks ... it is *assumed* by most observers that the vast majority, *probably* well over ninety percent, of these cases concerned the rape of White women by Black men" (see Van Niekerk "Freedom of speech concerning the administration of justice – a personal view from South Africa" 1977 *Revista Juridica de la Universidad de Puerto Rico* 661 fn 22).

Nor, it seems, as is alleged by Van Niekerk in the present work, have the teachings of modern realism with its stress on the judicial personality always been overlooked in South Africa, and least of all by that author. Thus the leniency of the white judiciary as regards violence committed by black upon black has been explained by Van Niekerk in terms of "inverted racism" (see especially that author in Sanders (ed) *Southern Africa in need of law reform* 170). The thesis is that "lack of wisdom" and of "spiritual independence", rather than (in relation to the accused's moral guilt)

compassion for his unstable environment or an understanding of his ethnic background, accounts for the fact that in many cases involving blacks only a conviction for culpable homicide instead of murder is returned. In this context, according to Van Niekerk on that occasion, race becomes a "kind of qualified carte blanche for crime" (*ibid* 170). The latter analysis indeed seems inconsistent in the light of the author's relentless pleading for the abolition of the death penalty (see particularly his urgings for the abolition of the death penalty in 1969 *SALJ* 457; 1970 *SALJ* 60). The judicial premises conceived by Van Niekerk to underlie unjust racial bias in sentencing in South Africa have also been taken abroad by that author. To the Academy of Psychiatry and Law in New Orleans Van Niekerk stated:

> "First and foremost, the privilege of being hoist by the hangman's noose in Pretoria is, in purely statistical terms, that of the Black man . . . it is a palpable statistical truth that racial factors do in fact play an obvious role in the life-or-death decisions" (see Van Niekerk 1977 *Bulletin of the American Academy of Psychiatry and the Law* 277 282).

So, too, they have been exported to Bophuthatswana. There Van Niekerk said:

> "There can be little doubt that the judicial rule against the death sentence for Whites for rape in practice is as strong as that of a statute, with only apparently three exceptions breaking the rule for rape of children (white) of tender age" (see Van Niekerk in Sanders (ed) *Southern Africa in Need of Law Reform* 172).

The foreword to *The Cloistered Virtue* is written by Dugard. The concession of the latter author that the prosecutions of Van Niekerk "failed to curb academic criticism of judicial decisions in the areas of race and security" (xvii), however late in the day it has come, is welcome and, in the perspective of the harmful picture painted of the South African judiciary, less incongruous than the customary allusion to the alleged dangers inherent in commenting critically on the judiciary for fear of contempt. The retraction relating to the ostensible risk of engaging in outspoken comment was also inevitable in the light of the number of writings relating to the alleged racial bias in sentencing which have seen the light of day since the *Van Niekerk* prosecutions – and also in the light of Dugard's own attempts to adduce statistical or other evidence which could fuel suspicion of the existence of a discriminatory sentencing policy.

As has been mentioned, an afterword to the present work of Van Niekerk is written by Gilbert Marcus. Concern is expressed by that author over the trend of judicial appointments over the last thirty years. According to Marcus, the Hoexter Commission rejected too glibly as "pious" the submissions in evidence of the Johannesburg Bar that arbitrary appointment to the bench was a factor in the unavailability of a number of senior counsel for judicial appointment. The Hoexter Commission had pointed out that if in future the claim of the bar to a monopoly of judgeships was to be continued to be realised, "it [the bar] would be short-sighted . . . to parade too piously too many reasons for declining appointment" (*Commission of Inquiry into the Structure and Functioning of the Courts* (RP 78 (1983) 71)). The point of the commission seems to the present reviewer not only pertinent in itself, but also not too glib a rejection of the Johannesburg Bar's submissions if the allegation is true that the dominant reason for members of the Johannesburg Bar refusing positions on the bench has mostly been financial. Thus in this regard it has been said:

> "South Africa's judiciary would probably be even more liberal if many offers of judgeships had not been turned down by liberal members of the Johannesburg Bar specifically. In some cases, this has been because of discomfort at the idea of administering patently unjust laws; but usually the reason has been financial" (see Dugard in the *Financial Mail* of 1986-08-08).

To criticise Van Niekerk's arguments or, at times in the present reviewer's opinion, their lack of foundation, is not to denigrate the value of the book, the subject of

which, as the author concedes, is of moment for many Western democratic governments. A further merit of the work concerns Van Niekerk's engagement in "narrating" his own experience. In this regard it has been stated:

> "[A]n important characteristic of humanistic legal studies . . . is its commitment to maintaining a subjective, experimental dimension – i.e., of not losing sight of actual beings and bringing oneself into one's work, while attending to the character of the larger system. The reflective narrative is central to this perspective . . ."

The invocation of an autobiographical preface or backdrop is perhaps commendable, because it would seem to be the honest thing to do if the criticism issues from the subjectivity of the critic.

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Zoo min als een Ambachtsman zijn handwerk, een Konstenaar zijnen arbeid, een heelmeester zijne operatiën, verrigten kan, zonder van die noodige gereedschappen, of werktuigen voorzien te zijn; even min kan iemand, zonder Boeken, *den noodigen trap van geleerdheid bereiken. – Ondertusschen is het niet onverschillig, van welke Boeken men zig bedient. De slechten brengen ons op een dwaalspoor; de middelmatige verschaffen dikwils meer overlast, dan hulp; de beste zijn het, die ons dienen kunnen. – Dit is inzonderheid waar, ten aanzien van* Regtsgeleerde Boeken, *waar in eene goede keuze hoogst noodzakelijk is* (*per* Van der Linden *Koopmans handboek* 2 1).

Sessie *in securitatem debiti* en die komponente van die skuldeisersbelang

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SUMMARY

Cession *in securitatem debiti* and the components of the creditor's interest

This contribution considers the uncertainty surrounding cession *in securitatem debiti* in South African law. It is contended that, despite indications to the contrary in *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 2 SA 769 (A), it is still open to the parties to such a cession to structure their relationship either as a security transfer or as a pledge of the right utilised to afford the cessionary security. *Marais v Ruskin* 1985 4 SA 659 (A), it is argued, established that the effect of a cession *in securitatem debiti* is determined by the intention of the parties to it. The attempt in this decision to typify an out-and-out transfer by way of security as a pledge, and to transform the cedent's reversionary right from a claim against the debtor to one against the cessionary for a retransfer of the ceded right can, however, not be supported.

Following the example of Continental legal systems, various South African commentators have sought to base the pledge of a right of action on the concept of a limited cession which, while leaving in the cedent the ultimate beneficial interest in the debtor's performance, vests the cessionary with the capacity to exact performance from the debtor and to retain the proceeds until satisfaction of the secured debt. Criticisms against this construction are considered and rejected on account of the failure to distinguish between the beneficial interest in the performance and the capacity to dispose of it as distinct components of a personal right. A review of various phenomena of South African private law leads to the conclusion that such a construction of personal rights is recognised in our law, thereby providing a sound basis for a limited cession along the lines contended for.

Such a cession, it is submitted, paves the way for the recognition that a real right of pledge may be constituted for the cessionary over the beneficial interest which the cedent retains against the debtor. It is contended that the requirement of possession in regard to a pledge of corporeals is a particular manifestation of a requirement common to the constitution of real rights of security in our law, namely that the creditor should obtain control of the asset in question. The requirement of possession ought not, therefore, to be set where the assets in question are incapable of being possessed, but may be subjected to the control of the creditor in other ways, e g by means of a cession of the capacity to claim and dispose of the right to the performance in question. In this manner, the primary objection to the recognition of a right of pledge with respect to a personal right, namely that such a right is incapable of being possessed, can be met. The notion of a limited cession and the view of the personal right on which it is based, also obviates the need to conceive of *dominium* in a personal right in order to construe an interest in the subject matter of the cession for the cedent.

I

Dit is 'n algemene verskynsel dat 'n skuldeiser behoefte daaraan het om sy vorderingsreg aan te wend ter versekering van sy eie skuld teenoor 'n ander. Afgesien van die registrasie van 'n notariële verband met betrekking tot die

vorderingsreg,[1] bied die Suid-Afrikaanse reg, in teorie altans, twee moontlike meganismes hiervoor. Aan die een kant is daar die moontlikheid van 'n sogenaamde sekerheidsoordrag van 'n vorderingsreg (*fiducia cum creditore contracta*). Hiervolgens gaan die sekerheidsgewer en die sekerheidsnemer 'n sessie aan waarkragtens eersgenoemde se vordering (of vorderings) ten volle aan laasgenoemde oorgedra word, maar onderhewig aan 'n kontraktuele beding (die sogenaamde *pactum fiduciae*) dat die reg na delging van die versekerde skuld na die sekerheidsgewer teruggesedeer moet word. Die verhouding tussen die partye en die regsgevolge in situasies waar die belange van derdes op die spel kom, word beoordeel vanuit hierdie uitgangspunt.[2] Aan die ander kant kan die partye, ten minste as alternatief tot die sekerheidsoordrag, sekerheid deur verpanding van die vorderingsreg bewerkstellig. Uit so 'n transaksie verkry die sekerheidsnemer bloot 'n beperkte sekerheidsbelang of pandreg in die vorderingsreg. Die wese van die verpandingskonstruksie is dat die sedent sy "*dominium*" in die vorderingsreg behou.[3] Dit bring mee dat die reg 'n bate in die boedel van die sedent bly en dat dienooreenkomstig daarmee gehandel word by insolvensie van sowel die sedent as die sessionaris, maar steeds onderhewig aan die sessionaris se saaklike sekerheidsreg. Alhoewel die sessionaris se pandreg of sekuriteitsbelang omvattende bevoegdhede met betrekking tot die reg inhou, word hy volgens hierdie siening nie as skuldeiser van die skuldenaar beskou nie.[4]

Hierdie dualisme weerspieël die stand van ons regspraak. Na die erkenning van die verpandingskonstruksie in *National Bank of South Africa v Cohen's Trustee*[5] het die appèlhof later in *Lief v Dettmann*[6] en *Trust Bank of Africa v Standard Bank of South Africa Ltd*[7] te kenne gegee dat sekerheidsessie die enigste manier is om vorderingsregte as sekuriteit te gebruik. Hierdie neiging, waarskynlik die gevolg van akademiese en regterlike kritiek en onsekerheid in verband met die verpandingskonstruksie,[8] bereik 'n hoogtepunt in *Holzman v Knights Engineering and Precision Works (Pty) Ltd.*[9] In hierdie saak verklaar regter Nestadt dat die pandkonstruksie deur ontwikkelinge in die regspraak geassimileer is tot die *fiducia*-konstruksie:

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1 'n Notariële verband kan t o v sowel stoflike as onstoflike roerende goed gevestig word. Sien a 53(1) van die Registrasie van Aktes Wet 47 van 1937; vgl *Sarwill Agencies (Pty) Ltd v Jordaan* 1975 1 SA 938 (T); *Netherlands Bank of South Africa v Yull's Trustee* 1914 WLD 133.

2 Sien hieroor De Wet en Van Wyk *Kontraktereg en handelsreg* (1978) 366–367; Van der Merwe *Sakereg* (1979) 482–483; Pahl *Die aanwending van vorderingsregte ter versekering van skulde* (1972) 177–197; Harker "Cession in securitatem debiti" 1982 *SALJ* 56; "Cession in securitatem debiti: in the nature of a quasi-pledge?" 1987 *SALJ* 200.

3 Wat in wese niks anders beteken as dat hy steeds skuldeiser teenoor die skuldenaar bly nie. Sien die bespreking hieronder.

4 Sien Scott *Law of cession* (1980) 140–142; Scott en Scott *Mortgage and pledge* (1987) 147 e v; Scott "Verpanding van Vorderingsregte: uiteindelike sekerheid?" 1987 *THRHR* 178–179; Van der Merwe 483–485.

5 1911 AD 235.

6 1964 2 SA 252 (A).

7 1968 3 SA 166 (A).

8 Sien bv De Wet en Van Wyk 366–374; Van der Merwe 477–586 veral met verwysing na *Frankfurt v Rand Tearooms Ltd and Sheffield* 1924 WLD 253; *Moola v Estate Moola* 1957 2 SA 463 (N) en *Barclays Bank (DC&O) v Riverside Dried Fruit Co (Pty) Ltd* 1949 1 SA 937 (K).

9 1979 2 SA 784 (W).

> "When one looks to the later and more recent cases, however, there is to be discerned a distinct development or change (of emphasis) in the following respects. Firstly, the concept of ownership of the right remaining in the cedent, whilst not expressly departed from, is either put in its proper perspective by being shown to be a contradiction in terms, or is impliedly banished by no longer being referred to at all. Secondly, the principle is established that, as regards third parties, the effect of a cession *in securitatem debiti* is as complete as an out-and-out cession ... In the result, it seems to me that it is now established that the effect of a cession *in securitatem debiti* is the same (as far as the debtor is concerned) as an out-and-out cession. If reference is still to be made to the cedent retaining *dominium*, it must be confined to the ownership of a personal right that he has against the cessionary arising from the contract between them, *inter alia*, that, on payment of the secured debt, the ceded right will be returned to the cedent."[10]

Desnieteenstaande het verskeie beslissings na die *Lief*-saak steeds die standpunt gehandhaaf dat die verpanding van 'n vorderingsreg, soos verstaan in die *Cohen*-saak, in ons reg bestaanbaar is.[11]

'n Verdere dimensie is aan die problematiek verleen deur *Alexander v Standard Merchant Bank Ltd*,[12] waar te kenne gegee is dat die Suid-Afrikaanse reg tot die punt ontwikkel het dat die aanwending van 'n vorderingsreg as sekuriteit ter keuse van die partye gestruktureer kon word as 'n verpanding of as 'n sekerheidsoordrag.

Meer onlangs is die verpandingskonstruksie opnuut deur die appèlhof onderskryf in *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk*,[13] *Marais v Ruskin*,[14] asook *Illings (Acceptance) Co (Pty) Ltd v Ensor*[15] en *Bank of Lisbon and South Africa Ltd v The Master*.[16] Hierdie ontwikkeling het egter steeds nie 'n einde gemaak aan die probleme rondom hierdie regsfiguur nie. Afgesien van onsekerheid oor die vraag of die partye tussen die twee alternatiewe kan kies, bestaan daar steeds vrae, nie soseer oor die aard van die verhoudinge wat by 'n verpanding ter sprake kom nie, as oor die teoretiese verduideliking en dogmatiese aanvaarbaarheid daarvan. In hierdie bydrae word gepoog om albei hierdie aangeleenthede te behandel.

II

Die vraag na die moontlikheid van meerdere, alternatiewe konstruksies vir die sessie *in securitatem debiti*, is nie pertinent in *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy* aangespreek nie. Dit skyn egter inderdaad of appèlregter Hefer, op grond van die *Cohen*-saak, sonder meer aanvaar het dat 'n sessie *in securitatem debiti* noodwendig as 'n verpanding beskou moet word.[17] Die aanname dat die oogmerk van sekerheidstelling sonder meer in die weg staan van 'n volle oordrag by wyse van 'n *fiducia cum creditore contracta*, blyk

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10 789 791–792.

11 Sien bv *Guman v Latib* 1965 4 SA 715 (A); *De Wet v Bank van die OVS* 1968 2 SA 73 (O); *Oertel v Brink* 1972 3 SA 669 (W); *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W); *Randbank Bpk v Morris* 1977 2 SA 21 (SOK); *Italtrafo SpA v Electricity Supply Commission* 1978 2 SA 705 (W); *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (N)).

12 1978 4 SA 730 (W).

13 1985 2 SA 769 (A).

14 1985 4 SA 659 (A).

15 1982 1 SA 570 (A).

16 1987 1 SA 276 (A).

17 Vgl die benadering op 870 en let daarop dat geen ag geslaan is daarop dat die sessie in hierdie geval geformuleer was as 'n volle oordrag van die sedent se regte nie.

ook uit die *Bank of Lisbon*-saak.[18] So 'n benadering is onoortuigend. Dit negeer die kontrakteervryheid van die partye en druis veral in teen die behoefte van sekerheidsnemers om vir hulself optimale sekerheid te beding deur middel van 'n sessie waardeur hulle die regte van die sekerheidsgewer ten volle bekom. Of die ontwikkelinge in die jongste beslissings die moontlikheid van 'n keuse aan die kant van die partye uitgeskakel het, is 'n vraag wat nie maklik te beantwoord is nie. Myns insiens kan daar egter nie gesê word dat die kursoriese uitlatings in die *Leyds*- en *Bank of Lisbon*- saak die verwarrende kompleksiteit van die regspraak tot op daardie stadium genoegsaam behandel het om 'n bevredigende oplossing van die botsende tendense te gee nie. Die gebruik, ook deur die appèlhof, van onpresiese terminologie wat neig om die skeidslyn tussen die twee konstruksies te vervaag, dra ook nie tot helderheid omtrent die stand van ons regspraak by nie.

Die onsekerhede in hierdie verband kan geïllustreer word aan die hand van die onlangse beslissing in *Marais v Ruskin*,[19] welke beslissing na my mening nietemin die sleutel tot die onderhawige vraag bied. Moll het R16 000 by Marais geleen. Ter versekering van hierdie skuld sedeer hy 'n vordering vir R88 730 teen 'n trust aan Marais, wat 'n trustee van die betrokke trust is.[20] Ingevolge 'n skikking ten tyde van Moll se egskeiding, sedeer Moll daarna "all claims which he presently has" teen die trust aan sy vrou. Toe Moll hierna gesekwestreer word, het Ruskin, sy kurator, die skuld teenoor Marais gedelg. Laasgenoemde het die reg teen die trust wat hy as sekuriteit gehou het aan die kurator terugsedeer, wat toe R88 730 van die trustees geëis het. Die trustees neem egter die houding in dat mevrou Moll ingevolge die sessie aan haar op die geld geregtig is. Die Transvaalse provinsiale afdeling beslis ten gunste van die kurator en die appèlhof verwerp die trustees se appèl teen hierdie beslissing. Die reg op die bedrag van R88 730 word dus beskou as 'n bate in die insolvente boedel.

Namens die trustees is in appèl betoog dat ongeag watter siening van die sessie *in securitatem debiti* aangehang word, Moll na die sessie aan Marais 'n reg op terugsessie teenoor laasgenoemde gehad het, welke reg aan mevrou Moll sedeer is.[21] Hierdie betoog word deur hoofregter Rabie verwerp. Die sessie tussen Moll en sy vrou het betrekking gehad op regte wat Moll teen die trust sou gehad het. Die bedoeling van die partye was volgens hoofregter Rabie dus om 'n vordering vir R88 730 teenoor die trust te probeer sedeer.[22] Omdat Moll egter reeds vantevore aan Marais 'n sessie gegee het van alle regte teenoor die trust, het hy aan sy vrou regte probeer sedeer wat hy nie meer gehad het nie. Die reg waaroor hy wel beskik het, naamlik dié teenoor Marais op terugsessie van die vordering na delging van die versekerde skuld, was 'n sedeerbare reg. Dit het egter nie op mevrou Moll oorgegaan nie omdat die saaklike ooreenkoms nie daarop betrekking gehad het nie. Omdat nie aanvaar kan word dat Moll *mala fide* was met die sessie aan sy vrou nie, lê die verklaring vir die strekking van die tweede sessie waarskynlik daarin dat die partye die eerste sessie as 'n verpanding beskou

18 274.
19 1985 4 SA 659 (A).
20 Ingevolge die sessie-akte was die sessie 'n oordrag van alle "reg en titel" wat Moll in sy leningsrekening teenoor die trust gehad het aan Marais ter versekering van lg se vordering (sien die uitspraak 668).
21 668.
22 670.

het wat Moll as *dominus* van die vorderingsreg steeds met 'n reg teen die trust gelaat het wat hy aan sy vrou kon sedeer. Ongelukkig was die eerste sessie, soos aangetoon, ingeklee in terme wat op 'n algehele regsoordrag dui.[23] Ten spyte van uitlatinge in *National Bank of South Africa v Cohen's Trustees* dat die sekerheidsoogmerk van 'n sessie 'n verpanding daarstel selfs al is die sessie in algemene terme gestel,[24] gee die hoofregter effek aan die gemanifesteerde bedoeling van die partye met die gevolg soos hierbo uitgespel. Op die feite van die saak en op algemene beginsels beoordeel, is hierdie gevolgtrekking korrek.

Eienaardig en bevreemdend is die feit dat die hof desondanks die transaksie tussen Moll en Marais as 'n verpanding van die vorderingsreg voorstel en dan ook van die geleentheid gebruik maak om die bestendiging van hierdie konstruksie in die *Leyds*-saak te onderskraag.[25] Dit skyn of die siening van die pandkonstruksie in hierdie twee appèlhofsake in wese van mekaar verskil. Die *Leyds*-saak is beslis op die basis dat die vorderingsreg ten spyte van die sessie steeds 'n bate in die boedel van die sedent bly sodat dit by sekwestrasie van die sedent in sy boedel val.[26] Die kern van die uitspraak in die *Marais*-saak lê egter juis daarin dat die gesedeerde vordering vanweë die sessie geheel en al uit die boedel van die sedent verwyder is en dat die sogenaamde "reversionary right" van die sedent 'n reg teenoor die sessionaris in stede van 'n reg teenoor die skuldenaar is. Dit is dan ook moeilik om in te sien hoe hoofregter Rabie sou kon ontsnap van die konklusie dat by insolvensie van die sessionaris die sedent bloot 'n konkurrente eis op terugvordering teenoor die kurator sou hê – 'n resultaat wat die verpandingskonstruksie in die tradisionele formulering juis trag om te vermy. Om 'n verpanding soos in die *Marais*-saak te konstrueer, bring mee dat die *fiducia*-konstruksie heelhuids onder die vlag van 'n verpanding tuisgebring word. So 'n siening van die pandkonstruksie vind aansluiting by die standpunt in *Holzman v Knights Engineering and Precision Works (Pty) Ltd*[27] en *Big Sixteen (Pty) Ltd v Trust Bank of Africa Ltd*,[28] maar bots onversoenbaar met die aanvaarding van die gebruiklike siening van die pandkonstruksie wat die sedent se "reversionary right" tipeer as 'n reg om die vorderingsreg teenoor die skuldenaar af te dwing nadat die versekerde skuld afgelos is.[29]

Myns insiens kan daar nie gesê word dat die *Marais*-saak, waar van 'n verpanding gepraat word terwyl die verhouding tussen die partye ingevolge die *fiducia*-konstruksie bepaal word, meebring dat die tradisionele siening van 'n vorderingsverpanding uit ons reg geweer is nie. Terselfdertyd kan die implikasies van hierdie beslissing egter nie buite rekening gelaat word nie. Dit is naamlik belangrik om daarop te let dat die sessie in die *Marais*-saak asook die ander beslissings wat die sogenaamde sedent-pandgewer met 'n eis teen die sessionaris laat, so geformuleer was dat dit op 'n volle oordrag van die vorderingsreg vir

23 Sien *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 2 SA 710 (A) waar Rabie HR 'n sessie in sodanige terme tipeer het as 'n volle regsoordrag.
24 Sien die uitspraak van De Villiers HR te 244; vgl Innes AR se meer versigtige opmerkings 252 en 254.
25 Sien 670 en vgl die beskrywing van die sedent se belang na die eerste sessie as 'n terugvallende oftewel 'n "reversionary right".
26 Sien die uitspraak van Hefer AR 780.
27 1979 2 SA 784 (W) 791.
28 1978 3 SA 1032 (K).
29 Sien *Kotsoupolos v Bilardi* 1970 2 SA 391 (K) 398; *Bank of Lisbon and South Africa Ltd v The Master supra* 291 294.

doeleindes van sekuriteit afgestem was.[30] Die implikasie van die *Marais*-saak is dus dat aan 'n sessie effek gegee moet word ooreenkomstig die bedoeling van die partye soos dit uit die saaklike ooreenkoms na vore kom. Dit kom voor of die mees realistiese houding is dat 'n versoening tussen die *Marais*- en *Leyds*-sake bewerkstellig kan word deur te aanvaar dat, na gelang van die bedoeling van die partye, 'n sessie *in securitatem debiti* op 'n sekerheidsoordrag of 'n vorderingspand kan neerkom.[31] Om konsekwent te wees, moet dieselfde erkenning aan die bedoeling van die partye verleen word wat poog om 'n verpanding in die tradisionele sin tot stand te bring, as wat in die *Marais*-saak verleen is aan 'n poging om 'n volle regsoordrag te bewerkstellig.

III

Vervolgens word aandag gegee aan die vraag of die verhoudinge wat ingevolge die verpandingskonstruksie in die vooruitsig gestel word, binne die raamwerk van die Suid-Afrikaanse privaatregdogmatiek haalbaar is. As vertrekpunt kan gekyk word na die relevansie van die sessiefiguur by 'n poging om aan die sekerheidsnemer 'n beperkte sekerheidsbelang in die vorderingsreg van 'n ander te gee. Begripsmatig beskou, skyn dit nie of so 'n transaksie noodwendig vereis dat die sekerheidsgewer en die sekerheidsnemer hulself van die sessiefiguur hoef te bedien nie. In stede van 'n saaklike of oordragsooreenkoms skyn dit of die partye sou kon volstaan met 'n ooreenkoms wat konstitutief werk in die sin dat daar ooreengekom word dat die vorderingsreg afgesonder word as sekerheidsobjek ter bevrediging van die sekerheidsnemer se eis. Op algemene beginsels sal so 'n ooreenkoms vir die sekerheidsnemer 'n reg ten opsigte van die sekuriteitsvoorwerp skep wat, vir sover dit die inhoud daarvan aangaan, geformuleer kan word as die presiese ekwivalent van 'n pandreg.[32]

Dit volg egter nie dat so 'n regskeppende ooreenkoms wat uitwerking betref die ekwivalent van 'n pandreg sal wees by insolvensie of beslaglegging op die bate deur 'n derde nie. 'n Beskouing van saaklike sekerheidsmeganismes in die Suid-Afrikaanse reg toon aan dat saaklike werking in hierdie verband nie bloot deur ooreenkoms tussen die partye tot stand gebring kan word nie. Op grond van beleidsoorwegings stel die reg verdere vereistes hiervoor. Afgesien van die bedoelingselement, word by die verpanding van stoflike roerende sake steeds sterk vasgehou aan die vereiste dat die pandvoorwerp in besit afgegee moet word aan die sekerheidsnemer,[33] terwyl die registrasie-element by die vestiging van saaklike sekerheidsregte oor onroerende goed fundamenteel is.[34] Terwyl dit ongetwyfeld so is dat die publisiteitsbeginsel 'n rol speel by die stel van hierdie

30 Sien bv die *Holzman*-saak *supra* 792; vgl die *Big Sixteen*-saak *supra* 1034.

31 Ten gunste van so 'n keuse is Scott *Cession* 144; 1987 *THRHR* 175; Scott en Scott 77 147 182; Lubbe "Mortgage and pledge" 17 *LAWSA* par 482; Butler *The use and control of share blocks in South African law* (LLD-proefskrif US 1987) par 410; Boraine 1987 *De Jure* 171; Clarke en Van Heerden 1987 *SALJ* 238.

32 Vgl die opmerking van Reinecke 1987 *TSAR* 119 120; sien ook *National Bank of South Africa Ltd v Cohen's Trustee* 1912 AD 235 250–251.

33 Sien *Vasco Drycleaners v Twycross* 1979 1 SA 603 (A) 611; *Edwards v Van Zyl* 1951 2 SA 93 (K) 98; *Bezuidenhout v Marais* 1915 OPD 134; vgl Van der Merwe 453; Scott en Scott 57–58; Lubbe par 489 en gesag aldaar.

34 Sien a 102 en 50 van die Registrasie van Aktes Wet 47 van 1937; *Lief v Dettmann* 1964 2 SA 252 (A) 265; Van der Merwe 448–449; Scott en Scott 48–50; Lubbe par 420 423.

vereistes vir saaklike werking,[35] is dit nie die enigste oorweging waarom dit hier gaan nie.[36] By nadere beskouing blyk dit dat die betrokke vereistes van so 'n aard is dat nakoming daarvan 'n sekere mate van heerskappy oor die sekuriteitsvoorwerp vir die sekerheidsnemer bewerkstellig. Sodoende word die sekuriteitsvoorwerp teen verdere beskikkingshandelinge deur die sekerheidsgewer geïsoleer.

Besitsafgifte by pand plaas byvoorbeeld 'n besliste beperking op die vermoë van die sekerheidsgewer om verder oor die saak te beskik en dra op 'n eenvoudige maar effektiewe wyse tot die beskerming van die sekerheidsnemer by.[37] Hierdie verskynsel is eweseer merkbaar by sekerheidsregte soos dié van die verbandhouer oor onroerende goed. Die betrokke wetsbepalings stel dit naamlik duidelik dat die vermoë van die sekerheidsgewer om na verlening van die sekerheidsreg opnuut oor die bate te beskik, in belang van die sekerheidsnemer aan bande gelê word.[38] Inderdaad is dit juis die element van feitelik-juridiese heerskappy wat, tesame met die publisiteitsfaktor, die juridiese erkenning van die sekerheidsnemer se belang as 'n saaklike reg veranker en regverdig. Dit is van die uiterste belang om, veral wat pandreg betref, hierdie aspek en die vereiste van besit in behoorlike verband te sien. Van primêre belang is nie besit as sodanig nie, maar eerder die begrip heerskappy, waarvan besit 'n uiting of manifestasie is. Dit blyk onder meer daaruit dat daadwerklike fisiese oordrag van besit aan die sekerheidsnemer nie noodwendig by saakpand vereis word nie: dit is genoegsaam dat die pandnemer die bevoegdheid verkry om onmiddellik en ter uitsluiting van buitebelange beheer oor die sekerheidsvoorwerp uit te oefen.[39] Erkenning van die heerskappy-vereiste as onderliggend aan meganismes ter vestiging van saaklike sekerheid, vereis egter ook dat, met die oog op verkeersbehoeftes, telkens met die besondere aard van die sekerheidsvoorwerp wat ter sprake is, rekening gehou moet word. Dit bring onder meer mee dat die vereistes vir beheer in enige gegewe geval afhang van en bepaal word deur die geaardheid en eienskappe van die sekerheidsvoorwerp.

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35 Sien bv Van der Merwe 13; Scott en Scott 48 58; Hahlo en Kahn *Union of South Africa: the development of its laws and constitution* (1960) 613–614; vgl *Lighter v Edwards* 1907 TS 442.

36 Dit is argumenteerbaar dat besitsafgifte met betrekking tot roerende sake in die hedendaagse opset nie as effektiewe kennisgewing van die bestaan van die derde se besondere belang in die saak dien nie en dat dit in werklikheid geen besondere funksie in hierdie verband vervul nie. Andersins is dit ook so dat publisiteit nie noodwendig genoeg is om saaklike werking te waarborg nie. So verskaf 'n notariële verband oor roerende goed ten spyte van registrasie daarvan nie in die reël 'n saaklike reg aan die verbandhouer nie (sien Van der Merwe 474–475; Lubbe par 472).

37 Sien Lubbe par 489.

38 Sien a 56(1) 57 65(3) 75(2) 70(6) en 71(5) van die Registrasie van Aktes Wet 47 van 1937, wat die verbandhouer se medewerking vereis vir verdere beskikkingshandelinge ten opsigte van die verbandvoorwerp; vgl a 20 van die Wet op die Vervreemding van Grond 68 van 1968, wat eweneens die beskikkingsbevoegdheid van 'n eienaar van grond aan bande lê ten gunste van die koper van die grond op afbetaling wat die koopkontrak ingevolge die voorskrifte van a 20 in die akteskantoor laat opteken het.

39 Vgl Wille *Mortgage and pledge* (1961) 50 wat verwys na Savigny *Possession* 142–148; Lubbe par 489 en sien par 491 i v m die mate waarin erkenning verleen word aan die moontlikheid om pandreg te vestig deur middel van leweringsvorms wat, hoewel dit nie met werklike fisiese besitsafgifte gepaard gaan nie, nietemin die vereiste van heerskappy bevredig (vgl *Pieters & Co v Landau Bros and the Trustees of the Insolvent Estate of I & J Goldberg* 1914 SR 30; *Phillips v Soqaka* 1915 EDL 37; *Thompson v Tremeer* 1917 EDL 362).

Die algemene beginsels vir die vestiging van saaklike sekerheid behoort ook van toepassing te wees waar vorderingsregte as sekuriteit aangewend word.[40] Teen hierdie agtergrond is dit sonder meer duidelik dat 'n konstitutiewe ooreenkoms soos wat hierbo in die vooruitsig gestel word, nie as sodanig effektief kan wees ten einde saaklike sekerheid aan die sekerheidsnemer te verskaf nie. Afgesien van die afwesigheid van publisiteit, ontbreek daar enige sweem van die bestaan van 'n feitelike sekerheidsbasis wat deur die verlening van heerskappy oor die sekuriteitsvoorwerp, die sekerheidsnemer ingevolge so 'n ooreenkoms beskerm teen verdere handelinge met die saak deur die reghebbende. Vanuit hierdie perspektief word die beheptheid met die relevansie van sessie by pogings om 'n vorderingsreg as sekuriteit aan te wend, verstaanbaar. Afgesien van die registrasie-handeling wat in die vooruitsig gestel word deur die Registrasie van Aktes Wet in verband met notariële verbande,[41] bied 'n sessie-handeling die enigste meganisme waardeur getrag kan word om die grondslag vir die aanwending van 'n vorderingsreg as sekuriteitsvoorwerp te lê.

'n Sessie *in securitatem debiti* by wyse van 'n sekerheidsoordrag verleen natuurlik aan die sekerheidsnemer heerskappy oor die sekerheidsvoorwerp en dien gevolglik as basis vir effektiewe sekerheid. Om met die sekerheidsoordrag te volstaan sou egter, in die lig van die risiko wat so 'n reëling vir die sedent inhou, nie bevredigend wees nie. Die regspraak bied geen bevredigende analise van hoe 'n gewone sessie, wat die volle oordrag van 'n reg veronderstel, die nodige heerskappy in die sessionaris kan vestig sonder om die sedent sy posisie as reghebbende skuldeiser te laat verloor nie. 'n Konstruksie dat die reghebbende eienaar van die vorderingsreg is en, as gevolg van 'n sessie wat slegs kwasie-besit oordra, eienaar bly terwyl die sessionaris slegs 'n pandreg op die bate vestig, is konseptueel té gekunsteld om te bevredig en voldoen nie aan die heerskappy-vereiste nie. In die afwesigheid van enige aanduiding van wat onder kwasie-besit verstaan word, kan die gevolgtrekking net wees dat oordrag daarvan neerkom op 'n volle sessie wat nie van 'n sekerheidsoordrag te onderskei is nie, of andersins bloot 'n hol fiksie is wat nie van 'n oneffektiewe konstitutiewe ooreenkoms onderskei kan word nie.[42]

Hoe kan sessie, wat tradisioneel gesien word as 'n volle regsoordrag, diensbaar gemaak word ten einde, met inagneming van die heerskappy-beginsel, 'n verhouding so te struktureer dat dit die kenmerke vertoon wat ooreenstem met dié wat aan 'n verpanding van vorderingsregte toegeskryf word? Die klaarblyklike antwoord, soos voorgestaan deur meerdere Suid-Afrikaanse skrywers,[43] is dat

40 Sien Scott 1987 *THRHR* 175.

41 Sien a 61 en 62 van Wet 47 van 1937. Omdat die registrasie-vereiste nie aangevul word deur bepalings wat aan die verbandhouer heerskappy oor die verbandvoorwerp verleen nie, is daar t o v notariële verbande in die algemeen nie sprake van 'n saaklike reg nie (sien Van der Merwe 474–475).

42 Op 'n onoortuigende wyse word selfs gepoog om d m v die drogbegrip van kwasie-besit voor te gee dat oordrag by wyse van sessie aan die publisiteitsvereiste vir die vestiging van saaklike sekerheid voldoen. Sien Scott 1987 *THRHR* 180 vir kritiek hierop en 'n bespreking van die anomaliese verskynsel dat die publisiteitsvereiste nie werklik in ons reg aangaande sessie *in securitatem debiti* in ag geneem word nie.

43 Sien Scott *Cession* 140; Malan *Collective securities depositories* (1983) 210; Joubert *Regsbetrekkinge by kredietfaktorering* (LLD-proefskrif RAU 1985) 483–484; Lubbe par 482 492; Butler par 410. Hierdie benadering verteenwoordig geen nuwe insig nie, maar sluit aan by denkbeelde wat reeds 'n geruime tyd in vastelandse regstelsels gehuldig word waar die verpanding van vorderingsregte naas die sekerheidsoordrag of *fiducia* erken word (sien die bespreking van die Duitse, Franse, Switserse en Nederlandse reg in hierdie verband deur Pahl 163–176 en sien Scott 1987 THRHR 175 vir 'n oorsigtelike maar meer resente bespreking).

die klem moet verskuif van 'n gewone sessie wat 'n algehele oordrag van die reg in die vooruitsig stel, na 'n beperkte sessie wat bloot betrekking het op 'n aspek of gedeelte van die sekerheidsgewer se reg; maar dan van so 'n aard dat dit aan die sekerheidsnemer heerskappy ten opsigte van die ekonomiese waarde wat as sekerheid dien, verleen. Of die probleem van die verpanding van vorderingsregte langs hierdie weg opgelos kan word, hang af van die konstruksie wat in ons reg aan die vorderingsreg gegee word. In die volgende afdeling word hierdie aangeleentheid met die Duitse reg as voorbeeld bespreek.

IV

In die Duitse reg word 'n vorderingsreg gesien as 'n bondel bevoegdhede, soos die bevoegdheid om die vordering te in (*jus exigendi*), die skuldenaar kwyt te skeld, 'n skikking met hom aan te gaan of die vordering te noveer of oor te dra.[44] Hierdie konstruksie hou in dat die reghebbende stuksgewys oor aspekte van sy belange kan beskik. 'n Vorderingspand word dan gekonstrueer as 'n *Abspaltung* of afsondering van die inningsbevoegdheid en die oordra daarvan aan die sekerheidsnemer.[45] Origens sou die ander komponente van die skuldeiser se belang egter nog in hom setel sodat hy steeds as skuldeiser van die skuldenaar aan te merk is.[46]

So 'n benadering is nie onomstrede vir die Suid-Afrikaanse reg nie. Die moontlikheid van so 'n opsplitsing van 'n vorderingsreg is al by geleentheid pertinent ontken[47] en word veral deur Pahl gekritiseer.[48] Afgesien daarvan dat Pahl die *Abspaltung*-konstruksie as vaag en onduidelik afmaak,[49] opper hy meer fundamentele kritiek teen hierdie gedagtegang en die siening van die vorderingsreg wat onderliggend daaraan is. Pahl deel die opvatting van sommige Duitse juriste wat kapsie maak teen die siening dat 'n vorderingsreg uit 'n bondel bevoegdhede bestaan. Die feit dat 'n skuldenaar op verskillende wyses deur middel van regshandelinge oor die reg kan beskik, beteken nie dat daar ooreenkomstige bevoegdhede is wat deel uitmaak van sy juridiese arsenaal nie, maar reflekteer net die verskillende wyses waarop verbintenisse tot niet kan gaan.[50] Dienooreenkomstig verklaar Pahl:[51]

> " 'n Vordering bestaan inteendeel uit die enkele bevoegdheid om 'n bepaalde prestasie te verg en die skuldeiser het slegs die moontlikheid om oor hierdie bevoegdheid op een van 'n aantal verskillende maniere te beskik."

Vanuit hierdie perspektief lyk die afsplitsing van die "inningsbevoegdheid" vir Pahl[52] gekunsteld:

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44 Sien Pahl 164.
45 *Ibid* en die gesag aldaar.
46 Sien Scott 1987 *THRHR* 175 en die meer resente Duitse gesag deur haar bespreek; vgl die ander kommentatore in vn 43 hierbo.
47 Sien Harker 1981 *SALJ* 56; vgl Lubbe "Die oordrag van toekomstige vorderingsregte" 1980 *THRHR* 128.
48 165 e v.
49 Sien 166 vir 'n kritiese bespreking van die pogings van die heersende Duitse leer om te verduidelik waarom 'n sekerheidsgewer na afsplitsing nie 'n skulddelgende handeling met die skuldenaar kan aangaan nie.
50 Sien Pahl 165–166 en gesag aldaar.
51 165–166.
52 176; vgl 166.

> "Aangesien 'n vordering ook bloot uit die reg bestaan om 'n bepaalde prestasie te verg, sal die oorspronklike skuldeiser na afsplitsing van die inningsbevoegdheid niks van sy verpande vordering terughou nie, maar dit volkome op die sekerheidsnemer oordra."

Pahl se bewering dat, in stede van 'n aantal diverse bevoegdhede om op bepaalde maniere met 'n vorderingsreg te handel, 'n skuldeiser 'n enkele bevoegdheid het om te beskik oor die lotgevalle van die verbintenis waartoe hy 'n party is, klink oortuigend. Dit is myns insiens te verkies bo 'n benadering wat die beskikkingsbevoegdheid verwar met 'n spektrum van regshandelinge wat die regstelsel erken ten einde aan die behoeftes van partye in die regsverkeer te voldoen.[53] Hierdie gevolgtrekking lei egter nie daartoe dat die afsplitsings-konstruksie sonder nut vir die problematiek rondom die verpanding van vorderingsregte is nie. 'n Basiese leemte in Pahl se analise is naamlik die ongeregverdigde vereenselwiging van die gewraakte beskikkingsbevoegdheid van die skuldeiser met die begrip vorderingsreg. Hierdie benadering laat nie reg geskied aan die volle kompleksiteit wat die posisie van die reghebbende ingevolge 'n verbintenis kenmerk nie. Inderdaad negeer so 'n benadering die feit dat bedoelde bevoegdheid om te beskik met betrekking tot iets moet bestaan en net dien ter realisering of verwesenliking van 'n skuldeiser se substantiewe en regtens erkende belang in die prestasie waartoe die skuldenaar verplig is. Indien die substantiewe genotsreg of -belang[54] van die skuldeiser in die betrokke prestasie in gedagte gehou word, volg dit nie dat sessie van slegs die beskikkingsbevoegdheid van die skuldeiser aan 'n ander, soos Pahl beweer, noodwendig meebring dat die sedent "niks terughou" van die vorderingsreg nie. 'n Beskouing wat rekening hou met die dualistiese aard van die skuldeisersbelang sou dit moontlik maak om die feit dat die sekerheidsgewer reghebbende is, te versoen met die vereiste dat die sekerheidsnemer heerskappy oor die sekerheidsvoorwerp moet hê. Dit sou dus kon dien as basis vir die konstruksie van 'n beperkte sessie wat die verhoudinge tipies van die verpanding van vorderingsregte haalbaar maak, en terselfdertyd die vereiste bevredig dat die sekerheidsnemer heerskappy oor die betrokke sekerheidsvoorwerp verkry. Dadelik moet egter beklemtoon word dat die begrip van die vorderingsreg wat hier voorgestaan word, geen ruimte laat vir die erkenning van *dominium* in die vorderingsreg nie. Gesien die ruime inhoud van die skuldeisersbelang, sou die erkenning van eiendomsreg 'n verdere vlak van abstraksie meebring wat eintlik sonder enige betekenis sou wees. Dit sou trouens ook nie nodig wees om van eiendomsreg oor 'n vorderingsreg te praat bloot ten einde 'n vorderingspand binne die patroon van 'n saakpand as 'n saaklike reg oor 'n ander se saak te bring nie. 'n Beperkte saaklike reg geld ten opsigte van 'n ander se bate, ongeag daarvan of die sekerheidsgewer se titel daartoe eiendomsreg, houerskap van 'n beperkte saaklike reg of, soos hieronder sal blyk, 'n

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53 Dit beteken nie dat 'n party se beskikkingsbevoegdheid nie in bepaalde gevalle van beperkte omvang kan wees nie. 'n *Pactum de non cedendo* bied 'n voorbeeld van 'n situasie waar bloot 'n aspek van die skuldeisersbelang uitgeskakel word. Indien dit eenmaal erken word, moet m i aanvaar word dat d m v sessie ook slegs 'n beperkte bevoegdheid, bv om alleen die prestasie te in sonder die bevoegdheid om die skuldenaar kwyt te skeld of 'n skikking aan te gaan, oorgedra kan word. Sien Scott 1987 *THRHR* 180 185 wat suggereer dat onderskei moet word tussen die innings- en beskikkingsbevoegdheid.

54 Menings kan verskil oor die vraag of die substantiewe genotsbelang van die skuldeiser streng gesproke as 'n bevoegdheid beskou moet word, en of dit bloot 'n regtens erkende "beneficial interest" daarstel. Dit doen egter nie afbreuk aan die feit dat enige realistiese beskouing van die vorderingsreg vir so 'n element voorsiening behoort te maak nie (vgl Dooyeweerd "Grondproblemen in de leer der rechtspersoonlijkheid" 1937 *Themis* 409).

vorderingsreg is.[55] Om 'n vorderingsreg tot regsobjek van eiendomsreg te maak, is onaanvaarbaar om sowel dogmatiese redes[56] as die moontlike praktiese resultate[57] daarvan. Daar is in ieder geval weinig sprake van die erkenning van eiendomsreg van vorderingsregte deur ons regspraak.[58]

V

Daar bestaan min twyfel dat hierdie siening van die vorderingsreg versoenbaar is met die verbintenisbegrip van die hedendaagse Suid-Afrikaanse privaatreg. Afgesien daarvan dat so 'n benadering deur analises vanuit 'n regsfilosofiese hoek onderskraag word,[59] kom dit voor asof verskeie erkende regsfigure en -verskynsels in ons privaatreg op hierdie grondslag te verklaar is.

In die eerste plek val dit nie te ontken nie dat die onderskeid tussen natuurlike en siviele verbintenisse, ten spyte van bedenkinge oor die praktiese relevansie daarvan,[60] steeds in die algemeen erkenning in ons regsdogmatiek geniet.[61] Die kontras tussen hierdie verbintenistipes werp lig op die komponente van die skuldeisersbelang ingevolge 'n verbintenis. Ingevolge die natuurlike verbintenis

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55 So kan 'n verbandreg t o v die beperkte saaklike regte van 'n ander gevestig word (sien Lubbe par 403 en gesag aldaar).

56 Sien Van der Merwe 109 wat betoog dat eiendomsreg as begrip beperk moet word tot stoflike vermoënsbestanddele omdat die grens tussen saaklike en persoonlike regte andersins uitgewis sou word. Indien 'n té ruime begrip van eiendomsreg aanvaar word wat ook vorderingsregte omvat, is dit moeilik om in te sien waarom, anders as wat algemeen aanvaar word, daar nie van eiendomsreg m b t 'n serwituut of verbandreg gepraat kan word nie.

57 As aanvaar word dat die "*dominium*" oor 'n vorderingsreg behou kan word ten spyte van die sessie daarvan aan 'n ander – dit is immers waarop die regspraak se siening van 'n verpanding neerkom – is daar seker geen rede waarom *dominium* oor die vorderingsreg nie sonder 'n sessie verkry kan word nie. Die aanwending van analises soos hierdie in verkeersituasies waarin sessie gereeld ter sprake kom, bring die moontlikheid van oneindige verwarring op 'n gebied wat tans redelik bevredigend volgens bestaande beginsels gehanteer word.

58 Uitlatings in verband met bv die "eiendomsreg" van aandele gaan gepaard met soveel kwalifikasies en huiwering dat dit duidelik is dat dit om beeldspraak gaan wat geriefshalwe aangewend word ten einde uiting te gee aan die gedagte dat die skuldeiser oor 'n reg teenoor die skuldenaar beskik (sien *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A) 447 453; *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 289 asook vn 70–80 en die verbandhoudende teks hieronder). Die aanwending van die begrip *dominium* oor 'n vorderingsreg in verband met sessie *in securitatem debiti* is baie onseker. As daar ooit sprake was van 'n erkenning van ware eiendomsreg t o v die vorderingsreg waaroor die sedent beskik, is die ontwikkelinge in die regspraak waarna hierbo verwys is genoegsame aanduiding van die onhoudbaarheid van so 'n benadering in ons reg (sien bv *Frankfurt v Rand Tea Rooms Ltd and Sheffield* 1924 WLD 253; *Van Zyl v Strandfontein Namaqualand Estates (Pty) Ltd* 1930 CPD 270; *Barclays Bank (DC & O) v Riverside Dried Fruit Co (Pty) Ltd* 1949 1 SA 937 (K); *Moola v Estate Moola* 1957 2 SA 463 (N); *Holzman v Knights Engineering and Precision Works (Pty) Ltd* 1979 2 SA 784 (W)).

59 Sien Dooyeweerd 1937 *Themis* 200 e v 367 409 waar gepraat word van "de beschikkings- en genotsbevoegdheid . . . als noodwendige momenten in ieder subjectief recht". Sien in navolging hiervan Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 412–417; vgl Hahlo en Kahn 80–82.

60 Sien Van der Merwe 1962 *THRHR* 275.

61 Sien De Wet en Van Wyk 1; Joubert *General principles of the law of contract* (1987) 10–15; Lotz "Obligations" 19 *LAWSA* par 238; Wessels *The law of contract in South Africa* (1951) I par 1271–1276; *Gibson v Van der Walt* 1952 1 SA 262 (A); *Rosen v Wasserman* 1984 1 SA 808 (W); *Fensham v Jacobsen* 1951 2 SA 136 (T); *Rulten v Herald Industries* 1982 1 SA 838 (W); *Allison v Massel and Massel* 1954 4 SA 69 (T).

is die skuldeiser inderdaad reghebbende met 'n substantiewe belang in die prestasie van die skuldenaar, ten spyte daarvan dat sy beskikkingsbevoegdheid hom op grond van beleidsoorwegings ten minste ten dele ontneem word.[62] Ingevolge die siviele verbintenis daarenteen beskik die skuldeiser oor die volle bevoegdheid om sy reg op die prestasie deur middel van litigasie te in en by wyse van 'n reeks regshandelinge daaroor te beskik.

Hierdie essensiële dualisme van die skuldeiser se posisie ingevolge die mees algemeen voorkomende verbintenistipe van die hedendaagse reg, word vanuit 'n ander perspektief bevestig deur Joubert.[63] Die skrywer wys daarop dat in die Romanistiese regsdogmatiek die verbintenis gekenmerk word deur die elemente van *Schuld* en *Haftung*. Eersgenoemde begrip impliseer 'n "duty to perform", terwyl laasgenoemde verwys na "a right or power belonging to the creditor which entitles him to enforce the duty of the debtor".[64] Alhoewel die skrywer in die loop van 'n algemene bespreking nie verwys na die reg van die skuldeiser op die prestasie waartoe die skuldenaar verplig staan nie, val dit myns insiens nie te ontken nie dat daar, as keersy van die *Schuld*, so 'n reg bestaan.[65]

Bogenoemde aspekte van die skuldeisersbelang kom ook na vore by vorderingsregte van hoogs persoonlike aard, waar die skuldeiser die bevoegdheid om die reg aan 'n ander oor te dra, ontbeer.[66] Afgesien daarvan dat oorwegings van regsbeleid 'n beperking op 'n skuldeiser se beskikkingsbevoegdheid kan meebring, kan dit ook deur die partye opgelê word deur middel van 'n geldige *pactum de non cedendo*.[67] 'n Afspraak waardeur ooreengekom word dat 'n skuldeiser vir 'n tydperk nie sy regte teenoor die skuldenaar sal afdwing nie,[68] skort klaarblyklik die inningsbevoegdheid van die skuldeiser op sonder om ander aspekte van die regsband te raak. Ook die verskynsel van opskortende tydsbepalings en voorwaardes hou die moontlikheid in dat aspekte van die beskikkingsbevoegdheid van die skuldeiser opgeskort kan word. Sodanige gebeurtenis bring nie mee dat daar in die tussentyd, tot en met vervulling van die voorwaarde of tydsbepaling, nie vir die skuldeiser 'n belang of reg in die prestasie van die skuldenaar bestaan nie.[69] Kennelik is daar in hierdie gevalle nie maar net van 'n beskikkingsbevoegdheid vir die skuldeiser sprake nie, maar van 'n belang in die prestasie.

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62 Sien oor die regsgevolge van natuurlike verbintenisse *Gibson v Van der Walt supra*; *Halsey v Jones* 1962 3 SA 484 (A) 490; *Rosen v Wasserman supra* 812; Joubert *Contract* 8 9–10 12–15.

63 7–8.

64 7.

65 Vgl Levenbach *De spanning van de kontraksband* (1923) 27 wat, met verwysing na *Schuld* en *Haftung* praat van "schuld en aansprakelikheid van de schuldenaarszijde, inschuld en verhaalsrecht van de schuldeiserszijde" (sien ook 28 en die literatuur na verwys op 27 vn 1). Sien Asser-Rutten-Hartkamp *Verbintenissenrecht* I (1984) aangaande die erkenning van hierdie onderskeiding in die hedendaagse Nederlandse reg.

66 Sien bv *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42; *Cullinan v Pistorius* 1903 ORC 33; *Friedlander v De Aar Municipality* 1944 AD 79; Scott *Cession* 122; Nienaber "Cession" 2 *LAWSA* par 351–352.

67 Sien *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600 611; *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 3 SA 166 (A); *Vawda v Vawda* 1980 2 SA 341 (T). Sodanige omstandigheid doen natuurlik nie afbreuk aan die skuldeiser se genotsbelang nie, en laat trouens sy beskikkingsbevoegdheid andersins ongeskonde.

68 Vgl De Wet en Yeats *Kontraktereg en handelsreg* (1964) 189–190.

69 Sien De Wet en Van Wyk 135–136 omtrent die regseffek van 'n reg onderhewig aan 'n opskortende voorwaarde.

'n Analise wat 'n vorderingsreg tipeer as bestaande uit 'n genotsbelang en 'n beskikkingsbevoegdheid, word myns insiens ook gereflekteer in verskynsels van die maatskappyereg. Dit is naamlik 'n algemene praktyk dat die persoon wat in die maatskappy se aandeleregister as aandeelhouer (en dus as lid van die maatskappy) geregistreer staan, dit hou ten bate van 'n ander, die sogenaamde genottrekker ("beneficial owner").[70] Hierdie toedrag van sake kan in uiteenlopende situasies ter sprake kom[71] en die regsverhoudinge wat in hierdie verband ontstaan, is van 'n besonder komplekse aard. Nietemin verklaar Borrowdale[72] dat dit dikwels om 'n verhouding gaan ingevolge waarvan "ownership" (van die aandeel) en "the ability to enforce the rights which are the subject of ownership" van mekaar geskei is.

Alhoewel dit om historiese redes gebruiklik is om van die aandeelhouer as eienaar te praat, impliseer hierdie spraakgebruik myns insiens nie, soos Borrowdale[73] skynbaar teësinnig aanvaar, dat die aandeelhouer in 'n juridiese sin eienaar van die regte is waaroor hy as skuldeiser teenoor die maatskappy beskik nie. So 'n konstruksie is, soos hierbo aangetoon word,[74] nie alleen teoreties onaanvaarbaar nie, maar inderdaad oorbodig en om praktiese redes riskant. 'n Nadere beskouing van die onderhawige situasie dui inderdaad ook daarop[75] dat die "ownership"-beeld van die regspraak in hierdie verband bloot dien ter uitdrukking van die gedagte dat ten spyte van die registrasie in naam van 'n ander, die genottrekker steeds as skuldeiser aan te merk staan ten opsigte van die maatskappy se verpligtinge. Om hierdie rede val die regte by insolvensie van die geregistreerde aandeelhouer in die boedel van die genottrekker.[76] Die sogenaamde *ius vindicandi*, waaroor die genottrekker sou beskik teenoor iemand wat as gevolg van 'n beskikkingshandeling met die voormalige geregistreerde aandeelhouer op die register gekom het, kan nie as 'n *rei vindicatio* in die ware

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70 Sien *Davis v Buffelsfontein Gold Mining Co Ltd* 1967 4 SA 631 (W) 633; *Sammel v President Brand Gold Mining Co Ltd* 1969 3 SA 629 (A) 666; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co Ltd* 1976 1 SA 441 (A) 453; *Standard Bank of South Africa v Ocean Commodities Inc* 1983 1 SA 276 (A) 289; *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A); Henochsberg *Companies Act* (red Meskin 1985) 155 166; Cilliers en Benade *Maatskappyereg* (1982) 185; Borrowdale "The transfer of proprietary rights in shares: a South African distillation out of English roots" 1985 *CILSA* 36.

71 Die geregistreerde aandeelhouer kan om prakties-administratiewe oorwegings as genomineerde hou onderhewig aan die instruksies van die genottrekker of as sy trustee ingevolge 'n formeel-opgerigte trust met aandele as trustbate. Hierbenewens kan die verhouding ook ter sprake kom waar na 'n verkoping of 'n verpandingsooreenkoms t o v aandele, die partye 'n sessie bewerkstellig sonder dat die oordragnemer in die plek van die oordraggewer as aandeelhouer geregistreer word (sien *Moosa v Lalloo* 1956 2 SA 237 (D) 239; vgl *Standard Bank of South Africa Ltd v Ocean Commodities Inc supra*; Henochsberg 194 195; Borrowdale 1985 *CILSA* 41). Sien aangaande die vereistes wat vir die oordrag van aandele gestel word *Caulfield v Barclays Western Bank Ltd* 1981 2 SA 424 (W); *Nezar v Die Meester* 1982 2 SA 430 (T); Borrowdale 1985 *CILSA* 46–50.

72 44. Teenoor bv die genottrekker staan iemand wat as bevoordeelde ingevolge 'n trust m b t aandele bloot oor 'n vorderingsreg teenoor die trustee beskik (sien bv *Secretary for Inland Revenue v Rosch* 1971 4 SA 172 (A) 188–191).

73 *Ibid.*

74 Sien vn 56 en 58 en die verbandhoudende teks hierbo.

75 *Ibid.*

76 Sien *McGregor's Trustees v Silberbauer* (1891) 9 SC 36, goedgekeur in 'n ander maar verwante konteks in *Randfontein Estates Ltd v The Master* 1909 TS 978; vgl *Sellar v Marais* 1908 CTR 286; *Farrar's Estate v CIR* 1926 TPD 501; *Jeffery v Pollak & Freemantle* 1938 AD 1 24; Borrowdale 1985 *CILSA* 41–42; Honoré *Law of trusts* (1985) par 355 357.

sin van die woord bestempel word nie. In wese kom dit daarop neer dat die genottrekker geregtig is op 'n verklarende bevel dat hy skuldeiser van die maatskappy is, dat die verkryer dit nie is nie en dat laasgenoemde verplig is om die formele handelinge te verrig wat die genottrekker in sal staat stel om homself op die register te kry.[77]

Daar moet egter onmiddellik toegegee word dat die genottrekker 'n besondere skuldeiser is. Die bepalings van die Maatskappywet stel dit naamlik duidelik dat hy die bevoegdheid om vorderings te in wat teenoor die maatskappy ontstaan, ontbeer. Die inningsbevoegdheid kom toe aan die geregistreerde aandeelhouer ingevolge die aandeleregister.[78] Inderdaad is die implikasie van hierdie reëling dat die geregistreerde aandeelhouer in hierdie opsig, byvoorbeeld met betrekking tot die opvordering van dividende wat deur die maatskappy verklaar is, as skuldeiser – en nie maar net as agent nie – aan te merk is.[79] Die oënskynlike teenspraak in die erkenning van beide die geregistreerde aandeelhouer en die genottrekker as skuldeisers van die maatskappy word uit die weg geruim indien ingesien word dat albei skuldeisers is, maar dan met betrekking tot afsonderlike komponente van die volle skuldeisersbelang. Die Maatskappywet en -praktyk erken die moontlikheid dat die komponente van die vorderingsreg om praktiese en geriefsoorwegings van mekaar afgesonder en aan verskillende persone toegedeel kan word.[80] 'n Verfyning van die vorderingsreg-begrip verhelder hierdie gebied sonder dat dit nodig word om op dogmaties-bedenklike begrippe terug te val.

Aanvaarding van hierdie siening van die vorderingsreg blyk ook uit die erkenning in ons regspraak dat 'n sessie na *litis contestatio* so geformuleer kan word dat die sedent daarna steeds *locus standi* kan hê om 'n geding met die sessionaris te voer wat eers met ten uitvoerlegging na vore kom. Dit geskied

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77 Sien *Oakland Nominees (Pty) Ltd v Gelria Mining Co Ltd supra* 462 aangaande die bevel wat t g v die genottrekker gemaak is; vgl *Standard Bank of South Africa Ltd v Stama (Pty) Ltd* 1975 1 SA 730 (A); sien ook die uitlatings aangaande die onvanpaste spraakgebruik in hierdie gevalle.

78 Ingevolge a 104 van die wet is die maatskappy nie verplig om van enige belanghebbende anders as die geregistreerde aandeelhouer kennis te neem nie (sien ook a 85 89 en 90 aangaande die uitbetaling van dividende).

79 Henochsberg 169 verklaar: "As far as the company is concerned, the rights arising from being the registered shareholder in respect of the shares belong exclusively to such shareholder." (Sien ook Henochsberg 195; Cilliers en Benade 187–188 en vgl *Lawrie v Beaton* 1938 TPD 260 261–269.) Daar word egter aanvaar dat die geregistreerde aandeelhouer verplig is om die opbrengs van dividende op aandele aan die genottrekker uit te keer en dat lg op sy beurt verplig is om die geregistreerde skadeloos te stel (sien *Moosa v Lalloo supra* 239; Henochsberg 194). Die geregistreerde aandeelhouer wat nie genottrekker m b t die aandele is nie, word meestal as verteenwoordiger van die genottrekker voorgestel (sien *Standard Bank of South Africa Ltd v Ocean Commodities Inc supra* 238; *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd supra* 453; Cilliers en Benade 187; Borrowdale 1985 *CILSA* 40–41). Hierdie benadering oortuig nie. Afgesien daarvan dat die geregistreerde in eie naam hou (sien die *Oakland*-saak 453; Cilliers en Benade 187) en daar dus nie sprake kan wees van 'n verteenwoordigingsbedoeling by handelinge met die maatskappy nie, strook die beeld van 'n vestiging van regte in die geregistreerde (onderhewig aan 'n rekenskapplig teenoor die genottrekker) en die immunisering van die maatskappy teen vorderings deur die veronderstelde prinsipaal, nie met die gevolge van 'n ware verteenwoordigingshandeling nie. Die geregistreerde aandeelhouer is dus in eie naam skuldeiser van die maatskappy.

80 'n Splitsing kan, soos hierbo aangetoon, ook toevallig intree waar 'n sessie van die aandeel geskied sonder 'n ooreenstemmende verandering van die aandeleregister.

deur middel van 'n sessie van 'n skuldeiser se "interest in the result of litigation" met behoud vir die sedent van die "interest in a claim". Hierdie benadering, geformuleer in *Thos Barlow v Dorman Long (Africa)*[81] met beroep op *Government of South Africa v Ngubane*,[82] het *obiter* erkenning gevind in *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd*.[83] Appèlregter Jansen se stelling dat die oordrag van die verwagting of *spes* met betrekking tot die opbrengs van die litigasie die sedent nie ontneem van die "interest in the claim" nie, en dat die sedent om hierdie rede steeds oor *locus standi* beskik, dui daarop dat hierdie begrip in wese slaan op die inningsbevoegdheid van die sedent.[84] Die verwagting op die opbrengs van litigasie waarvan gewag gemaak word, is eweneens nie maar net 'n blote *spes* nie. Dit slaan op die ander fundamentele komponent van die skuldeisersbelang, naamlik die genotsbevoegdheid of "beneficial interest" van die skuldeiser wat, soos hierbo aangetoon is, die pit of kern van die vorderingsreg daarstel.[85] Dat hierdie uitlatinge *obiter* van aard was, doen nie af daaraan dat dit 'n oorwoë mening weerspieël nie.

Inderdaad is die erkenning van die voorgehoue siening van die vorderingsreg in die *Waikiwi*-saak nie die enigste aanduiding dat die appèlhof bereid is om in hierdie terme na die vorderingsreg te kyk nie. In die uitspraak van hoofregter Rabie in *Skjelbreds Rederi A/S v Hartless (Pty) Ltd*[86] kom die dualistiese aard van 'n vorderingsreg pertinent na vore waar verklaar word:

> "If the respondent were an out-and-out cessionary of all Freedom Tramping's right, title and interest in and to the said claims, it would in law be entitled to enforce the claims and retain the proceeds thereof. It would also be entitled to accept from Skjelbreds any amount it pleased in settlement of the claims, or if it wished, to abandon the claims altogether."

Hierdie uitlating staan ook nie alleen nie. In *Colyvas v Standard Bank*,[87] waar dit gegaan het om 'n sessie *in securitatem debiti*, word "the right to sue" uitdruklik geskei van ander aspekte van die skuldeisersbelang. Ingelyks word in *Bank of Lisbon and South Africa Ltd v The Master*[88] aanvaar dat by 'n vorderingspand die sedent deur middel van sessie die "exclusive right to claim and receive . . . the amounts owing" verkry. Die standpunt dat die sedent in hierdie geval steeds "eienaar" van die vorderingsreg is, beteken maar net dat hy steeds skuldeiser is wat die genotsbevoegdheid betref. Dit blyk onder meer uit die siening dat terugsessie na aflossing van die versekerde vordering nie nodig is nie. Die regspraak se erkenning dat daar in gevalle van 'n volmag "coupled with an interest" of 'n "power given as security" sprake is van 'n sessie, bied ook 'n grafiese erkenning van die onderhawige konstruksie van die vorderingsreg in die regspraak. Soos aangetoon is in *Kotsopoulos v Bilardi*,[89] kom 'n sogenaamde onherroeplike volmag op 'n sessie neer indien die "verteenwoordiger" daardeur 'n belang vestig

81 1976 3 SA 97 (D).
82 1972 2 SA 601 (A).
83 1978 1 SA 671 (A) 667–668.
84 Die feit dat dit hier oor 'n sessie na *litis contestatio* gaan, bring nie mee dat hierdie aspek van die skuldeiser se belang nie voor *litis contestatio* alreeds bestaan het nie.
85 Sien Lubbe 1980 *THRHR* 127–128.
86 1982 2 SA 710 (A) 730.
87 1926 AD 56 57–58.
88 1987 1 SA 276 (A) 294.
89 1970 2 SA 391 (K).

"not merely in the exercise of his authority but in the very thing vested in, or entrusted to, him by his principal".[90]

VI

In die lig van die voorafgaande is daar genoegsame aanknopingspunte vir 'n konstruksie van die vorderingsreg waarvolgens die skuldeisersbelang nie maar net 'n beskikkingsbevoegdheid omvat nie, maar ook 'n substantiewe genotsbelang of -bevoegdheid inhou. Daar bestaan myns insiens geen dogmatiese besware teen 'n afsplitsing van die verskillende komponente van mekaar deur middel van sessie nie.[91] So 'n sessie kan nie afgekeur word op grond daarvan dat dit, deur 'n splitsing van die vorderingsreg te bewerkstellig, die skuldenaar se posisie verswaar nie en word, soos uit die bespreking hierbo blyk, inderdaad in ons regspraak erken. Die *Waikiwi*-saak aanvaar dat 'n eiser-litigant om prosesregtelike geriefsoorwegings die genotsbelang van die reg wat hy probeer afdwing, kan sedeer en met behoud van beskikkingsbevoegdheid kan poog om die reg namens die sessionaris af te dwing. Indien so 'n werkswyse aanvaarbaar is, kan die omgekeerde situasie, naamlik dat die sedent die genotsbelang behou en net die beskikkingsbevoegdheid aan die sessionaris oordra, in beginsel nie uitgesluit word nie. Op hierdie wyse kan die begrip van 'n beperkte sessie aangewend word om die grondslag vir 'n sekuriteitsreëling te lê wat as alternatief tot die volle oordrag van 'n vorderingsreg vir doeleindes van sekerheid kan staan. Indien ag geslaan word op die dualistiese aard van die skuldeisersbelang, is dit duidelik dat 'n sessie van die blote beskikkingsbevoegdheid nie noodwendig 'n oordrag van die volle skuldeisersbelang inhou soos Pahl[92] beweer nie. Inderdaad blyk dit uit die *Colyvas*- en *Bank of Lisbon*-beslissing dat so 'n siening al by geleentheid in verband met sessie *in securitatem debiti* gebring is en dat van ons skrywers al wesenlike bydraes gelewer het in verband met die uitwerk van die verhoudinge tussen die partye tot so 'n transaksie.[93]

Indien aanvaar word dat 'n beperkte sessie aangewend kan word as 'n sekerheidsmeganisme, ontstaan die vraag na die presiese aard van so 'n reëling. Die sessionaris ingevolge so 'n sessie kan op grond van die inningsbevoegdheid wat hy verkry, die prestasie invorder wanneer sy belange in die gedrang kom en die opbrengs behou tot tyd en wyl sy eis teen die sedent bevredig word. Dit is derhalwe argumenteerbaar dat sy sekuriteit in 'n sin uit 'n soort retensiereg ten opsigte van die opbrengs van die skuldenaar se prestasie bestaan. Sy beskerming kan denkbaar langs hierdie weg verklaar word sonder om toevlug tot die verpandingskonstruksie te neem. Sodoende sou die dogmatiese besware teen die idee dat vorderingsregte verpand kan word, vermy word. So 'n benadering lyk egter nie bevredigend nie. 'n Eiesoortige sekuriteitsmeganisme soos hierdie sal noodwendig nuwe probleme en onsekerheid skep, en dit is kennelik beter

90 399; sien ook 402 waar gepraat word van die "power or locus standi, to collect and sue". Stellings van Corbett R 401 stem inderdaad ooreen met Dooyeweerd 411–412 se opmerkings oor die aard van 'n skuldeiser se genotsbevoegdheid. Vgl *Netherlands Bank of South Africa v Yull's Trustee and the United Building Society* 1914 WLD 133.

91 Skrywer hiervan se aanvanklike skeptisisme in hierdie verband (vgl 1980 *THRHR* 123) het nie genoegsaam rekening gehou met die verskille tussen vorderingsregte en eiendomsreg in hierdie verband nie.

92 *Op cit* 165–166 170.

93 Sien veral Scott 1987 *THRHR* 175.

om aansluiting te soek by bestaande regsfigure waarvan die besonderhede reeds uitgewerk is.

Inderdaad kom dit voor of die dogmatiese probleme wat ontstaan in verband met die erkenning dat 'n pandreg in hierdie konteks vir die sessionaris gevestig kan word, erg oordrewe is. Uit die bespreking hierbo blyk dit naamlik dat die besitselement by pandreg, afgesien van enige publisiteitsfunksie wat dit kan hê, van belang is as uiting van die beginsel dat die vestiging van sekerheid afhanklik is van die verkryging van heerskappy oor die bate wat as sekuriteit moet dien. Uitgaande van heerskappy, in plaas van besit, as kernfaktor by die vestiging van saaklike sekerheid, is daar wel genoegsame gronde vir die siening dat hier van die vestiging van 'n saaklike sekerheidsreg sprake moet wees. Heerskappy vereis in die lig van die aard van die vermoënsbestanddeel wat tans ter sprake is, nie dat die sekerheidsnemer die sekerheidsvoorwerp moet besit nie. Daar kan tog nie ontken word dat verkryging van die inningsbevoegdheid as gevolg van 'n beperkte sessie aan die sessionaris heerskappy verleen oor die ekonomiese waarde beliggaam in die vorderingsreg waarvan die uiteindelike genotsbelang steeds in die sedent setel nie. Bygevolg verdwyn die dogmatiese beswaar teen die vestiging van pandreg in hierdie gevalle. Om nie die analise vanaf die basis van heerskappy deur te trek na die erkenning van pandreg nie, is in die lig hiervan nie oortuigend nie, veral ook omdat erkenning van 'n pandreg vir die beperkte sessionaris nie vereis dat van *dominium* in 'n vorderingsreg gepraat word nie.

Extensive interpretation: some anomalies in the South African approach

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OPSOMMING

Uitbreidende uitleg: anomalië in die Suid-Afrikaanse benadering

Die woorde van 'n wet moet, om uitdrukking aan die bedoeling van die wetgewer te gee, gelees word teen die agtergrond van die wet as geheel. Wanneer die gewone betekenis van woorde enger is as die betekenis wat uit die bedoeling van die wetgewer blyk, is dit nodig om die tegniek van uitbreidende (ekstensiewe) uitleg te gebruik om uitdrukking aan die bedoeling van die wetgewer te gee. Daar is drie meganismes van uitbreidende uitleg: by wyse van analogie; by wyse van implikasie; en by wyse van wysiging van die taal van die wet.

Uitleg by wyse van analogie impliseer dat die howe een stel omstandighede wat uitdruklik uiteengesit is, moet ekstrapoleer tot 'n ander stel omstandighede wat nie sodanig uiteengesit is nie. Die Romeins-Hollandse reg het uitleg by wyse van analogie toegepas. Die moderne Engelse reg is egter baie teensinnig om van hierdie meganisme gebruik te maak, hoofsaaklik as gevolg van die aanvaarding van die *casus omissus*-reël wat vereis dat die howe moet weier om 'n gaping of weglating in die woorde van die wet aan te vul. Die gevolg is dat wetgewing taalkundig omslagtig, onnodig gekompliseerd en by tye selfs onverstaanbaar is.

Die howe is meer ten gunste van uitleg by wyse van implikasie; die implikasie moet egter redelik en noodsaaklik wees. In die Romeins-Hollandse reg is nie onderskei tussen analogiese uitleg en uitleg by wyse van implikasie nie; in beginsel is daar ook geen verskil tussen hierdie twee tegnieke van uitbreidende uitleg nie.

Wysiging van die taal van die wet vind plaas wanneer die howe die woorde van 'n wet verander om dit te versoen met die bedoeling van die wetgewer. Die regspraak het uiteenlopende standpunte omtrent hierdie aangeleentheid. Die wysiging van taal is die mees drastiese vorm van uitbreidende uitleg. As sodanige wysiging toelaatbaar is, moet uitleg by wyse van analogie *a fortiori* ook veroorloof word. Die belangrikste vraag is nie na die klassifikasie van die gebrek in die wet nie, maar of die konteks enersyds en die gemenereg andersyds, wat albei geweldig belangrike oorweginge vir die bepaling van die bedoeling van die wetgewer is, die maak van "regterlike wetgewing" regverdig. Inkonsekwensie en verwarring is nie in die belang van regsadministrasie nie. Daarom moet gepoog word om onsekerheid uit die weg te ruim. Dit kan gedoen word deur die kunsmatige onderskeid tussen 'n *casus omissus* en uitleg by wyse van implikasie te ignoreer en deur die toepassing van die basiese beginsels en etos van ons gemenereg.

"For the letter killeth, but the spirit giveth life."[1]

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1 II Corinthians 3:6. See *R v Demetriades* 1938 OPD 122 in which the court per Botha JP held that interpretation "should not be in direct conflict with all our ideas and legislation on this subject. It would sacrifice the spirit to the letter". See also *The selective Voet being a commentary on the Pandects* (translated by Gane, 1955) vol 1 10. Voet takes the matter even further by quoting from *C* 1 14 9: "In all cases special account should be taken of justice and equity rather than strict law."

> "The court is not always bound to the literal meaning of words because the draftsman may have made a mistake in the use of a word or may have omitted a word or added what is mere surplusage" (per Wessels CJ).[2]

When taken at face value, words may fail to convey the complete and precise purpose of a statute in that they may express less than the legislature intended. Therefore in order to give effect to the object of a statute, the court may have to give an extended meaning to the words employed by the legislature. There are various mechanisms that can be used to effect extensive interpretation.

This article analyses and compares the jurisprudential basis and the merits of the three acknowledged mechanisms of extensive interpretation, namely interpretation by analogy, implied interpretation and the modification of language.

INTERPRETATION BY ANALOGY

The technique of analogous interpretation involves the curial extrapolation of the provisions of the statute from one set of circumstances expressly covered to another cognate set of circumstances not expressly set out in the act in order to give expression to the *ratio* or purpose of the statute. Maxwell[3] observes that this technique is referred to as equitable construction, a term that can be used with other connotations.[4] The same author explains that

> "[i]n the construction of old statutes, it has been understood as extending to general cases the application of an enactment which, literally was limited to a special case;"

and he further indicates that "equitable construction" has no application in the construction of modern statutes in British law. He states that in the interpretation of ancient laws, because of the conciseness of their drafting, there can be some justification for the application of this technique. The contemporary position in English law is that the legislature must be presumed to have exhaustively enacted everything and therefore it is not for the courts to furnish omissions in the language of the statute.[5]

Steyn,[6] after making a thorough and scholarly examination of the position in Roman-Dutch law, concludes that

> "ons skrywers in die algemeen in die analoë interpretasie 'n middel gesien het om gevolg te gee aan wat as die werklike wil van die wetgewer beskou is".

In his research he referred to Johannes Voet, who advocated interpretation by analogy on the grounds of equitable considerations and in support of his argument quoted the following celebrated text from Cicero:[7] "Valeat aequitas, quae paribus in causis paria jura desiderat" (let equity prevail, which demands like

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2 *Ex parte Minister of Justice: In R v Jacobson and Levy* 1931 AD 466 476 477.

3 *The interpretation of statutes* (1969) 236.

4 Crawford *The construction of statutes* (1940) 243: "Under the equitable or philosophical theory of interpretation, the bounds of 'genuine interpretation' are considerably extended. The legislative enactment, according to this theory, merely lays down a general guide and leaves the court wide leeway within which to deal with individual cases as the justice of the case demands in the light of reason and the moral sense of men generally." See also Maxwell *op cit* 237: "It was at one time asserted that a statute contrary to natural equity or reason . . . or contrary to *Magna Carta*, was void. . . But this doctrine . . . has gone."

5 The legal position is the same in South African law (see Steyn *Uitleg van wette* (1981) 48).

6 *Ibid* 44.

7 *Commentarius* 1 3 20 (Gane's translation vol I 53). This text was cited and distinguished in *De Villiers v Cape Divisional Council* 1875 Buch 50 64 and approved in *Ex Parte Hettish and Mahne, In re Luderitz Konsum Verein* 1923 SWA 39 41.

rights in like cases). This is a classical and pertinent expression of the fundamental jurisprudential principle of equality before the law. Thus on jurisprudential grounds analogous interpretation is justified in order to ensure equality before the law. Steyn[8] nevertheless observes that our courts are noticeably reluctant to employ this methodology, but he further perceptively comments that no matter how painstakingly and exhaustively statutes are drafted, it is virtually impossible for the legislature to foresee every concatenation of circumstances that may eventuate and consequently it cannot draft a law in a manner that would cover a universality of combinations of factual situations. Steyn,[9] however, indicates that interpretation by analogy was eschewed in Roman-Dutch law in, *inter alia,* the following circumstances:

(a) in the case of *leges correctivae* and *leges exorbitantes*, that is, statutory provisions which change the common law or make inroads into the principles of the common law;

(b) in regard to laws which impose penalties or remove or limit rights, that is, *casibus odiosis;* and

(c) in the case of *leges singulares* or *personales*, that is, laws presumably intended for specified circumstances or particular persons.

Analogous interpretation is a consequence of the purposive theory of interpretation found in Roman-Dutch law[10] and the exceptions to such interpretation enumerated above reflect the cogent motivation to do justice to the individual and to maintain the integrity of the common law in the process of interpretation. The common law enshrines certain primordial rights, and it is the inherent duty of the courts to maintain and protect them. An analysis of analogical interpretation as expounded by Steyn indicates that the theory and the *modus operandi* of statutory interpretation in Roman-Dutch law was a jurisprudential synthesis of natural law[11] and a purposive approach. Steyn, however, fails to recognise and articulate this important synthesis and as a result he erroneously singles out[12] the celebrated case of *Dadoo Ltd v Krugersdorp Municipal Council*[13] as an apt example of circumstances justifying the application of analogous interpretation. In this case the appellate division had to decide whether a company acting as a *persona iuris*, of which all the shareholders were Asians, could be registered as the legitimate owner of immovable property, despite the racially discriminatory provisions of section 2(b) of Act 3 of 1886 of the Volksraad, prohibiting Asians from being the owners of immovable property in the Transvaal. The court came to the conclusion that the law did not apply to companies

8 *Op cit* 47. In this regard see *Jaga v Dońges* 1950 4 SA 53 (A) 664G: "So too, if, when the interpretation is complete, it is clear that the legislature has failed to deal with a class of case that in all probability would have been dealt with if it had not been overlooked, there is a *casus omissus* which the court cannot fill."

9 *Op cit* 45.

10 See Cowen "Prolegomenon of a restatement of the principles of statutory interpretation" 1976 *TSAR* 144: "[T]he view supported by the overwhelming 'weight' of authority in Roman-Dutch law, favours the antiliteralist approach."

11 Wessels *The history of Roman-Dutch law* (1908) 285 and 293 respectively: "The law of nature is according to Grotius, the basis of all our ideas of law" and "[n]atural Law or the Law of Nature was the cornerstone of the whole fabric" of Roman-Dutch law.

12 *Op cit* 46.

13 1920 AD 530.

and that registration of the property in the name of the company did not constitute *fraus legis*.

Steyn[14] is, however, of the firm opinion that

> "hierdie beslissing . . . nouliks bevredigend genoem [kan] word en . . . deur die toepassing van analogiese interpretasie vermy [kon] geword het".

He therefore expresses his approval of De Villiers JA's dissenting judgment, in which analogical interpretation was employed, by observing that "[h]ierdie resultaat . . . vir ons regsgevoel seker meer aanneemlik" is.[15] His argument is, however, in conflict with Roman-Dutch law according to his own analysis and exposition since, as he explained,[16] analogical interpretation should not be applied *casibus odiosus* and Dadoo's case *par excellence* deals with a law which removes or limits a right. Therefore his apology for De Villiers JA's minority decision within the context of his own exposition of Roman-Dutch law was patently anomalous and was undoubtedly determined by his own "inarticulate premise",[17] which Cameron[18] has so devastatingly revealed in his incisive and perceptive article on Steyn.

Our courts, however, as a result of the pervasive influence of English law,[19] have been noticeably reluctant to apply analogous interpretation since it is clearly in conflict with the well known *casus omissus* rule. The courts, quite rightly, have declined to fill in omissions in statutes,

> "if to do so would impose liabilities on individuals which were clearly not imposed by Parliament".[20]

Besides *Dadoo's* case, examples of this approach are found in *Ex parte the Minister of Justice: In re R v Jacobson and Levy*[21] and *R v Letoani*.[22] However in *R v Forlee*,[23] the court was prepared to furnish an omission in a penal statute by imposing a punishment where the legislature had inadvertently failed to do so. According to Mason J[24]

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14 *Op cit* 46.
15 *Ibid* 47.
16 See fn 9 *supra*.
17 Dugard *Human rights and the South African legal order* (1978) 379; also Mathews *Law, order and liberty in South Africa* (1971) 301.
18 "Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law" 1982 *SALJ* 64. Cameron criticises Steyn's defence of De Villiers JA's judgment with the following comment: "But to attack it as a less satisfactory fulfilment of one's *sense of justice* reveals much about the author of the criticism."
19 In English law there is a strong difference of opinion on the merit of filling gaps in the law. Lord Denning is in favour of such a methodology. Thus in the case of *Magor and St Mellons Rural District Council v Newport Corpn* 1950 2 All ER 1226 1236 he stated: "We sit here to find the intention of Parliament . . . and we do this better by filling in the gaps and making sense of an enactment than by opening it up to destructive analysis." However, on appeal Viscount Simon refuted this statement as "a naked usurpation of the legislative function under the thin guise of interpretation". In this regard Odgers *Construction of deeds and statutes* (1967) 277 comments: "Sometimes the court has refused to imply an accidental omission of words on the ground that it is not for them to take upon themselves 'the office of the legislature'."
20 Cockram *Interpretation of statutes* (1987) 123.
21 1931 AD 466.
22 1950 3 SA 669 (O).
23 1917 TPD 52.
24 54.

> "the reasonable assumption is that the legislature, whilst intending the prohibition to be absolute and effective, overlooked the absence of any express penalty".

It is, however, submitted that *Forlee's* case was erroneously decided and is *par excellence* an example of circumstances where the *casus omissus* rule should decidedly have been applied. This viewpoint is supported by De Wet,[25] who articulated the following perceptive criticism of the judicial reasoning in this case:

> "Die beslissing in *R v Forlee* is geheel en al onaanneemlik. Die hof het hier groter gesag gaan toeken aan die verouderde menings van ouer skrywers as aan die nuwer en meer verligte houding van *Van der Linden*. Dit is 'n onoordeelkundige aanwending van die Romeins-Hollandse reg en sy leerstellings. Die Hof se beroep op die Engelse reg oortuig ook nie, want soos blyk uit wat hierbo omtrent die Engelse reg gesê is, was die Engelse reg op hierdie punt agterlik. Die Hof se beroep op die sake van *Berg, Lloyd* en *Mhlongo*, is ewe min oortuigend."

Judicial law-making in the circumstances of *Forlee's* case can therefore legitimately be impugned since it amounts to a violation of the *nullum crimen sine lege*[26] principle, that is, the principle of legality which is an essential requirement of the rule of law[27] and criminal liability.

Although our courts are manifestly reluctant to furnish an omission, and thus there are very few cases where the courts have responded positively in this regard, the case of *S v Mfoofu*[28] is an exception since the court found that where there is clear evidence that an article or section thereof has been omitted as a direct result of a printer's error, the court is obliged to supply the missing words. A similar *modus operandi* was adopted by Beadle CJ in *Van Heerden v Queen's Hotel (Pty) Ltd*[29] who observed that

> "[t]he courts are extremely loath to read into an Act words which are not there. They will only do so when not to do so will lead to an absurdity so glaring that it could never have been contemplated by the legislature".

It is submitted that this is an unrealistically high standard for filling a gap in a statute and that a more satisfactory criterion would be to do so when the *mistake is apparent* and *the intention is clear*.[30] The approach taken in the case of *Ex Parte Wilson*[31] is jurisprudentially sound and desirable since the court held that

> "this is a case that is not provided for and accordingly an order of Court is necessary and it seems to the court that a procedure must be adopted which will correspond as nearly as possible to that laid down in the act and regulations already referred to and that officials should act *in accordance with the spirit* of the provisions quoted, and attempt as nearly as possible to follow them out".[32]

This indeed is the approach that our courts should adopt to a *casus omissus*.

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25 *Strafreg* (1981) 46 47.
26 See Burchell and Hunt *South African criminal law and procedure* (1970) 53.
27 Mathews *Law, order and liberty in South Africa* 48.
28 1979 2 SA 255 (R); see also *Ex Parte Wilson* 1930 OPD 16 and *Maddison v Fourlamel (Pty) Ltd* 1977 1 SA 348 (T) 349. In English law Lord Mersey required a "clear necessity" for words to be read in (see *Attorney-General for Northern Ireland's Reference* 1977 AC 105).
29 1973 2 SA 14 (RAD) 26.
30 See Pearce *Statutory interpretation in Australia* (1981) 19.
31 1930 OPD 16 18 (italics added).
32 *Ibid* 18 (italics added).

The controversial 1966[33] and 1971[34] decisions of the International Court of Justice (ICJ) on Namibia clearly illustrate the difference between a literal *modus operandi* on the one hand, and a teleological one, motivated by a natural-law jurisprudence, on the other hand, in regard to a *casus omissus*. In 1966, the ICJ decided that Ethiopia and Liberia, as founder and former members of the erstwhile League of Nations, did not have *locus standi* in international law to bring an action against South Africa in vindication of a public international-law interest. In a contentious judgment, which clearly reflected the traditional or orthodox approach to interpretation, the court stated:[35]

> "It may be urged that the court is entitled to engage in a process of 'filling in the gaps' in the provisions of the mandate in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure achievement of their underlying purposes."

The majority of the court rejected this approach and its underlying philosophy with the following argument:[36]

> "Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to establish general legal rights and obligations and that the court should proceed accordingly. The court does not think so."

In a sharp contrast, in a 1971 advisory opinion the ICJ adopted a teleological approach to interpretation of the mandate. It held, by a process of unashamedly filling in gaps, that the United Nations had not only the power to supervise the mandate but also unilaterally to revoke it. The court stated[37] that

> "mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion . . . the court must take into consideration the changes which have occurred in the supervening half-century (since the League Covenant was drafted), and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations, and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation".

Sir Gerald Fitzmaurice and Judge Gros of France delivered motivated dissenting opinions. The former stated[38] that

> "my reading of the situation is based – in orthodox fashion – on what appears to have been the intention of those concerned at the time".

The majority opinion reflects a wide teleological[39] approach which is value-coherent with the ethos of international law and is based on a natural-law jurisprudence that has played a formative role in the development of international law.[40] Furthermore, the great Roman-Dutch jurists, like Hugo de Groot, who is

33 1966 ICJ Reports nos 46 and 47.
34 1971 ICJ Reports no 53.
35 *Op cit* 48 par 91 (*supra* fn 33).
36 *Ibid* 34 par 34.
37 *Op cit* 31 par 53 (*supra* fn 34).
38 *Ibid* 223 par 7.
39 Dugard "The opinion on South-West Africa ('Namibia'): the teleologist's triumph" 1971 *SALJ* 472: "They adopt a functionalist approach to the judicial process and maintain that judges do not merely declare the law. The judge's function is to choose between the alternative rules in the case of gaps in the law, and in making this choice he must be guided by *humanitarian, social and moral* purposes of the law" (italics added).
40 Akehurst *A modern introduction to international law* (1982) 13 14.

often regarded as the father of modern international law,[41] were natural lawyers. The teleological method of interpretation, which is found on the European Continent,[42] requires, as explained by Lord Denning,[43] that

> "the courts interpret the legislation so as to produce the desired effect. This means they fill in the gaps, quite unashamedly, without hesitation".

Lord Denning[44] has further also boldly proclaimed the merit of adopting such a method in regard to the interpretation of municipal law:

> "Even interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will 'promote the general legislative purpose' underlying the provision. This has been recommended by Sir David Renton and his colleagues in their most valuable report on *The Preparation of Legislation* ... There is no reason why we should not follow it at once without waiting for a statute to tell us."

The process of interpretation is by its very nature creative and involves judicial law-making. The maxim *judicis est jus dicere sed non dare* is now widely recognised as a fallacy and is incompatible with the purposive methodology and value-coherent theory of interpretation found in our Roman-Dutch common law.[45] The furnishing of an omission by our courts within defined parameters, falls within the ambit of the practice of judicial law-making of a secondary or supplementary nature.[46] When the omission is *apparent* and *the intention of the legislature is clear* there is no defensible reason why the courts should not fill in a gap, provided that inroads are not made into principles of the common law. Indeed, there is sufficient elasticity in our legal system to allow our courts to act with the boldness advocated by Lord Denning in the above extract and to interpret provisions of the law in accordance with the spirit of the legislation and the common law. This does not amount to a usurpation of the legislative function, but rather to an interpretive process compatible with a modern and accurate exposition of the so-called doctrine of separation of powers as "a government system of separated institutions sharing powers".[47]

However, the attitude of our courts in regard to a *casus omissus* is unfortunately epitomised by the timidity and restraint reflected in the following *dictum* of Trollip JA in *Amalgamated Packaging Industries Ltd v Hutt*:[48]

> "It might possibly be a *casus omissus* on the part of the legislature not to have afforded aggrieved members of the public some form of relief by way of appeal or review. If so the remedy lies with it and not with the Courts to remedy the omission."

The courts therefore essay to interpret a statute so as to avoid a *casus omissus* when its language makes this reasonably possible. Thus as De Villiers AJA observed:[49]

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41 *Ibid.*
42 Denning *The discipline of law* (1979) 20 21.
43 *Ibid* 21.
44 *Ibid.*
45 See *supra* fn 10 and Gane's translation of Voet Vol I 10: "[E]ven in the case of written laws a judge should bend to take account of equity in his interpretation."
46 Hahlo and Kahn *The South African legal system and its background* (1973) 304–325.
47 Mathews *The darker reaches of government* (1979) 178. Kelsen explains that in practice the doctrine amounts to not a "separation but a distribution of powers" (*General theory of law and state* (1961) 269).
48 1975 4 SA 943 (A) 949H; see also *R v Stevens* 1969 2 SA 572 (RAD) 577 and the cases listed by Steyn *op cit* 16 fn 60.
49 *Union Government v Thompson* 1919 AD 404 415; see also the judgment of Centlivres JA in *Dhanabakium v Subramaniam* 1943 AD 160 170–171.

> "When another construction, a reasonable construction may be put on an Act of Parliament, a court of law should not readily infer a *casus omissus,* and where a word in an Act is capable of two meanings, that meaning should rather be given to it which is in accordance with the rest of the Act."

The *casus omissus* rule gives rise to legislation that is linguistically prolix, unnecessarily complicated and frequently incomprehensible for the layman because, according to Cross[50]

> "the courts decline to come to the rescue, when a *casus omissus* is revealed, ... [and] the draftsman gets in first and ... produces a statute which is nothing less than horrific in detail".[51]

In contrast, according to the Renton report[52] "[t]he European tradition has been to express the law in general principles..." This drafting method is more in accordance with the spirit and practice of Roman-Dutch law. If our courts were prepared to adopt a more scientific approach to omissions in legislation this would ultimately influence the draftsman to produce legislation that is linguistically simpler and less detailed. Legislation would therefore become far more comprehensible for the layman and that in turn would contribute to making the law more intelligible and accessible to the community as a whole.

INTERPRETATION BY IMPLICATION

Provisions which are not enacted in express words may under certain circumstances be deemed to be implied by means of the process of curial interpretation. The implication sought to be drawn must, however, be a reasonable and necessary one.[53] This once again involves judicial law-making of a supplementary nature. Steyn[54] correctly observes that the Roman-Dutch jurists did not usually distinguish clearly between analogical interpretation and interpretation by implication. Indeed, there is no fundamental difference in principle between these processes. Despite this, our courts tend to discountenance interpretation by analogy, and are more favourably disposed to interpretation by implication. A variety of factors may give rise to the implication. The implication may arise from an inference abstracted from an examination of all the provisions of the statute. An apt example of such an interpretative implication is to be found in *Ex parte Cousins.*[55] Section 103 (1) of the Companies Act[56] provided that where any compromise or arrangement is proposed between a company and its creditors, the court may, on the application of a company or any creditor or member of the company, or, in case of a company being wound up, of the liquidator, order a meeting of creditors to be summoned. Since a judicial manager is not expressly mentioned in the section, the question arose whether a judicial manager had *locus standi* to apply for an order in terms of section 103. The court

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50 *Statutory interpretation* (1976) 11 12.

51 See Du Plessis *The interpretation of statutes* (1986) 3: "In an attempt to avoid 'loopholes', statutory provisions are often framed in rather inflationary language in which many words are used to say few things..."

52 *The preparation of legislation* ch 20 (conclusion 20).

53 *SA Medical Council v Maytham* 1931 TPD 45 47–48: "I do not see any reason why the principle that applied to the interpretation of contracts should not be applied to the interpretation of a statute, namely you must only make such implication as is a necessary one..." See also *Govindamma v Tobacco Industry Control Board* 1944 NPD 363 366–367.

54 *Op cit* 41 48.

55 1948 1 SA 1130 (N).

56 Act 46 of 1926.

held that by implication a judicial manager, although not mentioned in the section, would have the same *locus standi* as a liquidator would have. *Cousins's* case cannot in principle be distinguished from a *casus omissus* situation: the words "judicial manager" were *omitted* from section 103 of the Companies Act of 1926. The distinction between a *casus omissus* and interpretation by implication is artificial and confusing. In each case the court has to ascertain whether it is justified in resorting to judicial (supplementary) law-making by considering the context and the common law.

There are certain semantic devices that can be used to facilitate interpretation by implication. *Expressio unius est exclusio alterius* is a maxim encapsulating such a device. This maxim[57]

> "affords . . . no more than a *prima facie* indication of the legislature's intention, the weight of which must depend on the purport of the enactment as a whole".

The maxim is therefore a rule of logical thought which

> "may sometimes afford useful guidance for construing a doubtful enactment, but is not a rigid rule of construction to be applied without reference to the context in which the expression . . . occurs".[58]

In effect the court has to weigh up linguistic, contextual and common-law considerations in order to determine whether judicial law-making is justified under the circumstances.

Interpretation by implication may also occur *ex consequentibus*, in which case it is necessary to decide whether a prohibition or an authorisation, not contained in the express words of the provision, is implied. The case of *Bloemfontein Town Council v Richter* [59] provides a pertinent example. Here the court had to decide whether or not a law which authorised the city council to dam a river and to maintain the dam, included the right to remove silt, thereby infringing upon the rights of a riparian land owner. Once again the defect or *lacuna* in this statute could also be construed as a *casus omissus*. The court, however, sanctioned judicial law-making under the aegis of interpretation by implication *ex consequentibus* using the following reasoning (per Stratford JA):[60]

> "I have no hesitation in coming to the conclusion on the evidence that without the right to remove this silt, the right and power of the municipality cannot be properly enjoyed or exercised. If this is the position in fact the law is clear, that the right to clean (ie take away silt) is one conferred by necessary implication."

In adjudicating upon the matter the court was not merely concerned with a semantic polemic. It was concerned with the more fundamental jurisprudential issue of balancing and weighing up the rights of the council as against those of the riparian land owner in the light of both the *ratio* or object of the act and the principles of the common law. The nature of such legal reasoning is lucidly explained in the case of *Johannesburg Municipality v African Realty Trust Ltd.*[61]

> "[I]f an act which a statute definitely authorizes to be done is one which must necessarily interfere with common law rights, the Court will infer a legislative intention that they should be infringed. It is on this ground that statutory permission to run a railway engine

57 *Consolidated Diamond Mines of SWA Ltd v Administrator, SWA* 1958 4 SA 572 (A) 648.
58 *Chotabhai v Union Government* 1911 AD 1 28.
59 1938 AD 195 226 227.
60 227.
61 1927 AD 163 173.

> is held to justify its use, even though it emits sparks and frightens horses on the highway ... If, however, the nature of the work authorized is such that it may or may not interfere with private rights according to circumstances, then the person entrusted with statutory authority is entitled to show that, under the circumstances of the case, it is impossible to carry out the work without such interference, in which case an inference that an infringement to private rights was sanctioned would be justified. For otherwise the grant of statutory authority would be nugatory."

Interpretation by implication can be facilitated by making use of certain other maxims:

(a) *Ex accessorio eius de quo verba loquuntur:* Steyn[62] takes the view that this maxim encapsulates a separate ambit of operation, especially where accessory powers are involved. In practice the distinction between accessory powers and necessary powers is an artificial one.

(b) *A natura ipsius rei:* The maxim is concerned with an inherent relationship; thus a power to make a regulation implies the power to withdraw it.[63]

(c) *Ex correlativis:* This maxim involves mutual or reciprocal relationships; thus prohibiting the purchase of certain goods includes a prohibition of the sale of such goods.

(d) *Ex contrariis:* here the implication arises from opposites; thus if the law provides for a particular case, by implication it makes a contrary provision for the opposite case.

The operation of these maxims manifestly overlaps and it is not always possible to delineate clearly one from the other. The important point to note is that judicial law-making under the aegis of interpretation by implication is acceptable to the courts, whereas judicial law-making presented in the form of analogous interpretation or a *casus omissus* is unacceptable, although there is no difference in principle.

THE MODIFICATION OF LANGUAGE

The degree to which modification of language will be acceptable to the courts will depend on the theory of interpretation adopted by the courts. The literal approach permits a modification in exceptional cases where the application of the golden and mischief rules is justified in the cases of absurdity and ambiguity respectively. Thus Maxwell, who represents orthodox literalism, states:[64]

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words or by rejecting them altogether on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

A fortiori a purposive or value-orientated theory of interpretation permits a greater measure of modification of language.

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62 *Op cit* 53–54.
63 Du Plessis *The interpretation of statutes* 157 fn 46.
64 *Op cit* 228.

Steyn[65] remarks that where there is any doubt about the legislature's intention, the words themselves must be adhered to rather than an uncertain "veronderstelde" intention. This is jurisprudentially unsound since where the purpose is uncertain, recourse should be had to the presumptions of interpretation. Furthermore, Steyn[66] himself implied such a *modus operandi* elsewhere in his discussion of the presumptions by stating that

> "[d]ie woorde van 'n wet is, soos eerder aangedui, nie die uitsluitlike kenbron van die wil van die wetgewer nie. Sy wilsinhoud blyk in aansienlike mate ook uit weerlegbare vermoedens".

An examination of the relevant cases indicates that the courts have conflicting views on the question of modification of language. There are a number of cases where the courts have categorically refused to modify language. Most of these cases reflect the very *primitive* literalism epitomised by Lord Campbell's *dictum* in *Coe v Laurence*:[67]

> "I have no doubt as to the intention of the legislature, but *quod voluerunt non dixerunt*, the defendant is not brought within the terms used."

This manifestation of primitive literalism amounts to an indefensible example of judicial law-making, since the court gives the provision a meaning demonstratively at variance with the unequivocal intention of the legislature. Such primitive literalism amounts ironically to a usurpation of the legislative function. Such a usurpation is clear from the *dictum* of Krauw J in *R v Hildick-Smith*[68] despite the protestation to the contrary:

> "The question for the Court is not what the legislature meant, but what its language means, what it said it meant. Judges must be careful to interpret the law and not to make it."

However, there is a "catena"[69] of cases where the courts have indeed been prepared to modify the language of a statute. This amounts to legitimate judicial law-making or amendment, provided it takes place within certain clearly defined parameters that reflect the principles and ethos of the common law. This is clearly illustrated by the decision in *Ex parte the Minister of Justice: In R v Jacobson and Levy*[70] in which Wessels CJ stated:

> "The court is not always bound to the literal meaning of words because the draftsman may have made a mistake in the use of a word, or may have omitted a word or added what is mere surplusage . . . If, however, the language is such that in order to give a meaning to the section it must be materially altered . . . then especially in criminal matters . . . the Court is not entitled to radically alter the language so as to constitute a crime which cannot be otherwise extracted from the section, and cannot be rightly extracted from other sections of the statute."

In this last-mentioned case the court was not prepared to modify the language of the section in a way that amounted to sanctioning an inroad into the fundamental principle of *nullum crimen sine lege*. One of the parameters required

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65 *Op cit* 57: "By twyfel moet liewer die woorde gevolg word as 'n onsekere, veronderstelde bedoeling."
66 *Ibid* 69.
67 1853 22 LJQB 140.
68 1924 TPD 61 81.
69 Steyn *op cit* 192; *Ex parte Myburgh* (1906) 23 SC 668; *Skinner v Palmer* 1919 WLD 39 44–45; *Fernandez v SAR* 1926 AD 60.
70 1931 AD 466 477.

for modification of language is that there must be "reasonable certainty" concerning the exact purport of the statute.[71] In general, an important motivation is that of rendering a provision effective, a good example of which is found in *Ex parte Myburgh*[72] in which Lord de Villiers observed that

> "[a]s there would be no way of giving effect to the use of the words 'several villages' unless these communal allotments are taken to be villages, I think the Court should give effect to the intention of the Legislature".

Modification of language requires a judicious weighing up of very often competing factors, in the light of the principles and ethos of our common law. Thus rendering the law effective is not the only or paramount consideration as is evident from the *Jacobsen and Levy* case.[73] Lord Denning[74] aptly summed up the position, with characteristically perceptive judicial insight, when he observed that "[w]henever there is a choice, choose the meaning which accords with reason and justice".

Some of the considerations that a court should weigh up in the process of modification are set out by Maxwell:[75]

> "The judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text when on solid grounds from content or history of the enactment, or *from injustice, inconvenience or absurdity of the consequences* to which it would lead, that the language thus treated does not really express the intention and that the amendment does."[76]

Thus consequences of injustice, inconvenience and absurdity may, according to Maxwell, be considered in the process of modification, provided the intention of the legislature justifies it. These consequences are merely examples of aberrations and in each case it must be asked whether the intention of the legislature expressly or impliedly sanctions such a consequence.

Examples of modification of language occur in English law. A striking example is found in the words of MacKinnon LJ in *Sutherland Publishing Co v Caxton Publishing Co*:[77]

> "When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the Legislature. It may even be necessary, and therefore legitimate to substitute for an inept word or words that which such intention requires."

Such modification does not amount to a usurpation of the legislator's function, but to the legitimate exercise of judicial law-making of a complementary nature in order to give effect to the intention or the presumed intention of the legislature. When then is modification of language justified? In *Durban City Council v Gray*[78] the court held that

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71 *De Villiers v Cape Law Society* 1937 CPD 428 431–432: "It is not enough to come to the conclusion that the amendment 'probably' expresses the intention: in my opinion the court must be certain it does so."

72 23 SC 668; see *Skinner v Palmer* 1919 WLD 39 44; *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501 508.

73 *Supra* fn 70.

74 *The discipline of law* 22.

75 *Op cit* 228; see Maxwell (3ed) 354.

76 See also *R v Thamae* 1917 EDL 173; Steyn *op cit* 61 fn 140.

77 (1937) Ch 201.

78 1951 3 SA 568 (A) 580B.

> "it is within the powers of the court to modify the language of a statutory provision where it is necessary to give effect to what is clearly the legislature's intention;"

and in *R v Oosthuisen*[79] Roper J observed:

> "It is impossible to define the extent of the power of the court to alter the collocation of words or to make interpretations in order to correct careless language of the draftsman; *this is a question of degree. But it seems that it stops short of the power to redraft so as to express a supposed intention which cannot be gathered from the terms of the statute itself.*"

These cases provide us with two criteria, and it may be suggested that the exact extent of permissible modification falls somewhere between the parameters indicated by them. The teleological theory[80] of interpretation by its very nature necessitates acceptance of the principle of modification of language in order to bring the meaning of words into line with the purpose of the law in question and the purpose of law in general which according to Voet[81] is "justice and reason". This is essential in order to develop a consistent and dynamic jurisprudence of statutory interpretation. Cross[82] perceptively expounds the position as follows:

> "The curious reluctance of some judges to recognise what amounts to a power to rectify a statute when construing it, however limited that power may be, is almost as great an obstruction to the development of a jurisprudence of statutory interpretation as the equally curious reluctance of other judges and some writers to recognise that the plain ordinary meaning of statutory words must yield to a secondary meaning when the application of the ordinary meaning would lead to a result which 'cannot reasonably be supposed to have been the intention of the legislature'."

CONCLUSION

If modification of language, which according to Hahlo and Kahn is "the most glaring deviation from the literal rule"[83] is permissible, then *a fortiori* the courts should be allowed to supply an omission when this is justified by the intention of the legislature and is in accordance with the principles of our common law. Interpretation by analogy and by implication and the modification of language all involve the same principle, namely, judicial legislation of a secondary nature. Odgers[84] says that

> "it has been suggested that where there is not a clear omission but mere faultiness of expression, then the courts may have the power to change words to give effect to the intention of the legislation".

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79 1952 3 SA 541 (T) 545A–B (italics added).

80 Ross *On law and justice* (1958) 147 148: "Pragmatic interpretation might consider not only foreseeable social effects, but also technical acuity of the interpretation and its harmony with the legal system and the cultural ideas on which it is built"; and "If it is still thought desirable to use the term 'teleological' interpretation (rather than 'pragmatic' interpretation) it must be emphasised that the *telos* does not designate the isolated purpose of the individual statute, but *pars pro toto* refers to all considerations that can be applied." Lord Denning refers to the terms "schematic and teleological" (*The discipline of law* 20).

81 1 3 5; Hahlo and Kahn *The South African legal system and its background* 31: "The law ought to be just and reasonable, both in regard to subject matter, directing what is honourable, forbidding what is base: and as to form, preserving equality and binding the citizens equally."

82 *Statutory construction* (1976) 168.

83 *Op cit* 192.

84 Dworkin *The construction of deeds and statutes* (1967) 278.

He does, however, concede that the distinction between an "omission" and "faultiness of expression" is problematic. Such a distinction can be based only on caprice and not on any rational considerations. The net result of this state of affairs is that our case law is anomalous and inconsistent. The vital question is not the classification of the defect of the statutory instrument, but rather whether first of all the context and then secondly the common law, which are seminal considerations in ascertaining the intention of the legislation, justify the exercise of judicial legislation. Inconsistency and confusion are not in the interest of the administration of justice. Our courts should endeavour to bring greater consistency to this branch of the law. This could be done by ignoring entirely the artificial distinction between a *casus omissus* and interpretation by implication and by applying consistently the fundamental principles and ethos of our common law such as, *inter alia*, the principles of equality before the law and legality (*nullum crimen sine lege*) and the natural-law jurisprudence of Roman-Dutch law, to the process of interpretation.

Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme

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SUMMARY

Freedom of contract, contractual justice and the economic liberalism

The principle of freedom of contract (sanctity of contract) has become entrenched in the South African law of contract as a dominant principle to the detriment of the principle of contractual justice. In the article this development is sketched and evaluated. The term "freedom of contract" has five distinct meanings which must be taken into account in any examination of the phenomenon.

Freedom of contract in several of its meanings has been present in the law of contract since Roman times but has always been subject to certain restrictions. It has never been an absolute principle. The freedom-of-contract idea in its modern sense, however, is a development which started with the *pacta sunt servanda* rule in Canon law. The meaning of this rule changed subtly over centuries under the influence of rationalism, the social contract idea and human rights philosophies.

The most radical change in the idea of freedom of contract was caused by the economic liberalism of the nineteenth century. Under the influence of the *laissez faire* economic policy the fundamental principle of contractual justice was replaced by freedom of contract.

An account of the importance and meaning of contractual justice is given. Contractual justice can be established either by the *quid pro quo* approach or by looking at the reasonable expectations of the parties. It is submitted that the latter approach is more appropriate. The article concludes that contractual justice, as the more fundamental principle, should be given preference over freedom of contract should the two principles clash.

1 INLEIDING

Die beginsel van kontrakteervryheid is een van die hoekstene van die moderne Suid-Afrikaanse kontraktereg en het 'n belangrike rol gespeel in die ontstaan, aanvaarding en regverdiging van standaardbedinge. Die beginsel word vandag nog as argument teen enige vorm van bemoeienis met standaardbedinge aangewend. Ten spyte van die belangrikheid van die beginsel is daar tot dusver

weinig aandag aan die aard en betekenis daarvan in die Suid-Afrikaanse reg gegee.[1]

In *Roffey v Catterall, Edwards and Goudré*[2] gee die hof een van die duidelikste en breedvoerigste uiteensettings wat nog in die Suid-Afrikaanse reg verskyn het van kontrakteervryheid as 'n beginsel van die openbare belang. Die hof verwys met goedkeuring na die bekende aanhaling in *Printing and Numerical Registering Co v Sampson*[3] en verklaar dan:[4]

> "I am satisfied that South African law prefers the sanctity of contracts. That principle is firmly entrenched in our system, where it shows its head in so many places . . . The principle has a moral dimension too, which gives it a durability and universality beyond the norms of the market place. This consists of its simple requirement that people should keep their promises. That appeal to honour surely transcends all else of present relevance."

Dit is in die lig van hierdie en ander soortgelyke uitsprake,[5] waaruit die howe se baie sterk standpunt oor die plek en belang van kontrakteervryheid blyk, dat enige poging wat 'n algemene beperking op kontrakteervryheid kan inhou, geregverdig moet word. Hierdie standpunt verteenwoordig 'n beskouing van kontrakteervryheid wat nog sterk onder die invloed van die negentiende-eeuse liberalistiese denke staan, maar wat nie meer vandag klakkeloos nagevolg kan word nie.[6]

Vanweë die geweldige invloed van die kontrakteervryheidsleer is 'n ander grondliggende beginsel van die kontraktereg, naamlik kontraktuele geregtigheid, op die agtergrond geskuif en het dit half vergete geraak. Kontrakteervryheid, wat 'n middel tot die doel van kontraktuele geregtigheid was, het in die proses in 'n doel op sigself verander.[7]

2 BETEKENIS VAN DIE BEGRIP KONTRAKTEERVRYHEID

Die begrip *kontrakteervryheid* word meestal gebruik asof dit 'n vaste inhoud en betekenis het, maar by nadere ontleding is dit duidelik dat dit verskillende betekenisse kan hê en dus verskeie vorme kan aanneem.[8] Uit die opmerking in byvoorbeeld *Printing and Numerical Registering Co v Sampson*[9] blyk daar twee duidelike betekenisse, naamlik dat partye die bevoegdheid het om 'n kontrak

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1 Benewens verwysing daarna in die regspraak, is die besprekings van Aronstam *Consumer protection, freedom of contract and the law* (1979) 1 e v; Visser "The principle of pacta servanda sunt in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade" 1984 *SALJ* 641 e v en Volpe "Sanctity of contract – wisdom or folly" 1984 *Speculum Juris* 16 e v die volledigste.

2 1977 4 SA 494 (N) 504C–505H.

3 (1875) LR 19 Eq 462 465. Sien par 3 5 hieronder vir die aanhaling.

4 505F–H.

5 Sien ook *Wells v SA Alumenite Co* 1927 AD 69 73; *Osry v Hirsch & Loubser & Co Ltd* 1922 CPD 531 546; *Marlin v Durban Turf Club* 1942 AD 112 131; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 766C–767A; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 893H–894A.

6 Sien bv die standpunte van Raiser *Das Recht der allgemeine Geschäftsbedingungen* (1935) 102 oor die Duitse reg en Kessler "Contracts of adhesion – some thoughts about freedom of contract" 1943 *Col LR* 636–637 oor die Amerikaanse reg.

7 Pound "Liberty of contract" 1909 *Yale LJ* 457; Wilson "Freedom of contract and adhesion contracts" 1965 *ICLQ* 173; Atiyah *The rise and fall of freedom of contract* (1979) 402.

8 Aronstam 13–14; Feenstra en Ahsmann *Contract: aspecten van de begrippen contract en contractsvrijheid in historisch perspectief* (1980) 5–7; Hippel "The control of exemption clauses: a comparative study" 1967 *ICLQ* 592–593.

9 (1875) LR 19 Eq 462 465. Sien par 3 5 hieronder vir die volledige aanhaling.

in te klee soos hulle wil (vergestaltingsvryheid) en die verbod op die hof om met 'n kontraktuele verhouding in te meng (bemoeiingsvryheid). Die kritiek van die klasssieke ekonomiese skool teen staatsinmenging op die kontraktuele terrein gee op sy beurt 'n nuwe betekenis aan die begrip kontrakteervryheid.[10] Ten einde die aard en rol van die kontrakteervryheidsgedagte behoorlik te kan verstaan, is dit noodsaaklik dat daar tussen die verskillende betekenisse van die begrip onderskei moet word.

Kontrakteervryheid kan enigeen van die volgende betekenisse dra (of vorme aanneem):

(a) *Formele kontrakteervryheid* Dit beteken dat daar in beginsel geen formaliteite (soos skrif) vir die totstandkoming van die kontrak vereis word nie, maar dat blote *consensus* tussen die partye voldoende is.[11]

(b) *Vergestaltingsvryheid* Dit hou in dat die partye enige geoorloofde inhoud aan hulle kontrak kan gee en dat die partye die reëlende reg kan wysig om by hulle behoeftes aan te pas.[12] Standaardbedinge is dus 'n uitvloeisel van hierdie beginsel. Die beginsel bevat egter 'n belangrike inherente beperking, naamlik dié van geoorloofdheid.[13]

(c) *Sluitingsvryheid* Dit beteken dat 'n mens in beginsel vry is om te besluit of hy wil kontrakteer al dan nie en, indien wel, met wie.[14]

(d) *Bemoeiingsvryheid* Hiervolgens behoort daar nie *ex post facto* met 'n kontraktuele verhouding ingemeng te word nie, maar moet dit afgedwing word soos die partye ooreengekom het.[15] *Pacta sunt servanda* en *sanctity of contract* is begrippe wat as sinonieme vir kontrakteervryheid in hierdie sin gebruik word.

(e) *Kontrakteervryheid in omvattende sin* Kragtens hierdie beskouing is dit onwenslik dat die owerheid enigsins die ander vorme van kontrakteervryheid aan bande lê.[16] Hierdie laaste betekenis hou verband met die wyse waarop

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10 Sien par 3 4 hieronder.

11 Sien bv *Goldblatt v Fremantle* 1920 AD 123 128. Sien verder Friedman "Changing functions of contract in the common law" 1951 *U of Toronto LJ* 17; Scherrer *Die geschichtliche Entwicklung des Prinzips der Vertragsfreiheit* (1948) 9. Die Middeleeuse spreuk *pacta sunt servanda*, wat dikwels i v m of as sinoniem vir kontrakteervryheid gebruik word, het oorspronklik op hierdie betekenis van die begrip gedui: vgl Feenstra en Ahsmann 5.

12 Raiser *AGB* 21 97; Friedmann 1951 *U of Toronto LJ* 17; Wilson 1965 *ICLQ* 181; Nicklisch "Zum Anwendungsbereich der Inhaltskontrolle allgemeiner Geschäftsbedingungen" 1974 *Betriebsberater* 942; Schmidt-Salzer *Allgemeine Geschäftsbedingungen* (1977) Rn A6 A8; Aronstam 13; Feenstra en Ahsmann 5.

13 *Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 4 SA 494 (N) 502F; sien in die algemeen De Wet en Van Wyk *De Wet en Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 80 e v.

14 Kessler 1943 *Col LR* 630; Weber "Grundfragen zum Recht der allgemeinen Geschäftsbedingungen (AGB)" 1970 *Betrieb* 2361; Bolgàr "The contract of adhesion: a comparison of theory and practice" 1972 *Am J Comp L* 56; Aronstam 4 14; Feenstra en Ahsmann 6.

15 In *Scottish Union and National Insurance Co Ltd v Native Recruiting Corp Ltd* 1934 AD 458 465; sien ook Raiser *AGB* 303; Kessler 1943 *Col LR* 630–631; Wilson 1965 *ICLQ* 172; Schmidt-Salzer Rn A8; Kessler en Gilmore *Contracts: cases and materials* (1970) 38; Rakoff "Contracts of adhesion: an essay in reconstruction" 1983 *Harv LR* 1236; Aronstam 13. Die spreuk *pacta sunt servanda* het gedurende die agtiende en negentiende eeu 'n betekenisverandering ondergaan, met die gevolg dat dit vandag in hierdie sin gebruik word. Sien bv die wyse waarop die gedagte in *Wells v SA Alumenite Co* 1927 AD 69 73 na vore kom.

16 Pound 1917 *Yale LJ* 461–462; Raiser *AGB* 21 74; Kessler 1943 *Col LR* 630; Kessler en Gilmore 36–37; Aronstam 4.

die begrip gedurende die negentiende eeu deur die ekonomiese liberalisme gebruik is.[17] 'n Wetgewende bepaling waardeur die howe gemagtig sou word om inhoudelike beheer oor standaardbedinge uit te oefen, sou byvoorbeeld inbreuk op kontrakteervryheid in omvattende sin maak omdat dit die bemoeiingsvryheid aantas.

Dit is veral in hierdie betekenis dat kontrakteervryheid 'n ekonomies-politieke slagspreuk in die afgelope twee eeue geword het. Die gedagte het gedurende die negentiende eeu in die meeste Westerse kapitalistiese stelsels so diep wortel geskiet dat dit byna die status van onaantasbaarheid verwerf het.[18]

Hierdie verskillende vorme van kontrakteervryheid is nie noodwendig onafhanklik van mekaar nie. So is kontrakteervryheid in omvattende sin in baie opsigte bepalend vir die ander vorme van kontrakteervryheid. Indien die wetgewer bepalings neerlê wat vormvereistes voorskryf, word formele kontrakteervryheid beperk; indien hy bepalings ten aansien van die inhoud van kontrakte neerlê, word die vergestaltingsvryheid geraak; en indien hy aan die howe die bevoegdheid gee om agterna aan die kontraktuele verhouding te verander, word inbreuk op die bemoeiingsvryheid gemaak.

Dit is egter nie net wetgewende optrede wat 'n invloed op kontrakteervryheid kan hê nie. Omstandighede soos monopolieë beïnvloed die sluitingsvryheid van buitestaanders omdat hulle nie 'n keuse het met wie hulle wil kontrakteer nie. Indien hulle die dienste of goedere wil hê of benodig, moet hulle eenvoudig maar met die monopolis kontrakteer.[19] Feitelike beperkings op die sluitingsvryheid werk ook nadelig op die vergestaltingsvryheid in. Waar die een party in 'n baie sterker bedingingsposisie as die ander party verkeer, kan hy die bedinge van die kontrak op eensydige wyse dikteer. Die ander party het in so 'n geval weinig vergestaltingsvryheid omdat sy onderhandelingsvermoë beperk word tot die besluit om die kontrak te sluit of nie.[20]

Wanneer die aard, invloed en strekwydte van kontrakteervryheid ondersoek word, moet al hierdie beperkings – hetsy van regsweë, hetsy feitelik – ook in gedagte gehou word. In die markplek funksioneer 'n meganisme soos onderhandeling juis vanweë hierdie faktore nie altyd soos dit teoreties voorgestel word nie.

3 ONTWIKKELING VAN DIE KONTRAKTEERVRYHEIDSGEDAGTE

3 1 Inleiding

Alhoewel die kontrakteervryheidsbegrip eers op 'n taamlike laat stadium in die ontwikkeling van die kontraktereg sy verskyning gemaak het,[21] het 'n mate van *de facto* kontrakteervryheid in al sy betekenisse reeds vanaf 'n redelik vroeë stadium bestaan. In die Romeinse reg het daar reeds 'n ruim mate van vergestaltingsvryheid bestaan vanweë die plooibaarheid van die *stipulatio* as kontraksoort.[22] Kontrakteervryheid in formele sin was egter beperk vanweë die formaliteitsvereistes wat vir die meeste kontraksoorte gestel is.

17 Raiser *AGB* 102; Aronstam 13; Rakoff 1983 *Harv LR* 1236.
18 Sien bv Raiser *AGB* 303 se opmerking oor die *übermächtigen Idee der Vertragsfreiheit.*
19 Wilson 1965 *ICLQ* 172.
20 Pound 1909 *Yale LJ* 463; Friedman 1951 *U of Toronto LJ* 15–16 23; Wilson 1965 *ICLQ* 181.
21 Pound 1909 *Yale LJ* 455; Williston "Freedom of contract" 1921 *Cornell LQ* 366.
22 Scherrer 11; Feenstra en Ahsmann 8–9.

Kontrakteervryheid as bewustelik geformuleerde doelwit het eers met die ontwikkelinge rondom *pacta sunt servanda* gedurende die Middeleeue te voorskyn gekom. Daarna is verskillende aspekte van kontrakteervryheid telkens belig totdat die begrip in sy moderne betekenis (kontrakteervryheid in omvattende sin) ontvou het.

3 2 *Pacta sunt servanda*

Die spreuk *pacta sunt servanda* word vandag meestal gebruik om die absoluut afdwingbare karakter van kontraktuele verhoudinge aan te dui of te regverdig. Die reël het egter nie oorspronklik hierdie funksie vervul nie. Dit het naamlik ontstaan met die doel om vormvrye ooreenkomste naas die formele kontrakte ook afdwingbaar te maak.[23]

In die klassieke Romeinse reg was *nuda pacta*, dit wil sê afsprake wat nie aan die nodige formaliteite voldoen het nie, in beginsel nie afdwingbaar nie. Met die resipiëring van die Romeinse reg gedurende die Middeleeue is die reël *ex nuda pacta actio non oritur* behou, met die gevolg dat 'n blote ooreenkoms steeds nie voldoende was om kontraktuele gebondenheid daar te stel nie.[24]

Die *pacta sunt servanda*-reël, wat sy oorsprong in die Kanonieke reg gehad het, het algaande ook in die Romeinse reg soos dit deur die middeleeuers beoefen is, inslag gevind.[25] Die vraagstuk het op hierdie tydstip egter nie oor die bemoeiingsvryheid gehandel nie, maar oor kontrakteervryheid in formele sin, ofte wel konsensualisme.[26] Die Romeinse kontraktereg het gedurende die Middeleeue verander van 'n stelsel waarin die grondslag vir kontraktuele gebondenheid in die vorm van die regshandeling geleë was, na 'n stelsel waar *consensus* die grondslag gevorm het. Dit is in hierdie verband dat *pacta sunt servanda* oorspronklik die betekenis gehad het dat 'n kontrak, afgesien van die vorm waarin dit gegiet is, afdwingbaar is indien albei partye vryelik daartoe ingestem het.[27]

Daar het egter 'n belangrike klemverskuiwing gedurende die Renaissance ten aansien van die betekenis van die spreuk plaasgevind.[28] In hierdie tydperk waarin die natuurreg en veral die rasionalisme sy hoogtepunt bereik het, was dit veral skrywers met 'n sterk filosofiese gerigtheid wat die gedagtes oor kontrakteervryheid beïnvloed het.[29]

Die rasionaliste het geglo dat die mens met behulp van sy rasionele vermoëns die algemeen geldende natuurregsreëls kon vasstel en die positiewe reg daarvolgens kon rig.[30] Op hierdie wyse kon geregtigheid in elke gemeenskap bewerkstellig word.[31] 'n Grondliggende element van hierdie gedagterigting was die benadering dat elke mens sekere fundamentele regte besit en dat hy outonoom

23 Feenstra en Ahsmann 12–13.
24 Scherrer 14–15; Feenstra en Ahsmann 13.
25 Scherrer 21; Visser 1984 *SALJ* 647.
26 Scherrer 18.
27 Pound 1909 *Yale LJ* 455–456; Feenstra en Ahsmann 6–7; Visser 1984 *SALJ* 646.
28 Pound 1909 *Yale LJ* 456.
29 Feenstra en Ahsmann 6–7.
30 Hommes *Hoofdlijnen van de geschiedenis der rechtsfilosofie* (1972) 74–75; Van der Vyver *Die juridiese sin van die leerstuk van menseregte* (1973) 133; Van der Vyver "Die regsfilosofie van Hugo de Groot" 1983 *THRHR* 154.
31 Aronstam 1.

is.[32] Gevolglik het hy ook die reg om vryelik ooreenkomste aan te gaan (sluitingsvryheid).[33]

Daar word algemeen erken dat De Groot (1583–1645), wat 'n belangrike natuurregsfilosoof was,[34] een van die grondleggers van die moderne kontraktereg was.[35] De Groot het nuwe inhoud en betekenis aan die begrip *pacta sunt servanda* gegee. Hy was die eerste skrywer wat die wil om aan 'n ander 'n reg te verskaf as die grondslag van kontraktuele gebondenheid aangemerk het.[36] Hy het egter 'n verdere vereiste gestel, naamlik dat die wilsuiting vryelik moet geskied het, dit wil sê sonder dat dit deur dwang of bedrog beïnvloed is.[37] Waar daar wel so 'n wil bestaan het, was 'n persoon verplig om sy belofte na te kom.[38]

Waar die spreuk *pacta sunt servanda* oorspronklik gebruik is om die beginsel van konsensualisme deur te voer, word die klem deur De Groot op die verbindende krag van die ernstige belofte geplaas.[39] Dit gaan nou nie meer soseer daaroor dat ooreenkomste wat informeel gesluit is ook naas ander ooreenkomste wat aan die formele vereistes voldoen, afdwingbaar is nie, maar oor die feit dat dit 'n gebod van die natuurreg is dat ooreenkomste wat vrywillig aangegaan is, nagekom moet word.[40] Dit is hier waar die eerste tekens van die sogenaamde *sanctity of contract* of die absolute onaantasbaarheid van kontraktuele verhoudings gevind kan word.

Hierdie nuwe rigting wat deur De Groot ingeslaan is, moet gesien word teen die agtergrond van die humanistiese denkstrome van die Renaissance. Die mensbeskouing van die humaniste het 'n beslissende invloed op die ontwikkelings rondom die kontrakteervryheidsgedagte gehad. Daar is wegbeweeg van die statiese wêreldbeeld van die Middeleeue, waarvolgens elke mens sy goddelik-bepaalde plek in die gemeenskap ingeneem het.[41] Dit is vervang deur 'n nuwe selfbewussyn van die mens en sy belangrikheid as outonome wese. Ingevolge

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32 Locke *Two treatises of civil government* 2 8 95. In die bespreking van die sosiale verdraggedagterigting sal hoofsaaklik met verwysings na John Locke (1632–1704) volstaan word. Alhoewel daar heelwat verskille tussen die voorstanders van hierdie gedagte (soos De Groot, Hobbes, Pufendorf, Wolff en Rousseau) bestaan, bied Locke 'n verteenwoordigende voorbeeld van dié gedagterigting. Sien verder Hommes 80 e v; Dias *Jurisprudence* (1976) 95; Van der Vyver *Menseregte* 155–156.

33 Hommes 76–77.

34 De Groot was 'n oorgangsfiguur tussen die objektiewe natuurreg en die meer subjektiewe rasionalisme, maar nogtans 'n natuurregsfilosoof. Sien Nanz *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (1985) 139.

35 Feenstra en Ahsmann 17; Nanz 139.

36 De Groot 3 1 10 en 3 1 11: "Toezeggingen noemen wy een willighe daed eens mensches waer door hy aen een ander iet belooft, met meninghe dat den ander het zelve aenemen ende daer door op den belover eenig recht zal mogen verkrijgen . . . Toezegging is iet meer dan belofte, want de belofte maeckt wel dat het onbehoorlick is zulcks te laten als belooft is, maer geeft een ander gheen recht om zulcks te mogen aennemen." Sien ook Nanz 140–141.

37 De Groot 3 1 19.

38 De Groot 3 1 52. Hy het hierdie verpligting so belangrik geag dat hy dit as een van die fondamente van die natuurreg beskou het. Die reël beskou hy as so onveranderlik dat dit nie alleen die mens nie maar ook God bind: *De iure belli ac pacis* 2 11 1 6.

39 Visser 1984 *SALJ* 649–650; Nanz 145–146.

40 Pound 1909 *Yale LJ* 455–456; Feenstra en Ahsmann 18–19; Visser 1984 *SALJ* 649–650.

41 Hommes 58–59; Van der Vyver *Menseregte* 92–93.

hierdie beskouings was die mens 'n vrye, rasionele en outonome wese wat heerskappy oor sy goed en oor homself voer.[42] Daarom is hy in staat om na goeddunke daarmee te handel en behoort die reg daaraan gevolg te gee.[43] Waar hy dus vryelik toestem tot 'n ooreenkoms waardeur hy gebind sal word, moet die reg daaraan gevolg gee en die verpligting afdwing.[44]

Ten spyte van die belangrikheid wat De Groot aan die beginsel van *pacta sunt servanda* geheg het, het hy dit steeds nie as 'n absolute verpligting, in die sin dat die owerheid nie beperkings daarop mag plaas, gesien nie.[45] Die vrye wilsuitoefening van die mens, dit wil sê sy vergestaltingsvryheid, kan volgens De Groot van regsweë aan bande gelê word deur sekere ooreenkomste as ongeoorloof te bestempel. Hierdie beperkings is in ooreenstemming met die natuurreg.[46] Hiermee erken De Groot by implikasie dat daar sekere perke aan die privaatoutonomie van die mens deur die owerheid gestel kan word. Daardie perke word deur die beginsel van geoorloofdheid bepaal. In sy werke bespreek hy ook 'n aantal van hierdie beperkings, soos die woekerverbod[47] en bepalings oor huurkontrakte[48] en dienskontrakte.[49]

Die beste voorbeelde van bepalings wat aan die howe die bevoegdheid gegee het om *ex post facto* met kontraktuele verhoudings in te meng, was sekerlik die *laesio enormis*- en *clausula rebus sic stantibus*-leerstukke wat, hoewel hulle veral gedurende die Middeleeue van groot belang was, ook daarna nog hul invloed laat geld het.[50] Die *laesio enormis*-reël wat sy oorsprong in die Romeinse reg gehad het en wat daarop gemik was om grondeienaars teen uitbuiting te beskerm, is nie in die Middeleeue bloot toegepas nie, maar die toepassingsveld daarvan is selfs uitgebrei.[51] Ingevolge dié reël kon 'n hof 'n kontrak ongedaan maak indien die verkoper sy saak vir minder as die helfte van die waarde daarvan verkoop het. In die Middeleeue is die reël uitgebrei om ook die koper wat te veel betaal het, te beskerm.[52]

Die *laesio enormis*-reël is vanaf die sestiende eeu aan al hoe meer prinsipiële kritiek deur veral die natuurregskrywers onderwerp.[53] Volgens hulle beskouing was die reël nòg deel van die klassieke Romeinse reg, nòg deel van die natuurreg. In sy wese het dit ook nie gestrook met die nuwer denkrigtings nie. In die praktyk het die reël egter bly voortbestaan en is dit selfs in sommige Europese kodifikasies opgeneem. In Suid-Afrika het die reël in beginsel tot 1952 bly geld.[54]

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42 Hommes 59–60.

43 De Groot 3 1 12: "Den grond hier van bestaet in des mensches vrije macht over sijne daden: want ghelijckerwijs de macht die iemand heeft over sijn eighen goed, 't zy in volle of gebrecklicken eigendom, zoo veel werckt dat hy door levering ofte toelating een ander mag eigenaer maecken, ghelijck hier vooren is verklaert, alzoo oock vermag een mensch een deel, ofte veel eer een gevolg, sijns vrijheid aen een ander zulcks aennemend over te draghen zoo dat die andere eenig recht daer over werd geboren, welck recht inschuld word genoemdt."

44 Visser 1984 *SALJ* 649.

45 Feenstra en Ahsmann 19; Visser 1984 *SALJ* 650.

46 De Groot 3 1 19; 3 1 21; 3 1 42.

47 De Groot 3 10 9; 3 10 10; *De iure belli* 2 12 20.

48 De Groot 3 19 3.

49 De Groot 3 19 6; 3 19 13.

50 Feenstra en Ahsmann 21–23 26 e v.

51 Feenstra en Ahsmann 26–27.

52 Feenstra en Ahsmann 27–28.

53 Feenstra en Ahsmann 29.

54 *Ibid.*

Die *clausula rebus sic stantibus*-reël wat ook sy oorsprong in die Kanonieke reg gehad het, het daarvoor voorsiening gemaak dat die kontrak nie afgedwing sou word indien daar onvoorsiene veranderde omstandighede ingetree het nie.[55] Teen die vyftiende eeu het dié gedagte ook reeds stewig in die Romeinse reg inslag gevind. Hierdie reël verteenwoordig ook 'n beduidende inbreuk op die beginsel van bemoeiingsvryheid. De Groot het reeds belangrike uitsonderings op die reël geformuleer en die reël in beginsel verwerp. Vanaf die sewentiende eeu het die reël meeste van sy betekenis verloor.[56]

Dit is dus duidelik dat, ten spyte van die veranderde betekenis van die spreuk *pacta sunt servanda*, daar steeds belangrike uitsonderings op die beginsel bestaan het. Die bevoegdheid van die owerheid om beperkings op die sluitings- en vergestaltingsvryheid neer te lê, is ook tot op hierdie tydstip nie bevraagteken nie.[57] Die natuurregskrywers het egter begin om 'n onderskeid te tref tussen ewig geldende natuurregsreëls en veranderlike sekondêre regsreëls wat van eersgenoemde afgelei is. *Pacta sunt servanda* is as 'n natuurregsreël beskou, terwyl baie van die uitsonderings as sekondêre reëls geklassifiseer is.[58] Hierdie benadering het verder daartoe bygedra om die weg vir die aanvaarding van die absolute bindende krag van 'n kontrak voor te berei.

Die spreuk *pacta sunt servanda* het nie alleen in die kontraktereg 'n belangrike rol gespeel nie, maar is ook deur die voorstanders van die menseregteteorie gebruik om staatsvorming en gehoorsaamheid aan die owerheid te verduidelik. De Groot se werk het in baie opsigte die weg voorberei vir die ontwikkeling van die menseregteleerstuk.[59] Die leerstuk het op sy beurt weer 'n belangrike invloed op die ontwikkeling van die kontrakteervryheidsgedagte gehad.

3 3 Menseregteteorieë en die sosiale verdrag

Die Renaissance het 'n era ingelui waartydens die mens nie alleen tot 'n nuwe bewustheid van sy eie waarde gekom het nie, maar ook een waartydens daar grondige sosiale en ekonomiese veranderings ingetree het. Die statiese feodale stelsel is verplaas deur 'n sosiale orde waarin die individu baie meer persoonlike vryheid geniet het. Baie mense het hul landelike verknegting vir 'n vryer bestaan in die stede verruil. 'n Mens se stand was nie meer die allesoorheersende sosiale faktor nie, alhoewel dit steeds 'n belangrike rol gespeel het.[60] Op staatkundige terrein het die Middeleeuse monargieë saam met die ideaal van die herlewing van 'n groot eenheidstaat of ryk onder die aanslag van 'n nuwe gees van nasionalisme en onafhanklikheid begin verkrummel. Die individu het in hierdie opkomende nasionale state 'n al hoe sterker invloed laat geld.

Die opkoms van die nasionale state het egter dringende vrae oor die verhouding tussen die vrye outonome individu en die staat laat ontstaan. Die staatsfilosowe van hierdie tyd het die kwessie aan die hand van die sosiale verdrag verklaar. Hiervolgens was die mens in die natuurstaat vry en kon hy doen soos

55 Scherrer 29; Feenstra en Ahsmann 21.
56 Scherrer 30; Feenstra en Ahsmann 23 24.
57 Sien bv De Groot 3 1 19; 3 1 21; 3 1 42; *De iure belli* 2 12 20; Van Leeuwen *Rooms-Hollands-regt* 4 21 4; 4 20 1; 4 20 4; 14 18 4 waar hierdie beperkings sonder enige kritiek bespreek word.
58 Feenstra en Ahsmann 28–29.
59 Feenstra en Ahsmann 31.
60 Atiyah 611.

hy goed gedink het.[61] Elke mens was in beginsel ook gelyk en aan niemand anders ondergeskik nie. Die mens is dienooreenkomstig ook vry om homself te verbind en van sommige van hierdie vryhede afstand te doen.[62]

Die redenasie lui verder dat die oorgang van die natuurstaat na die burgerlike staat deur die sosiale verdrag bewerkstellig word.[63] Die sosiale verdrag is 'n onderlinge ooreenkoms wat deur die inwoners van die natuurstaat gesluit is, waardeur elkeen afstand gedoen het van sekere vryhede in ruil vir groter bestendigheid en veiligheid.[64] 'n Mens kan hom vanweë die natuurregtelike beginsel van *pacta sunt servanda* nie eensydig uit hierdie verhouding onttrek nie.[65]

Die aanhangers van die sosiale verdraggedagte het groot moeite ondervind om die absolute gesag van die staat te versoen met die gedagte dat elke mens in beginsel vry en outonoom is. Die menseregteteorieë van byvoorbeeld Locke, Rousseau en Kant was daarop afgestem om hierdie dilemma te probeer oplos.[66] Ingevolge hulle teorieë was elke mens in die natuurstaat toegerus met sekere natuurlike regte en vryhede.[67] In die burgerlike staat bly hierdie regte voortbestaan, maar slegs vir sover nie daarvan afstand gedoen is nie. Die vertrekpunt bly dus die vryheid van die mens en alle beperkings daarop is dus beperkings waartoe hy ingestem het.[68]

Ten spyte van dié uitgangspunt het baie van die vroeë humaniste 'n staatsabsolutistiese staatsfilosofie aangehang ingevolge waarvan die soewereiniteit van die staat ten aansien van alle lewensfere verklaar en geregverdig is.[69] Dit was die logiese gevolg van die sosiale verdragleerstuk. Hier is *pacta sunt servanda* dus gebruik om absolute bindende krag aan die sosiale verdrag toe te sê.[70]

Gedurende die sestiende tot agtiende eeu het die owerheid ook op talle terreine van die kontraktereg maatreëls uitgevaardig wat veral die sluitings- en vergestaltingsvryheid geraak het. Op ekonomiese terrein was dit veral die merkantilisme wat 'n kenmerk van hierdie periode was. Dit was 'n ekonomiese beleid waarvolgens elke staat probeer het om soveel handelsaktiwiteit moontlik na sy gebied te lok en sodoende die welvaart van die staat te verhoog. Dit het tot groot wedywering tussen die verskillende state en toenemende staatsinmenging gelei. Elke staat het probeer om die handel deur regulasie en monopolie na sy gebied te kanaliseer en te verhoed dat ander state belange in sy gebied verkry.

Die meeste van die maatreëls wat uitgevaardig is, het 'n invloed op die een of ander vorm van kontrakteervryheid gehad. Die vestiging van monopolieë en verbod op vreemde handelaars het sluitingsvryheid erg aan bande gelê en tot

61 Bv Locke 2 2 4; sien verder Atiyah 45; Van der Vyver *Menseregte* 143–144 195; 1983 *THRHR* 168.
62 Bv Locke 2 2 4; sien verder Atiyah 36–37 40–41.
63 Locke 2 9 123; sien verder Van der Vyver *Menseregte* 151.
64 Locke 2 9 123; 2 19 222.
65 Die gedagte van *pacta sunt servanda* speel 'n groot rol by al die voorstanders van die sosiale verdraggedagte, behalwe by Rousseau: sien Van der Vyver *Menseregte* 208–209.
66 Hommes 111–112; Van der Vyver *Menseregte* 173.
67 Sien bv Locke 2 2 4; vgl ook Atiyah 24–43 en Hommes 86 e v se bespreking oor Locke.
68 Locke 2 8 95; sien verder Atiyah 51.
69 Hommes 63–64; Atiyah 42.
70 Hommes 111. In die verband word daarna verwys as 'n *pactum subiectionis*: sien Van der Vyver *Menseregte* 167.

allerlei misbruike gelei.[71] State het ook regulasies uitgevaardig met betrekking tot die soort goedere wat in- of uitgevoer kon word of wat die kwaliteit van goedere bepaal het. Sulke regulasies het op hul beurt inbreuk op die vergestaltings- en handelsvryheid gemaak. Hier was dus geen sprake van kontrakteervryheid in die omvattende sin nie. Die staat het dit as sy goeie reg beskou om op alle lewensterreine in te meng. Owerheidsinmenging is geduld en geregverdig omdat geglo is dat dit in algemene belang geskied het.

Met verloop van tyd het die klem egter van die absolute gesag van die staat na die absolute vryheid en outonomie van die mens verskuif. In die menseregteteorieë het die belange van die individu 'n al hoe belangriker plek begin inneem.[72] Skrywers soos John Locke[73] en Jean Jacques Rousseau (1712–1778)[74] het 'n baie meer individualistiese benadering tot die staat-burgerverhouding begin volg.[75]

Volgens Locke dra die mens ingevolge die sosiale verdrag nie al sy regte aan die staat oor nie, maar slegs die reg om self sy regte te beskerm en te handhaaf. Die menseregte is volgens sy beskouing aangebore en onvervreembaar en die geïdealiseerde oorspronklike vryheid wat die individu geniet het, is van die allergrootste belang.[76]

Dit was veral Immanuel Kant (1724–1804) wat die gedagte van die outonomie van die individu die sterkste na vore laat kom het.[77] Die uitoefening van die privaatoutonomie was geleë in die uiting van die individu se wil.[78] Die grondslag van die kontrak het hy in die ontmoeting van die partye se wille gesien.[79] Hierdie beskouing van Kant was die grondslag van Savigny se wilsteorie wat gedurende die negentiende eeu inslag gevind het en ook aanhang in die Suid-Afrikaanse reg geniet.[80] Die wilsteorie was die teelaarde waarin die kontrakteervryheidsidee kon gedy. Volgens dié benadering moes die kontraktereg die outonomie van die partye respekteer en derhalwe nie inmeng met die vrye wilsuitinge van die partye nie. Privaatoutonomie en kontrakteervryheid vorm dus die natuurlike keersy van die wilsteorie.[81] Met die vestiging van die wilsteorie het kontrakteervryheid natuurlik ook 'n goeie vastrapplek gekry.

In soortgelyke trant verklaar Sir William Blackstone[82] teen die middel van die agtiende eeu dat menseregte, dit wil sê daardie regte wat mense van nature toekom, absolute regte is en dat dit deur die natuurreg beperk word slegs vir

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71 In die speseryhandel waarin die Hollandse kooplui 'n monopolie gehad het, het dit soms gebeur dat daar 'n oorvoorsiening was. In plaas daarvan om pryse op die markte te verlaag, is die speserye oorboord gegooi om sodoende die pryse kunsmatig hoog te hou.

72 Pound 1909 *Yale LJ* 457.

73 In *Two treatises.*

74 In *Du contrat social ou principes du droit politique.*

75 Hommes 134 e v; Atiyah 45 e v.

76 In *Two treatises* 2 3 17 verklaar hy: "He that in the state of Nature would take away the freedom that belongs to any one in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest." Sien verder Hommes 113–114.

77 Hommes 140–141.

78 Hommes 146–147.

79 Kessler "Some thoughts on the evolution of the German law of contracts – a comparative study: part 1" 1975 *UCLA LR* 1068.

80 Sien bv De Wet en Van Wyk 8–9 11–12.

81 Kessler 1975 *UCLA LR* 1069.

82 *Commentaries on the laws of England* (1770) bk 1 hfst 1 125–126.

sover dit noodsaaklik is. Met sy toetrede tot die staat stem die mens in tot die beperkings wat noodsaaklik is om sy vryhede te waarborg. In die burgerlike staat word die natuurregtelike beperkings deur positiefregtelike beperkings vervang wat in die openbare belang is. Die staat moet egter die natuurlike regte van die mens respekteer.[83]

Dit is dus duidelik dat die privaatoutonomie, dit wil sê die vermoë van die mens om selfstandig en verantwoordelik op te tree, as 'n fundamentele eienskap en reg van die mens beskou is.[84] 'n Belangrike onderdeel van die privaatoutonomie is die vermoë om kontrakte te kan sluit. Hierdie beskouings was die gevolg van 'n oorgeïdealiseerde selfbeeld van die mens, naamlik dat elkeen in staat is om rasioneel en in sy eie beste belang op te tree.[85]

Dit is in hierdie denkklimaat dat die gedagte van kontrakteervryheid in die omvattende sin teen die einde van die agtiende eeu begin posvat het. Die ontwakende ekonomiese wetenskap het die finale momentum in hierdie proses help verskaf.[86]

3 4 Ekonomiese liberalisme

Die gedagte van kontrakteervryheid in die omvattende sin wat vandag nog soveel aanhang geniet, is by uitstek 'n produk van die klassieke ekonomiese skool van die laat agtiende en die negentiende eeu.[87] Die klassieke ekonomiese skool onder leiding van David Hume (1741–1776), Adam Smith (1723–1790) en David Ricardo (1772–1823) het die grondslae van die moderne ekonomiese wetenskap gelê.[88] Hulle invloed het egter nie tot die ekonomiese sfeer beperk gebly nie en dit was veral hulle beroep op handelsvryheid, waarvan kontrakteervryheid natuurlik 'n belangrike komponent is, wat die reg beïnvloed het.[89]

Die klassieke ekonomiese skool is voorafgegaan deur die Franse fisiokratiese skool en, hoewel laasgenoemde nie dieselfde invloed as eersgenoemde sou hê nie, het sekere kernbeskouings van die fisiokrate tog by die klassieke skool inslag gevind.[90] Die fisiokrate se ekonomiese teorie was op die natuurregsfilosofie gegrond. Fisiokrate soos Francois Quesnay (1694–1774) en Ann Robert Jacques Turgot (1727–1781) het geglo dat die gemeenskap en die ekonomie net soos die fisiese wêreld aan sekere natuurwette onderworpe is.[91] Staatsinmenging met die ekonomie was dus in stryd met hierdie natuurwette, tensy dit gemik was op die beskerming van die natuurlike orde en die regte wat elkeen van nature toekom.[92]

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83 Blackstone 125–126; sien verder Van der Vyver *Menseregte* 342–344.
84 Raiser "Vertragsfreiheit heute" 1958 *JZ* 2; Hippel *Die Kontrolle der Vertragsfreiheit nach anglo-amerikanischem Recht. Zugleich eine Beitrag zur Considerationlehre* (1963) 24.
85 Williston 1921 *Cornell LQ* 366; Lukes "Gedanken zur begrenzung des Inhalts allgemeiner Geschäftsbedingungen" in *Festschrift Hueck* (1959) 480; Kliege *Rechtsprobleme der allgemeinen Geschäftsbedingungen in wirtschaftswissenschaftlicher Analyse unter besonderer Berücksichtigung der Freizeichnungsklauseln* (1966) 97.
86 Williston 1921 *Cornell LQ* 366.
87 Pound 1909 *Yale LJ* 456; Raiser 1958 *JZ* 2; Atiyah 294 e v.
88 Landreth *History of economic theory: scope, method and content* (1976) 33.
89 Williston 1921 *Cornell LQ* 366; Hippel 23; Atiyah 293.
90 Hackl *Vertragsfreiheit und Kontrahierungszwang im deutschen, im Östereichischen und im Italienischen Recht* (1980) 13; Clough en Cole *Economic history of Europe* (1952) 360–361; Landreth 24.
91 Hackl 13; Clough en Cole 360–361; Landreth 26.
92 Clough en Cole 361.

Die fisiokrate was van mening dat daar in die ekonomie 'n natuurlike orde of kringloop bestaan. Die welvaart van enige land sou dan afhang van die behoorlike funksionering van hierdie kringloop.[93] Daarom het hulle 'n groot premie geplaas op die vryheid wat in 'n ekonomiese stelsel bestaan, aangesien dit die behoorlike funksionering van die ekonomie verseker het.[94] Owerheidsinmenging moes gevolglik tot 'n minimum beperk word, omdat dit hierdie natuurlike proses sou versteur. Die owerheid se enigste taak sou verder wees om die lewens en eiendom van sy onderdane te beskerm en om kontrakteervryheid te verseker.[95]

Hier vind 'n mens die eerste tekens van die *laissez faire* ekonomiese benadering waarvoor die klassieke ekonomiese skool so bekend sou word. Teen hierdie agtergrond is dit duidelik dat die *laissez faire*-gedagte nie bloot 'n laat-maar-loop-houding weerspieël het nie, maar 'n edeler strewe was om die welvaart van die gemeenskap te verhoog.[96]

Die fisiokratiese en klassieke ekonomiese bewegings verteenwoordig ook in vele opsigte 'n opstand teen die oordrewe inmenging en beskerming van die merkantilisme.[97] Veral in Engeland het die merkantilisme ongekende afmetings aangeneem. Die staat het op haas elke terrein wette uitgevaardig waarin in- en uitvoere, handel met die kolonies en lone aan beperkings onderwerp is.[98] Smith het oortuigend aangetoon hoe hierdie beperkings sekere persone ten koste van ander bevoordeel het.[99] So het die bepalings oor die vervoer van wol, wat daarop gemik was om die uitvoer van wol te verhoed en sodoende die binnelandse prys kunsmatig laag te hou, die tekstielnyweraars byvoorbeeld ten koste van wolprodusente begunstig.[100]

Op die arbeidsterrein is daar maksimum lone neergelê met die oog daarop om mededinging in die arbeidsmark te verhoed en sodoende 'n stabiele en afhanklike arbeidsmag te skep.[101] Daar is geglo dat mededinging en bewegingsvryheid lone en gevolglik ook die prys van Engelse produkte sou opjaag. Dit sou op sy beurt die mededingendheid van Engelse produkte verlaag waardeur die "algemene welvaart" weer benadeel sou word.[102]

In teenstelling hiermee het die klassieke ekonome aangevoer dat owerheidsinmenging tot 'n minimum beperk moet word, aangesien handelsvryheid en die markmeganisme uiteindelik tot die grootste voordeel van almal sou lei.[103] Smith het erken dat die afskaffing van die beperkende maatreëls op die kort termyn sekere persone of lande sou benadeel, maar het beklemtoon dat dit op die lang

93 Brenner *Theory of economic development and growth* (1969) 25; Oser en Blanchfield *The evolution of economic thought* (1975) 30; Haussherr *Wirtschaftsgeschichte der Neuzeit: vom Ende des 14. bis zur Höhe des 19. Jahrhunderts* (1960) 280.

94 Oser en Blanchfield 30–31; Landreth 27–28.

95 Clough en Cole 361.

96 Atiyah 260.

97 Pound 1908 *Yale LJ* 457; Oser en Blanchfield 9 e v; Heaton *Economic history of Europe* (1965) 224 e v; Landreth 20–23; Wilson 1965 *ICLQ* 173.

98 Clough en Cole 196 e v; Oser en Blanchfield 9–10; Haussherr 277; Atiyah 68–69.

99 *An inquiry into the nature and causes of the wealth of nations I* bk 4 hfst 2 456 e v. Sien verder Oser en Blanchfield 12; Heaton 225.

100 Smith *Wealth of nations II* bk 4 hfst 9 163 e v; sien ook Clough en Cole 223 e v; Atiyah 299.

101 Clough en Cole 224–225.

102 Atiyah 67–68.

103 Pound 1909 *Yale LJ* 457; Williston 1921 *Cornell LQ* 366; Oser en Blanchfield 44; Clough en Cole 365–367; Landreth 38–39.

termyn net voordelig sou wees.[104] Die stryd wat die klassieke ekonome gestry het, was in baie opsigte daarop gemik om die vooroordele ten gunste van sekere belangegroepe af te breek sodat almal in die welvaart kon deel.[105] Die kern van die gedagte was dat alhoewel die individu in die eerste plek sy eie belang najaag, sy ingebore strewe na natuurlike orde daarvoor sou sorg dat hy ook die algemene belang dien.[106] Hierdie proses sou deur middel van die markmeganisme plaasvind wat op vrye mededinging geskoei en 'n natuurlike proses is.[107]

Net soos die fisiokrate het die klassieke ekonome geglo dat die ekonomie van nature aan sekere reëls onderworpe is en die beste sou funksioneer waar daar so min as moontlik met daardie reëls ingemeng word.[108] Hulle was daarvan oortuig dat die markmeganisme die *invisible hand* was waardeur die ekonomiese proses natuurlikerwys beheer is.[109] Die behoorlike funksionering van die markmeganisme was volgens hulle beskouing afhanklik van 'n hoë mate van handelsvryheid, dit wil sê sluitings- en vergestaltingsvryheid, maar ook kontrakteervryheid in die omvattende sin.[110]

So verklaar Adam Smith:[111]

> "All systems either of preference or of restraint, therefore, being thus completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord. Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men. The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and directing it towards the employment most suitable to the interest of the society."

Net soos die fisiokrate was Smith ook van mening dat die staat met betrekking tot die ekonomie slegs 'n sekondêre, ondersteunende rol moes speel.[112] Die hooftaak van die staat sou eerstens daarin geleë wees om die gemeenskap teen die geweld en invalle van ander nasies te beskerm; tweedens om elke lid van die gemeenskap sover moontlik teen *ongeregtigheid en onderdrukking* deur enige ander persoon te beskerm; en derdens, om openbare werke op te rig en te onderhou.[113] Hierdie gedagtes van Smith weerspieël die mate waarin die individualistiese vryheidsleer teen die einde van die agtiende eeu reeds begin posvat het.[114] Die vryemarkteorie wat Smith ontwikkel het, het vinnig veld gewen gedurende die negentiende eeu en het 'n byna allesoorheersende beginsel geword.[115]

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104 *Wealth of nations II* bk 4 hfst 9 206.
105 Atiyah 260–261.
106 Hackl 13.
107 Atiyah 282 300.
108 Hierdie gedagte is deur Smith se volgelinge in 'n baie omvattender vorm as wat hy oorspronklik voorgestaan het, uitgedra en gewild gemaak: Atiyah 305.
109 Clough en Cole 368; Landreth 40–41; Hart *Allgemeine Geschäftsbedingungen und Justizsystem* (1974) 39; Gluck "Standard form contracts – contract theory reconsidered" 1979 *ICLQ* 72; Atiyah 303.
110 Clough en Cole 367–368; Atiyah 76–77 296.
111 *Wealth of nations II* bk 4 hfst 9 206.
112 Atiyah 302.
113 Smith *Wealth of nations II* bk 4 hfst 9 206–207; sien verder Atiyah 302.
114 Williston 1921 *Cornell LQ* 366.
115 Sien bv hoe deeglik hierdie gedagtes by David Ricardo *Principles of political economy and taxation* bk 2 hfst 5 en 25 inslag gevind het. Sien ook Mill *Principles of political economy with some of their applications to social philosophy* hfst 4 par 1 se kritiek op die oordrewe klem wat die vroeë ekonome op mededinging geplaas het.

Teen die middel van die negentiende eeu verklaar John Stuart Mill:[116]

> "*Laisser-faire*, in short, should be the general practice: every departure from it, unless required by some great good, is a certain evil."

Die gedagte dat die owerheid nie op die ekonomiese terrein behoort in te meng nie, was reeds goed gevestig. Die uitgangspunt van Mill was dat die individu in staat is om die beste na sy eie belange om te sien en sy eie doelwitte te verwesenlik. Owerheidsinmenging behoort in die reël tot 'n minimum beperk te word aangesien dit gewoonlik tot nadeel van die individu strek.[117]

Mill het egter besef dat daar omstandighede kan bestaan waar 'n persoon nie die beste beoordelaar van sy eie omstandighede is nie en dat dít veral die geval is waar verbruikers betrokke is.[118] Gevolglik het hy 'n aantal uitsonderings op die reël teen inmenging geformuleer.[119] In hierdie gevalle was owerheidsinmenging nie alleen voordelig nie, maar ook wenslik.[120]

In sy essay *On liberty* neem hy egter sterker standpunt teen owerheidsinmenging in.[121] Hy verklaar dat die owerheid geen reg het om met 'n individu se sake in te meng omdat dit tot sy voordeel sou wees nie. Dit is slegs waar die individu se optrede potensieel nadelig vir derdes is dat die owerheid geregtig is om op te tree.[122] Mill het besef dat onbeperkte vryheid selfvernietigend kan wees. Hy het die perke op vryheid gesien in optrede wat tot benadeling van derdes sou lei, in welke geval owerheidsinmenging wel geregverdig sou wees.

Alhoewel die beroep op die handelsvryheidsgedagte of kontrakteervryheid in die omvattende sin nie sonder 'n taai stryd algemene aanvaarding verkry het nie, was hierdie beginsel teen die middel van die negentiende eeu goed ingeburger.[123] Dit is teen daardie agtergrond van individualisme, persoonlike vryheid en handelsvryheid dat die beginsel van kontrakteervryheid ook in die howe weerklank gevind het.[124] Die invloed van die Franse en Engelse ekonome was nie tot daardie lande beperk waarin hierdie ontwikkelings plaasgevind het nie, maar het na die meeste Europese lande en lande binne hulle invloedsfeer versprei.[125]

3 5 Kontrakteervryheid en die howe

Aanvanklik het die klassieke ekonome se gedagtes oor ekonomiese vryheid nie 'n regstreekse invloed op die beskouings van die howe gehad nie. Die howe het steeds op grond van billikheidsoorwegings met kontraktuele verhoudings ingemeng. Dit was eers teen 1830, met 'n nuwe geslag regters wat met die nuwe

116 *Political economy* bk 5 hfst 11 par 7; sien ook Mill *On liberty, representative government, the subjection of women: three essays* 15 116.
117 *Political economy* bk 5 hfst 11 par 2; sien verder Williston 1921 *Cornell LQ* 366; Atiyah 319 e v.
118 *Political economy* bk 5 hfst 11 par 7.
119 *Political economy* bk 5 hfst 11 par 8–13.
120 *Political economy* bk 5 hfst 11 par 7; sien verder Atiyah 319–320.
121 Williston 1921 *Cornell LQ* 366.
122 *Three essays* 15 93. Hy voeg egter die kwalifikasie by dat die stelling net geld t o v persone wat volwasse is en vir gemeenskappe wat reeds volwassenheid bereik het!
123 Sien Mill *Three essays* 116 e v se opmerkings oor die leerstuk van *free trade*; sien verder Williston 1921 *Cornell LQ* 366.
124 Pound 1909 *Yale LJ* 460.
125 Kausche *Die allgemeinen Geschäftsbedingungen im skandinavischen Recht: Eine vergleichende Darstellung* (1971) 16.

ekonomiese rigting vertroud was, dat 'n nuwe gees in die howe begin posvat en die agtiende-eeuse gees van paternalisme begin verdwyn het. Die nuwe benadering, waarin die klem baie sterk op die vryheid en verantwoordelikheid van die individu geval het, het nietemin baie vinnig veld gewen.[126]

Die bekende uitlating van Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson*[127] verdien weer vermelding:

> "[I]f there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

Dit lewer 'n duidelike bewys van die mate waarin die beginsel van kontrakteervryheid gedurende die negentiende eeu ook in die howe veld gewen het.[128]

'n Ontleding van die stelling toon aan dat die sogenaamde onaantasbaarheid van 'n kontrak veral twee vryhede veronderstel, naamlik vergestaltings- en bemoeiingsvryheid.[129] Die hof verklaar dat dit in die openbare belang is dat partye se vergestaltingsvryheid so wyd moontlik moet strek en dat 'n hof daaraan gevolg moet gee, dit wil sê nie agterna daarmee behoort in te meng nie. Indien 'n kontrak vrywillig aangegaan is, behoort die hof dit net so af te dwing – ongeag die billikheid al dan nie van die inhoud.[130]

In *The Manchester, Sheffield and Lincolnshire Railway v Brown* verklaar die hof:[131]

> "However, so it is, and I repeat that I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I shall require the strongest possible evidence, or something more even than a possibility, to shew me that that was an unreasonable agreement."

In die Engelse reg bestaan daar een baie duidelike uitsondering op die kontrakteervryheidsbeginsel, naamlik in die geval van *restraint of trade*-klousules. Sulke bepalings is *prima facie* onafdwingbaar in die Engelse reg omdat dit in stryd met die openbare belang is. Die belanghebbende moet gevolglik aantoon dat die beperkings wat hy afgedwing wil hê in die betrokke omstandighede nie onredelik is nie.[132] Hierdie reël, wat sy oorsprong reeds in die Middeleeue gehad het, het homself ten spyte van die *sanctity of contract*-beginsel dwarsdeur die negentiende eeu tot die hede laat geld. Die howe was egter gedurende die negentiende eeu op grond van die kontrakteervryheidsleerstuk teësinnig om die aanwendingsterrein van die *restraint*-reël uit te brei.[133]

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126 Atiyah 361 e v.
127 (1875) LR 19 Eq 462 465 (vgl *supra* vn 3).
128 Pound 1909 *Yale LJ* 454 e v; Williston 1921 *Cornell LQ* 367; Wilson 1965 *ICLQ* 175. Oor die ontwikkeling in die Amerikaanse reg, sien Aronstam 7 e v; Williston 1921 *Cornell LQ* 366 e v; en Hippel 28 e v.
129 Kessler 1943 *Col LR* 630; Meyer "Contracts of adhesion and the doctrine of fundamental breach" 1964 *Va LR* 1183.
130 Sien Gluck 1979 *ICLQ* 75.
131 (1883) 8 AC 703 (HL) 718–719.
132 Hierdie uiteensetting in *Nordenfeldt v Maxim Nordenfeldt Guns and Ammunition Co Ltd* 1984 AC 535 (HL) 565 word algemeen as 'n geldige opsomming van die Engelse reg aanvaar: sien *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 887A–D.
133 Williston 1921 *Cornell LQ* 373.

Gedurende die twintigste eeu het daar 'n kentering in die absoluutheid waarmee die *sanctity of contract*-beginsel beskou is, ook by die howe begin intree.[134] In *John Lee v Railway Executive*[135] word die volgende stelling gemaak:

> "Above all, there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused. It would, therefore, be a very serious question, whether the defendants are free to exempt themselves in the wide terms which are here contended for."

Die stelling getuig van 'n veranderde benadering tot die kwessie van bemoeiingsvryheid en die perke van vergestaltingsvryheid.[136] Die hof erken dat vergestaltingsvryheid misbruik kan word en dat die reg daarteen sal optree. Die hof verklaar homself dus by implikasie bereid om met die kontraktuele verhouding in te meng, dit wil sê inbreuk op die bemoeiingsvryheid van die partye te maak. Hierdie veranderde houding word goed geïllustreer deur onlangse Engelse beslissings soos *Macaulay v Schroeder Publishing Co Ltd* [137] en *Lloyds Bank v Bundy*.[138]

In die Suid-Afrikaanse reg is die beginsel van die onaantasbaarheid van kontrakte na aanleiding van die Engelse reg aanvaar. In *Wells v SA Alumenite Co*[139] verwys die appèlafdeling met goedkeuring na die aanhaling in die *Sampson*-saak hierbo en aanvaar dit as deel van die Suid-Afrikaanse reg. Sedertien is daar herhaaldelik na die belangrikheid van die beginsel in die Suid-Afrikaanse reg verwys.[140]

Die beginsel het egter hier te lande so 'n belangrike posisie ingeneem dat die Suid-Afrikaanse reg afgewyk het van die *restraint of trade*-uitsondering. Aanvanklik is die Engelse reël net so in die Suid-Afrikaanse reg oorgeneem,[141] maar in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd*[142] is beslis dat die bedinge wat handelsvryheid beperk, in beginsel afdwingbaar is, tensy dit teen die openbare belang is. Hierdie afwyking, wat met 'n beroep op die beginsel van kontrakteervryheid geregverdig is, is later deur die appèlafdeling in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [143] bevestig. Die feit dat die howe bereid was om 'n benadering wat reeds oor 'n lang tydperk deur hulle gevolg is op grond van die kontrakteervryheidsgedagte omver te werp, is 'n aanduiding van die geweldige invloed wat die beginsel vandag nog uitoefen.

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134 *Ibid.*

135 (1949) 2 All ER 581 (CA) 584.

136 Sien ook Wilson 1965 *ICLQ* 172 en Friedman 1951 *U of Toronto LJ* 19–20 oor die wyse waarop die houding van die Amerikaanse howe begin verander het. Dit is egter duidelik dat die verandering nie orals en ewe vinnig inslag gevind het nie. Net soos die howe aanvanklik traag was om die leerstuk te aanvaar, was hulle later ook traag om daarvan af te sien: sien Williston 1921 *Cornell LQ* 369; Deutch *Unfair contracts: the doctrine of unconscionability* (1977) 20.

137 (1974) 1 WLR 1308 (HL).

138 (1974) 3 WLR 501. Sien verder Trebilcock "The doctrine of inequality of bargaining power: post-Benthamite economics in the House of Lords" 1976 *U of Toronto LJ* 359–385 en Gluck 1979 *ICLQ* 77–78 se bespreking van die relevante beslissings. Vgl ook *Henningsen v Bloomfield Motors Inc* 161 A 2d 69 oor die Amerikaanse reg.

139 1927 AD 69 73.

140 Sien *Marlin v Durban Turf Club* 1942 AD 112 131; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767A; *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 4 SA 494 (N) 504; *Drewtons (Pty) Ltd v Carlie* 1981 4 SA 305 (K) 317.

141 Sien Kerr *The principles of the law of contract* (1982) 111 vn 90 en verwysings aldaar.

142 1977 4 SA 494 (N) 505H.

143 1984 4 SA 874 (A) 892E–893A.

Daar word erken dat sekere perke aan die vergestaltings- en bemoeiingsvryheid gestel moet word om die openbare belang te beskerm. Die grense van hierdie uitsondering is egter baie eng en strek kwalik wyer as bedinge wat die handelsvryheid beperk, kontrakte wat immoreel is, weddenskapskontrakte en kontrakte wat onwettig is.[144] Dit is nietemin duidelik dat die blote feit dat 'n kontrak of beding onbillik is, nie voldoende is om dit onafdwingbaar te maak nie.[145]

Ten opsigte van standaardbedinge en meer spesifiek uitsluitingsbedinge het die howe konsekwent die onaantasbaarheidsbeginsel gehandhaaf. In die enkele gevalle waar die howe wel kritiek teen die misbruik van standaardbedinge uitgespreek het, is telkens na die kontrakteervryheidsbeginsel verwys en gesê dat enige oplossing vir die probleem by wyse van wetgewing moet geskied.[146]

3 6. Ekskursus: kontrakteervryheid en standaardbedinge

Teen die begin van die negentiende eeu was die kontrak, veral vanweë die beginsel van vorm- en vergestaltingsvryheid, een van die plooibaarste regsinstrumente. Die grootste gedeelte van die kontraktereg het uit reëlende regsreëls bestaan met die gevolg dat partye feitlik enige inhoud aan hulle ooreenkoms kon gee.

Hierdie plooibaarheid het die voordeel ingehou dat partye hulle kontrakte by hul spesifieke behoeftes kon aanpas. Die ontwikkeling op sosiale en ekonomiese gebied gedurende die negentiende eeu het nuwe eise aan die reg gestel, maar die tradisionele kontraktereg was vanweë sy plooibaarheid daartoe in staat om hierdie nuwe uitdagings die hoof te bied. Waar daar 'n behoefte aan 'n nuwe soort kontrak ontstaan het, kon die partye eenvoudig self 'n nuwe soort kontrak daarstel.[147]

Toenemende industrialisering asook massa-afset en -verbruik het die behoefte aan 'n makliker en vinniger manier van kontraktering laat ontstaan. Standaardbedinge was die ideale metode om aan hierdie behoefte te voldoen.[148] Die gebruiker van die bedinge kon eenvoudig 'n konsepkontrak opstel wat aan sy behoeftes voldoen en dit dan deur oorhandiging of ondertekening by toekomstige kontraktuele verhoudings laat inkorporeer.[149] Standaardbedinge kan in hierdie opsig as 'n produk van kontrakteervryheid beskou word.[150]

3 7 Kontrakteervryheid vandag

Uit die voorgaande is dit duidelik dat die kontrakteervryheidsgedagte soos dit vandag in die Suid-Afrikaanse reg bestaan, nog baie sterk trekke van die negentiende-eeuse liberalistiese beskouing van die beginsel vertoon. Dit beteken eerstens dat aangesien die grootste gedeelte van die gemeenregtelike kontraktereg uit reëlende regsreëls bestaan, partye kragtens hulle vergestaltingsvryheid vryelik daarvan kan afwyk en dat hulle enige geoorloofde inhoud aan hulle ooreenkoms

144 Kerr 98–99; De Wet en Van Wyk 80–81.
145 *Wells v SA Alumenite Co* 1927 AD 69 73.
146 *Linstrom v Venter* 1957 1 SA 125 (SWA) 127C–128E; *Western Bank Ltd v Sparta Construction Co* 1975 1 SA 839 (W) 840B–F.
147 Friedman 1951 *U of Toronto LJ* 22.
148 *Ibid* 22–23.
149 Lukes *FS Heuck* 460.
150 Raiser *AGB* 277–278; Friedman 1951 *U of Toronto LJ* 23.

kan gee. Tweedens beteken dit dat 'n hof nie *ex post facto* met die kontraktuele verhouding sal inmeng nie, maar dit sal afdwing soos die partye daarin ooreengekom het.

Die gedagte van kontrakteervryheid in die omvattende sin oefen vandag nog steeds 'n groot invloed uit ten spyte van die talryke statutêre uitsonderings wat reeds op die beginsel inbreuk maak. Die gedagte dat elke party vir sy eie optrede verantwoordelik is en in staat is om die beste na sy eie belange om te sien, met die gevolg dat beskermende maatreëls nie noodsaaklik is nie, het nog baie min van sy oorredende krag in die Suid-Afrikaanse reg verloor.

Ten spyte hiervan het die wetgewer reeds op talle terreine bepalings neergelê waardeur die sluitings-, vergestaltings- en bemoeiingsvryheid van partye aangetas word. Hier sal met enkele voorbeelde ter illustrasie volstaan word.[151]

Ingevolge artikel 3 van die Wet op Strafbedinge 15 van 1962 is dit veral die bemoeiingsvryheid van 'n persoon wat in die gedrang kom, omdat die wet die bevoegdheid aan 'n hof verleen om *ex post facto* te besluit in watter mate 'n strafbeding afgedwing gaan word. Die hof kan die bedrag tot 'n redelike som beperk. Die Wet op Kredietooreenkomste 75 van 1980 meng veral met partye se vergestaltingsbevoegdheid in. Artikel 6 daarvan bevat byvoorbeeld 'n hele aantal bepalings en voorskrifte wat in die kontrak ingesluit móét word.[152]

Al die bestaande gevalle van wetgewende inmenging verteenwoordig meteen ook 'n inbreuk op die beginsel van kontrakteervryheid. Dit is duidelik dat die staat in die komplekse hedendaagse samelewing nie meer daarmee tevrede kan wees om partye eenvoudig toe te laat om alleen na hulle eie belange om te sien nie. Dit laat te veel ruimte vir uitbuiting en misbruik en kan nie geduld word nie.

Nie een van die vorme van kontrakteervryheid kan of behoort absoluut te geld nie. Daar bestaan 'n behoefte om sekere perke aan hierdie vryhede te stel ten einde misbruik en ongeregtigheid te voorkom. Waar daardie grense gestel moet word, is 'n vraag wat aan die hand van geregtigheidsoorwegings en die oortuigings van die gemeenskap bepaal moet word.[153]

4 KONTRAKTEERVRYHEID EN KONTRAKTUELE GEREGTIGHEID

4 1 Herkoms van kontraktuele geregtigheid[154]

Lank voordat die kontrakteervryheidsgedagte op die toneel verskyn het, is die ontwikkeling van die kontraktereg deur 'n ander fundamentele beginsel, naamlik

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151 Sien Aronstam hfst 3 vir verdere voorbeelde van sodanige bepalings.

152 Sien verder ook a 15 en 19 van die Wet op die Vervreemding van Grond 51 van 1983, a 6 van die Wet op Huurbeheer 80 van 1976 en a 4 en 9 van die Wet op Prysbeheer 25 van 1964.

153 Williston 1921 *Cornell LQ* 379.

154 Die gebruik van die begrip in hierdie verband het sy oorsprong by Schmidt-Rimpler "Grundfragen einer Erneuerung des Vertragsrechts" 1941 *AcP* 131, maar die gedagte van kontraktuele geregtigheid is natuurlik veel ouer. Adams "Ökonomische Analyse des Rechts des Gesetzes zur Regelung des Rechts der allgemeinen Geschäftsbedingungen (AGB-Gesetz)" in Neumann (red) *Ansprüche, Eigentums- und Verfügungsrechte: Arbeitstagung des vereins für Socialpolitik Geselschaft für Wirtschafts- und Sozialwissenschaft* (1984) 660 maak beswaar teen die gebruik van hierdie begrip aangesien dit volgens hom baie vaag en inhoudloos is. Dit is egter so dat daar op baie terreine van die reg (en die kontraktereg) sulke vae begrippe aangetref word, waarvan die uiteindelike inhoud van feitestel tot feitestel kan wissel. Daar bestaan nietemin enkele riglyne waardeur die begrip kontraktuele geregtigheid gekonkretiseer kan word en wat leiding by die gebruik daarvan kan verskaf. Die sg *Gerechtigkeitsgehalt* van die reëlende reg en die redelike verwagtinge van 'n party kan hierdie soort leiding verskaf. Sien ook Llewellyn "Book review: The standardization of commercial contracts in English and continental law" 1939 *Harv LR* 704.

kontraktuele geregtigheid, beïnvloed.[155] Aristoteles was van mening dat privaatregtelike verhoudinge deur die beginsel van ruilgeregtigheid beheers behoort te word.[156] Sy geregtigheidsleer het *via* Thomas van Aquino (1225–1274) ook in die Middeleeuse regsdenke inslag gevind.[157]

Thomas se gedagtes oor die reg en geregtigheid het 'n groot invloed op die moraalfilosowe en die beoefenaars van die Romeinse reg gehad. 'n Regstreekse uitvloeisel van sy geregtigheidsgedagte was die *iustum pretium*-leerstuk wat deur die moraalfilosowe oorgeneem is.[158] Ingevolge hierdie leer het daar vir elke kontrak 'n regverdige prys bestaan. Indien die partye op meer of minder as die regverdige prys ooreengekom het, was die moraalfilosowe van mening dat die kontrak ter syde gestel behoort te kon word.[159] So was Francisco Vitoria (1492–1546) byvoorbeeld van mening dat die *iustum pretium* aan die hand van die markprys vasgestel kon word. Die markprys was volgens sy beskouing nie 'n presiese bedrag nie, maar kon, afhangende van sekere faktore, tussen sekere uiterstes wissel.[160]

Alhoewel die *iustum pretium*-benadering self nooit in die Middeleeuse toepassing van die Romeinse reg inslag gevind het nie, het dit tog daartoe gelei dat die *laesio enormis*-reël na alle kontraksoorte uitgebrei is en ook gebruik is om die koper (en nie net die verkoper nie) te beskerm.[161] Beskouings oor kontraktuele geregtigheid het dus 'n besliste invloed op die ontwikkeling van die kontraktereg in die Middeleeue gehad.

De Groot het sy geregtigheidsbeskouing ook op die beginsel van *iustitia commutativa* of ruilgeregtigheid gebaseer.[162] Uit die oorkoepelende geregtigheidsvereiste het hy 'n aantal ander beginsels wat vir die kontraktereg van belang is, afgelei. Die belangrikste daarvan was die *pacta sunt servanda*-beginsel waarna reeds hierbo verwys is.[163] By De Groot word die vereiste van kontraktuele geregtigheid nie meer deur 'n maatstaf soos die *iustum pretium* gewaarborg nie, maar eerder deur die feit dat daar 'n vrye wilsbeskikking plaasgevind het. Indien 'n party vryelik en sonder dat sy wil deur bedrog beïnvloed is 'n wilsverklaring gemaak het, vereis geregtigheid dat hy daardie ooreenkoms moet nakom.[164]

De Groot het die gedagte dat die verbindende krag van die kontrak die gevolg van die mens se vrye wilsmag is in die kontraktereg gevestig. Aangesien die mens heerskappy oor sy eiendom en oor homself het, beteken dit ook dat hy daarvan afstand kan doen of homself deur sy vrye wilsbeskikking kan verbind.[165] Dit is om hierdie rede dat die reg daaraan gevolg moet gee. Dit is ook die rede waarom aanvaar kan word dat 'n kontrak aan die vereiste van ruilgeregtigheid moet voldoen.

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155 Sien Pound 1909 *Yale LJ* 458–459; Kliege 96; Atiyah 169.
156 Friedman 1951 *U of Toronto LJ* 16; Hommes 24.
157 Hommes 46.
158 Sien Wilson 1965 *ICLQ* 173.
159 Scherrer 25–26; Feenstra en Ahsmann 25–26; Atiyah 62–63.
160 Otte *Das Privatrecht bei Francisco de Vitoria* (1964) 82 e v.
161 Feenstra en Ahsmann 27.
162 *De iure belli* prol 10; sien verder Hommes 76; Van der Vyver 1983 *THRHR* 167.
163 Sien par 3 2 hierbo.
164 De Groot 3 1 12; sien verder Feenstra en Ahsmann 18.
165 *Ibid.*

Dit is duidelik dat die beskouing oor kontraktuele geregtigheid op hierdie tydstip 'n betekenisverandering ondergaan het.[166] Die nuwe beskouing dat die mens 'n outonome en verantwoordelike wese is, het daartoe gelei dat kontraktuele geregtigheid nie meer aan objektiewe vereistes nie maar aan subjektiewe vereistes, naamlik die wilsuitoefening van die partye, gemeet is. Daarom noem Hobbes die beginsel van *pacta sunt servanda* die bron van alle geregtigheid.[167]

Ten spyte van hierdie beskouings oor geregtigheid het die Engelse howe tot laat in die agtiende eeu 'n sterk paternalistiese houding teenoor kontraktante ingeneem. Die Chancery-hof het gereeld op grond van billikheid met kontraktuele verhoudinge ingemeng. Atiyah merk op:[168]

> "The notion which came to be widely adopted in the nineteenth century, that the Court would not make a contract for the parties, had no place in eighteenth-century Equity. The Court was constantly making contracts for the parties."

Die Engelse kontraktereg was egter in hierdie periode steeds in 'n ontwikkelingsfase waarin billikheid 'n sentrale rol gespeel het.[169]

In die Romeins-Germaanse regstelsels was hierdie ontwikkelingsfase reeds teen die middel van die agtiende eeu voltrek. Pothier (1699–1772) se *Traité des obligations* kan as 'n samevatting van hierdie ontwikkeling beskou word. Die billikheidsremedies (soos die *exceptio doli*) het reeds vasomskrewe vereistes gehad, met die gevolg dat daar nie vir die howe ruimte was om op grond van algemene billikheid met kontraktuele verhoudinge in te meng nie. Die *pacta sunt servanda*-beginsel was daarvoor reeds te goed gevestig.

4 2 Die kontrakteervryheidsgedagte

Met die ontstaan van die kontrakteervryheidsgedagte teen die einde van die agtiende eeu het die klem ook meer en meer begin val op die vryheid van die individu om selfstandig na sy belange om te sien.[170] As gevolg daarvan het reëls soos *laesio enormis* en die *iustum pretium* in onguns verval.[171] Aangesien albei partye volgens hierdie nuwer beskouing die geleentheid gehad het om op verantwoordelike wyse tot die vergestalting van die kontrak mee te werk, kan aanvaar word dat die kontrak in sy geheel die wense van die partye beliggaam.[172] Die een party kan die ander party nie verras met versteekte bedinge of bedinge waarvan die ander party nie kennis gedra het nie, omdat die partye oor al die bedinge onderhandel het.[173]

Die beginsel van kontrakteervryheid in omvattende sin is gebruik om 'n toestand van groter welvaart en geregtigheid te probeer bewerkstellig.[174] Die klassieke ekonome het geredeneer dat indien die ekonomie toegelaat sou word om

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166 Pound 1909 *Yale LJ* 460.
167 Sien bv Hobbes *Leviathan* 1 15; sien verder Friedman 1951 *U of Toronto LJ* 17–18.
168 173.
169 Die rol van billikheid in hierdie fase kan vergelyk word met die rol wat billikheid gedurende die voor-klassieke en klassieke Romeinse reg gespeel het.
170 Williston 1921 *Cornell LQ* 366; Kessler 1975 *UCLA LR* 1066; Atiyah 256 e v.
171 Raiser *Hundert Jahre* 127.
172 Sien Kessler 1943 *Col LR* 630; Hippel 24; Kliege 98; Schmidt-Salzer Rn A7; Atiyah 403.
173 Hierdie argument gaan natuurlik van die veronderstelling uit dat die partye op min of meer gelyke voet t o v hulle bedingingsmag met mekaar onderhandel het of dat daar 'n groot mate van sluitingsvryheid vir albei bestaan het: Friedman 1951 *U of Toronto LJ* 18–19.
174 Williston 1921 *Cornell LQ* 366.

sonder inmenging te funksioneer, dit tot die regverdigste verdeling van eiendom en welvaart sou lei.[175] Geregtigheid sou volgens hulle dus outomaties intree, aangesien die markmeganisme gebaseer is op vrye mededinging in 'n milieu waarin elkeen self sy eie belange deur onderhandeling kon beskerm.[176] Onderhandeling sou verhoed dat onbillike bedinge op 'n party afgedwing kon word. Die onderhandelingsmeganisme is dus as 'n soort waarborg vir kontraktuele geregtigheid gesien.[177]

Ingevolge hierdie benadering is die howe se rol beperk tot die vraag of die kontrakteringsproses behoorlik plaasgevind het. Die redenasie is dat indien kontraksluiting sonder gebreke plaasgevind het, die markmeganisme daarvoor sal sorg dat materiële geregtigheid geskied.[178] Dit is dienooreenkomstig nie die hof se taak om onder sodanige omstandighede met die inhoud van die kontrak in te meng nie, aangesien dit die outonomie van die partye benadeel. Hierdie sterk anti-paternalistiese houding is grotendeels deur die ooroptimistiese mensbeskouing en geloof in die markmeganisme gedurende die negentiende eeu veroorsaak.

In hierdie hele proses was die ideale van sluitings-, vergestaltings- en bemoeiingsvryheid natuurlik belangrike faktore wat moes sorg dat die kontraktuele en markmeganismes behoorlik funksioneer. Kontrakteervryheid was in hierdie tyd met ander woorde 'n middel tot 'n doel, naamlik die waarborg van kontraktuele geregtigheid. Gedurende die negentiende eeu het die middel egter 'n doel op sigself geword. Die beginsel van kontraktuele geregtigheid is op die agtergrond geskuif en verreikende kontrakteervryheid het die grondmotief geword.[179]

Soos dit uit hierdie kort oorsig blyk, het kontrakteervryheid 'n belangriker plek in die kontraktereg ingeneem as kontraktuele geregtigheid, alhoewel laasgenoemde histories 'n meer grondliggende beginsel is. Die beklemtoning van kontrakteervryheid behoort dus nie ten koste van kontraktuele geregtigheid te geskied nie, maar juis met die oog daarop.[180] Die gedagte is nie dat kontraktuele geregtigheid 'n plaasvervanger vir kontrakteervryheid moet word nie, maar dat eersgenoemde die perke vir laasgenoemde moet stel.[181] Waar kontrakteervryheid nie meer die rol kan speel wat aan hom toegewys is nie, moet kontraktuele geregtigheid die bepalende plek toegesê word.

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175 Sien Raiser *AGB* 279; Kessler 1943 *Col LR* 629–631; Leff "Unconscionability and the crown – consumers and the common law tradition" 1970 *U Pitt LR* 350. Die markmeganisme het later inderdaad ook daartoe bygedra om op baie terreine die gevolge te bewerkstellig wat voorspel is, maar dit het ook tot ernstige misbruike gelei: Atiyah 200 e v se twee weergawes van die geskiedenis bied 'n goeie illustrasie hiervan.

176 Smith bk 4 hfst 9. Sien verder Kliege 2; Hart *Justizsystem* 36 en Atiyah 300 402–403 se bespreking hiervan.

177 Schmidt-Rimpler 130 e v; Raiser *AGB* 278; Kessler 1943 *Col LR* 630; Flume "Rechtsgeschäft und Privatautonomie" in *Hundert Jahre deutsches Rechtsleben* (1960) 142; Dietlein "Neue Rechtsmaßtäbe allgemeine Geschäftsbedingungen" 1974 *NJW* 969; Atiyah 300.

178 Atiyah 404.

179 Pound 1909 *Yale LJ* 457; Atiyah 402.

180 Schmidt-Rimpler 131; Wilson 1965 *ICLQ* 174; Kessler 1943 *Col LR* 638 640; Raiser 1958 *JZ* 3; Schmidt-Salzer 1970 *NJW* 8; Hackl 18; Gluck 1979 *ICLQ* 75–76. Sien bv die hof se uitlatings oor geregtigheid in *Henningsen v Bloomfield Motors Inc* 169 A 2d 83. Sien verder die bespreking van Kessler 1975 *UCLA LR* 1074 e v oor die sg kontraktuele geregtigheidsbeweging in die Duitse reg.

181 Kessler 1975 *UCLA LR* 1080.

4 3 Betekenis van kontraktuele geregtigheid

Die inhoud van die begrip kontraktuele geregtigheid is grootliks van die aard van die gemeenskap waarbinne dit moet funksioneer en die gemeenskapsoortuiging afhanklik. Die kontrak bly in die kapitalisties-georiënteerde Suid-Afrikaanse gemeenskap steeds die belangrikste middel waardeur privaatregtelike verhoudinge en die verskuiwing van eiendom kan plaasvind. Kontraktuele geregtigheid moet dus binne hierdie kader nader omskryf word.

Kontraktuele geregtigheid kan myns insiens vandag òf in die maatstaf van ruilgeregtigheid (*quid pro quo*) òf in die redelike verwagtings wat die partye ten opsigte van die kontrak koester, gevind word. 'n Verdere maatstaf wat gebruik kan word, is die sogenaamde *Gerechtigkeitsgehalt* van die reëlende reg.

Aangesien die reëlende reg op 'n onpartydige wyse ontwikkel het om van regsweë voorsiening te maak vir omstandighede waarvoor die partye self nie 'n reëling getref het nie, kan aanvaar word dat dit 'n regverdige oplossing daarstel.[182] Waar 'n persoon dus standaardbedinge gebruik wat afwyk van die reëlende reg, kan die rede waarom so 'n afwyking noodsaaklik was, bepaal word aan die hand van 'n objektiewe maatstaf, naamlik die reëlende reg. Hierdie benadering kan egter nie in alle gevalle gebruik word om die regverdigbaarheid van 'n beding te toets nie, omdat dit dikwels moeilik is om die *Gerechtigkeitsgehalt* van 'n reëlende regsreël vas te stel of omdat daar nie 'n toepaslike reëlende regsreël bestaan nie.

Die *iustum pretium*-maatstaf kan as 'n voorbeeld van die *quid pro quo*-benadering gesien word. Hiervolgens moet die hof die onderskeie waardes van prestasie en teenprestasie teenoor mekaar afweeg en besluit of dit billik is. Daar bestaan egter talle bedenkinge teen die *quid pro quo*-benadering.[183] Die belangrikste beswaar is daarin geleë dat daar nie 'n geskikte maatstaf is aan die hand waarvan die hof sy beoordeling kan maak nie.[184] Die prys op sigself is moeilik beoordeelbaar vanweë verskillende faktore wat òf uit die kontrak self òf uit eksterne omstandighede spruit. Watter gewig moet byvoorbeeld aan die aan- of afwesigheid van 'n uitsluitingsbeding wat vir onsekere toekomstige gebeure voorsiening maak, toegeken word?

Die beswaar is nie so ernstig as wat dit met die eerste oogopslag mag lyk nie. Aangesien die toets 'n objektiewe toets is, kan 'n hof hom laat lei deur die markprys waar dit oor die prys gaan. Waar dit oor ander bedinge ook gaan, kan die hof kyk na die bepalings van die reëlende reg, of die bepalings wat gebruiklik is in 'n spesifieke bedryf of die bepalings wat 'n redelike man sou gebruik het. Daar kan in dié verband moeilik van *quid pro quo* gepraat word omdat daar nie werklik 'n verband tussen prestasie, teenprestasie en die betrokke beding bestaan nie. Dit is in elk geval baie moeilik om so 'n verband in 'n konkrete geval te probeer aantoon.[185]

Die moderner siening van die kontrak, naamlik dat dit 'n produk van wilsooreenstemming tussen die partye is en dat wilsooreenstemming te vinde is in

182 Sien bv Rakoff 1975 *Harv LR* 1238.

183 Die besware wat vanaf die sestiende eeu teen die *iustum pretium*-leer en die *laesio enormis*-reël geopper is (sien Feenstra en Ahsmann 28–29), kan net so hier ook geopper word.

184 Die stryd in die Engelse reg rondom die *adequacy of consideration* (sien Kessler en Gilmore 37 440 e v) het oor 'n soortgelyke probleem gehandel.

185 Kliege 139.

die redelike vertroue wat oor en weer tussen die partye opgewek is,[186] impliseer dat elke party 'n sekere verwagting ten opsigte van die kontrak gekoester het en dat hy daarmee tevrede was.[187] Indien alle partye vryelik tot die ooreenkoms toetree en elkeen in staat is om sy eie omstandighede en behoeftes ten beste in ag te neem, kom kontraktuele geregtigheid tot sy reg indien daar aan die redelike verwagtinge van die partye voldoen word.[188] Die reg behoort dus nie onredelike verwagtings te beskerm nie. Met hierdie benadering word baie van die besware wat daar teen die *quid pro quo*-benadering bestaan, uit die weg geruim. Aangesien hierdie benadering 'n subjektiewer benadering as die *quid pro quo*-benadering verg, is dit myns insiens te verkies bo laasgenoemde. Dit is ook beter in pas met die vertrouensteorie wat by die vasstelling van wilsooreenstemming gebruik word.[189]

Die vraag na kontraktuele geregtigheid behoort in beginsel slegs ter sprake te kom in gevalle waar die kontraktuele meganisme nie meer sy waarborgfunksie kan vervul nie, naamlik waar die sluitings- of vergestaltingsvryheid van een van die partye in wesenlike opsigte tydens kontraksluiting belemmer was. Hier kom veral twee gevalle ter sprake, naamlik waar die een party in 'n wesenlik sterker bedingingsposisie as die ander party verkeer en hy die inhoud van die kontrak kan voorskryf; en waar standaardbedinge gebruik word en die ander party gewoonlik onbewus van hulle inhoud is. Dit mag wees dat dit noodsaaklik is dat die wetgewer 'n algemene bevoegdheid aan die howe behoort te gee om in sodanige omstandighede in te gryp, maar dit mag ook wensliker wees dat daar beperkter en duideliker omskrewe bevoegdhede aan die howe gegee behoort te word om sulke gevalle te hanteer.

5 SAMEVATTING

Die begrip kontrakteervryheid moet versigtig gebruik word aangesien dit verskillende betekenisse kan dra. *Pacta sunt servanda*, wat vandag gewoonlik met die onaantasbaarheid van kontraktuele verhoudinge in verband gebring word, het byvoorbeeld gedurende die Middeleeue veel meer met formele kontrakteervryheid as met die absoluut bindende krag van kontraktuele verhoudinge te doen gehad.

Uit die geskiedkundige oorsig blyk dat die verskillende verskyningsvorme van kontrakteervryheid *de facto* reeds van 'n vroeë stadium af in 'n mindere of meerdere mate bestaan het, maar dat dit in geen stadium onaantasbaar was nie.

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186 Sien Christie *The law of contract in South Africa* 11 e v; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 903C–G; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 317H–319C.

187 Vir hierdie argument word gevalle waar omstandighede die sluitingsvryheid van een van die partye benadeel en hy bewustelik maar gedwonge toestem tot onbillike bedinge, buite rekening gelaat. In hierdie gevalle kan nie werklik van *vrye* toetrede tot die kontrak gepraat word nie. Daar moet noodgedwonge in sodanige omstandighede met die *quid pro quo*-benadering gewerk word.

188 Rakoff 1983 *Harv LR* 1253 se voorstel dat daar met die maatstaf van 'n *customary shopper* gemeet moet word, kan as 'n konkretisering van hierdie benadering beskou word.

189 Sien bv *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 903C–G; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 317H–319C; en *Henningsen v Bloomfield Motors* 169 A 2d 83 84. Die *quid pro quo*-benadering bied egter op sy beurt 'n bevredigender oplossing vir die *price unconscionability*-gevalle, waar die onbillikheid nie in die standaardbedinge geleë is nie maar in die ooreengekome prestasie self.

Daar was nog altyd beperkings waardeur kontrakteervryheid aan bande gelê is. Gedurende die laat agtiende en negentiende eeu het kontrakteervryheid in omvattende sin egter 'n ekonomies-politieke slagspreuk geword in die stryd teen oordrewe staatsinmenging op die ekonomiese terrein. Hierdie ontwikkeling is gerugsteun deur die gees van individualisme wat sedert die Renaissance begin posvat het en die natuurregsleer wat op daardie tydstip nog 'n groot aanhang geniet het. Dit was hierdie beweging onder aanvoering van die klassieke ekonome wat kontrakteervryheid ook in die kontraktereg tot 'n allesoorheersende beginsel laat groei het.

Kontrakteervryheid (vergestaltingsvryheid) en die soepelheid van die kontraktereg het meegewerk tot die ontstaan van standaardbedinge gedurende die negentiende eeu. Vanweë die klem op partye se vryheid om hul eie kontrakte tot stand te bring, kon die kontraktereg die meeste nuwe ontwikkelings op ekonomiese gebied hanteer. Die kontraktereg was egter nie in staat om die eensydigheid en onbillikhede wat uit die grootskaalse gebruik van standaardbedinge gevolg het, die hoof te bied nie.

Die gedagte dat kontraktuele verhoudings vanweë die partye se wilsvryheid onaantasbaar is, het in die howe so sterk wortel geskiet dat die beginsel vandag nog klakkeloos nagepraat word. Dit word gerugsteun deur die beginsel dat die owerheid so min moontlik maatreëls moet uitvaardig waardeur die werking van vryemarkkragte en kontrakteervryheid aan bande gelê word. In die Suid-Afrikaanse reg bestaan daar egter, soos elders ook die geval is, reeds soveel uitsonderings op laasgenoemde beginsel dat daar geen sprake van die absolute gelding daarvan kan wees nie.

Beskouings wat in die negentiende eeu oor die regte en verpligtinge van die individu, die gemeenskapsbelang, kontrakteervryheid en kontraktuele geregtigheid gehuldig is, kan vandag eenvoudig nie net so bly voortbestaan nie. Omstandighede het te veel verander. Die mate van individualisme wat in die negentiende eeu moontlik was, kan vandag, waar die meeste mense in groepsverband aan die ekonomie deelneem, nie meer standhou nie. Kontraksluiting wat die gevolg van onderhandeling tussen twee wilsvrye individue is, is grotendeels vervang deur massakontraktering waar min of geen onderhandeling plaasvind nie.

Die beginsel van kontraktuele geregtigheid wat 'n baie langer geskiedenis as die kontrakteervryheidsbeginsel het, is vanweë die kragtige emosionele aanslag van laasgenoemde tot 'n ondergeskikte tweede plek teruggedring. Die belofte dat kontrakteervryheid kontraktuele geregtigheid waarborg, kon nie in die praktyk realiseer nie. Veral vanweë monopolistiese praktyke en die gebruik van standaardbedinge is kontraktuele geregtigheid deur die invoeging van eensydige en onbillike bedinge geweld aangedoen. Dit is derhalwe nodig dat stappe gedoen word waardeur die inherente grense van die kontrakteervryheidsbeginsel gekonkretiseer kan word. In die proses is dit noodsaaklik dat die valse beeld van kontrakteervryheid wat met verloop van tyd geskep is, weggestroop moet word. Dit is 'n ope vraag of die howe hierdie stappe aan die hand van bestaande gemeenregtelike middele moet doen en of die wetgewer moet ingryp.

Die deliktuele aanspreeklikheid van persone wat as maatskappyorgane optree

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SUMMARY

The delictual liability of persons acting as company organs

It is an established principle that an incorporated company is a separate legal entity. Furthermore, it is often contended that the corporate veil provides a shield against the unlimited liability of *inter alios* the shareholders and directors of companies. Another prominent principle is that the organ theory or identification theory is used to establish whether the company has committed a delict. These principles evolved primarily in English company law. Their application to South African law may conflict with established principles of the law of delict. A company-law approach would, for example, favour the proposition that the act of the organ is the company's act and can render only the company liable. An approach based on the law of delict could give rise to the question whether it would be advisable to allow conduct performed in the capacity of organ to be raised as a defence against personal delictual liability.

The subject under discussion only started receiving particular attention in the past decade in countries such as Canada, England and Australia. In South Africa it can still be considered as dormant. In this contribution a brief exposition is given of the conclusions reached in the jurisdictions mentioned. They are analysed critically and suggestions are made as to how similar questions ought to be dealt with in South African law. One possible solution is that the corporate veil must first be lifted before the persons who acted as organs of the company can be held personally liable in delict. Another solution may be based on the argument that conduct performed in the capacity of organ should not offer a defence against personal delictual liability.

1 INLEIDING

Dit is 'n gevestigde beginsel dat die ingelyfde maatskappy 'n afsonderlike eenheid is.[1] Hierdie eenheid is selfstandig die draer van regte en verpligtinge.[2] Dié selfstandigheid het onder andere tot gevolg dat daar 'n korporatiewe sluier oor die

1 *Salomon v Salomon and Company Limited* 1897 AC 22 (HL). Kyk in die algemeen Sullivan "Company controllers, company cheques and theft" 1983 *Criminal Law Review* 516–517 (hierna Sullivan 1983 *Crim LR*); Williams "Limited liability" 1984 *Businessman's Law* 115: "The rationale of limited liability is economic; the protection that it affords is intended to act as an incentive to entrepreneurship."

2 De Wet en Van Wyk *De Wet en Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 528; Cilliers en Benade *Korporatiewe reg* (1987) 6 par 1 17, 7–8 par 1 19.

maatskappy se samestellende dele, byvoorbeeld die lede[3] en direkteure,[4] gespan word.

'n Tweede beginsel waaraan daar groot waarde in die Engelse reg geheg word, is dat daar van die orgaans- of vereenselwigingsteorie gebruik gemaak word om te bepaal of die *maatskappy* 'n onregmatige daad begaan het.[5] Hierdie teorie het tot inhoud dat as die rigtinggewende instansie (orgaan) van die maatskappy handel, dit meteen die maatskappy is wat handel. Ook in die Suid-Afrikaanse reg is daar steun te vind vir die beskouing dat die orgaansteorie gebruik moet word om te bepaal of die maatskappy 'n delik gepleeg het.[6]

Die beginsels wat so pas genoem is, het hoofsaaklik in die Engelse maatskappyereg ontwikkel. Die toepassing daarvan op die Suid-Afrikaanse reg kan tot eiesoortige probleme aanleiding gee. Dit is byvoorbeeld moontlik dat daar 'n botsing tussen hierdie maatskappyeregtelike beginsels en tipiese deliktuele beginsels kan voorkom.

Ten einde hierdie potensiële botsing te illustreer, kan daar na die volgende oorwegings verwys word. Uit 'n maatskappyeregtelike oogpunt beskou, kan geargumenteer word dat die handeling van die persoon wat as orgaan opgetree het, so met die maatskappyhandeling vereenselwig is dat daar geen ruimte meer vir sy persoonlike aanspreeklikheid bestaan nie. In die *The "Radiant"*-saak[7] kom daar 'n treffende uiteensetting voor van die tipiese maatskappyeregtelike argument wat geopper word as die deliktuele aanspreeklikheid van persone wat as maatskappyorgane optree, oorweeg moet word:

> "What he [maatskappyorgaan] does as a director is, so far as his own liability is concerned, a matter between him and the company: any act of his as director is the company's act, and in law can render only the company liable."[8]

Die grondslag vir hierdie opvatting lê in 'n absolutistiese beskouing van die Engelsregtelike orgaans- of vereenselwigingsteorie.

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3 *John Shaw & Sons (Salford) Limited v Shaw* 1935 2 KB 113 134; Cilliers en Benade 6 par 1 17, 7–8 par 1 19; Gower *et al Gower's principles of modern company law* (hierna Gower *Modern company law*) (1979) 97 e v.

4 *John Shaw & Sons (Salford) Limited v Shaw* 1935 2 KB 113 134; *Rainham Chemical Works Limited (In Liquidation) v Belvedere Fish Guano Company* 1921 2 AC 465 (HL) 475–476; *In re George Newman & Co* 1895 1 Ch 674 685; *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* 1979 89 DLR 3d 195 202; *Yuille v B & B Fisheries (Leigh) Ltd and Bates (The "Radiant")* 1958 2 Ll L Rep 596 617–618; Sullivan 1983 *Crim LR* 515; McQueen "Major reforms in insolvency laws take effect" 1987 (vol 5 no 3) *Company Law Digest* (*CLD*) 66.

5 *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* 1915 AC 705 (HL) 713; *R v ICR Haulage Co Ltd* 30 Cr App R 31 39–40; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* 1956 3 All ER 624 (CA) 630D–I; *Boulting v Association of Cinematograph Television and Allied Technicians* 1963 1 All ER 716 (CA) 722B–C; *Lady Gwendolen (Arthur Guinness Son & Company (Dublin)) Ltd v The Freshfield (Owners)* 1965 P 294 343–345; *Tesco Supermarkets Ltd v Nattrass* 1972 AC 153 (HL) 170D–173E; *Attorney-General's Reference (no 2 of 1983)* 1984 2 WLR 447 (CA) 461B–F.

6 *Bates & Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 3 SA 916 (A) 932I–933C; *Barkett v SA Mutual Trust & Assurance Co Ltd* 1952 2 SA 353 (A) 362F–H; Meskin *et al Henochsberg on the Companies Act: 1987 supplement* (1987) 15; Meskin *et al Henochsberg on the Companies Act* (1985) 325; Cilliers en Benade 170 par 14 03; Naudé *Die regsposisie van die maatskappydirekteur* (1970) 36.

7 *Yuille v B & B Fisheries (Leigh) Ltd and Bates (The "Radiant")* 1958 2 Ll L Rep 596.

8 617.

Uit oogpunt van die deliktereg beskou, ontstaan die vraag of hierdie redenasie tot bevredigende resultate sal lei. Is dit regswetenskaplik verantwoordbaar dat die optrede in die hoedanigheid van orgaan 'n verweer moet bied teen persoonlike deliktuele aanspreeklikheid? Sal individuele bekleërs van maatskappyampte nie al te geredelik tot die nadeel van derdes optree as hul skotvry daarvan afkom wanneer een maal bewys is dat hulle as organe opgetree het nie?

Die persoonlike deliktuele aanspreeklikheid van persone wat as maatskappyorgane optree, het pas die afgelope dekade besondere aandag in lande soos Kanada, Engeland en Australië begin geniet. In Suid-Afrika kan hierdie aangeleentheid steeds as sluimerend bestempel word.

Die gemene delers tussen die genoemde ander jurisdiksies en die Suid-Afrikaanse reg is dat daar besondere waarde geheg word aan die bestaan van die korporatiewe sluier en dat daar van die orgaans- of vereenselwigingsteorie gebruik gemaak word ten einde te bepaal of die maatskappy 'n onregmatige daad begaan het. Daar kan gevolglik verwag word dat wanneer die vraagstuk na die deliktuele aanspreeklikheid van persone wat as organe optree deur die Suid-Afrikaanse howe onder die loep geneem word, die gewysdes in genoemde ander lande hier waarskynlik oorredingsgesag sal hê.

Daar word vervolgens 'n uiteensetting gegee van die gevolgtrekkings waartoe daar in genoemde jurisdiksies gekom is. Daarna word dié resultate krities ontleed en laastens word aan die hand gedoen hoe soortgelyke vraagstukke in die Suid-Afrikaanse reg hanteer behoort te word.

2 ONLANGSE GEWYSDES IN ANDER JURISDIKSIES

2 1 Kanada

Wat die persoonlike deliktuele aanspreeklikheid van individuele orgaanvormers in die Kanadese reg betref, is *Mentmore Manufacturing Co Ltd v National Merchandising Co Ins*[9] 'n sleutelbeslissing. Regter Le Dain argumenteer dat, in die geval van die ingelyfde maatskappy, die bestaan van die korporatiewe sluier tot gevolg het dat die persone wat as orgaan opgetree het, nie sonder meer persoonlik vir die maatskappy se onregmatige dade aanspreeklik is nie. Die eiesoortige maatskappyeregtelike inslag wat hierdie argument openbaar, is dat die bevinding dat die orgaan se optrede die maatskappy deliktueel aanspreeklik stel, noodwendig beteken dat die persoon wat as orgaan opgetree het, self ook 'n delik gepleeg het. Die benadering van regter Le Dain is soos volg:

> "What is involved here is a very difficult question of policy. On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and officers, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of the limited liability afforded by incorporation. On the other hand, there is the principle that everyone should answer for his tortious acts."[10]

Verder word daar verwys na sowel Engelse[11] as Amerikaanse gesag en gewys op die gevaar om voorbehoudloos die beginsels van laasgenoemde stelsel na te volg.[12] Daar word tot die volgende slotsom gekom:

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9 1979 89 DLR 3d 195.
10 *Ibid* 202.
11 *Ibid* 202–203.
12 *Ibid* 203.

> "But in my opinion there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it. The precise formulation of the appropriate test is obviously a difficult one. Room must be left for a broad appreciation of the circumstances of each case to determine whether as a matter of policy they call for personal liability."[13]

In *Imperial Oil Ltd v C & G Holdings Ltd*[14] gee regter Goodridge van die Newfoundland Supreme Court 'n nuttige samevatting van Kanadese gesag oor die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het.[15] Hy kom tot die gevolgtrekking dat daar nie eensgesindheid oor die aangeleentheid bestaan nie[16] en vind dit onnodig om in die algemeen standpunt daaroor in te neem.[17] Die betrokke verweerder-direkteur word egter nie persoonlik deliktueel aanspreeklik gehou nie.[18]

2 2 Engeland

2 2 1 The "Radiant"[19]

In hierdie saak is daar onder andere pertinent stilgestaan by die vraag of die besturende direkteur, deur wie se optrede die maatskappy deliktueel aanspreeklik was,[20] ook persoonlik teenoor die eiser aanspreeklik is.[21] Regter Willmer[22] haal wesenlike dele uit *Rainham Chemical Works Limited* (*In Liquidation*) *v Belvedere Guano Company Limited*[23] en *Salomon v Salomon and Company Limited*[24] aan waaruit dit duidelik blyk dat die bestaan van die korporatiewe sluier dit problematies maak om direkteure sonder meer persoonlik deliktueel aanspreeklik te stel vir dieselfde optrede as wat tot die maatskappy se aanspreeklikheid gelei het.

Die hof wys eerstens daarop dat die besturende direkteur, net soos die eiser, as 'n werknemer van die maatskappy beskou kan word.[25] Daarna word die aard van die regsverhouding, wat uit hoofde van die besturende direkteur se optrede ontstaan het, soos volg verduidelik:

> "[I]t seems to me that the members of the crew of a ship improperly sent to sea in an unseaworthy condition would be persons in a sufficiently close relationship with the

13 *Ibid* 204–205.
14 1986 58 N & PEIR 326.
15 *Ibid* 344 par 152 tot 347 par 163.
16 *Ibid* 347 par 164. Die regter verklaar: "It does not appear that any clear and comprehensive statement of law on the subject has emerged in Canadian jurisprudence."
17 *Ibid* 347 par 165 166: "Whatever the law may be, it is neither desirable nor necessary to offer any statement of principle in this case for it fails on other grounds." Let op die verskil met die Suid-Afrikaanse reg oor nalatige wanvoorstellings en suiwer ekonomiese skade: "In most cases of tort proof of negligence alone will suffice to establish a cause of action where there are damages suffered. That is not so in the tort of inflicting economic harm."
18 *Ibid* 348 par 172 175.
19 *Yuille v B & B Fisheries* (*Leigh*) *Ltd and Bates* (*The "Radiant"*) 1958 2 Ll L Rep 596.
20 *Ibid* 602 612 614 617.
21 *Ibid* 614 617.
22 *Ibid* 617–618.
23 1921 2 AC 465 (HL).
24 1897 AC 22 (HL).
25 *Yuille v B & B Fisheries* (*Leigh*) *Ltd and Bates* (*The "Radiant"*) 1958 2 Ll L Rep 596 619.

> director of the company to create a legal duty on the part of the latter to exercise reasonable care."[26]

Die besturende direkteur word *in casu* inderdaad in persoonlike hoedanigheid as mededader saam met die maatskappy aanspreeklik gehou. Ter motivering van hierdie slotsom word daar soos volg geargumenteer:

> "I see no difficulty, therefore, in law, provided the facts warrant it, in coming to the conclusion that an officer of a company, whether he be a director or whether he be any other official in the service of the company, is in law capable of being a joint tortfeasor with the company itself, which of course, would also be vicariously responsible for his wrongful acts."[27]

2 2 2 *Eerste verwysings na die* Mentmore-*saak*

In Engeland het die *Mentmore*-saak spoedig in die kalklig gekom. In *Hoover PLC v George Hulme (Stockport) Limited*,[28] haal regter Whitford die kerngedeeltes uit die Kanadese saak aan en pas die beginsels, "as they so clearly emerge from this judgment [*Mentmore* se saak]",[29] sonder meer op die feite toe. *In casu* is die bevinding dat die direkteur nie persoonlik aanspreeklik is nie.[30]

Kort hierna kom die *Mentmore*-saak weer in die Engelse reg onder bespreking. In *White Horse Distillers Ltd v Gregson Associates Ltd*[31] gee regter Nourse naamlik 'n opsomming van hoe hy die beginsels in die *Mentmore*-saak begryp[32] en spreek dan sy voorkeur uit vir

> "the higher test, particularly in regard to its requirement that the director should make the act or conduct his own as distinct from that of the company".[33]

Die sogenaamde "higher test" waarna verwys word, is waarskynlik die een waarin regter Le Dain sê dat die direkteur persoonlik deliktueel aanspreeklik is as sy optrede gekenmerk word deur "a knowing, deliberate, wilful quality to the participation".[34]

2 2 3 *Die* Mancetter- *en* C Evans-*saak*

In twee onlangse Engelse sake, *Mancetter Development Limited v Garmanson* (hierna *Mancetter*)[35] en *C Evans & Sons Ltd v Spritebrand Ltd* (hierna *C Evans*),[36]

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26 *Ibid* 619.
27 *Ibid*.
28 1982 FSR 565.
29 *Ibid* 596.
30 *Ibid* 596–597.
31 1984 RPC 61 91–92.
32 *Ibid* 91. Dit word soos volg gestel: "Although I do not find it very easy to reconcile all the passages to which I have referred or which I have quoted, I believe that the principles embodied in the *Mentmore* decision can be stated as follows. Before a director can be held personally liable for a tort committed by his company he must not only commit or direct the tortious act or conduct but he must do so deliberately or recklessly and so as to make it his own, as distinct from the act or conduct of the company. It is unnecessary for him to know, or have the means of knowing, that the act or conduct is tortious. It is enough if he knows or ought to know that it is likely to be tortious. The facts of each case must be broadly considered in order to see whether, as a matter of policy requiring the balancing of the two principles of limited liability and answerability for tortious acts or conduct, they call for the director to be held personally liable."
33 *Ibid* 93.
34 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* 1979 89 DLR 3d 195 203.
35 1986 2 BCC 98, 924 (CA).
36 1985 2 All ER 415 (CA).

het dit weer eens gehandel oor die vraag na die persoonlike deliktuele aanspreeklikheid van persone wat as organe van die maatskappy opgetree het. In beide sake[37] [38] is die vertrekpunt, kenmerkend kasuïsties, dat daar gesaghebbende gewysdes in Engeland bestaan dat direkteure persoonlik deliktuele aanspreeklikheid kan opdoen, te wete die *Rainham Chemical Works*-saak[39] en *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd.*[40]

In die *Mancetter-* en *C Evans*-saak is daar geen twyfel oor die sleutelposisies wat die twee direkteure tydens die pleging van die beweerde onregmatige dade beklee het nie. Hulle was in alle opsigte volwaardige organe van die onderskeie maatskappye en het as sodanig rigtinggewende funksies vervul. Dit is juis as gevolg van dié vereenselwiging met hulle maatskappye dat aangevoer word dat hulle ook persoonlik, naas hulle onderskeie maatskappye, aanspreeklik is. In die *C Evans*-saak word hierdie vereenselwiging só gestel:

> "The plaintiffs' case against him [die direkteur] ... is ... based essentially on the simple proposition that a director of a company who personally directs and procures the company to commit a tort is himself liable to the victim in tort no less than the company."[41]

In die *Mancetter*-saak was die respondent die enkele uitvoerende direkteur ("sole active director") en was daar nie twyfel nie dat sy handelinge dié van die maatskappy was. Trouens, die hof *a quo* het die skade, wat uit die direkteur se onregmatige handeling gespruit het, verdeel tussen hom (in persoonlike hoedanigheid) en die maatskappy (wat 'n onregmatige daad begaan het deur die optrede van die orgaan). Slegs die direkteur het egter teen dié bevel geappelleer hoewel die maatskappy as gedingsparty gevoeg is. Vir die maatskappy sou dit min nut hê om te appelleer aangesien dit op die tydstip van appèl insolvent en in likwidasie was.[42]

In die *C Evans*-saak is regter Slade van mening dat die persoonlike deliktuele aanspreeklikheid van direkteure nie strenger as ander verweerders moet wees nie.[43] Die hof kan deur bepaalde beleidsoorwegings, byvoorbeeld dat die optrede van die direkteur nie deur 'n " 'knowing, deliberate, wilful quality' " gekenmerk is nie, beweeg word om die deliktuele eis teen die direkteur af te wys.[44] Die indruk word egter geskep dat sodanige oorwegings slegs in uitsonderlike gevalle toegepas sal word.

In die *Mancetter*-saak is die benadering selfs meer ongekwalifiseerd. Geen oorweging word geskenk aan die eiesoortighede wat ter sprake kan kom indien 'n orgaan van die maatskappy 'n onregmatige daad begaan nie. Dit wil voorkom of die benadering in hierdie saak is dat, as 'n onregmatige daad in eksterne maatskappyverband gepleeg is, die eiser òf die direkteur persoonlik, òf die maatskappy mag aanspreek.[45] Die minderheidsbevinding, naamlik dat die direkteur

37 *Mancetter Development Limited v Garmanson* 1986 2 BCC 98,924 (CA) 98, 926.
38 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 420a–b.
39 1921 2 AC 465 (HL) 476 (*supra* vn 23).
40 1924 1 KB 1 14.
41 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 419e.
42 *Mancetter Developments Limited v Garmanson Ltd* 1986 2 BCC 98,924 (CA) 98,925.
43 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 424c–f 425j; Walton "Companies" in *Halsbury's laws of England* (red Hailsham) vol 7(1) (1988) 462 par 649: "However, the suggestion that he must, to be liable, in every case act deliberately or recklessly is not justified."
44 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 425g–h.
45 *Mancetter Developments Limited v Garmanson Ltd* 1986 2 BCC 98,924 (CA) 98,925 98,926.

nie persoonlik aanspreeklik is nie, word gebaseer slegs op feitelike oorwegings, naamlik dat daar in werklikheid geen onregmatige daad voorhande was nie.[46]

2 3 Australië

Die Australiese saak *Hamilton v Whitehead*[47] bied 'n insiggewende voorbeeld van die probleme wat ervaar word om 'n bevredigende grondslag te vind vir die persoonlike aanspreeklikheid van die rigtinggewende organe van maatskappye. Die Australiese hooggeregshof moes beslis oor die persoonlike aanspreeklikheid van 'n maatskappy se besturende direkteur. Die hof twyfel nie oor die aanspreeklikheid van die maatskappy nie, want die besturende direkteur het as die maatskappy se "directing will and mind" opgetree. Die optrede van die orgaan stel die maatskappy direk aanspreeklik.[48] Die vraag was egter of die besturende direkteur as mededader *persoonlik* aanspreeklik was ingevolge artikel 38(1) van die Australiese Interpretation Code.[49] Die hof *a quo* was nie bereid om die besturende direkteur persoonlik strafregtelike aanspreeklikheid op te lê vir dieselfde misdrywe as waaraan die maatskappy skuldig bevind was nie.[50]

Hierdie argument word op vindingryke wyse in appèl verwerp. Daar word aangevoer dat die aanspreeklikheid van die maatskappy nie middellik nie, maar direk van aard was. Hiermee word daar geensins afgewyk van die ortodokse Engelsregtelike standpunt dat wanneer die rigtinggewende instansie (*in casu* die besturende direkteur) handel, dit meteen die maatskappy is wat handel nie. Die hof stel dit so:

> "There can be no doubt, on the facts of the present case, that the respondent, in placing the advertisement and in dealing with those who replied to it, was the company. He was its managing director and his mind was the mind of the company. The company therefore was liable as a principal for the breaches of s 169 of the code [Companies (Western Australia) Code]. The liability was direct, not vicarious."[51]

Volgens die Australiese hooggeregshof beteken hierdie argument geensins dat die besturende direkteur nie persoonlik aanspreeklik kan wees nie. Dit is immers 'n welbekende beginsel dat dieselfde persoon in verskillende hoedanighede kan

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46 *Ibid* 98,930. Daar word soos volg opgemerk: "The question which this court has to decide is whether or not Garmanson committed a tortious act when it removed the fittings from the holes. All that Garmanson did was to remove its own property without doing any damage to the walls. The realty was a wall with a hole in it and was not a wall with a hole filled with an exhaust fan. In the course of argument counsel were unable to draw our attention to any case where it was held that voluntary waste could be committed by an omission to do something and I have not been able to find any such case. Since it is accepted that no damage was caused to the walls when the fittings were removed, I have come to the conclusion that it is not possible to say that Garmanson was guilty of waste in removing the fittings. There was no tortious act at that time."

47 82 ALT 626.

48 *Ibid* 627–628.

49 *Ibid* 628: "The applicant relies on s 38(1) of the Interpretation Code, which reads as follows: 'A person who aids, abets, counsels or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or party to, the commission of an offence against any relevant Code shall be deemed to have committed that offence and is punishable accordingly.' "

50 *Ibid* 628.

51 *Ibid* 630.

optree.[52] In sy hoedanigheid van besturende direkteur was sy optrede dié van die maatskappy, maar in sy persoonlike hoedanigheid was hy 'n mededader saam met die maatskappy. Artikel 38 van die Australiese Interpretation Code vereis juis mededaderskap en gevolglik is die respondent as mededader skuldig.[53]

3 GESIGSPUNTE OP DIE GEWYSDES

3 1 Kanada

Dit is insiggewend om daarop te let dat in *Imperial Oil Ltd v C & G Holdings Ltd*[54] dit juis die besef was dat daar 'n korporatiewe sluier bestaan, wat 'n belangrike invloed op die bevinding uitgeoefen het.[55] Verder is daar in al die Kanadese sake wat op die *Mentmore*-saak gevolg het, deeglik besef dat die korporatiewe sluier eers gelig moet word alvorens die direkteure persoonlik aanspreeklik gestel kan word.[56] Daarom word die klem meesal geplaas op die aard van die direkteure se betrokkenheid by die onregmatige daad omdat dit die beleidsvraag of die korporatiewe sluier gelig moet word al dan nie, kan beïnvloed.[57]

Samevattend kan daar dus van die Kanadese reg gesê word dat diegene wat as maatskappyorgane opgetree het, inderdaad persoonlik deliktueel aanspreeklik gestel kan word, maar dan slegs met inagneming van die beskerming wat die korporatiewe sluier bied.

3 2 Engeland

3 2 1 Vroeëre Engelse gesag oor persoonlike aanspreeklikheid

In *The "Radiant"*[58] bestaan daar verskeie aanduidings van die onsekerheid waarmee te werk gegaan is om die vraag na die persoonlike deliktuele aanspreeklikheid van direkteure te hanteer. Die regter erken byvoorbeeld self dat hy "some difficulty" ervaar om hierdie aangeleentheid uit te pluis.[59] Verder word daar nooit standpunt ingeneem oor die vraag of die wyse waarop die maatskappy

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52 *Ibid* 630: "There is nothing conceptually wrong in such a course since 'it is a logical consequence of the decision in *Salomon v Salomon & Co* [1897] AC 22 that one person may function in dual capacities': *Lee v Lee's Air Farming Ltd* [1961] AC 12 at 26."

53 *Ibid* 630: "The company is not vicariously liable for the actions of the respondent. The company is the principal offender and the respondent is charged as an accessory."

54 1986 58 N & PEIR 326.

55 *Ibid* 348 par 172 175: "The defendants had no intention of doing an economic wrong to the plaintiff. Their simple purpose was to get money from Imperial or Petro Canada." Uit par 175 blyk die agting vir die korporatiewe sluier duidelik: "No fraud against them has been pleaded which would permit *a penetration of the corporate veil*; nor does it appear on the evidence that any fraud existed" (eie beklemtoning).

56 Vgl o a *Les Dictionnaires Robert Canada SCC v Librairie du Nomade Inc* 1987 16 CPR 3d 319 335; *Reading & Bates Construction Co v Baker Energy Resources Corp* 1987 13 CPR 3d 410 435–436; *Apple Computer Inc v Macintosh Computers Ltd* (*Apple Computer Inc v 11578 Canada Inc*) 1986 28 DLR 4th 178 222; *Visa International Service Association v Visa Motel Corporation* 1985 1 CPR 3d 109 119.

57 *Les Dictionnaires Robert Canada SCC v Librairie du Nomade Inc* 1987 16 CPR 3d 319 336 337; *Reading & Bates Construction Co v Baker Energy Resources Corp* 1987 13 CPR 3d 410 436; *Apple Computer Inc v Macintosh Computers Ltd* (*Apple Computer Inc v 11578 Canada Inc*) 1986 28 DLR 4th 178 222–224; *Morgan v Government of Saskatchewan* 1986 31 BLR 173 181–182; *Kepic v Tescumseh Road Builders* 1985 29 BLR 85 117; *Visa International Service Association v Visa Motel Corporation* 1985 1 CPR 3d 109 119–120.

58 *Yuille v B & B Fisheries* (*Leigh*) *Ltd and Bates* (*The "Radiant"*) 1958 Ll L Rep 596.

59 *Ibid* 619.

aanspreeklikheid opdoen vir die optrede deur die orgaan, direk of middellik van aard is nie.[60]

Dit wil ook voorkom of die benadering dat direkteure werknemers van hul maatskappye is,[61] 'n wesenlike invloed uitgeoefen het op die hof se redevoering oor die persoonlike deliktuele aanspreeklikheid van die besturende direkteur. Die feit dat hy as werknemer van die maatskappy bestempel was, het immers gedien as die grondslag vir die argument dat die verhouding tussen die eiser en die besturende direkteur van so 'n aard was dat daar 'n regsplig op die besturende direkteur gerus het om met die nodige sorg teenoor ander werknemers (onder andere die eiser) op te tree.[62] Hierdie "werknemer-beskouing" oor die regsposisie van direkteure kan ook die rede wees waarom dit soms voorkom of die hof van oordeel is dat die *maatskappy* se aanspreeklikheid middellik van aard was.[63]

In die lig van die verskeie onsekerhede in *The "Radiant"*,[64] kan dié saak beswaarlik as gesag dien vir die standpunt dat mededaderskap die grondslag is vir die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het.

Dit is verder belangrik om 'n deeglike insig te hê in die gesag waarna daar in die *C Evans*- en *Mancetter*-saak verwys word. Eerstens moet in ag geneem word dat daar in sowel die *Rainham Chemical Works*-[65] as die *Performing Right Society Limited*[66]-saak nadruklik verduidelik word waarom direkteure of besturende direkteure nie *per se* persoonlik aanspreeklik is net omdat hulle in beheer van maatskappye is nie. In albei hierdie sake is die uitgangspunt juis dat direkteure nie onvoorwaardelik persoonlik aanspreeklik moet wees vir alle maatskappyoptredes nie.[67]

In die tweede plek is dit baie duidelik dat in die *Rainham Chemical Works*-saak regter Buckmaster sterk onder die indruk was dat daar 'n afsonderlike eenheid, die regspersoon, bestaan en dat dié feit in die weg kon staan van die persoonlike aanspreeklikheid van direkteure.[68] Verder kan afgelei word dat regter Parmoor daarvan bewus was dat weens die bestaan van die korporatiewe sluier, dit noodsaaklik is dat daar besonder versigtig oorweeg moet word wat die grondslag vir die persoonlike aanspreeklikheid van direkteure is:

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60 Na 'n opsomming van die feite wat op die aanspreeklikheid van die maatskappy dui, merk Willmer R soos volg op: "These, of course, are all matters in respect of which the *defendant company* is liable, *vicariously or otherwise*..." (*ibid* 612; eie beklemtoning). Kyk verder *ibid* 618–619 waar daar verskeie aanduidings is dat die regter onder die indruk verkeer dat die aanspreeklikheid van die maatskappy middellik van aard is. Tog word die besturende direkteur as die maatskappy se *alter ego* beskou: *ibid* 602.

61 *Ibid* 618.

62 *Ibid* 619. Vgl die hof se ontleding van die argumente wat in die loop van die geding geopper is (*ibid* 617): "No duty could be owed by Mr. Bates [die besturende direkteur] to the plaintiff other than that owed by any *servant of a company to another servant*: in other words his only liability could be that of a *fellow-servant*" (eie beklemtoning).

63 *Ibid* 619.

64 *Yuille v B & B Fisheries* (*Leigh*) *Ltd and Bates* (*The "Radiant"*) 1958 2 Ll L Rep 596.

65 1921 2 AC 465 (HL).

66 1924 1 KB 1.

67 *Rainham Chemical Works Limited* (*In Liquidation*) *v Belvedere Guano Company Limited* 1921 2 AC 465 (HL) 476 488; *Performing Right Society Limited v Ciryl Theatrical Syndicate Limited* 1924 1 KB 1 14.

68 In *Rainham Chemical Works Limited* (*In Liquidation*) *v Belvedere Guano Company Limited* 1921 2 AC 465 (HL) 475 verwys Buchmaster R juis as vertrekpunt na *Salomon v Salomon and Company Limited* 1897 AC 22 (HL).

> "[T]here should be no confusion of the grounds on which liability has been suggested. In the first place I think that the appellants cannot be held liable, either directly or indirectly, as governing directors of the company, and to hold them to be so liable would be inconsistent with established principles. The appellants, as governing directors, incurred no personal liability. Directors of a company, which has been bona fide established, cannot be regarded as principals for whom the company acts as agents."[69]

Laastens is sowel die *Rainham Chemical Works*- as die *Performing Right Society*-saak beslis op 'n tydstip toe daar nog net beperkte insigte oor verskeie van die implikasies van die orgaans- of vereenselwigingsteorie was. Die *Lennards' Carrying Company*-saak[70] is weliswaar al in 1915 gerapporteer, maar dit was eers in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons*[71] en latere sake[72] dat die Engelse howe se absolutistiese beskouing van hierdie teorie duideliker ontbloot is. 'n Besondere groot sprong word derhalwe gegee as verwys word na sake wat pas na die *Lennards*-saak beslis is, maar nie na latere sake nie omdat dáár lig gewerp is op die toets (orgaans- of vereenselwigingstoets) om te bepaal of die *maatskappy* deliktueel aanspreeklik is.

3 2 2 Aanvanklike ooreenstemming met opvattings in Kanadese gewysdes

Die benadering van regter Nourse in *White Horse Distillers Ltd v Gregson Association Ltd* [73] is in ooreenstemming met die Kanadese reg. Hy wys pertinent daarop dat, wanneer daar oorweeg moet word of 'n persoon wat as orgaan van die maatskappy opgetree het persoonlik aanspreeklik is,

> "[t]he facts of each case must be broadly considered, in order to see whether, as a matter of *policy* requiring *the balancing of the two principles of limited liability and answerability for tortious acts or conduct*, they call for the director to be held personally liable".[74]

Hier word derhalwe gebruik gemaak van 'n spesifieke maatstaf, naamlik die oorweging van die feitelike omstandighede in samehang met 'n beleidsbesluit, om te bepaal of die korporatiewe sluier gelig moet word. Die persoon wat as maatskappyorgaan opgetree het, kan eers persoonlik aanspreeklik gestel word nadat daar in die lig van al die feite van die saak besluit is dat die korporatiewe sluier gelig moet word.

3 2 3 Kritiek op en leemtes in onlangse Engelse gewysdes

Dit sou onbillik wees om net kritiek te lewer op die benaderingswyse in die *C Evans*-saak. Hier het dit immers gehandel oor bepaalde statutêre bepalings wat uiteraard in die loop van die uitspraak verreken moes word.[75] Verder spreek die *Mancetter*-saak weer so min van die ware probleme aan wat op hierdie

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69 *Rainham Chemical Works Limited (In Liquidation) v Belvedere Guano Company Limited* 1921 2 AC 465 (HL) 488.

70 *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* 1915 AC 705 (HL) 713 (*supra* vn 5).

71 1956 All ER 624 (CA) 630D–I.

72 *Boulting v Association of Cinematograph Television and Allied Technicians* 1963 1 All ER 716 (CA) 722B–C; *Lady Gwendolen (Arthur Guinness Son & Company (Dublin) Ltd v The Freshfield (Owners)* 1965 P 294 343–345; *Tesco Supermarkets Ltd v Nattrass* 1972 AC 153 (HL) 170D–173E; *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd* 1975 2 All ER 424 (HL) 428e–f; *Attorney-General's Reference (no 2 of 1983)* 1984 2 WLR 447 (CA) 461B–F.

73 1984 RPC 61.

74 *Ibid* 91 (eie beklemtoning).

75 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 424e–j 425j; Walton 462 par 649.

gebied voorkom, dat die soeke na die *ratio* daarvan noodwendig tot bespiegelings sal lei.

Ongelukkig is daar in geeneen van die sake teruggegaan na die beginselgrondslag vir die deliktuele aanspreeklikheid van maatskappye nie. Daar is gevolglik geen verwysing na die feit dat daar van die orgaans- of vereenselwigingsteorie gebruik gemaak word om te bepaal of maatskappye deliktueel aanspreeklik is nie. Verder word daar ook nie in een van die twee sake ooit deeglik ingegaan op die vraag of daar hoegenaamd onderskei kon word tussen die handelinge van die maatskappye en dié van hul onderskeie direkteure nie.

Hoewel die kerngedeelte uit die *Mentmore*-saak in die *C Evans*-saak aangehaal word,[76] lyk dit eerder of slegs lippediens daaraan bewys word. Die enigste beleidsoorweging waarna regter Slade verwys, is eerder 'n feitelike oorweging.[77] Dit het allermins ten doel om te oorweeg wat die mededingende belange (beperkte aanspreeklikheid *teenoor* die persoonlike deliktuele aanspreeklikheid van diegene wat as die maatskappy se organe optree) is wat teen mekaar opgeweeg moet word.[78] Word die feite van elke saak beoordeel op die wyse wat deur regter Slade voorgestel word, is dit beswaarlik moontlik om 'n enkele geval te bedink waarin die maatskappyfunksionaris, wat as orgaan opgetree het, nie persoonlik deliktueel aanspreeklik sal wees onder omstandighede waar bewys is dat die maatskappy aanspreeklik is nie. Die resultaat van hierdie argument is dat die korporatiewe sluier eenvoudig ontken word.

3 3 Australië

Dit is eienaardig dat daar in *Hamilton v Whitehead*[79] nie na enige van die onlangse Engelse of Kanadese sake verwys word nie. Dit is moontlik die rede waarom die grondslag vir die persoonlike aanspreeklikheid van die persoon wat as orgaan opgetree het, in hierdie saak verskil van dié in onlangse Engelse en Kanadese sake.

'n Mens kan nie uit die *Hamilton*-saak aflei of die hof voorsien het dat daar ooit gevalle kan voorkom waar die individu aanspreeklikheid kan vryspring omdat hy nie as mededader saam met die maatskappy bestempel kan word nie. Wesenlike vrae ontstaan as die eindresultaat van die *Hamilton*-saak is dat die individu, wat as die maatskappy se orgaan opgetree het, in alle gevalle mededader saam met die maatskappy is. Bied die korporatiewe sluier dan nog enige beskerming aan persone wat as organe opgetree het?[80] As die stelling dat die orgaan "in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done"[81] korrek is, is dit werklik nodig om van die orgaansteorie[82] gebruik te maak ten einde te bepaal of die maatskappy 'n onregmatige daad begaan het?

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76 *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 421g–h.
77 *Ibid* 425g–h.
78 Domanski "Piercing the corporate veil – a new direction?" 1986 *SALJ* 232.
79 82 ALR 626.
80 Kyk vn 4 *supra*.
81 Aanhaling uit *R v Goodhall* (1975) 11 SASR 94 in *Hamilton v Whitehead* 82 ALR 626 630.
82 *Ibid* 628 629 630.

4 MOONTLIKE OPLOSSINGS

4 1 Maatskappyeregtelike beskouing: die beginsels om die korporatiewe sluier te lig

'n Absolutistiese beskouing oor die Engelsregtelik ontwikkelde orgaans- of vereenselwigingsteorie en die beskerming wat die korporatiewe sluier bied aan diegene wat die organe van die maatskappy vorm, lei noodwendig tot die slotsom dat die persone wat as maatskappyorgane optree, nie *per se* aanspreeklik is vir die onregmatige dade wat die maatskappy (hoewel deur die organe se optrede) begaan nie. Word hierdie benaderings aangehang, dan is die enigste geordende wyse om die persone wat as maatskappyorgane opgetree het ook persoonlik deliktueel vir hierdie optrede aanspreeklik te stel, 'n toepassing van die beginsels om die korporatiewe sluier te lig.

Daar sal gevolglik allereers oorweeg moet word of die verweerder inderdaad 'n rigtinggewende orgaan van die maatskappy was. Feitelike oorwegings sal hier die deurslag gee. Is eenmaal vasgestel dat hy so 'n orgaan was[83] en as sodanig opgetree het, moet die korporatiewe sluier eers gelig word alvorens die individu persoonlik aanspreeklik gestel kan word. Word dit nie gedoen nie, is die maatskappy aanspreeklik want die delik wat deur die orgaan gepleeg is, is die een waarvoor die maatskappy aangespreek word.

Die korporatiewe sluier kan statutêr[84] of deur die howe[85] gelig word. Nòg wat statutêre bepalings, nòg wat die gewysdes betref, kan daar sonder voorbehoud gesê word dat die korporatiewe sluier altyd gelig sal word om diegene wat as maatskappyorgane 'n onregmatige daad begaan het, persoonlik aanspreeklik te stel. Die howe is gewoonlik ongeneë om die korporatiewe sluier te lig.[86] Alvorens dit gelig word, word verskeie beleidsoorwegings in ag geneem. Hierdie oorwegings is noodsaaklik, want as die korporatiewe sluier te geredelik gelig kan word, word die wese van die selfstandigheid van die maatskappy as ingelyfde regspersoon ernstig aangetas. Bowenal sou dit beteken dat die prinsipiële grondslae vir die bestaan van hierdie juridiese skepping bevraagteken moet word.

'n Skrywer soos Domanski[87] beskou die Amerikaanse saak *Glazer v Commission on Ethics for Public Employees*[88] as navolgenswaardige voorbeeld van

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83 Uit *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 419e en *Mancetter Developments Limited v Garmanson Ltd* 1986 2 BCC 98,924 (CA) 98,925 blyk dit duidelik dat die respondent-direkteure in alle opsigte organe van die onderskeie maatskappye was en dat die handelinge wat die onregmatige dade daargestel het, verrig is in die hoedanighede van organe.

84 Cilliers en Benade 9–10 par 1 22.

85 *Ibid* 10–11 par 1 24.

86 Wat Suid-Afrika betref, kyk *J Louw v Richter* 1987 2 SA 237 (N) 241B; *Dithaba Plantation (Pty) Ltd v Erconovaal* 1985 4 SA 615 (T); Du Plessis, Olivier en Van Zyl "Die likwidasiegrond 'reg en billik' " 1987 4 *Med LSO* 29. Dit is ook die geval in ander jurisdiksies: kyk t o v Engeland Gower *Modern company law* 100 111; Sullivan 1983 *Crim LR* 513; Dine "Company controllers, company cheques and theft – (1) Another view" 1984 *Crim LR* 398–401; t o v Australië Ford *Principles of company law* (1986) 132–133 par 704; t o v die VSA *Glazer v Commission on Ethics for Public Employees* 431 So 2d 752 (La 1983) 756–757; Ford 139 par 710; t o v Kanada *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* 1979 89 DLR 3d 195 203.

87 224.

88 43 So 2d 752 (La 1983).

hoe die korporatiewe sluier gelig kan word. Hierin is gebruik gemaak van 'n sogenaamde "balancing test",[89] wat op die volgende neerkom:

> "[N]o categories ... [i]nstead, the court lays down a broad principle that requires an evaluation of competing policy considerations in order to determine whether or not the veil of incorporation should be pierced."[90]

In die Suid-Afrikaanse deliktereg bestaan daar sekere beginsels wat in verskeie opsigte nou aansluit by dit wat Domanski 'n "balancing test" noem. Daar word naamlik van die howe verwag om oor sekere aangeleenthede 'n "regtelike waarde-oordeel"[91] te vel. Die vraag of die korporatiewe sluier gelig moet word ten einde te bepaal of die persone wat as maatskappyorgane opgetree het deliktueel aanspreeklik is, is tipies een waaroor daar 'n waarde-oordeel gevel behoort te word.

Wanneer die hof sy waarde-oordeel uitoefen, behoort dit hom vry te staan om 'n wye verskeidenheid faktore te oorweeg. Die eiser se nadeel en die beskerming wat deur die korporatiewe sluier aan die verweerder-direkteur gebied word, kan byvoorbeeld teenoor mekaar afgeweeg word. Is die hof van oordeel dat daar 'n groot juridiese wanbalans weens die bestaan van die korporatiewe sluier voorhande is, kan hy besluit om die korporatiewe sluier te lig ten einde die persone wat as organe opgetree het, persoonlik aanspreeklik te hou.[92] Die hof sal uiteraard ook kan kyk na die mate van berekendheid waarmee daar tot die nadeel van onskuldige derdes opgetree is,[93] en of die rigtinggewende instansie binne of buite die vermoë en bevoegdheid van die maatskappy opgetree het.[94] Hierdie benadering strook met die beslissing van regter Le Dain in die Kanadese

89 Domanski 234–235.

90 *Ibid* 232.

91 Van der Walt "Nalatige wanvoorstelling en suiwer vermoënskade: die appèlhof spreek 'n duidelike woord" 1979 *TSAR* 154. Oorwegings soortgelyk aan dié wat reeds in die deliktereg uitgekristalliseer het, word derhalwe hier aangewend; kyk verder Van der Walt "Delict" 8 *LAWSA* 26 par 22.

92 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* 1979 89 DLR 3d 195 202; *White Horse Distillers Ltd v Gregson Associates Ltd* 1984 RPC 61 91; Domanski 232.

93 *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* 1979 89 DLR 3d 195 203; *White Horse Distillers Ltd v Gregson Associates Ltd* 1984 RPC 61 93; *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) 425g–h; *supra* vn 57.

94 Kyk in die algemeen Cilliers en Benade 62 par 6 01–6 02. Volgens Dine (403) sal dit steeds die maatskappy wees wat aanspreeklik is, al het die rigtinggewende orgaan *ultra vires* opgetree. Sy argumenteer soos volg: "There are a number of authorities which show quite clearly that even if the directors of a company are performing *ultra vires* acts, nevertheless they are acting in their capacity as directors, as the 'mind' of a company." Dieselfde skryfster (399–401 405(2)) sien die gevalle waarin die Engelse howe die korporatiewe sluier sal lig as beperk tot daardie gevalle wat reeds positiefregtelik uitgekristalliseer het. Let op die spitsvondighede waartoe so 'n kasuïstiese benadering lei. Sy merk naamlik soos volg op (404): "However to read this case [*International Sales Agencies v Marcus* [1982] 2 All ER 551] as determining that the 'alter egos' of the company cannot act *ultra vires* cannot be correct ... [T]here must be a distinction between acts which are *ultra vires* the company and acts which if done by an 'alter ego' are 'a frolic of his own' and so totally outside the 'business activities of the company' that the director is no longer acting in his capacity as the company." Die "balancing test" wat deur Domanski propageer word, of die uitoefening van 'n juridiese waarde-oordeel, maak dit onnodig om in detail op hierdie moeilik onderskeibare grade van *ulta vires*-handelinge in te gaan. Vir verdere kommentaar op Dine se benadering kyk Sullivan "Company controllers – (2) A reply" 1984 *Crim LR* 408–409 410–411.

saak *Mentmore Manufacturing Co Ltd v National Merchandising Co Inc*[95] en dié van regter Nourse in die Engelse saak *White Horse Distillers Ltd v Gregson Association Ltd.*[96]

Samevattend kan gesê word dat hierdie maatskappyeregtelike beskouing die absolutistiese aard van die korporatiewe sluier en van die orgaans- of vereenselwigingsteorie erken, maar dat dit nie ontken dat persone wat as maatskappyorgane opgetree het deliktueel aanspreeklik kan wees nie. Die onderhawige benaderingswyse het egter ten doel om die aanspreeklikheid van hierdie persone op 'n gesonde beginselgrondslag te plaas. Juis daarom is hierbo voorgestel dat die korporatiewe sluier eers gelig moet word voordat die aandag op hul deliktuele aanspreeklikheid toegespits word; en om die sluier te lig, verg 'n beleidsbesluit oftewel 'n regtelike waarde-oordeel deur die hof. Die wye diskresie wat die hof het, verseker 'n groot mate van soepelheid. Tog behoort dit gaandeweg uit die gewysdes duidelik te word in watter gevalle die howe bereid sal wees om die korporatiewe sluier te lig om diegene wat as maatskappyorgane opgetree het, ten volle persoonlik deliktueel aanspreeklik te stel.

4 2 Deliktuele beskouing: die beginsel dat die optrede as orgaan geen verweer teen deliktuele aanspreeklikheid bied nie

In die Engelse reg is daar reeds van vroeg af besef dat daar 'n besondere behoefte aan 'n direkte *vinculum iuris* tussen derdes wat benadeel en korporasies is. In *Whitfield v South Eastern Railway Company*[97] word gewys op die besondere nadeel wat vir derdes kan ontstaan as hierdie regsband nie erken word nie:

> "Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed."[98]

In "*Mersey Dock and Harbour Board" Trustees v Gibbs and Penhallow*[99] word dieselfde vraagstuk op 'n ietwat driftiger en omslagtiger wyse soos volg toegelig:

> "[I]t would be a very unreasonable and very mischievous thing if, in case of corporations dealing with the public or with individuals, such corporations should by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting for a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of."[100]

Uit hierdie aanhalings is dit duidelik dat die aanvanklike probleem nie was om die persone wat namens maatskappye opgetree het, persoonlik aanspreeklik te stel nie, maar om die maatskappye self aanspreeklik te stel. In die Engelse reg het die orgaans- of vereenselwigingsteorie as nuttige grondslag gedien om die deliktuele aanspreeklikheid van maatskappye te verklaar. 'n Absolutistiese beskouing oor hierdie teorie het klaarblyklik tot gevolg gehad dat daar uit die oog

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95 1979 89 DLR 3d 195 203: "What, however, is the kind of participation in the acts of the company that should give rise to personal liability? It is an elusive question. It would appear to be that degree and kind of personal involvement by which the director or officer makes the tortious act his own. It is obviously a question of fact to be decided on the circumstances of each case."

96 1984 RPC 61 91.

97 120 ER 451.

98 *Ibid* 451.

99 1866 LR 1 HL 93.

100 *Ibid* 127.

verloor is dat, voor die uitbouing daarvan, dit juis die persone was wat vir die maatskappy opgetree het wat persoonlik aanspreeklik was.

Daar kan derhalwe geargumenteer word dat die onvoorwaardelike geloof in die geldigheid van die Engelsregtelik ontwikkelde orgaans- of vereenselwigingsteorie die beskerming wat die korporatiewe sluier bied, tot 'n hersenskim aanleiding gegee het. Die bedoeling met die teorie om die maatskappy aanspreeklik te stel, was immers nie om die persone wie se optrede maatskappyhandelinge vergestalt het van aanspreeklikheid te vrywaar nie, maar om 'n grondslag vir die aanspreeklikheid van die regspersoon daar te stel.

Volgens hierdie beskouing is dit ook onnodig om, soos in die Australiese saak *Hamilton v Whitehead*,[101] die aanspreeklikheid van die persoon wat as orgaan opgetree het, te probeer verklaar aan die hand van die hoedanigheid, naamlik 'n mededader saam met die maatskappy, waarin hy opgetree het. Hy is eenvoudig persoonlik deliktueel aanspreeklik in alle gevalle waarin bewys is dat die maatskappy aanspreeklik is weens sy optrede. Die eiser het gevolglik die keuse om die geding teen die maatskappy, die persoon wat as maatskappyorgaan opgetree het of teen beide aanhangig te maak.

5 PERSPEKTIEF EN SAMEVATTING

'n Absolutistiese beskouing oor die Engelsregtelik onwikkelde orgaans- of vereenselwigingsteorie en oor die beskermingsfunksie van die korporatiewe sluier lei noodwendig tot die slotsom dat die individu, wat as maatskappyorgaan 'n delik gepleeg het, nie outomaties persoonlik aanspreeklik is nie. Volgens hierdie beskouing kan die hof, soos hierbo aangedui is, 'n wye verskeidenheid faktore oorweeg om te bepaal of dit noodsaaklik is dat die korporatiewe sluier gelig word. Die korporatiewe sluier kan onder andere gelig word as daar 'n groot juridiese wanbalans bestaan tussen die eiser se nadeel en die beskerming wat deur die korporatiewe sluier aan die verweerder-direkteur gebied word. Word die sluier wel gelig, is die algemene deliksbeginsels van toepassing ter bepaling van die individu se aanspreeklikheid. Die regtelike waarde-oordeel wat in elke geval geskied, verseker dat die lig van die korporatiewe sluier nie slegs van toeval afhang nie. Gaandeweg behoort daar al hoe duideliker riglyne te ontstaan oor wanneer die korporatiewe sluier gelig kan word en wanneer die persone wat as organe opgetree het, persoonlik deliktueel aanspreeklik behoort te wees.

In die tweede plek is dit eintlik onnodig om die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het, te benader uit die oogpunt van die bestaan van die korporatiewe sluier of die orgaans- of vereenselwigingsteorie. Mens kan naamlik aanvoer dat dit op 'n onlogiese ommekeer van die eertydse teorie neerkom om oorwegings, wat vroeër gebruik is om die *maatskappy* se aanspreeklikheid te verklaar, te verhef tot 'n verweer teen die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het.

101 82 ALR 626.

AANTEKENINGE

MISVERSTAND EN WANGEDRAG: BESKERMING VAN KONTRAKSPARTYE

Die kontraktereg word algemeen beskou as 'n versameling begrippe en reëls van hoogs gespesialiseerde en tegniese aard – in so 'n mate dat 'n logies-analitiese toepassing van die reëls en begrippe dikwels as 'n afdoende hantering van 'n gegewe stel feite aanvaar word. 'n Proses van logiese analise bevorder inderdaad die vereiste van algemene toepaslikheid waaraan regsreëls moet voldoen. Eweseer moet regsreëls egter algemeen as billik ervaar en aanvaar word: reëls behoort nie van hulle uitwerking in konkrete gevalle losgemaak te word nie. Kennelik kan hierdie twee vereistes afsonderlik verabsoluteer word – en word dit ook gedoen. Die gevolg is òf 'n abstrakte begripsjurisprudensie òf 'n stelsel van regskepping van geval tot geval (*jus in causa positum*) sonder die dissipline van die logika.

Die sluiting van kontrakte en gepaardgaande misverstand tussen die partye (dwaling in tegniese sin) is lank reeds die arena waarin die stryd om die balans tussen logiese analise en gevallereg gevoer word. Dit blyk onder meer uit 'n hele aantal onlangse beslissings van die appèlhof (bv *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A); *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A); *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A)) en ook die meer onlangs provinsiale beslissings in *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd* 1989 1 SA 337 (W) en *Keens Group Co (Pty) Ltd v Lötter* 1989 1 SA 585 (K). Laasgenoemde uitsprake stel nie soseer nuwe gesigspunte nie. Die feite wat dáár ter sprake was en die benadering van die hof tot die oplossing van die geskille, bring egter wel die problem wat hierbo aangeraak is, skerp na vore.

In albei sake het 'n kontraktant op grond van 'n wesenlike dwaling gebondenheid aan 'n beweerde kontrak ontken. In die *Slavin*-saak het 'n verkoper (opsiegewer) van masjinerie onder meer beweer dat hy 'n fout gemaak het toe hy in korrespondensie die koopprys as R20 000 in plaas van R66 000 netto aangedui het en dat die koper (opsiehouer) van die fout geweet het of behoort te geweet het. Die koper se aandrang om slegs R20 000 te betaal, is volgens die verkoper "unconscionable and constitutes snatching at a bargain" (339E). In die *Keens*-uitspraak het die ondertekenaar van 'n borgakte gebondenheid ontken op

grond van die bewering dat die skuldeiser hom oor die strekking van die dokument mislei het, tot die effek dat die ondertekenaar onder die foutiewe indruk verkeer het dat hy 'n dokument teken waardeur hy nie self nie, maar slegs namens sy maatskappy kontrakteer.

In albei gevalle kom die vraag of die betrokke dwaling *iustus* was, ter sprake. (In die *Slavin*-saak gooi die hof die uiteindelike beslissing oor die boeg van 'n "doctrine of 'snatching at a bargain' " (346A). Hieroor later meer.) Terselfdertyd kom die bestaan al dan nie van 'n beskermingswaardige (oftewel redelike) vertroue ter sprake (bv die aanhaling uit De Wet *Dwaling en bedrog by kontraksluiting* in die *Slavin*-saak 342E, en dié uit *George v Fairmead* in die *Keens*-saak 589F–G). Dit dui daarop dat die howe by die hantering van die feite die vraag of 'n bepaalde kontraktant kontraktueel gebonde kan word as die *eintlike* ondersoek beskou. Vrae na die redelikheid van een party se dwaling en die beskermingswaardigheid van die ander party se vertroue is dan in laaste instansie aspekte van die ondersoek en nie afsonderlike vrae wat teenoor mekaar gestel word en mekaar uitsluit nie (vgl die opmerkings in Lubbe en Murray *Farlam and Hathaway: Contract* (1988) 165). Faktore soos die misleiding van die dwalende, "skuld" van die kontraktante en die kwaliteit van hulle handelinge is almal oorwegings in die proses om gebondenheid te bepaal.

In *Keens Group v Lötter* aanvaar die hof dat die ondertekenaar van 'n dokument slegs aan die werking van die *caveat subscriptor*-reël (soos die hof (589B) dit noem) kan ontkom indien hy kan bewys dat hy (deur die ander party) mislei is en derhalwe 'n *iustus error* begaan het. Die hof (589J) neem in ag dat die ondertekenaar self "nalatig" was ("acted negligently") toe hy die dokument onderteken het sonder dat hy dit gelees het. Die hof (590A) oorweeg terselfdertyd die vraag of die ander kontraktant nogtans self die gevolge van die misverstand behoort te dra ("was itself to blame").

Die verband tussen redelike dwaling en redelike vertroue kom weer eens in dié uitspraak na vore. Die hof aanvaar dat die ondertekenaar wesenlik gedwaal het met die gevolg dat daar geen *consensus* was nie. Die hof erken implisiet dat die ander kontraktant die ondertekenaar ondanks die *dissensus* gebonde kan hou indien eersgenoemde nie self vir die dwaling te blameer is nie. Sulke gebondenheid sou dan op 'n *vertroue* van *consensus* moet berus. In gevalle van ligvaardige ondertekening van 'n dokument sal die vertroue van 'n mede-kontraktant dat die ondertekening van instemming getuig, regtens as redelik en dus beskermingswaardig beoordeel word, tensy omstandighede bewys word wat dit regtens onwenslik maak om die beskerming te handhaaf.

Ongeag of die vraag na gebondenheid van die kant van die dwalende (*iustus error*) of van die kant van die vertrouende (redelike vertroue) benader word, is dit noodsaaklik dat perke gestel word aan die mate waarin van die normale konsekwensies van *consensus* as grondslag vir 'n kontrak afgewyk kan word. Dit geskied met behulp van begrippe soos misleiding, onregmatigheid, skuld en kousaliteit. Na gelang van die stand van regsbeleid kan aan sulke begrippe dieselfde (enger) inhoud as op die gebied van die onregmatige daad verleen word. Vir doeleindes van die kontraktereg kan hulle egter ook wyer vertolk word, veral in die geval van sogenaamde onregmatigheid en skuld.

Daar bestaan in die regspraak reeds aanknopingspunte vir 'n wyer betekenis van skuld as 'n faktor in die proses (sien 1987 *THRHR* 446–447). Soortgelyke oorwegings kan ook die aanwending van die onregmatigheidsbegrip in hierdie

konteks beïnvloed. Vir sover 'n hof se oordeel of 'n kontraktant wat inderdaad dwaal tóg toegelaat moet word om hom op daardie dwaling te beroep, beleidsoorwegings insluit, is dit natuurlik om van 'n begrip soos onregmatigheid gebruik te maak. Die begrip word op stuk van sake aangewend om elders 'n oordeel oor regtens onaanvaarbare (onredelike) gedrag te vel. Jurisprudensieel is daar egter geen rede waarom, vir doeleindes van die totstandkoming van 'n kontrak, aan die geykte inhoud van onregmatigheid vasgehou hoef te word nie. 'n Afleiding van regmatigheid kan, *in hoc casu*, goedskiks gemaak word van gedrag wat byvoorbeeld vir doeleindes van 'n onregmatige daad *stricto sensu* nie só 'n afleiding sal regverdig nie. Dit is trouens denkbaar dat die net vir onredelike gedrag só wyd gegooi word dat dit ingevolge 'n werkbare begrippeleer nie doenlik sou wees om sulke gedrag hoegenaamd as onregmatig te tipeer nie. (Vgl die opmerkings ten opsigte van aanvegting van 'n kontrak in 1987 THRHR 79 e v.) Sodanige ontwikkeling kan uiteindelik die beantwoording van 'n grondliggende en dikwels moeilike vraag raak, te wete met verwysing na welke oomblik en kennisstand die onredelikheid van die gewraakte gedrag beoordeel moet word. Wanneer onregmatigheid bepaal word, word ook omstandighede wat *ex post facto* ontstaan en bekend geword het, in ag geneem. Die vraag of 'n kontraktant van sy mede-kontraktant se dwaling bewus was of behoort te gewees het, sal – vir sover dit sy plig aangaan om die dwaling op te klaar – dan nie bloot met inagneming van sy subjektiewe omstandighede beoordeel word nie.

Die *Slavin*-saak is vatbaar vir 'n soortgelyke vertolking. Die tweede alternatiewe pleit van die opsiegewer (verkoper) dat die opsiehouer se aanvaarding onbehoorlik ("unconscionable") was, bring nie die redelikheid van sy eie dwaling direk ter sprake nie. In elk geval word die vraag na misleiding van die dwalende as grond vir die redelikheid van die dwaling nie geopper nie. Dit wil trouens voorkom asof die hof dié pleit eerder vertolk met verwysing na 'n beskermingswaardige vertroue as moontlike grondslag vir die uitoefening van die opsie deur die opsiehouer (vgl bv die verwysing na die "doctrine of *quasi* mutual assent" (341D–I); die vertrouensteorie (342E); die formulering van die vraag ter beslissing met verwysing slegs na die gedrag van die vertrouende (342I–J 345I–346A) en ook die oorweging van die aanwending van die *exceptio doli generalis* (346D)). Wat ook al die betekenis van die pleit kan wees, is dit 'n duidelike illustrasie van die samehang en wisselwerking tussen dwaling en vertroue (sien *George v Fairmead (Pty) Ltd* 1958 2 465 (A) 471A–D). Die vraag of 'n kontraktant geweet het of behoort te geweet het dat sy mede-kontraktant dwaal, hou egter nie noodwendig slegs met eersgenoemde se redelike vertroue verband nie. Dit kan ook direk betrekking hê op die bestaan van 'n misleiding as grond vir die redelikheid van die teenparty se dwaling. Waar 'n kontraktant inderdaad van sy teenparty se dwaling geweet het of daarvan behoort te geweet het, kan sy versuim om te handel in gegewe omstandighede so 'n wanvoorstelling wees. In gevalle soos dié in die *Slavin*-saak kan die konstruksie van 'n wanvoorstelling, veral waar die een kontraktant maar net van die ander se dwaling *behoort* te geweet het, egter maklik gekunsteld wees. Dit bring weer eens die vraag na vore of misleiding dan die *enigste praktiese* grond vir die redelikheid van 'n dwaling kan wees. In *Trollip v Jordaan* 1961 1 SA 238 (A) 248–249 het hoofregter Steyn in sy minderheidsuitspraak uitdruklik die moontlikheid van ander gronde erken. 'n Duidelike voorbeeld van so 'n ander grond ontbreek tot dusver – ook in die *Slavin*-saak is die uitspraak nie oor dié boeg gegooi nie. (Sien ook die opmerkings deur

Lubbe en Murray 166–167 aantekening 7.) In die *Slavin*-saak oorweeg die hof, opvallend genoeg, die "gewetenloosheid" van die opsienemer se optrede en bring dit selfs met die "ethics of [the] free enterprise society" in verband (347D–E). Die hof oorweeg ook die moontlike toepassing van die *exceptio doli generalis* wat juis grense van behoorlike, aanvaarbare gedrag ter sprake bring. (Die uitspraak is reeds in 1984 gelewer – lank voordat die appèlhof die *exceptio doli* ter ruste gelê het in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A).) Bogemelde oorwegings sou uiteraard kon dien om die redelikheid van die opsiegewer se dwaling te vestig, ongeag die afwesigheid van 'n wanvoorstelling. Die hof beslis die aangeleentheid egter deur te bevind dat die leerstuk, soos die hof dit noem, van "snatching at a bargain" in die omstandighede nie aangewend kan word nie (346A).

Die uitdrukking "snatching at a bargain" het geen tegniese betekenis in die Suid-Afrikaanse verbintenisreg nie. (Vgl bv die opmerkings in die *Slavin*-saak 343A–C. Die standaardwerke oor die kontraktereg behandel die uitdrukking ook nie as 'n spesiale geval nie.) Die feit dat 'n geadresseerde toegeslaan het op 'n aanbod wat klaarblyklik vir hom óórgunstig was, kan inderdaad 'n oorweging wees by die soort feitestel wat hier bespreek word – maar dan nie as 'n selfstandige leerstuk nie. 'n Voor-die-hand-liggende moontlikheid is dat die begunstigde se handeling 'n grond vir aanvegting van die kontrak kan wees, soos bedrog of selfs uitbuiting van sy mede-kontraktant se vergissing. Om 'n aanbod op hierdie wyse te aanvaar, kan ook eenvoudig die afleiding regverdig dat die aannemer se gedrag dermate onredelik en dus onaanvaarbaar is dat hy hom nie op 'n redelike vertroue van wilsooreenstemming kan beroep nie. Eweneens sal sy gedrag, soos hierbo gesê, op die redelikheid van die teenparty se dwaling dui.

Woorde soos onredelik en onaanvaarbaar is vaag en dikwels moeilik omlynbaar. Dit is derhalwe begryplik dat begrippe wat reeds op ander regsterreine ontwikkel is, gebruik word om ook op die gebied van die kontrak diens te doen. ('n Mens wonder of dit die rede sou wees waarom die hof in die *Slavin*-saak die verkoop van die koopsaak in stryd met die opsie nie eenvoudig as kontrakbreuk getipeer het nie, maar as 'n onregmatige daad teenoor die opsienemer beskou het omdat die verkoop "was intended to deprive the plaintiff of its right to obtain delivery" (347E–F).) Uit bostaande bespreking behoort egter te blyk dat dit dikwels dienstiger is om, juis vanuit die behoeftes van die kontraktereg self, terselfdertyd aan sowel 'n begrip soos redelikheid as die eie moraliteit van die kontrak inhoud te gee.

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CONDITIO SINE QUA NON

1 Inleiding

Dit is bekend dat 'n feitelike kousale verband tussen 'n handeling en 'n gevolg 'n element van sowel 'n delik as van 'n gevolgsmisdaad is. Daar is egter nie eenstemmigheid oor watter toets aangewend moet word om so 'n kousale verband te bepaal nie. Dit wil nietemin voorkom of sowel die appèlafdeling as

die meeste skrywers ten gunste van die *conditio sine qua non*-teorie is (sien Neethling, Potgieter en Visser *Deliktereg* (1989) 146). Hierdie teorie is egter na 'n indringende ondersoek deur ADJ van Rensburg (*Juridiese kousaliteit en aspekte van aanspreeklikheidsbegrensing by die onregmatige daad* LLD-proefskrif Unisa 1970) aan oortuigende kritiek onderwerp. Hierop het FFW van Oosten (*Oorsaaklikheid by moord en strafbare manslag* LLD-proefskrif UP 1981) in besonderhede gereageer en probeer aantoon dat alhoewel *conditio sine qua non* sy gebreke het, dit tog die enigste werkbare kousaliteitstoets is. Hierdie standpunt, asook regterlike *dicta* waarin feitelike kousaliteit ingevolge *conditio sine qua non* uitgedruk word, kan moontlik die verkeerde indruk wek dat *conditio sine qua non* inderdaad 'n korrekte kousaliteitstoets is.

My oogmerk met hierdie aantekening is om kortliks aan te toon dat Van Oosten nie daarin geslaag het om die kern van Van Rensburg se besware teen *conditio sine qua non* as kousaliteitstoets te weerlê nie en dat dié teorie ook nie aan die vereistes vir 'n kousaliteitstoets voldoen nie. Daarna sal ek die standpunte van die appèlafdeling behandel en ten slotte die korrekte benadering tot feitelike kousaliteit uiteensit.

2 Die omskrywing van *conditio sine qua non*

Van der Merwe en Olivier (*Die onregmatige daad in die Suid-Afrikaanse reg* (1989)), wat sterk voorstanders van *conditio sine qua non* as kousaliteitstoets is, formuleer dié benadering soos volg (197):

> "Wil 'n mens by die vasstelling van 'n kousale verband niks meer bepaal nie as dat 'n handeling 'n besondere gevolg veroorsaak het, is die tradisionele maatstaf geleë in die *conditio sine qua non*-toets. Hiervolgens is 'n handeling oorsaak van 'n gevolg indien die handeling nie weggedink kan word sonder dat die gevolg tegelyk verdwyn nie. Die handeling moet met ander woorde *conditio sine qua non* vir die gevolg wees."

(Sien egter *infra* par 5 vir die redes waarom hierdie formulering geen kousaliteits*toets* daarstel nie. Vir ander voorbeelde van hoe *conditio sine qua non* omskryf word, sien Van Oosten 1982 *De Jure* 11; Van der Walt *Delict: principles and cases* (1979) 95; Boberg *The law of delict* (1984) 380; De Wet en Swanepoel *Strafreg* (1985) 63.)

3 Sekere punte van kritiek op die toepassing van *conditio sine qua non* as kousaliteitstoets

Van Rensburg (*Juridiese kousaliteit* 20–62) bespreek talle punte van kritiek teen *conditio sine qua non* maar dit is hier slegs nodig om op die kern daarvan in te gaan (sien ook Snyman *Strafreg* (1986) 61–63). Een van Van Rensburg (36 e v) se belangrike argumente, naamlik dat *conditio sine qua non* nie 'n oplossing bied in gevalle van gesamentlike veroorsaking nie (bv waar X en Y gelyktydig en onafhanklik van mekaar die slagoffer elkeen 'n dodelike wond toedien) word in ieder geval deur die meeste gesaghebbendes aanvaar en daarom is dit onnodig om dit hier te bespreek (sien bv *Minister of Police v Skosana* 1977 1 SA 31 (A) 43; Van Oosten 25 e v; Boberg 383; *contra* Van der Merwe en Olivier 201).

Voorts gee Van Rensburg die volgende voorbeeld (28–29) om aan te dui dat die *conditio sine qua non*-teorie gebaseer is op 'n lompe, onregstreekse denkproses wat op 'n sirkelredenasie uitloop:

> "Veronderstel die hof moet in 'n bepaalde geval beslis of A die oorsaak van X was. Gerieflikheidshalwe kan al die ander antesedente wat X voorafgegaan het, onder die

simbool B saamgevat word. Volgens die *conditio sine qua non*-toets moet A nou in die gedagte geëlimineer word, met behoud van alle ander antesedente, en die vraag moet dan gestel word of X nog sou plaasgevind het waar A nou geëlimineer is. Is die antwoord *Ja* dan was A nie die oorsaak van X nie, en is die antwoord *Nee* dan was A wel 'n oorsaak van X. Op gebiede waar behoorlik gekontroleerde eksperimente moontlik is, word die antwoord *Ja* of *Nee* deur die resultaat van die eksperiment self opgelewer . . . In die gegewe voorbeeld is die eksperimentele metode egter uitgesluit. 'n Mens sal gevolglik maar in jou gedagtes moet probeer bepaal wat sal gebeur as A geëlimineer word. As A geëlimineer word, bly die ander antesedente, wat ek onder die simbool B saamgevoeg het, oor. Die vraag waarmee 'n mens dan sit, is of B, op sigself, dit wil sê sonder A, X sou veroorsaak het of nie. Hoe weet 'n mens nou of B X sou veroorsaak het of nie? Daar is geen eksperimentele resultaat wat die antwoord verskaf nie en daarom moet die ondersoeker dit maar probeer uitdink. Hy kan probeer om deur middel van die *conditio sine qua non*-toets vas te stel of daar 'n kousale verband tussen B en X is. Dit beteken dat hy nou weer B in sy gedagte moet elimineer *met behoud van A* (!) om te bepaal of B X sou veroorsaak het of nie. Daarmee is die ondersoeker maar weer by dieselfde vraag waarmee hy begin het."

Daarby is *conditio sine qua non* volgens Van Rensburg geen *toets* vir kousaliteit nie en berus die aanwending daarvan op 'n gerieflike stukkie selfbedrog. Hy gebruik die volgende voorbeeld (29–30):

"A steek B met moorddadige opset met 'n mes. Hy wond hom net liggies in die skouer. B word na die hospitaal geneem waar hy 'n infeksie opdoen en sterf. Wat is nou makliker as om te sê: As A nie B met die mes gesteek het nie, sou B nie in die hospitaal beland het nie, en as B nie in die hospitaal beland het nie, sou hy nooit die infeksie opgedoen en gesterf het nie; *daarom*: A se handeling is oorsaak van B se dood, en siedaar! 'n pragtige illustrasie van die sukses waarmee die *conditio sine qua non*-toets toegepas kan word. Maar wat het die persoon wat so redeneer nou eintlik gedoen? Waaraan het hy gedink toe hy gesê het: 'As A B nie met die mes gesteek het nie . . .'? As hy aan *niks* gedink het nie, is sy gevolgtrekking nie verbasend nie want niks kan nie iets veroorsaak nie en dan móét die iets wat hy weggedink het, naamlik die steek met die mes, noodwendig die oorsaak van die dood wees. Die *conditio sine qua non*-toets verg egter nie net dat hy A se handeling moet wegdink nie maar dat hy *alle ander* antesedente in sy gedagte moet hou. Is dít wat die *conditio sine qua non*-aanhanger gedoen het toe hy sy gevolgtrekking hierbo gemaak het? Aan watter ander antesedente het hy gedink nadat hy A se handeling weggedink het? Aan watter ander antesedente *kon* hy gedink het as hy van geen ander antesedente geweet het nie? In ons voorbeeld word daar geen ander antesedente genoem nie!"

4 Kommentaar op die kritiek teen *conditio sine qua non*

Van Oosten (19–24) aanvaar nie dat Van Rensburg deur die bovermelde voorbeelde geldige punte van kritiek teen die *conditio sine qua non*-toets geopper het nie. Sy vernaamste argument is dat Van Rensburg *met die verkeerde formulering van conditio sine qua non* werk, naamlik as "voorwaarde waarsonder . . . wel" in plaas van "voorwaarde waarsonder . . . nie".

Met verwysing na die voorbeeld hierbo waar besluit moet word of A vir X veroorsaak het, betoog Van Oosten (19) dat die vraag by *conditio sine qua non*

"bloot [is] of X sonder A sou wegval en nie of B wel sonder A die gevolg sou bewerkstellig het nie".

Wat die voorbeeld van die meswond betref, argumenteer hy (19–21)

"dat dit vir die gevolgtrekking dat A wel B se dood veroorsaak het, nie nodig was om op die vraag in te gaan of die ander oorblywende voorwaardes [antesedente] tesame B se dood sou veroorsaak het sonder A se handeling nie".

Volgens hom beteken die *conditio sine qua non*-toets dat die vraag gestel word na die voorwaarde *waarsonder die gevolg nie sou ingetree het nie* en nie na die

voorwaarde *waarmee die gevolg wel sou ingetree het nie.* Hy voeg by dat die voorwaardes vir die gevolg in die tweede voorbeeld van Van Rensburg voldoende is om te bepaal of A se handeling voorwaarde en dus oorsaak vir B se dood was.

Van Oosten (23) beskryf die benadering van Van Rensburg tot die *conditio sine qua non*-toets (d w s ingevolge waarvan die handeling onder oorweging weggedink word en daar gevra word of die oorblywende antesedente die gevolg veroorsaak het) as die sogenaamde *positiewe formulering* van die toets wat die *rede* vir die bestaan van 'n oorsaaklike verband weergee en die formule wat hy self aanvaar (ingevolge waarvan bloot gevra word of die gevolg wegval as die betrokke handeling weggedink word), as die *negatiewe formulering* van *conditio sine qua non.* Hy beklemtoon dat slegs die sogenaamde negatiewe formule die kousaliteitstoets beliggaam en dat die positiewe formule bloot die resultaat van die negatiewe formule bevestig. Omdat Van Rensburg volgens hom die kar voor die perde span in die gebruik van die sogenaamde positiewe formule, ontsê Van Rensburg syns insiens *conditio sine qua non* ten onregte die status van 'n toets.

5 Evaluasie van die kommentaar op die kritiek teen *conditio sine qua non*

Die vraag ontstaan nou of Van Oosten gelyk het in sy argument dat Van Rensburg se kritiek teen *conditio sine qua non* op die verkeerde formule van hierdie toets berus.

Uit die bespreking wat volg, sal dit blyk dat Van Oosten se standpunt sonder twyfel ongegrond is. Die kernfout wat hy begaan, is om eenvoudig te aanvaar dat Van der Merwe en Olivier se uiteensetting van *conditio sine qua non* (sien par 2 *supra*) inderdaad op 'n kousaliteits*toets* neerkom. Van Oosten meen gevolglik ten onregte dat mens *bloot deur 'n handeling weg te dink kan vasstel of 'n gevolg verdwyn al dan nie* en dat 'n kousale verband aldus bepaal kan word.

Dit is egter duidelik dat Van der Merwe en Olivier se beskrywing van *conditio sine qua non* geen kousaliteitstoets van enige aard openbaar nie. 'n *Toets* vir doeleindes van die reg moet tog 'n volledige en werkbare manier voorskryf waarop mens 'n verskynsel kan ondersoek om tot 'n korrekte gevolgtrekking te kan kom. Die toets van die *redelike man* vir die bepaling van nalatigheid is 'n goeie voorbeeld van 'n werkbare toets. Volgens hierdie toets tree iemand nalatig op indien die redelike man in sy posisie die redelike moontlikheid sou voorsien het dat sy optrede 'n ander kan benadeel en stappe sou gedoen het om die nadeel te voorkom, terwyl die dader nie sodanige stappe gedoen het nie (sien bv *Kruger v Coetzee* 1966 2 SA 428 (A) 430). Dié toets is so geformuleer dat daar voldoende aanwysings en inligting is om mens in staat te stel om te bepaal of iemand nalatig gehandel het of nie.

Dit wat Van Oosten egter as kousaliteitstoets aansien en propageer, voldoen nie aan die minimum-vereistes vir 'n werkbare toets nie aangesien dit byvoorbeeld *nie aandui hoe 'n mens sal weet dat indien jy 'n handeling wegdink, die gevolg ook verdwyn nie.* Van der Merwe en Olivier se "toets" verg net dat mens 'n handeling moet wegdink en verklaar dan dat daar 'n kousale verband sal bestaan *as* die betrokke gevolg ook verdwyn, maar vertel mens nie *hoe* jy sal weet of die gevolg verdwyn of nie! Hierdie "toets" sou dus net 'n resultaat kon bied as mens *voordat* jy 'n handeling wegdink, reeds goed weet dat dit wel die betrokke gevolg veroorsaak het. Slegs dan sou mens by die "toepassing" daarvan kon sê dat as jy die handeling wegdink, die gevolg ook verdwyn.

Dit staan dus vas dat *conditio sine qua non* soos deur Van der Merwe en Olivier omskryf, geen toets is nie maar bloot *'n manier om 'n voorafbepaalde kousale verband uit te druk.* Om die werkswyse wat inderdaad gevolg word, as 'n ware toets te beskryf, kom op 'n wanvoorstelling neer. Die volgende voorbeeld sal hierdie feit illustreer: X besoek Y om laasgenoemde van owerspel met X se vrou te beskuldig. Y is buitengewoon vriendelik en bied X 'n glas bier aan. 'n Paar minute nadat X die bier gedrink het, kry hy stuiptrekkings en val dood neer. Hoe sal mens nou *conditio sine qua non* as kousaliteitstoets toepas om vas te stel of Y vir X deur die bier vergiftig het? Al dink jy die gee van die bier aan X weg, is jy nog nie nader aan 'n oplossing nie omdat 'n behoorlike ondersoek eers nodig is om vas te stel of X nie dalk aan 'n hartaanval dood is nie en of die bier (of iets anders wat hy vroeër ingeneem het) moontlik gif bevat het. Eers nadat al die relevante feite vasgestel is en die *oorsaak van die dood (d w s die antesedente waaruit die dood inderdaad gevolg het) op grond daarvan bepaal is,* sal mens kan sê of die gee van die bier aan X wel oorsaak van sy dood was of nie. Hierdie voorbeeld bewys maar net weer dat die "toets" van *conditio sine qua non* net suksesvol aangewend kan word nadat mens op *'n ander manier* vasgestel het wat die oorsaak van die dood was en dat *conditio sine qua non* sonder sodanige voorkennis geen antwoord bied op die vraag of 'n kousale verband bestaan of nie.

Uit Van der Merwe en Olivier se omskrywing (sien par 2 *supra*) blyk ook dat die *toets* wat mens gebruik om kousaliteit mee te bepaal (die sg *conditio sine qua non*-"toets") en die *resultaat* van die toets, naamlik dat iets inderdaad 'n *conditio sine qua non* is, een en dieselfde is! 'n Soortgelyke sirkelredenasie kom voor in die volgende *dictum* van appèlregter Corbett in *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA (A) 915:

> "The enquiry as to factual causation generally results in the application of the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question."

Hoe eienaardig Van der Merwe en Olivier se "toets" is waarmee mens feitelike kousaliteit moet vasstel, blyk ook uit die volgende voorbeeld wat hulle self gee (198–199):

> "Hoe bepaal die geneesheer by die lykskouing dat die dolk in die oorledene se hart oorsaak van die dood was? . . . Is die redenasieproses nie telkens dat . . . as die dolk nie in die oorledene se hart was nie, het hy nie op die tydstip en wyse gesterf waarop hy gesterf het nie?"

Dit sal werklik vreemd wees om 'n geneesheer te vind wat so redeneer om 'n kousale verband te bepaal of uit te druk. 'n Mens sou eerder verwag dat hy die dolksteek as doodsoorsaak sou aanmerk weens die vernietiging van noodsaaklike hartweefsel en die massiewe bloedverlies wat die wond veroorsaak het. Hoekom die geneesheer homself die irrelevante vraag sou afvra oor wat sou gebeur het indien die dolk nie in die hart van die oorledene was nie, is uit die voorbeeld nie duidelik nie. Slegs as daar besliste getuienis was dat die oorledene byvoorbeeld ook 'n koeëlwond in die kop of gif in die maag gehad het, sou dit verstaanbaar wees indien hy oor ander doodsoorsake spekuleer aangesien hy dalk tussen verskillende moontlike oorsake sou moes kies. 'n Dolk in die hart van 'n dooie persoon, sonder enige ander relevante feite, gee reeds 'n *prima facie*-aanduiding van die doodsoorsaak en om die dolk in die hart "weg te dink", is

'n nuttelose oefening. 'n Ewe verkeerde benadering blyk uit 'n voorbeeld wat appèlregter Corbett in die *Siman*-saak *supra* 915 gee:

> "So, take a very simple example, where A has unlawfully shot and killed B, the test [d w s *conditio sine qua non*] may be applied by simply asking whether in the event of A not having fired the unlawful shot (i e by a process of elimination) B would have died."

As hierdie voorbeeld iets bewys, dan is dit dat *conditio sine qua non* beslis geen toets is nie want eers verklaar regter Corbett uitdruklik dat A vir B wederregtelik doodgeskiet het (die regter stel dit dus as 'n feit dat A inderdaad B se dood veroorsaak het), en daarna word die afvuur van die dodelike skoot skielik weggedink om te "toets" of dit wel die oorsaak van dood was! Die appèlregter gebruik die *conditio sine qua non*-formule ooglopend slegs om 'n reeds bepaalde kousale verband uit te druk en nie om vir kousaliteit te "toets" nie.

Vervolgens moet vasgestel word waarom Van Rensburg werk met die sogenaamde positiewe formule van *conditio sine qua non* ("voorwaarde waarsonder . . . wel") en of dit die korrekte werkswyse is. In sy benadering tot *conditio sine qua non* aanvaar Van Rensburg tereg dat dit sinloos is (soos *supra* aangetoon) om 'n handeling weg te dink en, terwyl mens aan *niks anders dink nie*, te probeer vasstel of die gevolg ook wegval al dan nie. In die tweede voorbeeld hierbo aangehaal (par 3 *supra*) verklaar hy dat indien mens 'n handeling sou wegdink en aan niks anders dink nie, 'n mens altyd tot die gevolgtrekking sal kom dat die handeling die gevolg veroorsaak het aangesien *niks* tog nie *iets* kan veroorsaak nie! (Die korrektheid van hierdie standpunt word geïllustreer deur die voorbeelde van Van der Merwe en Olivier en Corbett AR wat *supra* behandel is.) Aangesien dit so vanselfsprekend en ooglopend is dat die blote wegdink van 'n handeling op sigself niks kan sê van 'n kousale verband tussen die handeling en 'n gevolg nie, benader hy *conditio sine qua non* op die basis dat vasgestel moet word of *ander* antesedente in 'n feitestel nie die alleenoorsaak van 'n gevolg was nie. *'n Gevolg het tog inderdaad ingetree en is deur iets veroorsaak en die enigste manier waarop conditio sine qua non as kousaliteitstoets sou kon funksioneer, is om die hipotetiese verloop van gebeure te probeer vasstel sonder die handeling wat weggedink word.* Maar soos uit die voorbeelde in paragraaf 3 *supra* blyk, stel ook hierdie toepassing van *conditio sine qua non* geen kousaliteitstoets daar nie. Van Oosten (met wie Snyman 63 saamstem) se beskrywing van hierdie interpretasie en toepassing van *conditio sine qua non* as 'n fout, beteken terselfdertyd die einde van hulle eie standpunt aangesien al wat dan oorbly en wat hulle as kousaliteitstoets beskryf (die negatiewe formule van *conditio sine qua non* as "voorwaarde waarsonder . . . nie"), die blote wegdink van 'n handeling is wat op geen werkbare toets dui nie.

Van Rensburg se toepassing van die sogenaamd verkeerde formule van *conditio sine qua non* is egter in ooreenstemming met hoe ander skrywers soos De Wet (sien De Wet en Swanepoel 63 en vgl ook Van Oosten 11–12 256) en Hunt (sien *South African criminal law and procedure* (1982) 345) hierdie teorie benader. Voorts klop die gebruik van die "verkeerde formule" ook met *dicta* uit die regspraak (sien bv *R v Makali* 1950 1 SA 340 (N)). Wat die standpunt van die praktyk betref, kan ook verwys word na die *Siman*-saak *supra* 915 waar appèlregter Corbett die volgende sê:

> "This test is applied by asking whether but for the wrongful act or omission of the defendant the event giving rise to *the loss sustained by the plaintiff would have occurred*

> [my beklemtoning] . . . In many cases, however, the enquiry requires the substitution of a hypothetical course of lawful conduct for the unlawful conduct of the defendant . . ."

Hierdie aanhaling dui nie daarop dat mens *conditio sine qua non* kan toepas deur bloot 'n handeling weg te dink en te vra of die relevante gevolg ook wegval nie, maar klop met Van Rensburg se "positiewe" formule van *conditio sine qua non* waarteen hy dan sy kritiek rig.

Alhoewel Snyman (60) hom by Van Oosten skaar in die betoog dat Van Rensburg met die verkeerde formule van *conditio sine qua non* werk, is eersgenoemde skynbaar nie konsekwent nie. Eers formuleer hy die *conditio sine qua non*-toets soos in paragraaf 2 *supra* uiteengesit, dit wil sê ingevolge waarvan mens probeer kyk of 'n gevolg wegval as jy 'n handeling wegdink. Maar net hierna verduidelik hy dit verder:

> "Die aan- of afwesigheid van 'n oorsaaklike verband tussen handeling en gevolg word volgens hierdie toets bepaal deur 'n denkbeeldige eliminasiemetode te volg: die *werklike* oorsaaklike verloop *met* inagneming van die handeling van X word vergelyk met die *moontlike* oorsaaklike verloop *sonder* die handeling van X."

Hierdie metode wat Snyman beskryf, is maar wesenlik dieselfde as die een wat Van Rensburg gebruik in die eerste voorbeeld in paragraaf 3 *supra* aangehaal. Van Rensburg maak dit juis duidelik dat dit onsinnig is om bloot iets weg te dink en dan te vra of die gevolg verdwyn aangesien niks nie iets kan veroorsaak nie en mens deur so 'n proses noodwendig tot die gevolgtrekking sal kom dat dit wat jy weggedink het, oorsaak van die betrokke gevolg is. Ook Snyman se kritiek teen Van Rensburg se aanwending van *conditio sine qua non* en die afleidings wat laasgenoemde daaruit maak, oortuig dus nie.

Die gevolgtrekking uit die voorafgaande is dat Van Rensburg nie met die verkeerde formule van *conditio sine qua non* werk nie en dat sy kritiek teen hierdie teorie nie op hierdie grond afgewys kan word nie.

Alhoewel Van der Merwe en Olivier (197–199) al Van Rensburg se besware teen *conditio sine qua non* verwerp, gaan hulle nie self op die kern van sy argumente in om dit te probeer weerlê nie. Hulle verwerping van sy argumente is dus grootliks ongemotiveerd en dra daarom min gewig. Daar kan ook verwys word na Scott (1985 *De Jure* 137) se verwerping van Van Rensburg se argumente as sou dit onder meer "werklikheidsvreemd" wees (maar sien ook 1977 *De Jure* 190). Dit moet egter duidelik wees dat vir sover Van Rensburg aantoon dat die gebruik van *conditio sine qua non* as "toets" op denkfoute en selfbedrog neerkom, sy standpunte nie werklikheidsvreemd kan wees nie.

Ten slotte kan daarop gewys word dat Boberg die meriete van Van Rensburg se standpunt teen *conditio sine qua non* as toets insien en onder andere verklaar (384-385):

> "The cogency of Van Rensburg's arguments cannot be denied. . . [His] arguments have a cogency that makes them difficult to resist."

6 Die standpunt van die appèlafdeling oor *conditio sine qua non*

Dit is vervolgens nodig om te kyk na sekere uitsprake van die appèlafdeling wat soms voorgehou word as sou dit dui op 'n aanvaarding van die *conditio sine qua non*-teorie as kousaliteitstoets. Uit uitsprake van veral die afgelope twintig jaar blyk dit dat die appèlafdeling graag *conditio sine qua non*-terminologie

gebruik in die beskrywing van 'n kousale verband en dat dit ook as "toets" vir feitelike kousaliteit bestempel word.

In *Da Silva v Coutinho* 1971 3 SA 123 (A) 147 verklaar appèlregter Jansen dat alhoewel dit nie nodig is om in besonderhede op kousaliteit in te gaan nie, die optrede van die verweerder 'n *conditio sine qua non* van die skade was en gebly het. Die hof het dus hier bloot 'n bestaande kousale verband beskryf en niks meer nie.

In *S v Mokoena* 1979 1 PH H13 (A) verklaar die hof:

> "By die beoordeling van die kousaliteitsvraag ... dui die oorwig van gesag op aanvaarding deur ons howe van die *conditio sine qua non*-leerstuk. Hiervolgens word elke insident in die voorafgaande aaneenskakeling van gebeurtenisse wat vir die bestaan van 'n bepaalde toedrag of eindresultaat onontbeerlik is, juridies as oorsaak aangemerk ... Het die beskuldigdes nie die oorledene in 'n bedenklike toestand bewusteloos of halfbewusteloos agtergelaat nie, spreek dit vanself dat hy nie in die brandende huis sou gebly het nie."

Conditio sine qua non is ook nie hier as 'n selfstandige *toets* vir kousaliteit gebruik nie. 'n Antesedent wat tot 'n gevolg bygedra het, kan inderdaad as *conditio sine qua non* van daardie gevolg beskryf word maar dan moet natuurlik eers op 'n ander manier vasgestel word of mens wel met so 'n antesedent te make het. Daar kan nie aanvaar word dat die hof 'n sirkelredenasie gevolg het waarvolgens die *gevolgtrekking* dat 'n kousale verband bestaan, ook *as toets* vir die vasstelling van 'n kousale verband aangesien word nie. (Dieselfde opmerking is ook geldig t a v *S v Haarmeyer* 1971 3 SA 43 (A) – welke beslissing in ieder geval nie duidelik genoeg is om werklik as gesaghebbend aangemerk te word nie: sien bv De Wet en Swanepoel 163.)

In *Minister of Police v Skosana supra* waar deliktuele aanspreeklikheid weens 'n late ter sprake was, het waarnemende appèlregter Viljoen wat 'n minderheidsuitspraak gelewer het (maar met wie die meerderheid wat hierdie aspek betref op gekwalifiseerde wyse saamgestem het: sien 35), verklaar dat *conditio sine qua non* die enigste logiese kousaliteitstoets is. Van Rensburg (1977 *TSAR* 101 e v) betoog egter in hierdie verband dat sowel regter Viljoen se opmerking oor *conditio sine qua non* as die meerderheid se instemming hiermee *obiter dicta* was. Dit blyk in ieder geval uit die volgende woorde van appèlregter Corbett (35) wat namens die meerderheid uitspraak gegee het, dat hy deur die uitdrukking *conditio sine qua non* waarskynlik niks meer wou aandui nie as dat die bewese oorsaak van 'n gevolg as *conditio sine qua non* van 'n gevolg beskryf kan word:

> "[G]enerally speaking ... no act or omission can be regarded as a cause in fact unless it passes this test."

Van Rensburg (1977 *TSAR* 112) verduidelik die vasstelling van feitelike kousaliteit by 'n late soos volg:

> "Om die moontlike kousale werking van 'n late te bepaal, moet 'n mens die handeling wat pligsmatig verrig moes gewees het, '*indink*' in die gebeure wat werklik plaasgevind het, dit wil sê 'n mens moet jou 'n voorstelling maak van 'n hipotetiese stel gebeure waar al die werklike gebeure dieselfde bly met die toevoeging van die handeling wat die verweerder moes verrig het, maar nagelaat het om te verrig. Blyk dit dat die gewraakte gevolg in so 'n geval sou uitgebly het, was die late wel 'n oorsaak van die gevolg, anders nie. Hierdie metode kom nie op 'n toepassing van die *conditio sine qua non*-teorie neer nie, aangesien dit nie 'n eliminasie behels nie maar 'n byvoeging."

Elders (*Juridiese kousaliteit* 64–65) sê Van Rensburg ook nog die volgende oor die beweerde suksesvolle aanwending van *conditio sine qua non* by 'n late:

> "By die vasstelling van 'n kousale verband tussen 'n bepaalde *late* en 'n bepaalde gevolg, kan gerieflikerwys 'n metode gevolg word wat lyk op die *conditio sine qua non*-metode, maar wat nie daarmee ooreenstem nie, en ook nie mank gaan aan die gebreke daarvan nie . . . Waar dit blyk dat 'n persoon deur 'n normstrydige handeling 'n bepaalde gevolg veroorsaak het, is dit *soms* moontlik én sinvol om te vra wat sou gebeur het as hy inderdaad ooreenkomstig die bepaalde norm gehandel het. In so 'n geval is 'n mens egter nie besig met die kousaliteit van sy handeling as geheel nie, maar met die juridiese vraag of die normoortreding relevant was met betrekking tot die intrede van die gevolg."

Oor die "toets" van *conditio sine qua non* by 'n late is daar in die algemeen nie veel duidelikheid nie aangesien byvoorbeeld Van der Merwe en Olivier (224) beweer dat die late "weggedink" moet word terwyl hulle elders (bv 199) skynbaar met die "indink" van 'n hipotetiese handeling (*conditio cum qua non*) in die gegewe feite werk. Is die wegdink van 'n late altyd dieselfde as die vervanging daarvan deur positiewe optrede? Dit is vir doeleindes van hierdie aantekening onnodig om verder op die kwessie van *conditio sine qua non* by 'n late in te gaan behalwe om te beklemtoon dat dit ook nie in sodanige gevalle werklik as kousaliteitstoets aangewend kan word nie – 'n standpunt wat skynbaar ook deur De Wet (1941 *THRHR* 134) aanvaar word (sien in die algemeen oor *conditio sine qua non* en 'n late Boberg 384–385 397–400; Van Oosten 30–33; *S v Van As* 1967 4 SA 549 (A); Visser en Vorster *General principles of criminal law through the cases* (1987) 117–120).

Ook uit die uitspraak in *Standard Bank of South Africa v Coetsee* 1981 1 SA 1131 (A) is nie steun te vind vir die toepassing van *conditio sine qua non* as *toets* nie. In die uitspraak van appèlregter Miller met wie die meerderheid saamgestem het, word boonop verwys na *Ranger v Wykerd* 1977 2 SA 976 (A) 991 waar die volgende gesê word:

> "One of the problems sometimes encountered in seeking to apply the measure is whether or not the fraud complained of did occasion, as cause and effect, the alleged patrimonial loss. This involves ascertaining whether the fraud influenced the claimant's mind and conduct in entering into the contract in question or his agreeing to particular terms thereof and, if so, to what extent."

Hierdie *dictum* dui op 'n verstaanbare en positiewe benadering tot die vasstelling van 'n feitelike kousale verband en gaan nie mank aan die spekulasie en sirkelredenasie wat eie is aan 'n poging om *conditio sine qua non* as toets toe te pas nie.

Die beslissing in *S v Daniëls* 1983 3 SA 275 (A) ('n saak waarin daar geen *ratio decidendi* is wat deur 'n meerderheid onderskryf is nie en waarin die appèlregters die feite verskillend benader het) bevat in twee uitsprake (dié van appèlregters Trengove en Jansen) skynbare steun vir die toepassing van *conditio sine qua non*. Die betrokke uitsprake gaan egter nie verder as om bloot *conditio sine qua non* te gebruik as 'n wyse om die bestaan van 'n kousale verband te beskryf nie.

In die *Siman*-saak ('n saak oor beweerde wanvoorstelling) gaan appèlregter Corbett (914–918) in die *minderheidsuitspraak* in besonderhede in op die toepassing van *conditio sine qua non* as kousaliteitstoets. Daar is reeds (par 5 *supra*) gewys op die feit dat regter Corbett sonder twyfel *conditio sine qua non* soms so "toepas" dat hy dit bloot gebruik om sy gevolgtrekking dat 'n handeling inderdaad 'n gevolg veroorsaak het, op 'n ander manier uit te druk. Uit die lang bespreking van die appèlregter blyk dit voorts dat hy soms nalatigheid en kousaliteit met mekaar verwar. So verklaar hy byvoorbeeld (915G–H):

> "A straightforward example of this would be where the driver of a vehicle is alleged to have negligently driven at an excessive speed and thereby caused a collision. In order to determine whether there was factually a causal connection between the driving of the vehicle at an excessive speed and the collision it would be necessary to ask the question whether the collision would have been avoided if the driver had been driving at a speed which was reasonable in the circumstances. In other words, in order to apply the but-for test one would have to substitute a hypothetical positive course of conduct for the actual positive course of conduct."

Hier gebruik die appèlregter klaarblyklik die "but-for"-toets in die sin van 'n vergelyking van redelike optrede met onredelike optrede. In die voorbeeld is dit duidelik dat die betrokke bestuurder die botsing veroorsaak het en die vraag is net of die redelike man die gevolg sou voorkom het deur stadiger te ry. Hierdie ondersoek is deel van die nalatigheidstoets (sien bv *Kruger v Coetzee supra* 430 en par 5 *supra*). Ook regter Corbett se verdere poging om ten aansien van die feite van die geval 'n kousale verband tussen 'n wanvoorstelling en skade vas te stel deur die wanvoorstelling met 'n ware voorstelling te vervang en so die hipotetiese kousale verloop te probeer bepaal, is klaarblyklik nie soos byvoorbeeld Van Oosten en Van der Merwe en Olivier (sien *supra*) die toepassing van *conditio sine qua non* as toets beskryf nie. Dit is onnodig om hier op kousaliteit by 'n wanvoorstelling in te gaan (sien bv Neethling, Potgieter en Visser 251), behalwe om te meld dat volgens die "wegdink"-formule van *conditio sine qua non* (sien *supra*) die bestaan van 'n kousale verband tussen 'n wanvoorstelling en skade waarskynlik nie bepaal moet word deur die wanvoorstelling "waar te dink" nie (soos Corbett AR doen), maar deur die wanvoorstelling bloot "weg te dink". In die geheel word regter Corbett se bespreking van *conditio sine qua non* gekenmerk deur 'n benadering waarvolgens antesedente soms bloot weggedink word en soms deur hipotetiese "antesedente" vervang word – 'n uiteensetting wat 'n taamlik verwarrende beeld van die toepassing van *conditio sine qua non* gee.

Die *meerderheid* van die hof in hierdie saak volg 'n ander benadering tot kousaliteit (907–908). Die hof wil klaarblyklik nie die "but for"-toets toepas soos deur regter Corbett aanvaar nie:

> "That being so, I think that it is wrong or inappropriate, in applying the 'but for' test to M's misstatement, to eliminate it and substitute another, different statement to the effect that the Bank was willing to procure the forward cover that afternoon provided S produced to M the requisite evidence of the transactions expeditiously. For that hypothetical statement would be entirely contrary to or inconsistent with M's refusal and would postulate an unrealistic or artificial premise on which to determine the issue of causation . . . Moreover, the present is a case in which no difficulty or injustice arises in applying the ordinary, simple 'but for' test to M's misstatement and paying due regard to his refusal. There is therefore no need to resort to the 'elimination' or 'substitution' theory."

Die "gebruik" van die "but for"-toets hier was dus klaarblyklik net 'n manier om *die vraag te stel* of M se optrede oorsaak van die skade was. 'n Onmiddellike antwoord op hierdie vraag was daar nie aangesien daar volgens die hof nie getuienis was wat 'n kousale verband bewys nie. In die geheel is daar deur die meerderheid 'n korrekte benadering tot feitelike kousaliteit gevolg wat nie strook met die argument dat *conditio sine qua non* as "toets" aangewend kan word bloot deur 'n handeling weg te dink nie. Die meerderheid se behandeling van die kousaliteitsvraag is waarskynlik in ieder geval *obiter* aangesien bevind is dat daar geen bewys was dat M nalatig opgetree het nie.

Ten slotte moet verwys word na *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) waarin appèlregter Corbett onder meer die volgende sê (832E–H):

> "The question of causation, especially in the field of delict, has been considered by this Court in a number of recent cases ... I do not propose to canvass fully the discussion of this question in these judgments. Suffice it to say that it is generally recognised that causation in the law of delict gives rise to two distinct enquiries. The first, often termed 'causation in fact' or 'factual causation', is whether there is a factual link of cause and effect between the act or omission of the party concerned and the harm for which he is sought to be held liable; and in this sphere the generally recognised test is that of the *conditio sine qua non* or the 'but for' test. This is essentially a factual enquiry. Generally speaking no act or omission can be regarded as a cause in fact unless it passes this test."

Hierdie *dictum* gaan nie verder nie as om die bekende gebruik te bevestig waarvolgens 'n handeling wat 'n oorsaak is van 'n gevolg, as *conditio sine qua non* van die gevolg beskryf word. Hoe die "factual enquiry" waarmee vasgestel word of 'n handeling só beskryf kan word (en wat eintlik die "ware" toets vir kousaliteit is) daar uitsien, deel die hof egter nie mee nie. In ieder geval het dit nie hier oor 'n deliktuele of strafregtelike vraag gehandel nie sodat dit waarskynlik nie vir die hof nodig was om dieper op die saak in te gaan nie.

In die lig van die voorafgaande bespreking moet Van der Merwe en Olivier se stelling (224) dat

> "[i]n ons appèlhof ... die *conditio sine qua non*-toets al telkemale aangewend [is] ..."

as taamlik oordrewe beskou word. Sekere regters van die appèlafdeling het 'n voorliefde daarvoor om 'n reeds vasgestelde kousale verband in terme van *conditio sine qua non* uit te druk, maar daar is geen werklike gesag vir *conditio sine qua non* as 'n ware kousaliteitstoets soos dit deur sekere skrywers gepropageer word nie. Indien die appèlafdeling inderdaad *conditio sine qua non* as toets wil aanwend, sal hierdie hof rekening moet hou met die kritiek daarteen en kan verwag word dat hy in staat sal wees om sodanige kritiek na 'n behandeling daarvan te weerlê. 'n Aanvaarding van *conditio sine qua non as toets* sonder om op die kritiek daarteen in te gaan, kan nie werklik gesaghebbend en oortuigend wees nie.

7 Die vasstelling van 'n feitelike kousale verband

Aangesien *conditio sine qua non* as kousaliteits*toets* verwerp moet word, ontstaan die vraag welke maatstaf, indien enige, in hierdie verband aangewend kan word. 'n Belangrike standpunt van diegene ten gunste van *conditio sine qua non* (sien bv Van der Merwe en Olivier 199; Scott 1985 *De Jure* 137; Van Oosten 24), is dat die verwerping daarvan nie aanvaar kan word alvorens 'n beter kousaliteitstoets gevind is nie. Nou moet mens natuurlik in gedagte hou dat *conditio sine qua non* in elk geval geen kousaliteitstoets is nie en dat daar in effek nie gevra word vir 'n "beter" toets nie maar bloot vir *enige* kousaliteitstoets.

Die feit dat die bepaling van 'n feitelike kousale verband in praktyk betreklik min probleme oplewer, bewys dat daar inderdaad geen behoefte aan 'n algemene en omvattende "toets" is om kousaliteit mee te bepaal nie. Dit is ook nie moontlik om 'n "toets" te formuleer wat alle gevalle kan dek nie aangesien die moontlikhede van oorsaak en gevolg te ingewikkeld, omvangryk en uiteenlopend kan wees om in 'n enkele algemene toets te beliggaam.

Die kenmerk van 'n kousale verband is dat *een feit uit 'n ander volg* (Van Rensburg 141 152) en die bestaan van 'n kousale verband word soos enige ander feit deur die getuienis bepaal wat aan die beoordelaar voorgelê word. Van Oosten (24) het egter die volgende vrae in hierdie verband:

> "Wie en wat is die beoordelaar, moet hy 'n subjektiewe of 'n objektiewe oordeel vel, moet hy sy oordeel grond op sy ervaring *ex ante facto* of *ex post facto*, hoe gaan hy gevalle wat deskundige kennis vereis beoordeel, hoe betroubaar is sy waarneming, hoe wyd strek sy ervaring, van watter nut gaan sy waarneming wees in gevalle van kumulatiewe veroorsaking of deelneming aan gevolgsmisdade ensovoorts?"

Dit is egter nie nodig om die vrae van Van Oosten hier te beantwoord nie aangesien dit ewe goed geld ten aansien van die gebruik van die *conditio sine qua non*-toets wat hy voorstel.

Vir die vasstelling van 'n kousale verband, is *kennis en ervaring* nodig (sien ook De Wet 1941 *THRHR* 134). Hierdie kennis kan van 'n eenvoudige aard wees (byvoorbeeld dat 'n vuurhoutjie by petrol 'n brand veroorsaak) of dit kan van 'n deskundige aard wees (byvoorbeeld dat die eet van kaas terwyl 'n sekere soort medisyne gebruik word, tot beroerte lei – vgl *Alston v Marine and Trade Ins Co Ltd* 1964 4 SA 112 (W)). Sonder kennis dat 'n sekere antesedent 'n bepaalde gevolg *kan* veroorsaak, is dit onmoontlik om in 'n konkrete geval te bepaal of 'n sekere handeling wel 'n gewraakte gevolg *veroorsaak het*. Aangesien daar geen towerformule is aan die hand waarvan 'n kousale verband in die algemeen bepaal kan word nie, sal die bestaan van sodanige verband van die feite van 'n bepaalde geval afhang; en, soos gestel, word die bestaan van 'n kousale verband daardeur gekenmerk dat die een feit uit 'n ander volg. Of dit die geval is, moet dan bepaal word deur middel van menslike ervaring en kennis in die algemeen en dié van die beoordelaar van die feite in die besonder. Feitelike kousaliteit sal dus soos enige ander feit in geskil op die getuienis beslis word en geen algemene "formule" of "toets" kan 'n feitelike kousale verband bepaal of die bepaling daarvan vergemaklik nie (sien in die algemeen Neethling, Potgieter en Visser 152–153).

'n Goeie voorbeeld word deur *Ocean Accident and Guarantee Corporation v Koch* 1963 4 SA 147 (A) gebied. In dié saak moes die hof beslis of die verweerder, die derdepartyversekeraar van 'n motor waarmee die bestuurder op nalatige wyse agter in die motor van die eiser vasgery het, aanspreeklik gehou kon word vir die koste opgeloop weens 'n trombose-aanval wat na bewering mede-veroorsaak is deur 'n voortdurende angstoestand wat weer sou gevloei het uit 'n nekbesering wat die eiser in die ongeluk opgedoen het. *In casu* het die meerderheid van die hof in appèl beslis dat dit nie op grond van die mediese getuienis moontlik was om te sê dat die uiteindelike trombose-aanval die feitelike gevolg van die ongeluk was nie. Die hof het tot hierdie gevolgtrekking gekom sonder om die *conditio sine qua non*-"toets" te gebruik.

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EENPARIGE TOESTEMMING EN SPESIALE BESLUITE

Daar word geruime tyd reeds aangevoer (sien Beuthin "The principle of unanimous assent" 1974 *SALJ* 2; "More about special resolutions and unanimous

assent" 1981 *SALJ* 261; Fourie "Unanimous assent and special resolutions" 1979 *SALJ* 263) dat die beginsel van eenparige toestemming in die maatskappyereg (sien hieroor in die algemeen De Wet en Yeats *Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 664 vn 938; Cilliers en Benade *Maatskappyereg* (1982) 292) nie toepaslik is by aangeleenthede waarvoor 'n spesiale besluit vereis word nie. Daarteenoor is daar egter skrywers wat beweer (vgl Cilliers en Benade *op cit* 294; Cilliers, Benade, Botha, Oosthuizen en De la Rey *Korporatiewe reg* (1987) 201) dat die onderliggende gedagtegang van hierdie beginsel wel sodanige toepassing verg, mits die resultaat ooreenkomstig artikels 200–203 van die Maatskappywet 61 van 1973 by die registrateur geregistreer word.

Ek was nog altyd van mening dat 'n besluit wat op informele wyse geneem is *sonder* dat 'n algemene vergadering gehou is, nie kragtens ons huidige Maatskappywet registreerbaar is nie (vgl Fourie *loc cit* 263). Cilliers en Benade (*Maatskappyereg* 294 vn 12) was egter van mening dat in die praktyk spesiale besluite ingevolge eenparige toestemming reëlmatig ingedien en geregistreer word deur gebruik te maak van Vorm CM 25 waardeur lede afsien van die vereiste dat behoorlike kennis gegee word en wat normaalweg impliseer dat geen vergadering hoegenaamd in werklikheid gehou is nie. Hierdie opvatting skyn nie korrek te wees nie. Op die betrokke vorm wat deur die lede ingevul word, stem hulle slegs toe om 'n spesiale besluit te neem op 'n vergadering waarvan minder as 21 dae kennis gegee is. 'n Kennisgewing moes dus gegee gewees het en 'n vergadering moes gehou gewees het aangesien die datum van die vergadering ook op die betrokke vorm ingevul moet word. Die praktyksreëling ingevolge hierdie vorm regverdig gevolglik geensins die afleiding dat die beginsel van eenparige toestemming ook ten opsigte van spesiale besluit geld nie. Waar lede dus in die verlede 'n besluit wat op informele wyse verkry is sonder dat 'n kennisgewing uitgereik is of 'n vergadering gehou is, as 'n spesiale besluit deur middel van hierdie betrokke vorm wou registreer, sou hulle noodwendig 'n valse verklaring op die betrokke vorm moes maak. In die jongste uitgawe van hul boek (*Korporatiewe reg* 201 vn 15) erken Cilliers, Benade *et al* egter dat hul standpunt aanvegbaar is aangesien verklaar word:

> "Die huidige praktyk van die Registrateur dat 'n afskrif van die kennisgewing waardeur die vergadering belê is waarop die spesiale besluit aangeneem is in alle gevalle die spesiale besluit soos ingedien vir registrasie moet vergesel, plaas ons standpunt egter onder verdenking."

Die doel van hierdie aantekening is om vas te stel of alle probleme met betrekking tot hierdie aangeleentheid nou opgelos is deur die onlangse wysiging van artikel 199 Wet 61 van 1973 deur Wet 63 van 1988 wat nou subartikel 3A invoeg. Gemelde subartikel bepaal soos volg:

> "Ondanks die bepalings van subartikel (1) kan 'n besluit met die skriftelike toestemming, op die voorgeskrewe vorm, van al die lede van die maatskappy as 'n spesiale besluit voorgestel en aangeneem word op 'n vergadering waarvan nie kennis in subartikel (1) bedoel, gegee is nie. 'n Afskrif van so 'n toestemming, op die voorgeskrewe vorm, moet by die Registrateur ingedien word tesame met 'n afskrif van die spesiale besluit."

In die memorandum oor die oogmerke van die Maatskappywysigingswetsontwerp 77 van 1988 word verklaar:

> " 'n Spesiale besluit mag slegs op 'n algemene vergadering van 'n maatskappy aangeneem word, en is slegs registreerbaar indien behoorlike kennis van die vergadering en van die spesiale besluit wat daarop geneem staan te word, aan alle lede gegee is. Hierdie vereiste van die Wet is daarop gemik om die belange van lede te beskerm, maar kan 'n onbehoorlike swaar las plaas op klein maatskappye met slegs een of baie min lede, veral in daardie gevalle waar al die lede bereid is om afstand te doen van hulle reg om sodanige

> kennisgewing ten opsigte van 'n bepaalde spesiale besluit te ontvang. Voorsiening word gemaak om toe te laat dat 'n spesiale besluit aangeneem kan word op 'n vergadering waarvan kennis soos deur die Wet vereis, nie gegee is nie, mits al die lede eenparig toegestem het tot die aanneem van die spesiale besluit."

Die pertinente vraag wat beantwoord moet word, is of die beginsel van eenparige toestemming nou, ook wat spesiale besluit betref, deur hierdie nuwe subartikel statutêre beslag verkry. Ek (1979 *SALJ* 263) het reeds daarop gewys dat behoorlike kennisgewing van die vergadering en die neem van die spesiale besluit op die vergadering onder meer 'n statutêre vereiste vir die registrasie van 'n spesiale besluit is. Volgens die bewoording van die nuwe subartikel is dit duidelik dat die lede deur eenparige toestemming op informele wyse kan afsien van die verpligting om enige kennisgewing van die vergadering te ontvang. Kennisgewing van die vergadering is dus nou nie meer 'n vereiste nie mits lede ingevolge die gewysigde artikel 200(1) 'n afskrif van die toestemming in artikel 199(3A) beoog, indien tesame met die spesiale besluit.

Regverdig die feit dat kennisgewing van die vergadering in 'n bepaalde geval nie meer 'n vereiste is nie, die afleiding dat die wetgewer nou ook die hou van 'n vergadering as onnodig beskou? Die woorde van subartikel 3A regverdig nie hierdie afleiding nie. Daar word duidelik bepaal dat "die spesiale besluit voorgestel en aangeneem [moet] word *op 'n vergadering* waarvan nie kennis gegee is nie" (my kursivering). Die hou van 'n vergadering is nog altyd 'n vereiste. Lede sal gebonde wees aan die betrokke spesiale besluit wanneer die vergadering gehou word weens hul eenparige toestemming. Eenparige toestemming dien in so 'n geval 'n dubbele funksie, naamlik afstanddoening van hul reg om kennisgewing te ontvang en gebondenheid aan die inhoud van 'n spesiale besluit.

Bogenoemde standpunt, naamlik dat die hou van 'n vergadering nog steeds 'n vereiste is, sal moontlik, soos in die verlede, deur sommige skrywers betwyfel word. Daar kan moontlik geargumenteer word dat dit die wetgewer se bedoeling was om die hou van 'n vergadering as onnodig te beskou aangesien daar nou uitdruklik afstand gedoen kan word deur lede van hul reg om sodanige kennisgewing te ontvang. So 'n opvatting word egter nie gesteun deur die woorde van die wet nie en selfs ook nie deur die memorandum hierbo aangehaal nie. Indien die wetgewer die hou van 'n vergadering nie meer as 'n vereiste wou stel nie, kon hy dit maklik gedoen het deur middel van 'n wetlike fiksie wat soos volg lui:

> " 'n Besluit kan met die skriftelike toestemming, op die voorgeskrewe vorm, van al die lede van die maatskappy waarin hulle afstand doen van hulle reg op kennisgewing van 'n vergadering, as 'n spesiale besluit voorgestel en aangeneem word, asof die besluit voorgestel en aangeneem was op 'n vergadering van die maatskappy."

As bogenoemde formulering die bedoeling van die wetgewer weergee, dan moes dit so bewoord gewees het. Die huidige bewoording regverdig egter nie die afleiding dat eenparige toestemming ten opsigte van spesiale besluite nou statutêre erkenning verkry het nie. Die huidige bewoording skep weer eens onsekerheid en gaan tot gevolg hê dat valse verklarings dat 'n vergadering wel gehou is soos in die verlede op die betrokke vorms gemaak gaan word.

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TEACHING JURISPRUDENCE: THE PROBLEMS OF THE POSITIVIST PARADIGM

It was Dicey (quoted in Gray *The nature and sources of the law* (1921) 134 147) who wrote that "jurisprudence is a word that stinks in the nostrils of the practising barrister". Although it is hoped that the same cannot be said of its effect on the olfactory senses of students, jurisprudence remains surely one of the most difficult subjects to teach in any legal curriculum, especially a curriculum in a South African university. Students' responses to it range, on the one hand, from those who simply wish to "know the law"on a given topic so as to equip themselves for practice, and who find jurisprudence frustrating and largely incomprehensible, to those students, on the other hand, who may have done some philosophy or politics in their first degrees and who find a half-course in jurisprudence superficial or insufficiently radical. One of the most difficult areas to teach is *positivism*. Most students are already vaguely acquainted with Dugard's description of legal positivism in South Africa as "the truth of the theory of command, and the need for the strict separation of law and morality" (Dugard "The judicial process, positivism and civil liberty" 1971 *SALJ* 183), and his criticism of the pro-executive perversion of positivism, a criticism which fails to distinguish between the real and the heretical versions of positivism (Gauntlett "Aspects of the value problem in judicial positivism" 1972 *Responsa Meridiana* 216). Many students thus commence their study of positivism in the firm belief that it is positivism alone which has led to a judicial rejection of legal values in South Africa; that some judges have, as a result of adopting a positivist attitude, developed a mechanical and wooden approach to statutory interpretation. Positivism is therefore approached by many with more than a faint antipathy. One has to commence its study by emphasising that legal positivism does not necessarily merit this summary rejection, and that an aversion to judicial evaluation is no true positivism, but may well be simply judicial obsequiousness to executive policy, concealed beneath a facade of greater objectivity.

In any discussion on legal positivism the fundamental problem is that of deciding what is meant by the term. Hart ("Positivism and the separation of law and morals" 1958 *Harv LR* 618) describes it as the simple contention that there is no necessary connection between law and morality – that it is in no sense true to say that laws reproduce or satisfy certain standards of behaviour although in fact they have often done so. MacCormick ("Law, morality and positivism" 1981 *Legal Studies* 132–133) lists the following as essential features of legal positivism today:

First of all, the independence of law from any particular moral values which are of universal application to all legal systems.

Secondly, positivism's emphasis on the social feature of law: its establishment by human beings in society (MacCormick 133). To acquire knowledge about the law, one examines it from a purely descriptive vantage point: identification precedes evaluation, which is a matter for the individual conscience and which determines the ultimate moral question of obedience. There is no privileged code, purpose or end, no evaluation which can provide a test of legality. The moral right of the individual to disobey injustice commanded in the name of the law is enshrined in Hart's positivism as the corner-stone of a liberal open

society (Blackman "Professor HLA Hart and the separation of law and morals: a liberal theory of law" in Corder (ed) *Essays on law and social practice in South Africa* (1988) 179). Hart's positivism is not seeking to impugn the validity of moral belief – simply to assert that the separation of law and morality is contained in his concept of law.

As Forsyth and Schiller ("The judicial process, positivism and civil liberty II" 1981 *SALJ* 220–221) point out, legal positivism is a theory of knowledge, not of law, and in order to discredit positivism or to reveal its limitations it is necessary to show that, as an epistemology, as a way of acquiring valid knowledge of law or of construing a claim, it is flawed. The key problem of epistemology may be posed as follows: "What are the proper standards for assessing the truth of beliefs about the world and how can one demonstrate in a rational way what makes these standards the proper ones?" This is the test to which the positivist paradigm must be subjected. Twentieth-century positivism as represented by Hart (*The concept of law* (1961) ch 1–5) attemps to improve Austin's purely external view of law. The hermeneutic approach adopted by Hart recognises the connection between rules and social attitudes to the rules but maintains that the theorist, in describing the legal system, need not himself subscribe to the moral values in the system he describes.

The true significance of Hart's concept of law lies in its methodological commitment to ordinary linguistic and social practice. It purports to be based on descriptive sociology and on the ordinary language philosophy of Wittgenstein and Austin. The very adoption of a positivist epistemology presupposes that we all share one ordinary language. In a legal context it assumes that people can refer or point to the authoritative sources of their law because they already have an adequate comprehension of what is meant by law. But is there in fact a fundamental test for distinguishing legal from other social standards? How can one describe what Hart's rule of recognition is before one can distinguish between law and other social phenomena? Goodrich ("Law and language: a historical and critical introduction" 1984 *Journal of Law and Society* 185) maintains that the language philosophy upon which positivism is based, is inadequate epistemologically. First, it assumes in its hermeneutic methodology a certain objectivity of legal language, suggesting that there is a non-subjective solution to the problem of meaning. Secondly, it assumes a separate legal language which is understood only by legally competent persons. This approach is in itself valuational and ideological. Thirdly, positivism's linguistic methodology tends to abstract language from its political and historical context by assuming that in a large number of cases the interpretation of statutes is dependent on a clear case of settled meaning and that it is only in the peripheral cases where the meaning is unclear that the judge is required to exercise his extra-legal discretionary powers. Fourthly, positivism fails to pay adequate attention to the relationship between meaning and power and to the fact that rules are often applied to maintain power and influence and not because they are regarded by officials as standards of conduct. Finally, positivism is unable to explain adequately social change or the emergence or disappearance of linguistic codes, and its emphasis on neutral value-free observation also fails to take full cognisance of the use of legal language as a rhetorical device. The theory and method of structuralism so closely associated with legal positivism have been queried by the deconstructionists such as Barthes and Derrida. Barthes (*On Racine* (Howard trans, 1972);

Critical essays 258–260 (Howard trans, 1972)) argues that meaning is produced by the relationship between reader and text – a form of discourse governed by interacting codes in reader and text: cultural, political, social and economic. Derrida (*Of grammatology* 18–26) emphasises the endless referral process of every text to another text. Meaning is further affected by this interplay of texts. As the referral process will differ depending on the reader's cultural, social or economic background, each reader will establish a different yet altogether valid meaning in the text. Ultimately the process of interpretation becomes largely subjective. Derrida draws an analogy between the legislature-statute-judiciary relationship and that of author-text-reader, pointing out that different judges will interpret the same provision in a statute differently, each interpretation establishing an equally valid meaning. So too, each word in a statute is but a sign in a system and subject to the process of referral or intertextuality which means that the meaning of each term is infinitely deferred to other signs in the system.

Hart's distinction between the internal and external point of view does recognise that validity only exists subjectively within the convictions of those who accept it from the internal point of view, but he believes this acceptance can be expressed objectively from the external view. However, in the task of interpretation the judiciary relies upon certain prescriptive guide-lines or principles which enjoy only a limited internal validity. From the external perceptive such interpretations cannot be expressed as objectively valid, since they are only subjectively valid in terms of the value systems by which each judge "decodifies" the law. The only reason why there is usually a high degree of conformity is that the texts belong to a shared legal system in which many of the judiciary share similar legal, cultural and socio-economic backgrounds; hence their processes of interpretation will be similar. Despite the lack of an absolute objective meaning, language fixes meaning sufficiently to ensure that legal doctrine has a framework for a particular type of political discourse. Deconstruction thus emphasises the responsibility of the judge by emphasising the availability of judicial choice. Derrida is fascinated by the elusive quality of language, expands Barthe's initial suggestion of an alliance between this new epistemology and the study of politics. It reveals the inability of legal positivism to explain the interpretative function of the judiciary. A greater recognition of the role of political ideology is required in order to encourage a greater degree of responsibility and creativity amongst our judiciary. Judicial activism in protection of human rights is usually clearly articulated in terms of a liberal legal ideology (see the dissenting judgments of Hoexter JA in *Omar v Minister of Law and Order* 1987 3 SA 859 (A) 909 and Friedman J in the Cape Court 1986 3 SA 306 (C)). However, a pro-executive stance or political ideology which is motivated by national security interests often fails to give reasons for the decision as evidenced by the approach of the majority judges in the *Omar* case *supra*. The positivist paradigm cannot explain how the majority in the *Omar* case reached its decision. It is only by a full examination of the cultural, social and economic backgrounds of the judges that one can appreciate the extent to which individual political ideology determined the outcome in favour of security considerations. The judgment in fact boils down to a "statement of politics" (Mathews "Omar v Omar" in "Focus on Omar" 1987 *SAJHR* 513). The divisions among the South African judiciary clearly demonstrated the contrast between the liberal legal ideology of some

judges and the political ideologies of others. One cannot describe the judicial process in this country without explaining such manifold inconsistency and contradictions in terms of ideology.

I turn now to the conceptual problem posed by positivism: whether a separation of the concept of law and morality is in fact possible. If morality is described as that which renders action right or wrong; and if law is perceived to be a purposive institution, aiming for particular objectives, then what it "is" and what it "ought to be" become linked. Hart has argued, however, in his famous debate with Fuller, that a judicial decision may be intelligent and purposive but still not moral (1958 *Harv LR* 613). Hart appears to ignore the fact that one of the chief characteristics of law is that the judges believe that they are engaged in a moral enterprise. The judicial oath should convince them of that. A judge might act legally and be morally wrong but this does not prove there is no necessary connection between law and a moral stance – it only proves that there may be no necessary connection between law and goodness. The purposes of law are ostensibly moral and in adopting those purposes the judiciary adopts a moral stance.

For Dworkin (*Law's empire* (1986) 631–632) legal rules are infused with ethical principles and ideals. Those principles which are legally binding are those which belong to the "soundest theory of the law"; that is the one which best coheres with and justifies these legal rules and doctrines. Judges appeal to principles in reaching determinate outcomes and in doing so are giving force to pre-existing legal obligations and not simply making a political choice among competing rules. But does the Dworkinian attempt to rescue legal determinancy by the incorporation of ethical principles and ideals succeed? What if there are competing opposed principles and ideals? Can there be one right answer – one answer which is best according to the soundest theory of the law in a society where irreconcilable visions of humanity and radically different aspirations for our common future compete? Dworkinian jurisprudence appears limited to liberal perceptions of a community's true morality (Kerruish "Coherence, integrity and equality in law's empire, a dialectical review of Ronald Dworkin" 1988 *International Journal of Sociology of Law* 51). Dworkin's conception of the soundest theory of the law seems to assume that there is some metalevel principle for determining the appropriate weights to be assigned to the different principles which may be applicable in a given case. In the South African context the principles of our law often have their weight and scope determined rather by an ideological power struggle – with the spectrum of political controversy being reproduced, albeit unconsciously, in the law (see Steyn J's judgment in *Bloem v State President* 1986 4 SA 1064 (O); see also Cameron "Nude monarchy: the case of South Africa's judges" 1987 *SAJHR* 341). Dworkin's theory is limited in its application to the South African situation: it could prevent judicial obsequiousness only if the judges were to assume that parliament, despite its sovereignty, is designed to serve a range of values associated with liberal democracy. Otherwise this model of judicial reasoning might well encourage more conservative judgments, given the political ideologies of some of our bench.

To conclude: the fundamental limitations of the positivist paradigm in my view are linguistic and conceptual. The ordinary language philosophy of Hart's positivism cannot explain the fundamental quality of law as an enterprise and

tends to ignore the problems of meaning inherent in language as a social discourse, which is subject to differing ideological interpretations. At every level of the implementation of law, morality of one kind or another will find its way into the law. MacCormick ("Challenging sociological definitions" 1977 *BJLS* 90) has stated that to confirm or confute positivist epistemology it is necessary to take up some position in the philosophy of language. Legal positivism offers the possibility of a grounded meaning in language which has an independent existence. But does language provide a basis for objectivity founded on a correspondence between communication and the real world, or is our situation such that we are limited by the historical or cultural specificity of the language we have made and through which we relate? Are not truth and knowledge more than the properties of our created language? It is from this perspective that the limitation of the positivist paradigm as an epistemology becomes revealed in its tendency towards an ahistorical view of language (Berman "Towards an integrative jurisprudence: politics, morality and history" 1988 *Cal LR* 779) and its marginal concern with the relationship between language and hierarchy and the social relations produced by and in language. We cannot describe law as social practice without facing the question Dworkin refers to as "sense": the question of what these propositions mean to those who make them ("Legal theory and the problem of sense" in Gavison (ed) *Issues in contemporary legal philosophy* (1987)). In South Africa, judicial realisation of the limitations of the positivist paradigm should lead to a greater awareness of the role of ideology, moving language to centre stage. This should encourage a greater sense of responsibility for judicial choice and a rejection of judicial servility or apathy in the face of oppressive executive policy.

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REKENAARS EN DIE REG*

Die toenemend belangrike rol wat rekenaars in die reg speel, is beklemtoon deur die wye verskeidenheid onderwerpe wat tydens die vierde internasionale kongres oor hierdie tema in tien sessies bespreek is. Die sessies is breedweg soos volg ingedeel: (i) Die rol van die staat by rekenarisering; (ii) die rekenaar en sy rol ten opsigte van regsgeskiedenis en regsfilosofie; (iii) die rekenaar en privaatreg; (iv) die rekenaar en strafreg; (v) die rekenaar en handelsreg; (vi) die rekenaar en omgewingsreg; (vii) die rekenaar en publiekreg; (viii) die rekenaar, volkereg en Europese gemeenskapsreg; (ix) die rekenaar en regspleging oor die algemeen in Italië; en (x) tegniese metodes om toegang tot inligting te verkry. Ondanks hierdie indeling was daar heelwat oorvleueling tussen die onderwerpe.

1 Die rekenaar en die staat

Die rol wat die rekenaar op die gebied van die staat kan speel, is tweeledig: eerstens is gewys op die omvattende hulpmiddel wat die rekenaar op die gebied van wetgewing en regulering kan wees, en tweedens op die rol wat die rekenaar

*Verslag oor die vierde internasionale kongres oor hierdie tema gehou te Rome 1988-05-16-21. Die kongres is deur bykans 1 800 persone, verteenwoordigend van 73 lande, bygewoon.

kan speel om hierdie reëls aan die onderdane van die staat bekend te maak. Die regering sou byvoorbeeld 'n medium soos videoteks (Beltel in Suid-Afrika) kon gebruik in plaas van die *Staatskoerant* om wette te promulgeer. Weens gapings in wetgewing is die diskresie van die regter egter nog nodig om die wette uit te lê en hier is kundige stelsels ("expert systems") waardevol as 'n soort tweede opinie. Nog 'n nut sou die vervanging van papierrekords met elektroniese databasisse wees.

Laasgenoemde aspek hou nietemin 'n bedreiging vir die individu in. Indien gegewens aangaande hom op die databasis beskikbaar is, kan inligting wat hy geheim wou hou nou *via* die rekenaar die wêreld ingestuur word. Beskerming van privaatheid deur middel van wetgewing is dus nodig maar die reg op privaatheid behoort nie misbruik te word om onnodige beperkings op rekenaartegnologie te plaas nie. By privaatheidsbeskerming is die kwessie van transnasionale datavloei ook 'n kompliserende faktor, aangesien lande nie dieselfde mate van beskerming bied nie. 'n Interessante vraag wat in hierdie verband gevra is, is of 'n omvattende burokratiese stelsel om persoonlike inligting te kontroleer (soos d m v die Engelse Data Protection Act, 1984) werklik effektiewe privaatheidsbeskerming sal bewerkstellig. (Hierdie aspekte het ook t a v die versameling van persoonsinligting deur private instansies (*infra* par 3) aandag geniet.)

Hoe dit ook al sy, wat soos 'n goue draad deur hierdie sessie geloop het, was dat die rekenaar 'n nuwe konsep of idee – as't ware 'n vierde dimensie – na vore laat tree het, naamlik dié van inligting. Inligting het, alhoewel dit van onstoflike aard is, 'n bepaalde ekonomiese waarde en behoort deur die owerheid gereguleer te word.

2 Die rekenaar, regsgeskiedenis en regsfilosofie

Wat die filosofie betref, is die interessante statistiese benadering van Stuart Nagel in sy bydrae "Computer-aided law decisions" noemenswaardig. Sy uitgangspunt is dat genoemde begrip kwalitatief anders is as "computer-aided clerical work" soos woordprosessering, litigasie-steun, die opspoor van bronne en kantoorboekhouding. Laasgenoemde groep kan maklik deur die rekenaar alleen hanteer word maar sodra 'n besluit geneem moet word, is 'n mens noodsaaklik en is die rekenaar slegs 'n hulpmiddel. Voorsittende beamptes hoef dus nie vir hul toekomstige brood en botter te vrees nie!

Die rol van die rekenaar is egter veral ten opsigte van die regsgeskiedenis beklemtoon. Veral in Italië heers groot belangstelling in hierdie verband. Sowel die bronne self (Romeinse reg) as die bibliografieë (bv van die Justiniaanse Kode) word gerekenariseer. In hierdie verband verdien die Irnerio-projek in Bologna (vernoem na die groot Irnerius) spesiale vermelding. Wat die Middeleeuse reg betref, is daar al veel vordering gemaak met die katalogisering en rekenarisering van Middeleeuse handskrifte en daar word gehoop dat die geheime boeke van die Vatikaan beskikbaar gestel sal word sodat deskundiges dit kan bestudeer. Daar is ook heelwat belangstelling in die rekenarisering van die verskillende geskiedkundige godsdienstige stelsels, byvoorbeeld van die Jode en Islam.

3 Die rekenaar en privaatreg

Die betrokkenheid van die rekenaar by die privaatreg het oor redelik uiteenlopende onderwerpe gehandel. Dit het gewissel van privaatheidsbeskerming (wat ook in Italië baie aandag geniet; in hierdie verband is vermeld dat daar 'n

"Convention for the protection of individuals with regard to automatic processing of personal data" is in 'n poging om dieselfde beskerming in alle lande te hê in die lig van die oor-die-grens-versending van persoonlike inligting) tot die gesondheidsgevare wat rekenaarterminale kan inhou en die registrasie van aktes per rekenaar. Alhoewel dit in Suid-Afrika 'n meer selfstandige gebied is, het die bewyskrag van rekenaardrukstukke ook by hierdie afdeling ter sprake gekom. Voorts is besin oor die regsgeldigheid van kontrakte per rekenaar gesluit asook oor die voordele om *pro forma*-voorbeelde van kontrakte wat baie gebruik word, op rekenaar te hou. 'n Verdere vraagstuk was wat die grondslag van aanspreeklikheid moet wees vir die verkopers of ontwikkelaars van defektiewe sagteware, of vir die skending van iemand se privaatheid wie se persoonlike besonderhede op jou databasis aangehou word. By eersgenoemde vraagstuk word daar nou wegbeweeg van die opvatting dat die verskaffer of skrywer van programmatuur " 'n deskundige" met absolute verantwoordelikheid teenoor die "onkundige" koper en verbruiker is; melding is gemaak van die verantwoordelikheid van laasgenoemde om sy behoeftes duidelik te spesifiseer en om te help ontwikkel aan die programme wat sy probleme kan help oplos.

Daar bestaan wydverspreide kommer dat die koms van die rekenaar baie eiendomlike "dinge" wat in die verlede as regtens liggaamlik geag is, oorgedra het na die terrein van die onliggaamlike, soos 'n lêer, 'n plan, 'n ontwerp, 'n rekord, ensovoorts. Daar behoort dus 'n herbepaling gedoen te word van die hele konsep van liggaamlike en onliggaamlike eiendom, insluitende inligting; sodanige herbepaling behoort te geskied deur 'n noukeurige ondersoek te loods na sowel verskeie onderdele van die siviele en strafreg as die sosiale, politieke, ekonomiese en morele agtergrond waarteen daardie regsbeginsels toegepas moet word. Veral die outeursregwette van verskillende lande behoort in hierdie verband aangepas te word om voldoende beskerming daar te stel; die beskerming behoort egter nie net die letter van die (program)kode te dek nie, maar ook die funksie of selfs die resultate van die funksie (vgl die huidige "look and feel"-kontroverse in die VSA).

Die besit en bemarking van inligting het ook aandag geniet: veral is gewys op die feit dat inligting waarskynlik 'n internasionale kommoditeit is, en dat daar 'n behoefte bestaan aan 'n internasionale konvensie wat 'n eenvormige benadering sal verseker.

Ten slotte kan die rekenaar ook deur gebruik van onder meer simulasies die hofprosedure aansienlik vergemaklik. Dit het veral geblyk uit 'n bydrae getitel "Meeting the challenge: the courtroom of the future", waar dit gaan oor 'n elektroniese hofsaal in Phoenix, Arizona, wat aan al die hofpersoneel onmiddellike en individuele toegang tot die gelewerde getuienis gee. Die "electronic blackboard" gee aan getuies die geleentheid om tekeninge te maak wat onmiddellik deel van die hofrekord word. Die ganse rekord is gereed wanneer die saak afgehandel is en kan per modem binne minute by die appèlafdeling wees!

4 Die rekenaar en strafreg

Hier is ook klem gelê op die wyses waarop rekenaars nie alleen die hofprosedure nie, maar ook die strafvoltrekkingsproses (ook in gevangenisse) kan vergemaklik en meer vaartbelyn kan maak, byvoorbeeld deur die hou van misdaadrekords. Daarbenewens is vrese uitgespreek oor die omvangryke geleentheid tot misdaad

waartoe die rekenaar aanleiding gee. (Heelwat nasionale en internasionale ondersoeke is al gedoen na die omvang van hierdie probleem asook na moontlike wysigings van bestaande reg om die probleem die hoof te bied.)

In laasgenoemde verband ontstaan die vraag of inligting die onderwerp van 'n saaklike reg en dus vatbaar vir diefstal kan wees. Franse regsgeleerdes beantwoord die vraag bevestigend deur inligting te omskryf as 'n saak wat vatbaar is vir toe-eiening (ongeag die onstoflike aard daarvan) aangesien dit oor die algemeen ekonomiese waarde het, aan iemand behoort en aangesien ander immateriële entiteite soos werfkrag en outeursreg reeds erken word. (M i geld lg faktor as 'n moontlike teenargument omdat die reg, ten minste op genoemde gebiede, alternatiewe voorsiening gemaak het.)

Ander interessante aspekte was die vraag watter persepsie mense van roofkopiëring van programmatuur het en of die beskerming van programmatuur by die strafreg tuishoort ("Software piracy: how is it perceived?"), of daar strafregtelike aanspreeklikheid vir die misbruik van kundige stelsels behoort te wees (bv t a v die kernongeluk by Three Mile Island), asook die probleem van die geweldige ekonomiese skade wat aangerig kan word deur "hacking" ('n soort elektroniese betreding van 'n rekenaar of rekenaarnetwerk sonder toestemming). Laasgenoemde is een gebied waar die bestaande strafreg definitief nie 'n voldoende antwoord het nie; die saak raak boonop meer aktueel as gevolg van die onlangse vlaag van "rekenaarvirusse".

5 Die rekenaar en handelsreg

Die beskerming van sagteware het baie aandag geniet, veral die vraag of die beskerming daarvan *via* die outeursreg of *via* patentreg behoort te geskied. Die regswese dwarsoor die wêreld word op die proef gestel om 'n bevredigende oplossing – wat steeds buite bereik is – te vind. (Die groot voordeel van die huidige beskerming ingevolge outeursreg is natuurlik die internasionale aard daarvan wat wedersydse beskerming moontlik maak.)

Wat die finansiële sy betref, is daar erkende en aanvaarde metodes om produksie en produksiefasiliteite te finansier. Probleme ontstaan egter by die finansiering van iets so ontasbaars soos 'n rekenaarprogram. Sagteware verteenwoordig elektroniese inligting en weë sal gevind moet word om die regte hierin te beskerm.

Daar is ook gelet op die invloed van die rekenaar op entrepreneursaktiwiteite in sowel die privaat- as publiekreg. Veral belastingreg skyn 'n vrugbare aanwendingsveld vir die rekenaar te wees, waarskynlik omdat die reëls gewoonlik statutêr en redelik eenvormig is, en daarom reduseerbaar tot 'n kundige stelsel soos die bekende TAXMAN-program is.

Selfs met die vooruitgang in gesentraliseerde inligting is 'n spesifieke probleem, naamlik die inligtingsanalises van gekonsolideerde balansstate, nog nie opgelos nie. Tot dusver was dit nie moontlik om die formaat van die aanbieding van inligting te standardiseer nie – die inligting se geldigheid kom gevolglik onder verdenking.

6 Die rekenaar en omgewingsreg

Die al hoe groter wordende rol van die rekenaar ten opsigte van omgewingsreg is beklemtoon. Die rekenaar is naamlik van uiterste belang vir die monitor van die vervaardiging en verspreiding van byvoorbeeld gevaarlike stowwe en vir die monitor van water-, grond- en atmosferiese besoedeling.

Die rekenaar stel gemeenskappe in staat om meer inligting vinniger te versprei, uit te ruil en vergelykende studies te doen. Daar kan ook met behulp van die rekenaar omvattende databasisse opgerig word oor aangeleenthede wat die hele Europese gemeenskap raak. Uitstekende voorbeelde van sulke databasisse is ECDIN (wat inligting oor chemiese stowwe bevat) en die baie gewilde ENLEX (wat alle aspekte rakende omgewingsreg bevat).

7 Die rekenaar en publiekreg

Soos verwag kan word, het die rol van die rekenaar in die publiekreg al drie magte van die regering aangeraak. Wat die uitvoerende mag betref, is die vraag byvoorbeeld behandel of daar 'n reg op inligting is en of dit aan ander menseregte gekoppel kan word.

Die wetgewende mag het aan die beurt gekom deur behandeling van die wyses waarop rekenaars die proses van wetopstelling kan bespoedig. Dit geld veral met betrekking tot die formaat van die wetgewing, die vergelyking van huidige wetgewing en vorige wette en soortgelyke bepalings, eenvormigheid en verbetering van terme, taalgebruik en uitdrukkings en die uitskakeling van leemtes en duplisering. Ook word wetgewing meer toeganklik en kan makliker in al sy fases nagegaan word. (Juis op die gebied van die toeganklikheid van ondergeskikte wetgewing is daar ook in Suid-Afrika 'n groot rol vir die rekenaar te speel.)

Voorts is verwys na die gebruik van die rekenaar deur die regterlike mag. In Italië is die rekenaar aanvanklik gebruik om die administrasie van die hof, dit wil sê die werk van die griffier, te vergemaklik. Dit het vir laasgenoemde nou bykans onmoontlik geword om byvoorbeeld hofrolle saam te stel of die program van die hof behoorlik uit te werk sonder gebruik van die rekenaar. Hierbenewens word die regters in hul judisiële taak bygestaan deur seker een van die beste "on-line" regsdatabasisse in die wêreld, naamlik die ITALGIURE-stelsel.

'n Ander interessante perspektief was die voordrag van Stone oor "The effect of computers on the law and legal research". Daar is 'n nuwe beweging in die VSA (die sg "Critical legal studies") wat nagaan hoe die bronne wat ons gebruik, die reg beïnvloed. Volgens Stone is die gevaar dat die mens net na die rekenaar, wat 'n meganistiese stelsel is, sal gaan kyk en nie meer boeke oor filosofie, geskiedenis ensovoorts sal lees nie. In hierdie verband moet veral die kundige stelsels met versigtigheid hanteer word. Byna in dieselfde gees was 'n bydrae deur Pirnat wat Toffler se "Third Wave" bysleep om te verduidelik waarom kundige stelsels nooit sal werk nie. (Met respek, Toffler se boodskap, nl dat rekenaars juis die kenmerk van die nuwe tegnologiese rewolusie is wat ons help wegbeweeg van die meganisties industriële era, gaan hom verby!)

8 Die rekenaar en volkereg

Alhoewel hierdie sessie oënskynlik oor Europese gemeenskapsreg en volkereg sou handel, is laasgenoemde aangegryp om heelwat interessante dinge oor internasionale toegang tot regsdatabasisse te sê. Hier het veral die kwessie van "transborder data flows" ter sprake gekom, wat al die erkende uitdrukking in Engels geword het, maar moeilik vertaalbaar is. Volgens Trautman van Harvard is die tradisionele beginsels van die volkereg nie meer in staat om dié kwessie te hanteer nie en hy stel voor dat 'n internasionale konvensie gehou behoort te

word om bindende of selfs net aanbevole riglyne in hierdie verband uit te stippel. Die beskerming moet nie tot persoonlike dataprivaatheid beperk bly nie, maar behoort ook riglyne vir data-integriteit (betroubaarheid) neer te lê. By "trans-border data flows" kom elektroniese geldoordrag (EFT) ook ter sprake en hier is die behoefte aan eenvormige standaarde in die verskillende lande bepleit.

9 Die rekenaar en regspleging in Italië

Hier het dit merendeels gegaan oor organisatoriese aspekte binne die administrasie van die reg en die impak wat die rekenaar daarop het. Verskillende aanwendingsmoontlikhede van die rekenaar is bespreek en die Italianers se ervaring op dié gebied is oorgedra. Vanselfsprekend het hulle uitstekende regsdatabasis ITALGIURE telkens ter sprake gekom. Hierdie databank is so gekoppel dat alle uitsprake van die EEG se geregshof onmiddellik in die databank opgeneem word. Inligting van die verskillende afdelings van ITALGIURE is per rekenaarterminaal by die meeste howe in Italië beskikbaar in die vorm van "massima" (opsommings van hofbeslissings, akademiese artikels en selfs boeke). Die Italianers was egter gelukkig omdat die stelsel van opsommings bedryf is jare voordat rekenaars ter sprake gekom het; die databasis hoef dus nie van nuuts af vir die rekenaar gebou te gewees het nie. Baie van die nuwe opsommings word gemaak deur 'n instituut vir "Juridiese Dokumentasie" in Florence wat nie verwar moet word met ITALGIURE se sentrum in Rome nie. Laasgenoemde is deel van die Italiaanse Hooggeregshof ("Corte Suprema di Cassazione") terwyl die Instituut in Florence deur die Italiaanse eweknie van ons RGN (die "GNR") gestig is en befonds word.

10 Tegniese metodes om toegang tot rekenaardata te verkry

Hierdie sessie het basies oor die gebruik van tegnologie sowel vir toegang tot inligting (veral in databasisse) as by kundige stelsels gehandel; veral is metodes bespreek om hierdie stelsels meer toeganklik en verbruikersvriendelik te maak, hoofsaaklik deur die gebruik van *thesauri* of kunsmatige intelligensie. Die Italianers, onder andere professor Martino, hoof van die Instituut vir Juridiese Dokumentasie in Florence, was optimisties oor die moontlikhede om die reg by 'n kundige stelsel in te bou, mits die ware aard van regsreëls en logika in gedagte gehou word. Hiervoor moet die beginsels van regsfilosofie en algemene regsleer gebruik word. Daarenteen was die Engelssprekende bydraers versigtiger en selfs skepties oor hierdie raakvlak tussen rekenaars en die reg. Backhouse se bydrae was byvoorbeeld getitel: "Expert systems – lawyers beware!"

Vir my was die waardevolste bydrae van die hele konferensie dié van Eve Wilson van Kent Universiteit in Canterbury oor HYPERTEXT. "Hypertext" is 'n nie-liniêre wyse van die oordra van inligting waardeur 'n dokument nie van begin tot einde deurgelees hoef te word nie; die opsteller bied aan die leser 'n hele aantal keuses om stil te staan en hom te verdiep by 'n sekere punt, of om tot 'n wisselende graad afdraaipaadjies te neem en self ontdekkings te maak. Myns insiens hou dit opwindende moontlikhede vir sowel regsonderrig as die regspraktyk in.

Selfs meer waardevol as die formele lesings was die uitstalling van tegniese hulpmiddels by die kongres. Waarskynlik die interessantste was die nuwe CD-ROM- of laser-tegnologie wat dit moontlik maak om byvoorbeeld alle hofverslae of alle statute op 'n klein kompakskyfie te stoor wat dan by jou rekenaar

ingelees kan word. JUTASTAT is 'n onlangse Suid-Afrikaanse toepassing van hierdie tegnologie.

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LIABILITY OF DIRECTORS FOR "WRONGFUL TRADING" IN TERMS OF ENGLISH LAW

The extent of the liability of directors for bad management of the company has always been a thorny issue. Non-executive directors recently received a warning on this very point. In *Cronje v Stone* 1985 3 SA 597 (T) a non-executive director who had failed to take any active part in the management of the company and had blindly believed the reassurances of the managing director that all was well, was held liable under section 424 of the Companies Act 61 of 1973, as a person who had knowingly been a party to the carrying on of the company's business recklessly. Although the outcome of the case can perhaps be supported, the decision leaves non-executive directors in an unenviable position. It is common practice for a person to invest money in a company, to accept the position of a non-executive director with a vague idea of protecting his investment and then to take very little active interest in the management of the company. Many situations may arise where commercial practice does not accord with the view taken by the courts, and the non-executive director is therefore faced with the difficulty of deciding which path to follow.

The original section 185 *bis*(1) of the Companies Act 46 of 1926 was initially modelled on section 332 of the English Companies Act 1948 (11 & 12 Geo 6 c 38). The major obstacle facing anyone who wished to make use of either statute was the difficulty of proving fraud. The recommendations of the Van Wyk De Vries Commission of Enquiry into the Companies Act (RP 45/1970) eventually led to the amendment of legislation affecting companies, and section 424 now imposes liability on persons who were knowingly party to the carrying on of the company's business fraudulently or recklessly. The 1962 Jenkins Committee Report (Cmnd 1749) had recommended the extension of the equivalent English section to include reckless trading as well, but the English legislature failed to act on this. In 1982 the fact that in England liability could still be incurred only for fraudulent behaviour was considered by the Cork Committee which was of the view that liability should also arise for what they termed "wrongful trading". It proposed that:

> "a company shall be trading wrongfully if, being insolvent or unable to pay its debts as they fall due, it incurs liabilities to other persons without a reasonable prospect of meeting them in full" (Report of the Insolvency Law and Practice Review Committee Cmnd 8558 June 1982 par 1781 399).

The committee proposed that before liability be imposed on one who was an officer of the company, it should be proved that he had been a party to the carrying on of the business and that he knew or ought to have known that the company's trading was wrongful. With regard to a person who was not an officer of the company, it was suggested that it should be proved that he was party to

the carrying on of the business and that he knew the trading was wrongful (par 1806 404–405).

The concept of wrongful trading was first included in section 15 of the Insolvency Act 1985 (c 65) and has subsequently become section 214 of the Insolvency Act 1986 (c 45). Section 214 represents a major breakthrough in English company law, which until 1985 had only contemplated the possibility of liability for a company's debts on proof of fraudulent trading. Section 214 now imposes personal liability on directors for conduct very much akin to negligence.

Subsection (1) states the circumstances in which a director of a company may be held responsible for his company's wrongful trading. It stipulates that the court may declare a person liable to contribute to the company's assets if

> "(a) the company has gone into insolvent liquidation,
> (b) at some time before the commencement of the winding up of the company that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
> (c) that person was a director of the company at that time".

The existence and use of the remedy provided by the section is dependent on the company having gone into insolvent liquidation which occurs

> "if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up" (s 214(6)).

Only the liquidator is entitled to bring an application in terms of the section. Although it is debatable whether the remedy should be available only on an insolvent liquidation it must be noted that this requirement is tied up with the crux of the remedy, which is that the person must have known or "ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" at some time before the commencement of the winding up of the company.

It is not clear at what stage the wrongful trading period commences. The phrase "at some time before the commencement of the winding up" does not assist at all (*Company Law Digest* vol 4 no 2 58). All that can be said for certain is that it must be after 28 April 1986 (s 214 (2) of the Insolvency Act 1986). It remains a question of fact as to what events herald the onset of trouble. The English legislature has entrusted the courts with the task of assessing each specific situation on its merits in deciding at what stage before the commencement of the winding up the director knew or ought to have known that the company could not avoid insolvent liquidation.

Quite clearly a decision that a director actually knew that there was no real prospect of the company's avoiding insolvent liquidation can be made on the evidence which is before the court, but it is more difficult to decide what the director ought to have known or concluded. In judging whether the director ought to have known or concluded that there was no reasonable prospect of avoiding insolvent liquidation, the court must decide what would have been known or concluded by a reasonably diligent person having both the general knowledge, skill and experience that could reasonably be expected of a person carrying out the functions of the particular director concerned, and the general knowledge, skill and experience which that particular director has (s 214(4)). The situation is assessed objectively and subjectively. A director cannot escape liability simply because he failed actually to carry out any duty which had been delegated to him (s 214(5)).

It is certainly arguable, though by no means certain, that the section is open to the construction that it applies only to a director who has functions entrusted to him in relation to the company. On the other hand, if a reasonably diligent person having the skill and expertise of the particular director concerned, would have concluded that the company could not avoid insolvent liquidation, then it might be contended that that director, although having no specific functions to perform in relation to the company, nevertheless ought to have come to the same conclusion and so could be held liable under the section. Take, for example, the non-executive director in the position of the second respondent in the *Cronje* case *supra*. Although she had no obligation to perform any specific functions in relation to the company, if a reasonable person with her business experience and expertise would have concluded that the company could not avoid insolvent liquidation, then she could incur liability under the English section 214 as a director who "ought to have concluded" that there was no reasonable prospect of the company's avoiding insolvent liquidation. It would seem that the greater the director's skills, the greater the risk of potential liability.

It is possible to avoid liability, even assuming that a director knew that there was no reasonable prospect of the company's avoiding insolvent liquidation, provided that he took all such steps to minimise the potential loss to the company's creditors as he ought to have taken (s 214(3)). In deciding what steps he ought to have taken, the court must judge his conduct against that of a reasonably diligent person, having both the general knowledge, skill and experience that could reasonably be expected of a person carrying out the functions of the particular director concerned, and the general knowledge, skill and experience which that particular director has (s 214(4)). A director who knows that the company is in financial trouble may well take steps which might tend to avert the disaster, but if he did not know that insolvent liquidation was inevitable (although it may be concluded that he ought to have known) he might not be protected by the subsection. As he fails to anticipate any real financial trouble, he probably would not have taken any specific steps for the purposes of minimising loss to the creditors. Any action he might have taken would have been purely coincidental.

The question has been raised (see Prentice "Fraudulent trading: parent company's liability for the debts of its subsidiary" 1987 *LQR* 13) whether the steps the director ought to have taken to minimise loss to creditors should be steps which have the force of law. In other words, must they be legally enforceable safeguards? Is it sufficient that the company's major customer assures the director of further orders which the director judges will enable the company to trade out of its difficulties (13)? Bearing in mind the substantially different considerations which may arise in each case, the legislature has left it to the courts to decide whether adequate steps were taken.

The manner in which the English courts are required to assess whether a director ought to have realised that there was no reasonable prospect of avoiding insolvent liquidation and what steps he ought to have taken to guard against liability in terms of section 214, seems to coincide with that adopted in the *Cronje* case *supra* 615E. Although the second respondent in that case had no specific functions to perform in relation to the company, Le Roux J seems to have been of the view that because a reasonable person with her knowledge and business expertise would not have blindly believed what she was told, she herself

ought not to have. Further, he concluded that to safeguard her position she ought either to have resigned as a director or to have taken steps to place the company in liquidation.

The requirement that a person must have been a director of the company at the time is not quite as limiting as it appears, as "director" includes a shadow director, who is defined as a "person in accordance with whose directions or instructions the directors of the company are accustomed to act" (s 251 of the Insolvency Act 1986). However, a person is not deemed to be a shadow director by reason only that the directors act on advice given by him in a professional capacity. As always, the difficulty will be to prove that the directors of a company are accustomed to acting on another person's instructions. Pride and knowledge of the fiduciary duties owed by the director may well tend to seal his lips.

Section 424 of the South African Companies Act may seem wider than its new English counterpart in the sense that one does not need to be a director or shadow director to incur liability. However, it must be remembered that it has to be proved that the person was knowingly a "party" to the carrying on of the company's business either fraudulently or recklessly. This raises the question whether one can be "party" to conduct by remaining completely passive, especially if one is a non-executive director who has not undertaken any specific obligations *vis-à-vis* the company. In terms of the English section 214, once it has been established that the person was a director or shadow director and that the company has gone into insolvent liquidation, all that then needs to be proved is that he knew or ought to have concluded that there was no reasonable prospect of avoiding liquidation and that he failed to take any steps to minimise loss to creditors. The director is not actually required to have been a party to the conduct which led to the insolvent liquidation. This sidesteps the difficulty raised in *Re Maidstone Building Provisions Ltd* 1971 2 QB 711 (A); 1971 3 All ER 16, where the phrase "party to" was interpreted as involving positive steps of some nature.

Section 214 may attract the criticism that it could cause overcautious directors to place the company into premature liquidation. This, however, would seem to be preferable to allowing them to continue trading, ultimately at the expense of the creditors. A real entrepreneur will still take risks. However, these risks will of necessity need to be well calculated because they will not only be risking creditors' and shareholders' money but also exposing themselves to potential liability. This may well make their judgment just that little bit keener.

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VONNISSE

SPORTBESERINGS EN TOESTEMMING

Boshoff v Boshoff 1987 2 SA 694 (O)

Die beslissing in *Boshoff v Boshoff* handel oor toestemming tot die risiko van benadeling in die geval van sportbeserings. Tydens 'n vriendskaplike muurbalspel tussen twee broers glip verweerder se raket uit sy hand, tref eiser teen die kop en beseer sy oog. Eiser stel 'n eis vir gevolgskade in. Die enigste verweer wat die hof se aandag geniet, is die bewering dat "eiser die risiko van besering vrywillig aanvaar het" (697B).

Regter Kotzé aanvaar dat *volenti non fit iniuria* as verweer kan geld indien 'n deelnemer aan sport hom in 'n situasie begeef "waar hy [soos hier] die risiko loop om deur ander beseer te word" (699B). Hy beskou die grense en toepassingsgebied van die verweer nie as volkome uitgekristalliseerd nie (699G–H), maar ag hom gebonde aan die uitspraak van die appèlhof in *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A).

In laasgenoemde saak (780–781) – wat klaarblyklik oor stilswyende (of geïmpliseerde) toestemming tot die risiko van benadeling handel – word Strauss *Aspekte van die begrip "toestemming" in die strafreg en die deliktereg* (1963) 32 se standpunt dat bewustelike blootstelling aan gevaar reeds toestemming daarstel, as te wyd beskou. Aan die ander kant word die sogenaamde "bargain"-teorie, wat 'n (uitdruklike of stilswyende) meersydige ooreenkoms tussen eiser en verweerder vereis (vgl in dié verband Boberg 1974 *SALJ* 19), ook verwerp. Wat wel vereis word, is dat

> "in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself . . . provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk".

Dit belas vanselfsprekend die hof met 'n subjektiewe ondersoek wat bewysprobleme veroorsaak, veral aangesien die eiser normaalweg sal ontken dat hy toegestem het. Derhalwe moet die hof by wyse van 'n objektiewe beoordeling van die bewese feite aflei wat die inherente risiko's van die betrokke aktiwiteit is, en dan bepaal of die eiser inderdaad daartoe toegestem het.

In die *Santam*-saak (*supra* 755 777 781) word dus aanvaar dat vrywillige aanvaarding van risiko in gepaste omstandighede 'n vorm van *toestemming* (en wel tot die risiko van benadeling) kan wees. Die regter bestempel dit as 'n volkome verweer alhoewel hy die vraag ooplaat of dit 'n regverdigingsgrond (wat dus onregmatigheid uitsluit) is. In die *Boshoff*-saak beskou die regter onses insiens wel die ter sake verweer as 'n regverdigingsgrond (vgl 701G–H 702B–C). Hierdie opvatting geniet wye steun (vgl Neethling, Potgieter en Visser *Deliktereg*

(1989) 82–89 en gesag daar aangehaal), maar word deur Boberg (*The law of delict* (1984) 724 e v; 1974 *SALJ* 19 e v) gekritiseer. Die kern van sy beswaar is dat hierdie opvatting die verskil tussen 'n bloot feitelike risiko-aanvaarding en juridiese toestemming misken: die afleiding van stilswyende toestemming uit uiterlike gedrag negeer die wesenlik subjektiewe aard van toestemming. Die vereistes wat deur die *Santam*-saak gestel word (soos hierbo uiteengesit) is volgens hom

> "not really a subjective test of consent at all: it is a subjective test of foresight which, once established, is deemed objectively to amount to consent" (*Delict* 727).

Dié interpretasie van die vereistes kan getoets word

> "by asking whether a risk-taker can preserve his rights by an express disclaimer of the consent that would otherwise be inferred from his conduct" (*ibid* 728).

'n Positiewe antwoord op hierdie vraag sal natuurlik die subjektiewe aard van die toets bevestig, maar Boberg meen dat die howe nie geneë sal wees om so 'n antwoord te gee nie. Het hy gelyk, beteken dit dat die howe inderdaad bewustelike feitelike risiko-aanvaarding aan juridiese toestemming gelykstel, en dit is vir hom op beleidsgronde onaanvaarbaar. Om hierdie besware te ondervang, ondersteun hy die "bargain"-teorie van Glanville Williams *Joint torts and contributory negligence* (1951) 308:

> "[N]othing short of an express or implied bargain between the parties, whereby the plaintiff gave up his right of action for negligence, would suffice to establish the defence of *volenti*."

Onder "bargain" word dan verstaan

> "some sort of intercourse or communication between plaintiff and defendant from which it can reasonably be inferred that the plaintiff has given an assurance to the defendant that he waives any right of action that he may have in respect of the conduct of the defendant" (*ibid* 314).

In hierdie verband 'n paar opmerkings. Gevalle van risiko-aanvaarding is problematies juis omdat uitdruklike toestemming meestal ontbreek. Indien 'n afleiding dat toestemming gegee is, te geredelik uit blote gedrag gemaak word, bestaan die gevaar natuurlik dat toestemming tot 'n fiksie gereduseer word. Daarom is ons dit met Boberg eens dat stilswyende toestemming met groot omsigtigheid benader moet word, maar dit gaan te ver om enige erkenning daarvan teen te staan. Dit is 'n bekende verskynsel in ons reg dat 'n subjektiewe *factum probandum* uit objektief vasstelbare feite – soos gedrag – afgelei moet word (byvoorbeeld die bepaling van opset; en *consensus* by kontraksluiting) sonder dat die subjektiewe aard van die te bewese feit noodwendig in die slag bly. Ons meen dus nie dat om toestemming van gedrag af te lei, *noodwendig* op 'n gelykskakeling van feitelike risiko-aanvaarding met juridiese toestemming neerkom nie.

Die vraag bly steeds waarin die onderskeid tussen 'n feitelike aanvaarding van risiko en stilswyende toestemming dan bestaan. Ons doen aan die hand dat toestemming bevind moet word slegs indien dit blyk dat die benadeelde hom met die intrede van die gewraakte gevolg *versoen* het. Dat die positiewe reg dit so aanvaar – sonder om spesifiek die begrip "versoening" te gebruik – blyk uit die volgende stelling in die *Santam*-saak (*supra* 781) (wat in die *Boshoff*-saak aanvaar word (700E–F));

> "The foregoing [uiteensetting van die vereistes vir toestemming] appears to me . . . to be in accord both with the vital conclusion of Schreiner JA in *Lampert v Hefer* [1955 2 SA 507 (A) 509E] that the applicant '. . . must have known and appreciated the risk and

> elected to encounter it', and with the view of Van Winsen J [*Rosseau v Viljoen* 1970 3 SA 413 (K) 481A–C] that an enquiry is, inter alia, required regarding – 'the question of whether – and this is *a subjective enquiry* – an inference arises from all the evidence that plaintiff must have understood *and accepted such risk*' " (ons beklemtoning).

Die *Santam-* en *Boshoff*-beslissing lê besondere klem op die vereiste dat die benadeelde die risiko van benadeling moet *voorsien* het. Ons meen dat dit net 'n (belangrike) stap is in die beantwoording van die deurslaggewende vraag of die benadeelde hom met die risiko *versoen* het. Daarom kan ons nie saamstem met Boberg se hierbogenoemde vertolking dat die toets een van "subjective foresight" is nie; dit is wel 'n toets van *subjektiewe versoening.* 'n Bevinding dat die benadeelde die bepaalde risiko voorsien het, sal wel dikwels die afleiding regverdig dat hy hom ook daarmee versoen het. Nietemin kan gevalle voorkom waar die benadeelde se gedrag daarop dui dat hy – alhoewel hy die bepaalde risiko voorsien het en hom feitelik daaraan blootgestel het – hom nie met die intrede daarvan versoen het nie. 'n Voorbeeld van so 'n geval kan wees waar die benadeelde *voor realisering van die risiko* uitdruklik te kenne gee dat hy hom nie daarmee versoen nie. In so 'n geval meen ons (anders as Boberg) dat die howe die ontkenning as aanduidend van afwesigheid van toestemming sal oorweeg.

In die lig van die voorgaande is ons van mening dat dit onnodig is om die "bargain"-teorie te aanvaar ten einde die subjektiewe aard van stilswyende toestemming tot die risiko van benadeling tot sy reg te laat kom.

Van besondere belang in *Boshoff v Boshoff* is die volgende stelling (700F–G):

> "Elke intelligente mens word, tot 'n mate altans, gereken 'n beskikker oor eie lot te wees en dit is klaarblyklik nie *contra bonos mores* wanneer wilsvermoënde mense toestem om in die loop van regmatige sport of fisieke rekreasie bepaalde redelike liggaamlike beserings, veroorsaak deur ander deelnemers, te ondergaan nie. Net so is dit ook nie onregmatig om toe te stem om die risiko van liggaamlike beserings opgesluit in die redelike gedrag van medespelers, op sigself te neem nie."

Hieruit blyk eerstens dat regter Kotzé dit as 'n vereiste beskou dat toestemming nie *contra bonos mores* moet wees nie; positief gestel: toestemming moet redelik wees. Akademici is dit lank reeds eens dat hierdie vereiste gestel behoort te word, maar tot dusver was daar weinig positiefregtelike erkenning daarvan (sien Boberg *Delict* 740 e v; vgl egter *S v Collett* 1978 3 SA 206 (RA)). Die erkenning van die vereiste in hierdie saak is dus te verwelkom. Verder is dit belangrik dat die regter in hierdie verband – onses insiens tereg – toestemming tot benadeling en toestemming tot die risiko van benadeling oor dieselfde kam skeer. Laastens is die regter se opvatting omtrent die redelikheid van toestemming tot *sportbeserings* in die besonder van groot belang. Die gangbare opvatting was nog altyd dat dit in beginsel *contra bonos mores* is om tot ernstige liggaamlike besering (of die risiko daarvan) toe te stem. Twee uitsonderingsgevalle kom normaalweg ter sprake, naamlik mediese behandeling en erkende sport. Die eerste uitsondering het al baie aandag van die howe geniet. Die opvatting dat toestemming tot sportbeserings (of die risiko daarvan) nie *contra bonos mores* is nie, het egter tot dusver geen uitdruklike positiefregtelike erkenning geniet nie. Regter Kotzé se uitspraak vul dié leemte.

In sy toepassing van bogenoemde beginsels op die feite, ondervind die regter geen probleme om te beslis dat die eiser inderdaad geldig toegestem het tot die risiko van besering nie (701C–G; vgl ook 698B).

Hy gaan dan verder deur te sê (701H–I):

> "Sou ek verkeerd wees met my bevinding dat dit bewys is dat eiser toegestem het tot die risiko wat hier realiseer het, is ek nog steeds van mening dat nie bewys is dat hier enige onregmatige daad teenoor eiser gepleeg is nie. 'n Besering vanweë 'n gevolg soos hier ter sprake is redelikerwys te verwagte in 'n sosiale muurbalwedstryd tussen amateurs en ek kan nie insien dat die 'algemene redelikheidsmaatstaf' (vgl *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) op 1168) kan verg dat die gevolg as onregmatige daad aangeslaan moet word nie."

Alhoewel hy dit nie in soveel woorde sê nie, dui regter Kotzé se beroep op die algemene redelikheidsmaatstaf en *Marais v Richard supra* daarop dat hierdie alternatiewe grond vir die uitspraak ook – soos toestemming – op die afwesigheid van *onregmatigheid* dui. Hier het ons dus duidelike positiefregtelike steun vir Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 100 se voorstel dat

> "die veroorsaking van nadeel aan 'n speler deur 'n medespeler in die normale loop van 'n erkende spel, selfs buite die grense van toestemming om, nie ooreenkomstig die *boni mores* as onregmatig aangevoel word nie".

Die gesag waarop die regter hom hier beroep (*Wooldridge v Sumner* 1962 2 All ER 978 (CA) 983), steun hom onses insiens nie ondubbelsinnig nie aangesien dit ewe goed met toestemming in verband gebring kan word. Dit is jammer, want hierdie standpunt verdien oorweging.

In die lig van hierdie bevindings, vind die regter dit onnodig om te oorweeg of die verweerder skuld (hier nalatigheid) gehad het (702B–C). Dit steun ons vertolking dat die beslissing neerkom op 'n bevinding van afwesigheid van onregmatigheid.

Die uitspraak in *Boshoff v Boshoff* word gekritiseer deur Dendy 1987 *Annual Survey* 180 e v. Daar word geargumenteer dat, aangesien daar geen bewys van nalatigheid was nie, die eiser nie 'n *prima facie* saak uitgemaak het nie. Die hof moes dus absolusie van die instansie verleen het, en dit was onnodig om die verweer van *volenti* te oorweeg. Die vertrekpunt van hierdie argument is daarin geleë dat altwee gedingspartye erken het dat

> "dit volgens hulle kennis . . . een van die gevare *inherent* in die spel van muurbal was dat spelers deur medespelers se raket getref kan word . . . " (698B).

Volgens Dendy is "an inherent danger . . . one that cannot be guarded against by the exercise of reasonable care" (*Annual Survey* 182; vgl Boberg *Delict* 727). Daarom skakel 'n erkenning dat die besering deur 'n inherente risiko veroorsaak is, volgens hom enige moontlikheid van nalatigheid by die verweerder uit.

Ons stem nie saam met die veronderstelling dat 'n inherente risiko noodwendig ook 'n *onvermydelike* risiko is nie. Dat 'n risiko inherent – en derhalwe voorsienbaar – is, sluit glad nie die moontlikheid uit dat die redelike man tog in bepaalde omstandighede daarteen kan en sal waak nie. As voorbeeld kom die inherente risiko's verbonde aan die bestuur van 'n motorvoertuig onwillekeurig by 'n mens op. In die lig hiervan meen ons dat die feite in die *Boshoff*-saak nie noodwendig dui op die afwesigheid van *prima facie* nalatigheid nie, en dat die regter se benadering dus geregverdig is.

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UITSETTINGSBEVELE EN DIE HUURDER SE VERGOEDINGSEIS VIR VERBETERINGS AAN DIE HUURSAAK

Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors 1989 1 SA 106 (W)

1 Inleiding

In die Suid-Afrikaanse reg word daar baie waarde aan eiendomsreg geheg. Daarom word die eienaar en sy regte en bevoegdhede baie deeglik deur sakeregtelike remedies beskerm. In beginsel kan die eienaar sy saak met die *rei vindicatio* terugeis van wie ook al in beheer daarvan is sonder om vergoeding daarvoor aan te bied (*Grosvenor Motors (Potchefstroom) v Douglas* 1956 3 SA 420 (A) 425E). Dit doen hy deur bloot te bewys dat hy die eienaar van die saak is, dat die saak nog bestaan en identifiseerbaar is en dat dit in die verweerder se beheer is (*Chetty v Naidoo* 1974 3 SA 13 (A) 21). Die *rei vindicatio* kan ten aansien van sowel roerende as onroerende sake ingestel word. In die geval van onroerende goed neem dit gewoonlik die vorm van 'n uitsettingsbevel aan (*Ebrahim v Deputy Sheriff, Durban* 1961 4 SA 265 (D)). Afgesien van die eienaar kan sekere nie-eienaars ook 'n uitsettingsbevel teen die okkupeerder – en spesifiek 'n huurder – van onroerende goed verkry. Oor die aard en inhoud van uitsettingsbevele bestaan daar soms nog 'n mate van verwarring en onsekerheid.

Verwere teen 'n uitsettingsbevel moet deur die okkupeerder beweer en bewys word. In bepaalde omstandighede word sekere okkupeerders toegelaat om hulle teen die eienaar se *rei vindicatio* te verweer op grond van die bestaan van 'n retensiereg. Dit beteken dat die okkupeerder 'n beheersreg op die saak het wat hom in staat stel om die saak as sekuriteit terug te hou totdat die eienaar sy skuld teenoor hom vereffen het. Gewoonlik hou die skuld wat deur middel van die retensiereg verseker word verband met verbeterings wat ter uitvoering van 'n kontraktuele verpligting of by wyse van uitgebreide saakwaarneming deur die okkupeerder aan die saak aangebring is. Die okkupeerder moet die bestaan van die versekerde hoofskuld en van die aksessore sekerheidsreg bewys ten einde die eienaar se *rei vindicatio* suksesvol teen te staan (sien in die algemeen *Chetty v Naidoo* 1974 3 SA 13 (A); *Brooklyn House Furnishers v Knoetze and Sons* 1970 3 SA 264 (A)). Indien die uitsettingsbevel deur 'n nie-eienaar ingestel word, kan die okkupeerder hom gewoonlik net op grond van 'n sterker reg op die saak of op grond van 'n kontraktuele (skuldeiser-skuldenaar-) retensiereg teen die uitsettingsbevel verweer.

Bogaande samevatting kan die indruk skep dat die toepassing van die uitsettingsbevel en die erkenning van 'n retensiereg relatief eenvoudig is, maar daar bestaan tog 'n aantal probleme in hierdie verband wat die situasie aanmerklik kompliseer. Verskeie van hierdie probleme is opnuut deur die beslissing onder bespreking beklemtoon. Die volgende is voorbeelde van enkele van hierdie probleme:

(a) Hoewel dit seker een van die algemeenste remedies in die alledaagse regslewe is, bestaan daar nog 'n hele aantal onopgeloste vrae oor die aard en toepassing van die uitsettingsbevel. Hieronder sal aangetoon word dat 'n uitsettingsbevel nie net op basis van die eienaar se *rei vindicatio* nie, maar ook in die vorm van die sogenaamde besitsaksie en op grond van 'n huurooreenkoms verkry kan

word. Omdat die remedies se vereistes verskil, is dit belangrik om telkens die presiese aard van 'n besondere uitsettingsbevel te ondersoek (sien Olivier, Pienaar en Van der Walt *Sakereg studentehandboek* (1989) 163 259).

(b) Ten aansien van (minstens sekere) huurders is die verhaalsreg op grond van verbeterings aan die saak – en die meegaande retensiereg – ingekort deur sekere *placaeten* wat op 26 September 1658 en 24 Februarie 1696 in Holland en Wes-Friesland gepromulgeer is (sien die verwysings na die *placaeten* in die *Syfrets*-saak *supra* 110H 111B) en steeds deel van die Suid-Afrikaanse reg uitmaak (*Barnard v Colonial Government* (1887) 5 SC 122 125; *De Beers Consolidated Mines v London and South African Exploration Co* (1893) 10 SC 359 368–369; *Oosthuizen v Estate Oosthuizen* 1903 TS 688 692; *Rubin v Botha* 1911 AD 568 575 579; *Van Wezel v Van Wezel's Trustee* 1924 AD 409 416; *Lechoana v Cloete* 1925 AD 536 549; *Lessing v Steyn* 1953 4 SA 193 (O) 199A; *Weilbach v Grobler* 1982 2 SA 15 (O) 24E–25D; die *Syfrets*-saak *supra* 111C–D). Verskeie vrae oor die toepaslikheid, interpretasie en uitwerking van hierdie *placaeten* het al in die regspraak en literatuur na vore gekom. Aspekte van hierdie vraagstuk was ook in die beslissing onder bespreking van belang, soos hieronder volledig aangetoon sal word.

(c) Hoewel daar duidelikheid oor die werking van 'n retensiereg bestaan, is die skrywers dit nie heeltemal eens oor die aard van hierdie reg nie. Sonnekus ("Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 100–106) voer byvoorbeeld aan dat retensieregte voorkeurregte is, maar nie saaklike regte nie, terwyl taamlik algemeen deur ander skrywers en die howe aanvaar word dat minstens die sogenaamde verrykingsretensieregte beperkte saaklike regte is (sien veral *Brooklyn House Furnishers v Knoetze and Sons* 1970 3 SA 264 (A) 271C). Hierdie kwessie is nog nie bevredigend aangespreek nie en sal ook nie hieronder behandel word nie.

2 Feite

Die applikant (S) doen aansoek om 'n uitsettingsbevel teen die respondent (E) ten aansien van sekere onroerende eiendom. S is die verbandhouer van twee deelnemingsverbande ten aansien van die eiendom wat hy op 'n eksekusieverkoping gekoop het nadat die geregistreerde eienaar en verbandgewer (T) versuim het om sy verpligtinge ingevolge die verbande na te kom. S het op die verhoordatum nog gewag op registrasie van die oordrag van die eiendom in sy naam (106J). E het oorspronklik okkupasie van die eiendom verkry op grond van 'n skriftelike huurkontrak met T. Volgens die gerapporteerde feite was E sedertdien deurlopend in okkupasie van die eiendom. Kort voor die eksekusieverkoping van die eiendom is E onder die indruk gebring dat die huurooreenkoms met T ongeldig was omdat S nie daartoe toegestem het nie. Hierdie indruk was volgens die hof foutief omdat die afwesigheid van S se toestemming nie die geldigheid van die ooreenkoms tussen T en E geraak het nie (112D). Desnieteenstaande is die huurkontrak, skynbaar op grond van genoemde wanindruk, by wyse van 'n verdere ooreenkoms tussen T en E gekanselleer. Volgens die gerapporteerde feite lyk dit of E okkupasie van die perseel behou het ten spyte van die kansellasie. Enkele dae daarna het S die eiendom op die eksekusieverkoping gekoop, waarna E met S begin onderhandel het oor die moontlikheid om die eiendom van S te koop. Weens finansieringsprobleme het hierdie onderhandelinge deur die mat geval en vandaar die aansoek om 'n uitsettingsbevel.

Die hof bevind dat daar 'n huurooreenkoms tussen S en E bestaan het tussen die datum waarop die huurooreenkoms tussen T en E gekanselleer is en die datum waarop S vir E gevra het om die perseel te ontruim (112J–113B).

Tydens die bestaan van die huurooreenkoms tussen T en E is bepaalde verbeterings, in ooreenstemming met die huurkontrak, deur E aan die perseel aangebring. Nadat hierdie ooreenkoms gekanselleer is, het E verdere verbeterings aangebring waarvoor in die kontrak tussen T en E voorsiening gemaak is, maar nie in die kontrak tussen S en E nie. E se verweer teen S se aansoek berus op die bewering dat E 'n retensiereg op die perseel het hangende die betaling van vergoeding vir die verbeterings wat hy aangebring het.

3 Uitspraak

Die hof staan die uitsettingsbevel toe. Hierdie beslissing berus op die volgende bevindings:

(a) E was te alle relevante tye 'n huurder van die perseel, aanvanklik as huurder van T en later as huurder van S. Gevolglik is die bepalings van die *placaeten* ten aansien van E se verbeterings aan die perseel van toepassing (112C–113B).

(b) As gevolg van die werking van die *placaeten* beskik E nie oor 'n geldige retensiereg waarmee hy S se uitsettingsbevel kan teenstaan nie (112F–I).

Bogenoemde bevindings aangaande die werking van die *placaeten* berus op 'n aantal veronderstellings wat in die uitspraak in meer besonderhede behandel word:

(a) Die *placaeten* raak vergoeding vir alle verbeterings en sluit vergoeding vir noodsaaklike verbeterings wat sonder die eienaar se toestemming aangebring is dus ook uit (111F).

(b) Die *placaeten* raak verbeterings aan alle soorte huurgrond en sluit vergoeding vir verbeterings aan stedelike grond dus ook uit (112B).

(c) Verbeterings wat ingevolge 'n kontrak aangebring word, kan nie die basis vir 'n verrykingseis (of meegaande retensiereg) vorm nie (112G).

(d) Die voormalige huurder kan nie die huidige verhuurder aanspreek vir vergoeding vir verbeterings wat tydens die huurtermyn ter verryking van 'n vorige eienaar aangebring is nie (112G).

(e) S het oor die nodige *locus standi* beskik en kon die bewyslas vir die verlening van 'n uitsettingsbevel bevredig. Hierdie aanname is nooit in die uitspraak in twyfel getrek of ondersoek nie, en daar is ook nie beslis in watter vorm die uitsettingsbevel verleen is nie.

Verskeie van hierdie aannames en bevindings is problematies en verdien daarom verdere toeligting en kommentaar.

4 Kommentaar

4 1 Basis van die uitsettingsbevel

Volgens die huidige stand van die reg kan 'n uitsettingsbevel blykbaar een van die volgende vorme aanneem, elkeen waarvan op eiesoortige vereistes berus:

(a) *Uitsettingsbevele gegrond op die applikant se eiendomsreg* In hierdie geval berus die aansoek op die beginsel dat die eienaar in beginsel daarop geregtig is om in beheer ("besit") van sy saak te wees, en daarom neem die uitsettingsbevel die vorm van 'n *rei vindicatio* aan. Vir 'n suksesvolle beroep op die *rei vindicatio*

moet die applikant bewys dat hy eienaar van die saak is – iets wat die applikant in die onderhawige feitestel skynbaar nie sou kon doen nie aangesien hy nog op registrasie van die oordrag gewag het (sien in die algemeen Olivier, Pienaar en Van der Walt 163; Van der Merwe *Sakereg* (1989) 347–349; *Ebrahim v Deputy Sheriff Durban* 1961 4 SA 265 (D); *Chetty v Naidoo* 1974 3 SA 13 (A) 20). Skynbaar word nog duideliker bewys van eiendomsreg verwag in die geval van aansoekprosedure (*Munisipaliteit van Port Nolloth v Xhalisa*; *Luwalala v Municipality of Port Nolloth* saak no 8580/1988 en 10458/1988 1989-01-12 (K) (ongerapporteer, op 18 van die getikte uitspraak)).

(b) *Uitsettingsbevele gegrond op die applikant se sterker besitsreg* In hierdie geval berus die aansoek op die feit dat die applikant 'n sterker reg op beheer ("besit") van die saak kan bewys as die respondent en daarom neem die uitsettingsbevel die vorm van 'n besitsaksie aan. Vir 'n suksesvolle beroep op die besitsaksie moet die applikant bewys dat hy 'n sterker reg op beheer as die respondent het en dat hy voorheen reeds in fisiese beheer van die saak was. Hierdie vereiste geld aangesien die besitsaksie 'n remedie vir die herwinning van verlore beheer ("besit") is en nie vir die afdwinging van 'n vorderingsreg op beheer nie (sien in die algemeen Olivier, Pienaar en Van der Walt 258–260; Van der Merwe 150–151; Joubert "The action for ejectment – possessor and occupier" 1962 *SALJ* 130–131; *Kanniappen v Govender* 1962 1 SA 101 (N) 104H). Uit die gerapporteerde feite wil dit voorkom of die applikant in die onderhawige saak nooit in beheer van die saak was nie; daarom sal hy hierdie vereiste waarskynlik ook nie kan bevredig nie.

(c) *Uitsettingsbevele op grond van die huurkontrak* In hierdie geval vra die verhuurder die uitsettingsbevel bloot op grond van die huurkontrak sonder om die basis van sy eie reg op die saak te openbaar. Daar word aanvaar dat 'n nie-eienaar iemand anders se saak kan verhuur en dat die kontrak *inter partes* geldig en afdwingbaar is sonder om noodwendig ook teen die eienaar afdwingbaar te wees (sien Cooper *The South African law of landlord and tenant* (1973) 25–26). Hierdie beginsel berus op die feit dat die verhuurder nie waarborg dat hy oor die bevoegdheid om te verhuur beskik nie, maar net dat hy ongesteurde beheer en gebruik van die saak kan lewer. Die implikasie is dat die huurder hom nie in 'n aksie vir die verhaal van huurgeld of vir uitsetting op die verhuurder se gebrekkige titel ten aansien van die saak self kan beroep nie (sien bv *Kala Singh v Germiston Municipality* 1912 TPD 155 159–160; *Glatthaar v Hussan* 1912 TPD 322 327; *Frye's v Ries* 1957 3 SA 575 (A) 518A; *Eksteen v Pienaar* 1969 1 SA 17 (O) 20F). Die sukses van die uitsettingsbevel berus dus in hierdie geval daarop dat die applikant hom bloot op die huurooreenkoms beroep, terwyl die huurder nie toegelaat word om die verhuurder se gebrekkige titel ten aansien van die saak self aan te val nie.

Uit die onderhawige uitspraak is dit nie heeltemal duidelik of die uitsettingsbevel op basis van die huurkontrak aan S verleen is nie, maar die sterk beklemtoning van die huurkontrak (112J–113B) skep tog die indruk dat dit die geval was. Die afwesigheid van enige verwysing na of bespreking van die gesag in hierdie verband maak dit moeilik om die hof se benadering te bepaal. Nietemin lyk dit tog (106J) of die hof die feit dat S nog nie eienaar was nie in berekening gebring het, met die gevolg dat die uitsettingsbevel nie op basis van die *rei vindicatio* verleen kon word nie. (Sien hieroor in die algemeen *Eksteen v Pienaar* 1969 1 SA 17 (O) 20A–C, waar die oorgang van eiendomsreg en

registrasie vir hierdie doel kortliks saamgevat word.) Siende dat die applikant klaarblyklik nooit fisiese beheer van die saak gehad het nie, kan ook aanvaar word dat die uitsettingsbevel nie op basis van die besitsaksie verleen is nie. Die enigste oorblywende moontlikheid is die uitsettingsbevel wat op grond van die huurooreenkoms aan 'n nie-eienaar verleen word. Die feit dat die uitsettingsbevel in hierdie geval op dié spesifieke basis verleen is, skep egter eiesoortige probleme, veral ten aansien van die huurder se verweer gegrond op 'n retensiereg vir die vergoeding vir verbeterings aan die huursaak aangebring, asook die invloed van die *placaeten* op sodanige verweer.

4 2 Toepassing van die placaeten *op noodsaaklike verbeterings*

In die uitspraak word uitdruklik beslis dat daar aanvaar kan word dat die *placaeten* op sowel nuttige as noodsaaklike verbeterings van toepassing is en dat die huurder dus ook ten aansien van noodsaaklike verbeterings aan die huurgrond remedieloos is indien hy die verbeterings sonder die verhuurder se toestemming aangebring het (111F). Hierdie standpunt is nie geheel en al sonder probleme nie.

Op grond van die feit dat die *placaeten* nie uitdruklik na noodsaaklike verbeterings verwys nie, is die standpunt in *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 359 369 ingeneem dat die *placaeten* nie op noodsaaklike verbeterings van toepassing is nie. Hierdie standpunt is sedertdien gekritiseer deur Cooper 305; De Wet en Van Wyk *De Wet en Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 319; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 104 en Van der Merwe (1989) 165. Die oorwig van die gesag is skynbaar ten gunste daarvan dat noodsaaklike en nuttige verbeterings vir doeleindes van die *placaeten* oor een kam geskeer moet word. In die onderhawige uitspraak (111F) is verder geargumenteer dat die afwesigheid van 'n onderskeid tussen die verskillende soorte uitgawes 'n sterk aanduiding van die bedoeling is dat alle soorte uitgawes dieselfde behandel moet word. Met verwysing na die toepassing van die *placaeten* op huishuur neem die hof egter die standpunt in (111I) dat die spesifieke vermelding van landelike grond en die afwesigheid van verwysings na stedelike grond nie daarop moet dui dat stedelike grond uitgesluit is (soos wat die uitlegbeginsel *unius inclusio est alterius exclusio* sou suggereer) nie. As die afwesigheid van verwysings na spesifieke gevalle as 'n aanduiding van algemeenheid gesien word, kom dit enigsins vreemd voor dat die aanwesigheid van verwysings na spesifieke gevalle ook ten gunste van algemeenheid verstaan word. Die beslissing in *Astralita Estates v Rix* 1984 1 SA 500 (K) (waarin die verweerder se beweerde verhaalsreg en meegaande retensiereg vir noodsaaklike verbeterings nie direk deur die eiser ontken is nie) skep die verdere vraag of daar nie dalk opnuut na die toepaslikheid van die *placaeten* op noodsaaklike verbeterings aan die huursaak gekyk moet word nie.

As daar egter aanvaar word dat noodsaaklike en nuttige verbeterings vir doeleindes van die *placaeten* oor een kam geskeer moet word, ontstaan die verdere vraag of die huurder in sekere gevalle as *negotiorum gestor* vir noodsaaklike verbeterings kan eis. De Vos 104–105 argumenteer in hierdie verband dat 'n huurder wat aan al die vereistes van normale *negotiorum gestio* voldoen het, nie gepenaliseer moet word bloot omdat hy toevallig ook 'n huurder is nie en dat hy toegelaat moet word om te eis. Dit impliseer dat die huurder die verbeterings werklik as *negotiorum gestor* moet aanbring en nie vir sy eie voordeel

nie. Hierin word De Vos deur Cooper 305, Van der Merwe (1987) 95 par 98 vn 22 en Van der Merwe (1989) 165 570 gesteun. In die uitspraak word daar in hierdie verband bloot na Van Zyl *Negotiorum gestio in South African law* (1985) 67–71 verwys sonder om die vraag te ondersoek of die huurder in hierdie geval as *negotiorum gestor* sou kon slaag, waarskynlik op grond van die hof se aanname dat die verbeterings ter uitvoering van 'n kontrak aangebring is en daarom nie die basis van 'n verrykingseis kan vorm nie (112G). Met verwysing na De Vos se standpunt (104–105) lyk dit egter of die hof se aanname korrek is in die sin dat die huurder in hierdie geval nie die vereistes vir normale *negotiorum gestio* sou kon bevredig nie, aangesien hy nie die eienaar se belange nie maar sy eie belange behartig het (sien hieroor Van Zyl 24–28). Dit is desnieteenstaande 'n vraag of die huurder in hierdie geval deels sy eie en deels die eienaar se belange behartig het, met die gevolg dat hy proporsioneel as *negotiorum gestor* sou kon eis (sien Van Zyl 25–26). Hierdie vrae is nie in die uitspraak verder ondersoek of beantwoord nie.

4 3 Toepassing van die placaeten *op landelike grond*

Die tweede probleemvraag wat ten aansien van die toepassingsveld van die *placaeten* uit hierdie beslissing voortspruit, hou ook verband met die beslissing in *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 359. In die *De Beers*-beslissing 369–370 is die standpunt ingeneem dat die bedoeling met die *placaeten* nie kon wees om huurders van stedelike grond in 'n beter posisie as die huurders van landbougrond te plaas nie. (Die woorde "it clearly was not intended to place agricultural lessees in a better position than urban lessees" in die uitspraak, soos *verbatim* aangehaal in die *Syfrets*-saak *supra* 111G, moet kennelik lees "it clearly was not intended to place agricultural lessees in a *worse* position than urban lessees".) Die (skynbaar goedkeurende) verwysing na hierdie beslissing in *Rubin v Botha* 1911 AD 568 579 moet as *obiter* beskou word, aangesien die hof in daardie saak bevind het dat die tersaaklike okkupeerder nòg 'n *bona fide possessor* nòg 'n huurder van die grond was. Die (ewe goedkeurende) verwysing in *Van Wezel v Van Wezel's Trustee* 1924 AD 409 416 is eweneens *obiter*, siende dat dit in daardie saak oor landbougrond gegaan het en die beslissing hoofsaaklik oor die permanente aanhegting van die verbeterings en die gevolge daarvan vir eiendomsreg op die aangehegte materiaal gehandel het. Aangesien selfs die *De Beers*-saak nie baie duidelik oor die toepaslikheid van die *placaeten* op stedelike grond beslis het nie (dit is bv 'n vraag of die betrokke gebruik van die grond in daardie saak stedelik of landelik van aard was), lyk die standpunt van die meerderheid moderne skrywers oor hierdie aspek bevredigend: die *placaeten* behoort net op landelike grond (of eintlik grond wat vir landboudoeleindes gebruik word) van toepassing te wees (sien hieroor Cooper 305–307; De Wet en Van Wyk 319; De Vos 105; Van der Merwe (1989) 166). Die *De Beers*-beslissing is in *Burrows v McEvoy* 1921 CPD 229 in hierdie opsig uitdruklik verwerp. Dit lyk op die oog af aanvaarbaarder om die restriktiewe interpretasie van 'n wesenlik benadelende wysiging van die gemenereg te verkies, met gevolg dat die toepassingsveld van die *placaeten* tot landbougrond beperk word.

In die *Syfrets*-saak het die hof egter verkies om die ekstensiewe interpretasie te gebruik, en wel op grond van 'n interpretasie van die woord *landen* wat volgens die hof die gemeenskaplike element is aan die hand waarvan die trefwydte van

die *placaeten* gemeet moet word (111G–112B). Siende dat die *placaeten* so uitdruklik ter bekamping van die aldaar vermelde misbruike ingevoer is, en met inagneming van die feit dat die onderskeid tussen landelike (of landbou-) en stedelike grond vir doeleindes van die *placaeten* op die gebruik eerder as die ligging van die grond berus, lyk dit egter aanneemliker om te aanvaar dat die verswyging van stedelike grond en die afwesigheid van voorbeelde van misbruike ten aansien daarvan gesien moet word as 'n aanduiding van die feit dat die *placaeten* tot landbougrond beperk is. Cooper 307 aanvaar sonder meer dat die afwesigheid van toepaslike voorbeelde aandui dat die huurders van stedelike grond nie aan dieselfde wanpraktyke skuldig was nie en dat die *placaeten* ook nie op hulle gemik was nie.

Die hof se tweede rede vir die beslissing dat die *placaeten* ook op stedelike grond (huishuur) van toepassing moet wees, oortuig ook nie. Daar word naamlik aangevoer (112B–C) dat dit onbillik sou wees om die onderskeid tussen stedelike en landelike huur te tref, met die gevolg dat die huurder van landbougrond uitgesonder word vir benadeling. Daar is al voorheen (in verband met die posisie van die persoon wat opreg maar verkeerdelik glo dat hy huurder is) na hierdie oënskynlike anomalie verwys (sien Scott "Lien" 15 *LAWSA* 86 par 110; Van der Walt "The bona fide occupier of land" 1984 *SALJ* 257 258). Hoewel onderhuurders waarskynlik ook deur die *placaeten* geraak sal word (sien De Vos 105), kan daar nie op grond van die anomalie-benadering geargumenteer word dat "putatiewe huurders" (wat onbewus is van die ongeldigheid van die huurkontrak) ook daardeur geraak word nie. Dit is beslis so dat uitsluiting van die "putatiewe huurders" 'n anomalie na vore bring in die sin dat die *bona fide* (en onregmatige) okkupeerder wat 'n ongeldige kontrak aangegaan het dan in 'n beter posisie as die werklike huurder is, maar hierdie anomalie word nie deur die uitsluiting van "putatiewe huurders" veroorsaak nie. Die anomalie is die direkte gevolg van die doelbewus nadelige werking van die *placaeten* vir 'n bepaalde groep huurders. Om die nadeel uit te brei net om dit eweredig te versprei, sou teen alle beginsels van wetsuitleg indruis. Die normale wetsuitlegbeginsels verg eerder dat die nadeel beperk word deur die wet net op die duidelik omskrewe groep toe te pas, anomalieë ten spyt. As die anomalieë wat uit die toepassing van die *placaeten* voortspruit weens die onbillikhede wat dit vir die huurders van landbougrond inhou vir die regsgevoel van die gemeenskap onaanvaarbaar word, is dit nie 'n teken daarvan dat die werking van die *placaeten* uitgebrei moet word nie, maar eerder dat die *placaeten* afgeskaf moet word (sien Van der Walt 1984 *SALJ* 257 258). Wesenlik dieselfde argument is van toepassing op die uitbreiding van die *placaeten* na stedelike huishuur op basis van die anomalie-benadering. In wat hierop volg, word argumentshalwe aanvaar dat die *placaeten* wel op stedelike huur van toepassing is.

4 4 Konkurrensie van verrykingseis en kontraktuele eis

'n Aspek van die uitspraak wat vir die uiteindelike resultaat minder wesenlik was – maar tog interessant is – is die hof se stelling dat die verbeterings in hierdie geval hoofsaaklik in nakoming van 'n kontrak aangebring is en dus nie 'n verrykingseis kan regverdig nie (112G). Dit is natuurlik belangrik om die wesenlike verskil tussen 'n sogenaamde verrykingsretensiereg en 'n sogenaamde skuldeiserskuldenaarretensiereg in gedagte te hou, omdat die twee retensieregte op heeltemal verskillende en uiteenlopende eisoorsake berus en verskillende regsgevolge het (sien die duidelike uiteensetting van die verskil in *Brooklyn House Furnishers*

v Knoetze and Sons 1970 3 SA 264 (A) 270E–271D; asook die *Syfrets*-beslissing *supra* 109H–110E). Daarbenewens is dit egter ewe belangrik om in gedagte te hou dat 'n gegewe feitestel tegelykertyd die basis van albei soorte verhaalsregte en retensieregte kan vorm (sien *D Glaser and Sons v The Master* 1979 4 SA 780 (K); Olivier, Pienaar en Van der Walt 354).

Die onderhawige feitestel is juis 'n goeie voorbeeld hiervan. Op basis van die kontrak verkry die verbeteraar 'n kontraktuele verhaalsreg vir die kontraktueel ooreengekome vergoeding, asook 'n meegaande skuldenaar-skuldeiserretensiereg wat net *inter partes* afdwingbaar is. Daarbenewens verkry hy egter ook 'n verrykingseis vir vergoeding insoverre die eienaar deur die verbeterings ongeregverdig verryk is en 'n meegaande verrykingsretensiereg. Die verrykingsaanspraak moet natuurlik alle normale vereistes vir die totstandkoming van verryking bevredig en die eis is beperk tot die omvang van die verryking; maar die retensiereg word deur die howe as 'n beperkte saaklike reg beskou en daarom teen alle derdes afgedwing. Die blote feit dat die huurder die verbeterings op grond van die huurkontrak aangegaan het, moet dus nie die indruk skep dat die moontlikheid vir 'n verrykingseis daarmee uitgesluit is nie (112G) – die kontraktuele afspraak ten aansien van die verbeterings bewys trouens dat dit met die eienaar se toestemming aangebring is. Die vraag ontstaan inderdaad of daar in die uitspraak voldoende rekenskap gegee is van die feit dat die huurder (minstens aanvanklik) die eienaar-verhuurder se toestemming gehad het om (minstens sommige van) die verbeterings aan te bring (107C). Dit blyk duidelik uit die uitspraak dat die huurder ten minste sekere verbeterings tydens die aanvanklike huurkontrak met die eienaar-verhuurder se toestemming aangebring het. Ten aansien van daardie verbeterings moet hy dus, by die beëindiging van die huurtermyn, geregtig wees op 'n verhaalsreg teenoor die eienaar, maar op grond van die *placaeten* het die huurder geen retensiereg waarmee hierdie eis afgedwing kan word nie.

4 5 Regsverhouding tussen die partye

Die opmerking hierbo bring die laaste, en moeilikste, aspek van hierdie uitsonderlike feitestel na vore. Omdat S nog nie eienaar van die huursaak geword het nie, ontstaan die vraag of vergoeding vir die verbeterings wat aanvanklik met die eienaar-verhuurder se toestemming aangebring is ook van latere eienaars (of verhuurders) verhaal kan word. Volgens De Vos 238 en Van der Merwe (1989) 165 is dit die teenswoordige eienaar (by verstryking van die huurtermyn) wat teenoor die huurder aanspreeklik is, selfs al het 'n vorige eienaar die toestemming in werklikheid gegee (sien ook die gesag deur Van der Merwe (1989) 165 vn 561 vermeld). In hierdie geval is S nog nie die eienaar nie en daarom is die logiese gevolgtrekking dat die "vorige" eienaar nog aanspreeklik is. Die vraag is egter hoe die verhouding tussen die huurder en die nie-eienaar-verhuurder beoordeel moet word vir doeleindes van verbeterings wat tydens die huurtermyn van die nie-eienaar aangebring is. Moet die huurder die toestemming van die eienaar of van die verhuurder daarvoor verkry? Wie sal vir die betaling van die vergoeding aanspreeklik wees? Wanneer is die *placaeten* op hierdie situasie van toepassing? Hierdie vrae is ongelukkig nie in die uitspraak behandel nie en daarom kan daar net oor moontlike benaderings en oplossings gespekuleer word.

Gesien die feit dat die vergoeding vir enige verbeterings op die beginsel van ongeregverdigde verryking berus en dat slegs die eienaar deur verbeterings verryk kan word, lyk dit minstens duidelik dat enige verrykingseis slegs tussen die

eienaar en die okkupeerder (huurder) kan ontstaan. Daar kan dus nie verrykingseise (en meegaande retensieregte) tussen 'n verhuurder-nie-eienaar en 'n huurder tot stand kom nie. 'n Tweede feit wat taamlik duidelik lyk, is dat die *placaeten*, gesien die nadelige uitwerking en die baie spesifieke doelstellings daarvan, ook in hierdie geval beperkend geïnterpreteer moet word. Dit beteken dat die toepassingsveld van die *placaeten* beperk moet word tot dit waarvoor die *placaeten* bedoel was: die huurverhouding tussen grondeienaar en huurder. Vir die situasie wat hier ter sprake gekom het, naamlik waar 'n huurder die grond van 'n nie-eienaar huur, hou hierdie benadering een van drie moontlike implikasies in:

(a) Aan die een kant kan dit beteken dat die *placaeten* hoegenaamd nie op huurverhoudings tussen 'n nie-eienaar en 'n huurder van toepassing is nie, met die gevolg dat die huurder in sodanige geval as 'n gewone regmatige okkupeerder beoordeel moet word wat sy eis vir vergoeding vir verbeterings betref. (Dit sluit natuurlik gevalle uit waarin die huurder in werklikheid 'n onderhuurder is, in welke geval die *placaeten* wel van toepassing is.) Die implikasie hiervan is eenvoudig dat die *placaeten* glad nie op die situasie van toepassing is nie en dat die normale verrykingsbeginsels die vergoedingskwessie beheers. Die verhaalsreg wat in sodanige geval ontstaan, gaan dus ook met 'n retensiereg gepaard.

(b) Aan die ander kant kan geargumenteer word dat die *placaeten* wel van toepassing is, maar dan tussen die eienaar en die huurder en dat die verhuurder-nie-eienaar se toestemming irrelevant is. Die huurder kan dan met die eienaar se toestemming verbeterings aanbring wat laasgenoemde verryk, met die gevolg dat die huurder sy vergoedingseis aan die einde van die huurtermyn tot die eienaar moet rig.

(c) In die derde plek kan geargumenteer word dat die verhuurder-nie-eienaar eenvoudig vir alle doeleindes in die plek van die eienaar te staan kom en dat sy toestemming nodig is alvorens die huurder toegelaat word om vergoeding vir verbeterings te verhaal. Die uitspraak in die saak onder bespreking is blykbaar op 'n kritieklose aanvaarding van hierdie oplossing gegrond.

Van bogenoemde moontlikhede bevredig die tweede die minste aangesien dit klaarblyklik 'n ingrypende aanpassing van die *placaeten* meebring. Dit sal ook moeilik wees om in die praktyk die verrykingsverbintenis tussen eienaar en huurder en die kontraksverbintenis tussen verhuurder en huurder op 'n billike wyse te versoen. Die derde moontlikheid is ook onbevredigend, enersyds bloot omdat dit op 'n ekstensiewe interpretasie van 'n benadelende bepaling neerkom, maar andersyds ook meer fundamenteel omdat dit die feit ignoreer dat enige verbetering 'n verbintenis tussen die eienaar en die huurder tot stand bring en nie tussen die verhuurder en die huurder nie. Dit is onaanvaarbaar dat die verhuurder namens die eienaar toestemming tot die ontstaan van sodanige verbintenis kan gee. Daarom lyk die eerste oplossing die billikste, naamlik om die werking van die *placaeten* heeltemal op te skort in gevalle waar die huurder van 'n nie-eienaar huur. Een probleem met hierdie oplossing is die feit dat die huurder, wanneer hy in 'n geskil tussen hom en die verhuurder sy verrykingseis en retensiereg teen die eienaar as verweer opper, in effek die verhuurder se gebrekkige titel opper. Die feit dat die verweer teen die eienaar self ook geldig sal wees, behoort egter voldoende te wees om hierdie beswaar uit te skakel. Toegepas op die feitestel hierbo sal die effek van hierdie benadering die volgende wees:

(a) Vir die verbeterings wat tydens die aanvanklike huurtermyn met die eienaar se toestemming aangebring is, het die huurder 'n verhaalsreg, in ooreenstemming met die besondere bepalings van die *placaeten*, teen die eienaar. Die eis word nie deur 'n retensiereg gesteun nie.

(b) Vir die tweede huurtermyn met die nie-eienaar is die *placaeten*, selfs in die geval van landbougrond, nie van toepassing nie. Die huurder se verbeterings moet dan volgens die gewone verrykingsbeginsels beoordeel word op basis daarvan dat hy 'n regmatige okkupeerder van die grond is. Die feit dat die eienaar aanvanklik tot die verbeterings ingestem het, sal 'n belangrike rol speel en die uiteindelike verrykingseis teen die eienaar sal deur 'n verrykingsretensiereg gesteun word. Hierdie retensiereg sal ook teen die verhuurder-nie-eienaar afdwingbaar wees.

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FUNDAMENTAL RIGHT OF ASSEMBLY AND FREEDOM OF EXPRESSION

Castel v Metal and Allied Workers Union 1987 4 SA 795 (A)

1 Facts and legal issues

The Minister of Law and Order had issued a notice under section 46(3) of the Internal Security Act 74 of 1982 in terms of which all open-air meetings, other than those of a *bona fide* sporting nature, were prohibited unless he or the magistrate in the district in which the meeting was sought to be held, had expressly authorised the holding of such a meeting. The respondent, a trade union, applied to the appellant, an acting chief magistrate, for permission to hold the annual general meeting of its Natal branch at an open-air venue in Durban. Permission was refused, whereupon the respondent made an urgent application to the local division for an order setting aside the appellant's refusal and directing the appellant to authorise the meeting.

There were two legal issues to be determined. The first concerned the validity of the notice; the second issue, presupposing the validity of the notice, requires the determination of the question whether and to what extent the appellant was required to elicit additional information from the respondent or to make any further investigations or enquiries of his own before making a decision.

2 Decision of the court

In the court *a quo* the order was granted. The grounds were the following: the respondent had not been given a hearing (*audi alteram partem* rule); the appellant had erred by adopting an incorrect approach and by taking irrelevant matters into account; and the appellant had been *mala fide* and had acted *in fraudem legis*. The court held that the authority should have been granted by the magistrate if the proposed gathering was such that it would not be expedient to prohibit it for the maintenance of public peace; and if the magistrate felt that insufficient facts had been placed before him, he should have notified the applicant of this and offered it the opportunity of proper representations. The court

held that in applying for permission to hold a meeting, the applicant was not applying for permission to do something it was not otherwise entitled to do. The court decided that cases such as *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A) were not applicable.

However, on appeal it was held that the minister's power under section 46(3) of the Internal Security Act of 1982 to prohibit any kind of gathering or all gatherings, *if he deemed it necessary or expedient, had no bounds*, provided that he exercised that power for no purpose other than those specified in the section. The court also decided that, unlike the applicant for a trade licence (who is entitled to be granted a licence unless there are sound reasons to the contrary), an applicant for authority to hold a gathering of the kind in question had no right to receive permission, even though he might be able to show positively that the proposed authority would not lead to a breach of the public peace. The court concluded that in terms of the section and the notice issued under it, it was clear that the minister's or magistrate's view as to whether a proposed gathering would lead to a breach of public peace was conclusive and not justiciable: to hold that a decision by either of them not to grant permission in any given case was justiciable on the grounds that, objectively viewed, the reason for the prohibition did not exist, would *make a mockery of the inviolability* of the minister's prerogative to decide on the expediency of the prohibition. Accordingly, there is no need for the minister or the magistrate to whom the application for authority had been made, to observe the *audi alteram partem* rule unless there were other reasons calling for its observance. The decision in the *Laubscher* case *supra* was thus approved and applied.

3 *Audi alteram partem* rule and the fundamental rights of the individual

Our courts have frequently required the presence of pre-existing rights as an essential for the right to a fair hearing. Thus where the decision of the administration does not affect existing rights, either because the decision affecting the rights was not reached by the body that denied a hearing (see *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 263 (A)), or because the complainant had no right in the first place (see the *Laubscher* case *supra*), it has been held that the *audi alteram partem* rule does not apply. This approach has been used in many decisions to justify the exclusion of the *principles of natural justice.*

This stereotyped expression is, according to *Minister of the Interior v Bechler* 1948 3 SA 409 (A) 451

> "used to describe those fundamental principles of fairness which underlie or ought to underlie every civilized system of law".

In the *Laubscher* case *supra* 549B–E Schreiner JA said in this regard:

> "The importance of the *maxim audi alteram partem* was stressed in *R v Ngwevela*, 1954 (1) SA 134 (AD), but its value would be lessened rather than increased if it were applied outside its proper limits. Those limits have not been defined with extreme precision and I certainly shall not attempt any definition. At p 127 of *Ngwevela's* case, CENTLIVRES CJ, quoting TINDALL J, in an earlier case, said that 'when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual, that individual has a right to be heard before action is taken against him . . . unless the statute expressly or by necessary implication indicates the contrary.' "

In the *Ngwevela* case (129) there is also an extract from the judgment of Tindall ACJ in the *Bechler* case *supra* where the maxim was said to apply where a power is entrusted to a

> "ministerial or administrative authority to give a decision affecting rights or involving legal consequences to persons".

It becomes clear from even a cursory reading of the authorities that the traditional classification of judicial, quasi-judicial and administrative decisions is no longer adequate and has become increasingly unhelpful as regards the decision whether the rules of natural justice are to be applied, and more particularly the rule relating to the right to be heard. It is evident from the *dicta* quoted above that other tests have been adopted, such as whether the administrative act in question is one "affecting rights or involving legal consequences to persons" (see the *Bechler* and *Laubscher* cases *supra*). In *Hack v Venterspost Municipality* 1950 1 SA 172 (W) 190, Roper J also said that

> "it is probably correct to say that as a general rule, a tribunal, or a body, even if administrative, must exercise its functions in a judicial or quasi-judicial way whenever it is empowered to make decisions, not in its own arbitrary discretion, but as a result of an inquiry into matters of fact, or fact and law, and these decisions may affect the rights of, and involve civil consequences to, individuals".

Whatever the approach and the test, there is no doubt that the *audi alteram partem* rule should have been applied in the *Castel* case. The decision taken affected fundamental rights of individuals. The exercise of a discretion presupposes the canvassing of certain factors, which entails acquisition of information, and therefore, the application of the *audi alteram partem* rule. (Cf also Wiechers "Die publieke subjektiewe reg" *Huldigingsbundel vir WA Joubert* (1988) 287.)

In recent years the approach adopted in England has become more flexible, in consequence of the following *dictum* of Lord Denning in *Schmidt v The Secretary of the State for Home Affairs* 1969 1 All ER 904 909B–C:

> "The speeches in *Ridge v Baldwin* (1963) 2 All ER 66, show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

In the *Castel* case there was a pre-existing fundamental right that was affected by the decision. The right cannot be taken away by the statute. The court in this respect ignored the rule that the "act can regulate but not prohibit". Where a discretion is conferred, it follows that it must be exercised according to standards of fairness. The proper question to ask in any given set of facts is whether the person complaining is entitled to expect, in accordance with ordinary standards of fairness, that the rules of natural justice (*audi alteram partem*) will be applied. At any rate, the absence of a right is not a convincing reason for not enforcing the tenets of natural justice, since for purposes of natural justice the question which matters is not whether the claimant has some legal right but whether legal power is being exercised to his disadvantage. It must be borne in mind that the existence of pre-existing rights may be a sufficient, but not a necessary condition for the application of natural justice.

I submit that the appellant *in casu* was under a duty to notify the respondent of his view that respondent had not placed sufficient facts before him and should have given the respondent an opportunity of making "proper representations". In general the rules of natural justice require that prejudicial information should be brought to the knowledge of an applicant so that he can deal with it (see *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 3 SA 476 (T) 486E–F).

4 Legitimate expectations

It was argued by Chaskalson SC (802E–F) as follows:

> "As appellant did not apprise the respondent of the prejudicial information, the excercise of the discretion was improper. Respondent also had a 'legitimate expectation' that it would be afforded a hearing before the application was dismissed on grounds not disclosed . . .";

and later (802H–I):

> "Once appellant was inviting representations on one issue, respondent had a 'legitimate expectation' that the true reasons for refusing would also be canvassed."

Mention must be made of Hlophe "Legitimate Expectation and Natural Justice: English, Australian and South African Law" 1987 *SALJ* 165 *et seq* in which it is pointed out that according to the concept of natural justice a "legitimate expectation" entitles the complainant to be heard before an adverse decision is made against him. It is not necessary to show that the decision affects his pre-existing rights.

In *Ridge v Baldwin* 1964 AC 40 76, Lord Reid suggested that the duty to observe the rules of natural justice should be inferred from the nature of the power conferred upon the authority. That is a useful approach to the consideration of whether in any particular case a person has acquired a right, interest or legitimate expectation. The question then becomes whether the right, interest or legitimate expectation is such that it would be unfair or unjust for the power to deprive him of it without giving him a hearing.

This test of a legitimate expectation has recently begun to be strongly considered in our courts. (See *Everett v Minister of the Interior* 1981 2 SA 453 (C) 456D–E 457B; *Langeni v Minister of Health and Welfare* unreported case no 18815/87 (W); *Mokoena v The Administrator of the Transvaal* unreported case no 23104/87 and 22987/87 (W); *Metal and Allied Workers Union v Castel* 1985 2 SA 280 (D).) In the United States of America the reference is to "legitimate claim of entitlement" (see *Board of Regents v Roth* 80 US 564 (1972) 577 per Justice Steward).

Many examples, as are mentioned in the *Langeni* case *supra*, spring to mind to illustrate that even in the absence of the legal right or interest, there may be a "legitimate expectation" which would make an arbitrary decision concerning that expectation or entitlement both unfair and unjust. From the fact that the trade union in the *Castel* case was previously authorised to hold annual meetings, it may be inferred that it was entitled to the benefits of legitimate expectation. The crux of the matter is the exercise of the fundamental right of assembly. The trade union would legitimately expect to be heard before an adverse decision affecting those rights could be implemented. In *Schmidt v The Secretary of State for Home Affairs* 1969 1 All ER 904 foreign students of scientology were refused extensions to their entry permits without a hearing. They sought an order quashing the decision of the Home Secretary on the ground of breach of natural justice. In his judgment Lord Denning suggested that natural justice did not merely protect rights but any legitimate expectation(s) of which it would not be fair to deprive him without hearing what he has to say.

Legitimate expectation was also recognised in *Everett v Minister of the Interior supra*. The applicant, a British citizen, wished to become a permanent resident of South Africa. She applied for an extension of her temporary permit for one year, during which time she wanted to make further representations to be granted

permanent residence. This application was granted, and her temporary permit was finally extended until 8 July 1980. On 10 June 1980 she was advised by way of personal letter that her permit had been withdrawn, and was ordered to leave the country on or before 11 June 1980. She applied to the supreme court for an order setting aside the notice purporting to withdraw the temporary permit on the ground of non-observance of the *audi alteram partem* rule. The court held that there had been a breach of natural justice and the notice was set aside. Fagan J's judgment was welcomed for invoking the concept of legitimate expectation.

As has been stated, there is no doubt that the applicant in the *Castel* case also had a legitimate expectation in that the decision affected the rights of individuals, that is the right of assembly and freedom of speech. However, Hefer JA said (810I–J):

> "Applicant's counsel submitted that the applicant had a legitimate expectation that it would receive a fair hearing, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. There is, however no factual basis for such a submission. Unlike the English and Australian cases on which counsel relied, nothing had happened before the application for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation . . ."

This *dictum* is open to criticism. The right to freedom of assembly is a fundamental right acquired at birth. Legitimate expectation arises immediately the individual is born. In the event of any decision prejudicial to the citizen, he acquires a legitimate expectation to be granted a hearing. It would be absurd if a foreigner applying for a permit were to have such an expectation while a citizen would not. It is against this background that I submit that the respondent *in casu* had a legitimate expectation to be heard, and that the rules of natural justice were applicable. (Cf the recent case of *Lunt v University of Cape Town* 1989 2 SA 438 (C), in which the doctrine of legitimate expectation was expressly recognised in our law for the first time.)

5 Critical assessment: the exercise of a discretion and fundamental rights

In essence, the dispute in the case under discussion centered on the applicability of the principle in *Laubscher v Native Commissioner, Piet Retief supra.*

In *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 589E–F it was held that any restriction imposed on the fundamental rights or any inroad made on them designed to limit the free exercise of such rights, is *prima facie* unlawful and that the burden of proving the lawfulness of the restriction rests on the imposing authority. Indeed, so fundamental is this right of freedom of assembly that a court faced with a challenge as to the lawfulness of any limitation thereon, is bound to scrutinise carefully the action of the authority imposing such limitation to ascertain whether or not there has been exact and precise compliance with the enabling legislation before concluding that the particular limitation upon the *unfettered exercise* of this fundamental right has been lawfully imposed. In the *Castel* case, however (806G–H), we find that, provided the minister exercises his powers for an authorised purpose, *there are no bounds to his powers.*

The latter ruling cannot be sustained. It is emphasized by Schwartz and Wade (*Legal control of government* (1982) 254–255) that

> "[e]very legal power must have legal limits, otherwise there is dictatorship. In particular, the courts are stringent in requiring that discretion should be exercised in conformity

> with the general tenor of policy of the statute and for proper purposes, and that it should not be exercised unreasonably. In other words, every discretion is capable of unlawful abuse and to prevent this *is a fundamental function of the courts.* Unfettered discretion is a contradiction in terms".

It is unimaginable that the court could have equated the phrase "no bounds to his powers" with "unfettered discretion". The fact that the court qualified the powers but added a condition, automatically circumscribes the powers of the minister, because they could be subjected to all or particular grounds of review employable in administrative law.

The state of emergency should in no way have a negative bearing on the court's duty. Indeed, Lord De Villiers, in *In re Willem Kok and Nathaniel Balie* (1879) 9 Buch 45 66 said:

> "But then it is said the country is in such an unsettled state and the applicants are reputed to be of such dangerous character that the court ought not to exercise a power, which, under ordinary circumstances, might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country."

Even though the *dictum* is more than a hundred years old, it is significant and relevant to the duty of the court even in modern times.

Also in *UDF (Western Cape Region) v Van der Westhuisen* 1987 4 SA 926 (C) 929D–E, the court said:

> "As Kannemeyer J observed in *Nkwinti v Commissioner of Police and Others* 1986 (2) SA 421 (E) at 439, 'those sentiments remain as valid as they were when they were expressed 106 years ago'; nor is any apology called for for its repetition, inasmuch as, to quote Goldstone J in *Radebe v Minister of Law and Order and Another* 1987 (1) SA 586 (W) at 5694E 'it . . . (this fundamental role of the Court) . . . may be that it cannot be reiterated too frequently'. Put simply and to resort to modern idiom, where it is sought to curtail, in troubled times, the exercise of the fundamental rights of free men, the function of the Court is to act as watch-dog and not as lap-dog."

The duty and the responsibility of our courts as "watchdog" should be to guard against improper and unlawful violation and infringement of the civil liberties and to be vigilant that those rights are curtailed as provided for in the enabling statute but not eliminated. Parliament, I submit, by providing that discretion be exercised by the minister or magistrate, acknowledges those rights and the courts should do likewise. In *Congress of SA Trade Unions v District Magistrate of Uitenhage* 1987 2 SA 102 (SEC) 107H–J the court held:

> "The effect of the prohibition is that persons do not have the right to hold a gathering the subject of the prohibition unless they are granted authority to do so. Indeed, without such authority, the holding of a prohibited gathering would constitute an offence. Accordingly the applicant in the *Metal & Allied Workers* case and the applicant in the instant case did in fact apply to do something which, by virtue of the prohibition, they were not otherwise entitled to do. The fact that prior to the prohibition the applicant did have the right to hold a gathering such as it proposed to hold is, with respect, neither here nor there."

The court in this respect seems to have overlooked the vital point that the rights are not completely destroyed by the legislation but merely curtailed to a greater or lesser extent. Had the legislature categorically decided to prohibit rights in the form and substance referred to in the quoted paragraph, the legislature could not have delegated the responsibility of deciding when, where and how those rights should be exercised and enjoyed. In the light of this submission, the applicant was applying for something it was entitled to, but subject to evaluation and authorisation, which is neither absolute nor sacrosanct. The state does not

confer any fundamental right upon the individual. Those rights are intrinsic and inherent rights and the state has no power to take them away for that will give birth to dictatorship (cf Schwartz and Wade *supra*; see also Pretorius "Vryheid van byeenkoms en vergadering" 1986 *SA Public Law* 174).

The court in *Congress of SA Trade Unions v District Magistrate of Uitenhage supra* proceeded to say (107J):

> "To transpose the language used in *Laubscher's* case to the present: By virtue of the prohibition, the applicant had no antecedent right (ie antecedent to its application to the first respondent) to hold the gathering and the refusal of the first respondent to authorise the gathering did not affect the applicant's property or its freedom, including its freedom of assembly; nor did it affect any legal right it already had; it can be said to have affected rights only in the sense that it prevented it from acquiring the right to hold the gathering."

It is submitted that this approach is not correct. *In casu* the court should have realised that the aim and objective of the statute was to curb violence and maintain peace, law and order, but not to uproot fundamental rights. These rights are described as follows in *S v Turrel* 1973 SA 248 (C) 256GH:

> "Freedom of speech and assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundations upon which Parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly."

The same line was taken in *S v Evans* 1982 4 SA 346 (C) 351.

In *R v Magano and Madumo* 1924 TPD 129 it was further held that the right of inhabitants to assemble and meet is recognised, but that this right is subject to limitation. If each of the human rights were by its nature absolutely unconditional and exclusive of any limitation, like a divine attribute, any conflict between them would be irreconcilable. However, this should not detract from the court's duty to protect fundamental rights (see e g *Krohn v The Minister of Defence* 1915 AD 191 197;*United Democratic Front* (*Western Cape Region*) *v Theron* 1984 1 SA 315 (C) 320E).

I believe that it is against this background that Kahn "Freedom of Assembly" 1973 *SALJ* 22, after having discussed *S v Turrel supra* and *S v Budlender* 1973 1 SA 264 (C), said:

> "I should like to think that the two judgments will go down in South African history as a striking affirmation of judicial endorsement of the liberties of the citizen, subject to certain well recognized limitations. A balance has to be struck between the competing values of freedom of assembly (a facet of freedom of expression) and the maintenance of public order."

In my view, the judgment of the court *a quo* in the *Castel* case is to be preferred to that of the appellate division. To begin with, the analogy which was drawn in the latter decision between the *Laubscher supra* and *Castel* cases is not convincing. But whatever the nature of the administrative act in question, the fact remains that information and facts are needed to achieve a lawful decision making process. The facts and information upon which the exercise of a discretion is based, are jurisdictional facts, and jurisdictional facts are always subject to judicial scrutiny. In *Metal & Allied Workers Union v Castel* 1985 2 SA 280 (D) 284A–E, the court quoted from *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 31 (C) 34–35 where Corbett J explained the phenomenon of jurisdictional facts as follows:

> "Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs which objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that, objectively, the fact did not exist, it may then declare invalid the purported exercise of the power (see e g *Kellerman v Ministry of Interior* 1945 TPD 179; *Tefu v Minister of Justice and Another* 1953 (2) SA 61 (T)). On the other hand it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In the cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the prerequisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter."

Since fundamental rights are affected, it would be unthinkable to hold that the *audi alteram partem* rule is not applicable. It is difficult to envisage how an administrative organ can pay due attention to the establishment of jurisdictional facts if the *audi alteram partem* rule has not been observed, since the facts on which the organ has based its decision would be incomplete without it.

In *Matroos v Coetzee* 1985 3 SA 474 (SEC) 479G–H Kannemeyer J held:

> "The Legislature has placed this responsibility on a magistrate because it is appreciated that certain fundamental rights of citizens may be interfered with as a result of such orders and the Legislature wishes to make certain that a responsible person will weigh the pros and cons of the information available before the issue of an order results."

In truth, weighing the pros and cons of the information should be understood to mean the application of the *audi alteram partem* rule so as to acquire information that would enable a person to apply his mind to the matter in the light of the available information and arrive at a decision that would find justification in the mind of a reasonable man.

Adherence to the *Laubscher* case *supra* would mean the exclusion of the *audi alteram partem* rule in many instances where its observance is vital to the effective protection of fundamental rights. Is it not high time that the *Laubscher* decision *supra* (which is trenchantly criticised by Baxter both in his work *Administrative law* and in "Fairness and natural justice in English and South African law" 1979 *SALJ* 617–625) should be reconsidered in the light of more modern notions of administrative law?

Wiechers *Administrative law* (1985) emphasises that "primeval" democratic rights or freedoms must be protected, because they form the basis of any free democratic constitutional system. A state that does not recognise these rights cannot be called a democratic state. In a modern state these rights often have to be restricted by statute for various reasons such as the needs of organised commerce, state security etcetera and such restrictions can be very easily imposed in a state having a flexible constitution without constitutional entrenchments, but this is no reason for denying the very existence of the rights. Fundamental rights in South Africa should be jealously guarded by both the administration and the civil courts. The courts should, when interpreting legislation, enshrine rather than negate fundamental rights.

Wiechers's approach accords perfectly with the fundamental rule of our law that the legislature intends to alter the common law, the source of such rights, as little as possible.

6 Conclusion

In conclusion, the decision in *Castel* highlights the need for legal reform, and, in particular, a review of the *Laubscher* decision *supra* by the appellate division. Consideration should also be given to the recognition of legitimate expectations as a criterion for the applicability of the *audi alteram partem* rule. As the law stands at present, the *Laubscher* decision *supra* is standing in the way of any development of our administrative law "to meet the needs of a rapidly developing and expanding society" (see *Motaung v Mothilia* 1975 1 SA 6128 (O) 629 (D)).

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ASPEKTE VAN AANSPREEKLIKHEID WEENS SUIWER EKONOMIESE VERLIES: BEMOEIING MET 'N KONTRAKTUELE VERHOUDING EN DIE ROL VAN BELEIDSOORWEGINGS

Dantex Investment Holdings (Pty) Ltd v Brenner 1989 1 SA 390 (A); Witham v Minister of Home Affairs 1989 1 SA 116 (ZHC)

Die interessante en dinamiese delikteregsgebied van aanspreeklikheid weens suiwer ekonomiese verlies het in die onlangse tyd dikwels die howe se aandag geniet (sien hieroor Neethling, Potgieter en Visser *Deliktereg* (1989) 9–11 242–246 en die gesag daar aangehaal; vgl ook *ibid* 246 e v m b t nalatige wanvoorstelling en 252 e v i v m bemoeiing met 'n kontraktuele verhouding). Daarvan getuig ook die twee sake onder bespreking.

Voordat die betrokke sake van nader beskou word, is dit ter wille van begripshelderheid noodsaaklik om die begrip "suiwer ekonomiese verlies" duidelik te omskryf. Onses insiens omvat suiwer ekonomiese verlies enersyds vermoënsverlies wat hoegenaamd nie die gevolg van saakbeskadiging of persoonlikheidskrenking is nie, soos meestal die geval by nalatige wanvoorstelling (bv *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *EG Electric Co (Pty) Ltd v Franklin* 1979 2 SA 702 (OK); *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 288 (A)) en onregmatige mededinging (bv *Geary and Son (Pty) Ltd v Gove* 1964 1 SA 434 (A); *Schultz v Butt* 1986 3 SA 667 (A)) is, en in gevalle soos *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T) en *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) voorgekom het. Andersyds het suiwer ekonomiese verlies te make met vermoënsverlies waar saakbeskadiging of persoonlikheidskrenking wel bestaan, maar sodanige beskadiging of krenking nie ten aansien van *die eiser* se saak of persoonlikheid geskied het nie. Hierdie tipe gevalle doen hulle voor in byvoorbeeld *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D) en *Franschhoekse Wynkelders Ko-operatief Bpk v SAR en H* 1981

3 SA 36 (K). Streng gesproke het 'n mens dan ook in gevalle van vermoënsbenadeling weens die dood of besering van 'n ander (Neethling, Potgieter en Visser 229 e v) met suiwer ekonomiese verlies te make aangesien die eiser self nie liggaamlik benadeel is nie (vgl Boberg *The law of delict* (1984) 103). Hierdie gevalle lewer in die reël egter geen besondere probleme nie aangesien gevestigde reëls daaromtrent bestaan. Dit geld ook vir gevalle van suiwer ekonomiese verlies weens saakbeskadiging waar die eiser 'n beperkte saaklike reg of, in historiesverantwoordbare gevalle, selfs net 'n persoonlike reg ten aansien van die saak het (vgl Neethling, Potgieter en Visser 7 8 10 vn 61 253). In laasgenoemde gevalle het 'n mens natuurlik met die bemoeiing met 'n kontraktuele verhouding te make.

1 In die *Dantex*-saak vind 'n mens 'n voorbeeld van suiwer ekonomiese verlies onafhanklik van saakbeskadiging of persoonlikheidskrenking. Die vraag het ter sprake gekom of die huurder van grond wat nog nie in besit daarvan gestel is nie, die Aquiliese aksie vir skadevergoeding kan instel teen 'n derde wat die grond ongemagtig beset. Hierdie vraag hang volgens appèlregter Grosskopff ten nouste saam met die vraag "whether in such a case the third person's conduct is unlawful in the delictual sense, against the lessee" (394H–I).

Nou erken ons reg, soos gestel, dat 'n persoon wat kragtens 'n kontrak met die eienaar van 'n saak in besit daarvan is, in die mate waarin hy 'n direkte belang in die ekonomiese waarde van die saak het, die *actio legis Aquiliae* kan instel teen 'n derde wat die saak beskadig het. In die gemenereg is die Aquiliese aksie aan so 'n houer van 'n persoonlike reg ten aansien van 'n saak toegesê in die geval van die *colonus partiarius*, die lener, die *fullo* en die huurder van die dienste van 'n slaaf of dienaar. Later het die regspraak hierdie bevoegdheid om te ageer tot die huurkoopkoper en langtermynhuurder van 'n saak uitgebrei. (Sien vir gesag Neethling, Potgieter en Visser 253.) *In casu* was die eiser egter nie in besit van die grond nie en was daar ook nie van saakbeskadiging sprake nie. Daarom het die eiser waarskynlik nie beweer

> "that a lessee who is not in occupation of the leased premises has a sufficient interest in the property to entitle him to invoke the Aquilian action in respect of damage to his limited interest in the land in the same way in which, for instance, the owner or *bona fide* possessor might take action to protect their more extensive interests . . . [oftewel] that the Aquilian remedy has been or should be extended in this direction" (395B–C).

Die eiser beweer wel dat die derde party "deliberately interfered with its contractual rights under the lease with the intent to injure it", met ander woorde die eis word op die opsetlike bemoeiing met 'n kontraktuele verhouding gebaseer. Appèlregter Grosskopff (395D–G) lewer die volgende kommentaar:

> "It is clear that an interference with contractual rights can in certain circumstances constitute a delict. What is less clear is what precisely the requirements for liability are. In the present case Mr Slomowitz accepted that this cause of action required fault in the form of *dolus* on the part of the defendants. Moreover both parties were *ad idem* that, if such *dolus* has been pleaded, the pleading would disclose a cause of action in delict. For the purposes of this case I assume, without deciding, that the parties' attitude is correct. I would, however, emphasize that the question whether *culpa* might not constitute a sufficient element of fault to ground liability for damages for an unlawful interference with contractual relations was not raised or debated in argument.
>
> Since there was in any event no allegation of *culpa* in the pleadings I need say no more about this possibility."

Dit is opmerklik dat alhoewel die regter die algemene benadering in ons reg volg dat die opsetlike bemoeiing met 'n kontraktuele verhouding tussen andere 'n selfstandige deliktuele skuldoorsaak daarstel, hy – en dit is baie belangrik –

anders as in *Union Government v Ocean Accident and Guarantee Corp Ltd* 1956 1 SA 577 (A) nie summier Aquiliese aanspreeklikheid weens die *nalatige* bemoeiing met 'n kontraktuele verhouding (buite die histories-verantwoordbare gevalle) afwys nie. Hierdie benadering is te verwelkom. In die *Union Government*-saak baseer die hof sy standpunt dat die nalatige bemoeiing met 'n kontraktuele verhouding nie ageerbaar is nie, daarop dat die verlening van 'n aksie tot 'n "unmanageable situation" aanleiding kan gee omdat die deur vir oewerlose aanspreeklikheid dan oopgemaak word. Onses insiens behoort enige nalatige optrede deur 'n derde wat die skending van 'n kontraktuele vorderingsreg of die verswaring van 'n kontraktuele verpligting tot gevolg het, egter in beginsel die Aquiliese aksie te fundeer. Die vrees vir oewerlose aanspreeklikheid kan besweer word deur die korrekte toepassing van die elemente van die onregmatige daad. Veral die vereiste van onregmatigheid speel in hierdie verband – net soos by probleemgevalle van aanspreeklikheid weens suiwer ekonomiese verlies – 'n baie belangrike rol. 'n Mens het trouens, weens die onstoflike aard van die belange wat in gevalle van die bemoeiing met 'n kontraktuele verhouding op die spel is, deurgaans met benadeling in die vorm van suiwer ekonomiese verlies te make (sien Neethling, Potgieter en Visser 254). Daarom moet beklemtoon word dat nie elke feitelike inwerking op 'n kontraktuele prestasie of verswaring van 'n kontraktuele verpligting deur 'n derde prinsipieel onregmatig is nie. Dit is eers die geval indien sodanige inwerking of verswaring boonop *contra bonos mores* of *onredelik* is. En hier speel, soos ten aansien van aanspreeklikheid weens suiwer ekonomiese verlies, die dader se *subjektiewe wete* dat die eiser benadeel gaan word en (ander) *beleidsoorwegings* 'n belangrike rol. By implikasie word hierdie benadering reeds deur die beslissing in die *Shell and BP*-saak (*supra*) gerugsteun (sien ook Neethling 1981 *THRHR* 79).

Ten slotte kan genoem word dat die *Dantex*-saak ook van belang is ten opsigte van die skuldvereiste (in besonder opset) vir deliktuele aanspreeklikheid in die algemeen. Die hof beklemtoon naamlik tereg met betrekking tot die geval *in casu* dat opset of *dolus* sowel die *wilsgerigtheid* tot die intrede van 'n bepaalde gevolg as *onregmatigheidsbewussyn* by die dader omvat. Regter Grosskopff maak die volgende belangrike opmerkings (396D–H):

> "Moreover, it is now accepted that *dolus* encompasses not only the intention to achieve a particular result, but also the consciousness that such a result would be wrongful or unlawful . . . In *Ramsay's* case *supra* [1981 4 SA 802 (A) 807 818] the majority of this Court (*per* Botha JA) doubted whether *animus injuriandi*, including consciousness of wrongfulness, was a necessary element in all forms of *injuria* (see at 818F–819C). In the present case we are, of course, not concerned with an *injuria* but with a claim under the extended *lex Aquilia* in which the plaintiff relies upon fault in the form of *dolus*. The policy considerations which might affect the elements of various types of *injuria* consequently do not arise in the present case, and I do not read the judgment of Botha JA as casting doubt on the proposition that *dolus* or *animus injuriandi* in principle requires consciousness of unlawfulness. And even if there may be policy considerations in certain cases falling under the extended *lex Aquilia* why a plaintiff, who relies on fault in the form of *dolus*, should not be required to prove consciousness of unlawfulness, the present is, in my view, not such a case. In the type of interference with contractual rights with which we are here concerned there would appear to be no reason why *dolus* should not comprise all its normal elements."

2 In die *Witham*-saak het die tweede geval van suiwer ekonomiese verlies hierbo genoem, voorgekom. Die eiser se vrou is gedood en hy beseer toe daar deur 'n lid van die Zimbabwese polisie op hulle geskiet is. Die eiser eis onder andere skadevergoeding vir verlies van inkomste uit sy vrou se besigheid wat

weens haar dood gesluit moes word. Regter Ebrahim beklemtoon ten aanvang dat dit hier nie gaan om die eis van 'n afhanklike weens verlies van onderhoud nie. 'n Mens het dus te make met die aksie van 'n nie-afhanklike vir suiwer vermoënsverlies gely as gevolg van die dood van 'n ander (vgl Neethling, Potgieter en Visser 299 e v). Die regter ondersoek die vraag of hierdie geval onder die uitgebreide toepassingsgebied van die *lex Aquilia* tuisgebring kan word en verklaar (132E–F):

> "In considering whether to recognise an extension of the law such as that for which counsel contended, Courts are bound by circumspection. The line between extension of law and creation of law is often ill-defined . . . To avoid encroaching on the latter, strict adherence must be kept to the basic principles of law involved . . . and close regard should be paid to the question of whether public policy requires the extension."

Die hof weier egter om die Aquiliese aksie tot die onderhawige geval uit te brei, hoofsaaklik op grond van die oorweging dat die skade hier spekulatief van aard is. Regter Ebrahim (133A–D) laat hom soos volg uit:

> "The Court is constrained to ask whether, in circumstances where it is asked to award damages of a speculative nature to enable a plaintiff to enjoy a lifestyle he merely anticipated would result from his wife's activities in a business in which he neither assisted nor displayed particular interest, it is in the public interest to extend the *lex Aquilia* to accommodate the claim. The answer, I think, must be firmly in the negative. The allowance of such a claim would entail a major extension of the ambit of the *lex Aquilia*. The cases referred to by plaintiff's counsel in which exceptions were made to the Aquilian requirement excluding pure economic loss all concerned situations where commercial considerations demanded an award of damages to redress an obvious injustice. In this case, a private individual claims damages to an amount which will enhance his standard of living to a degree well in excess of that which he enjoyed before tragedy befell him. While not minimising the magnitude of the loss he has suffered, the Court is by duty bound to view the matter objectively and ensure that what he receives accords with the dictates of public policy which, in this context, has been defined as '. . . the general sense of justice in the community, the *boni mores*, manifested in public opinion' (*per* Van Dijkhorst J in the *Atlas Organic Fertilisers* case *supra* at 188H). I cannot conceive that public opinion, appreciating the circumstances of the case, would approve of the award of damages in the sum contended for under this head. I therefore decline to make the award sought."

Hierdie uitspraak verdien om twee redes instemming: Eerstens is die regter korrek vir sover hy die *spekulatiewe aard van die skade* as 'n belangrike, straks deurslaggewende, oorweging aanvoer vir die weiering van die man se aksie. Hierdie standpunt sluit trouens aan by die beslissing in *Lockhat's Estate v North British Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) waar te kenne gegee is dat 'n erfgenaam of legataris geen eis vir skadevergoeding het op grond daarvan dat die oorledene se vroeë dood waarskynlik verhoed het dat sy toekomstige boedel groter sou gewees het nie. Die belangrikste rede vir weiering van die aksie is seker die feit dat 'n erfgenaam *nie skade sal kan bewys* nie. In plaas van groter, kon die boedel in die toekoms net sowel aansienlik kleiner geword het. Enige poging om die toekomstige waarde van die boedel te bepaal, sou dus op blote spekulasie – soos *in casu* – neerkom (Neethling, Potgieter en Visser 230).

Tweedens bevestig die uitspraak die belangrike rol wat *beleidsoorwegings* by die onregmatigheidsvraag met betrekking tot aanspreeklikheid weens suiwer ekonomiese verlies in besondere gevalle speel (Neethling, Potgieter en Visser 245). Beleidsoorwegings word gewoonlik getipeer as die "policy based aspect of the 'duty of care' concept, by means of which the scope of delictual liability is judicially controlled" (bv *Shell and BP*-saak *supra* 659; *Franschhoekse Wynkelder*-saak *supra* 40; *Coronation Brick*-saak *supra* 381–382). 'n Beleidsoorweging wat dikwels 'n rol speel is dat die situasie "one fraught with an overwhelming

potential liability" is, soos waar die gewraakte optrede waarskynlik 'n "multiplicity of actions" wat "socially calamitous" kan wees, tot gevolg gaan hê (bv *Greenfield Engineering Works*-saak *supra* 916–917). In sodanige omstandighede word dan te kenne gegee dat die verweerder nie 'n regsplig gehad het om benadeling te vermy nie. In die *Franschhoekse Wynkelder*-saak *supra* 41 het die hof inderdaad die aksie onder andere op grond van beleidsoorwegings afgewys. Die hof verklaar naamlik dat

> "[n]o considerations of the policy have been advanced to us to justify the extension of the Aquilian action so as to cover the facts of the present case, and I can see none".

In casu steun die regter ook op beleidsoorwegings om die eis af te wys. Soos blyk uit die *dictum* hierbo aangehaal, is regter Ebrahim van mening dat in die onderhawige geval die weiering van die aksie nie "an obvious injustice" tot gevolg sal hê nie. Die rede wat hy aanvoer, is dat die toekenning van skadevergoeding "will enhance his [die eiser se] standard of living to a degree well in excess of that which he enjoyed before the tragedy befell him," en dit sou nie "accord with the dictates of public policy" nie.

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BOEKE

HULDIGINGSBUNDEL VIR WA JOUBERT

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Hierdie bundel is aan professor Willem Adolf Joubert by geleentheid van sy sewentigste verjaardag op 27 Oktober 1988 aangebied.

Professor Johann Neethling het my gevra om die boek te bespreek. Hoewel ek geen akademikus of resensent van regswerke is nie, doen ek dit met genoeë.

Stewig gebind met 'n mooi hardeband (waaroor later meer) bevat dit 'n kort "preface" in Engels, 'n mooi biografie deur SA Strauss getiteld "Willem Joubert: Regsgeleerde, hoogleraar, kollega, mens en vriend", 'n weergawe van 'n mondelinge gesprek tussen Willem en sy kollega Willy Hosten, opgeteken in 1978, en 'n aantal bydraes deur eminente juriste. Aan die einde is 'n lys van doktorale en magisterstudente wat proefskrifte met Willem as promotor voltooi het. Omdat hy en ek so 'n lang pad in die Vereniging Hugo de Groot saamgeloop het, noem ek hom Willem. Eintlik is hy ook onse Willem omdat hy so lank redakteur van die *THRHR* was en nog steeds die Vereniging se jaarvergaderings bywoon waar ons van sy advies gebruik kan maak en die verversings geniet wat Hulda, sy vrou, persoonlik aan ons verskaf. Dit verheug my dat in die biografie ook hulde aan Hulda – wat sy ryklik verdien – gebring word.

Willem se lewe moet gesien word teen die agtergrond van die opkoms van die Afrikaner in hierdie eeu. 'n Paar pioniers soos Malherbe en Pont het uiteindelik in die regte 'n ryk oes op hul saaiwerk gekry. Willem beklee eintlik 'n besondere posisie. Hy was klassikus, taalkundige, pedagoog en by uitstek 'n skepper van dit wat in die reg onontbeerlik is, naamlik 'n groot biblioteek, regsinstitute en regstydskrifte. Hy was inderdaad 'n professionele redakteur. Kyk mens na die groei van die breë regswese in die twintigste eeu, moet hy in 'n sekere opsig as uniek beskou word.

Strauss (9) skryf in die biografie die volgende oor Unisa se regsbiblioteek:

> "In die onvergelyklik-pragtige Botaniese Tuin te Kirstenbosch, Kaap, is daar 'n eenvoudige gedenksteen vir die grondlegger van die tuin opgerig, waarop woorde met min of meer die volgende strekking voorkom: 'If you seek his monument, look around you.' Van Willem Joubert kan mens waarlik dieselfde sê as jy in die Regsbiblioteek staan."

Ek dink Strauss moes liewer verwys het na die oorspronklike inskripsie op 'n deur in die St Paul's Katedraal, Londen, aangaande die veelsydige Sir Christopher Wren (1632–1723), 'n matematikus, professor in sterrekunde en later wêreldbekende argitek, onder meer van die herboude St Paul's en van vele ander kerke en geboue. Daardie inskripsie lui: *si monumentum requiris, circumspice.* Willem se monument is nie net die biblioteek nie, maar sy proefskrif, sy tydskrifte, sy *LAWSA* en sy studente. In die biografie is 'n paar mooi foto's van Willem (van baba tot gevorderde

ouderdom) en een van Willem en Hulda in 1981 toe hulle altwee kortstondige politieke ambisies gehad het. Voor op die band verskyn 'n afdruk in kleur van 'n skildery van Willem, sittende in sy rooi doktorale toga. Dit maak die band kleurvol maar die gesig van Willem is nie heeltemal geslaagd nie. Hy het wel 'n Mona Lisa-glimlag, maar 'n mens kan sien dat die portret nie deur Henkel geskilder is nie. Uit Strauss se biografie blyk ook dat Willem 'n mens met 'n sin vir humor is en dat hy selfs 'n redelike sportpresteerder was.

Die res van die bundel bestaan uit hoofsaaklik goeie bydraes, 'n deel waarvan deur bekende oud-studente van Willem. Gebrek aan ruimte laat my toe om net kortliks na die bydraes te verwys. Na my mening is een van die beste en tegelyk een van die moeilikste vir die ouer juris dié van Johan van der Vyver oor "The doctrine of private-law rights". Dit is spesiaal in Engels geskryf om Engelssprekende juriste tegemoet te kom. In sy bekende proefskrif (in 1963 nog te koop vir R1,00) het Willem na vele skrywers, onder andere Dooyeweerd, die skepper van 'n sogenaamde Calvinistiese filosofie, verwys. Later in 1958 het hy in 'n artikel in die *THRHR* (band 21) weer na Jean Dabin se klassifikasie van regte verwys en Van der Vyver meen dat hierdeur (sonder skuld van Willem) verwarring ontstaan het. Die artikel van Van der Vyver is regsfilosofies van aard en dit verwys na vele bronne; dit is duidelik dat in hierdie denkwêreld die teologiese aspek van Calvinisme agterweë gehou word en dat 'n nie-Calvinis die artikel dus met groot vrug kan lees.

Verskeie bydraes handel oor aktuele onderwerpe. In 'n goed gefundeerde artikel oor "Databeskerming: Motivering en riglyne vir wetgewing in Suid-Afrika" toon Johann Neethling wat databeskerming behels en hoe dringend nodig dit is dat 'n databeskermingsreëling in die lewe geroep moet word. SA Strauss skryf oor problematiese aspekte van 'n onderwerp wat wêreldwyd groot besorgdheid veroorsaak, te wete Vigs, onder die titel "Employees with AIDS: some legal issues". Volgens Marinus Wiechers het Willem Joubert nie alleen die private subjektiewe reg onder die loep geneem nie maar ook as kampvegter vir die individu se publieke regte en vryhede opgetree. Dit motiveer hom vir 'n bydrae oor "Die publieke subjektiewe reg". Na 'n analise van moderne skrywers oor die onderwerp kom hy tot die slotsom (277) dat "[o]ns huidige stand van publiekregtelike teorie . . . dus wel lewendig, maar hoogs verwarrend" is. Wiechers verwys na die Engelse reg wat onder meer " 'n impressionistiese regstoepassing gehuldig het". Ek weet van "impressionisme" ten opsigte van die skilderkuns, lettere en musiek maar ek dink ek verstaan wat hy bedoel. Sou dit ooreenkoms toon met die sogenaamde "robust approach" wat 'n onlangse appèlregter lief was om te gebruik? En dan die uitdrukking "by goedguns van die owerheid" (272) – dit klink aanvaarbaar as verkorting van "goedgunstigheid". 'n Bydrae van professor Dawie Joubert is getitel "Aspekte van skadelike en gunstige newewerkings van verryking en verarming". Hy verwys na 'n aantal skrywers en sekere hofbeslissings en toon aan dat die probleem ontstaan as gevolg van moderne ontwikkeling. AJGM Sanders lewer 'n bydrae oor "Die belangrikheid van regsvergelyking vir beter begrip en effektiewe hervorming van die Suid-Afrikaanse regstelsel". Met verwysing na 'n aantal skrywers is die gevolgtrekking waartoe Sanders kom dat effektiewe hervorming van die Suid-Afrikaanse regstelsel konsensus vereis en om dit te bereik, moet daar van regsvergelyking gebruik gemaak word. "Reflections on 'domicile' as a connecting factor" is 'n bydrae van André Thomashausen waarin hy aantoon dat die begrip *domicilium* bestudeer moet word vir sover dit alle privaatregtelike aspekte, asook die implikasie daarvan ten opsigte van ander regsverhoudings, betref.

Daar is twee kort bydraes van PM Bekker en Victor Hiemstra. Eersgenoemde skryf oor "Assessore in Suid-Afrikaanse strafsake". Nie alleen word die probleme behandel wat met assessore kan ontstaan nie, maar die artikel bevat ook 'n nuttige oorsig van die geskiedenis van die juriestelsel in die Suid-Afrikaanse reg. Hiemstra

skryf oor enkele belangrike artikels van 'n konsep-grondwet vir Namibië soos opgestel deur 'n konstitusionele raad waarvan hy voorsitter was. Ek is bevrees dat wanneer SWAPO die bewind in Namibië oorneem, die nuwe grondwet daar ietwat anders gaan uitsien as hierdie ontwerp. (Terloops, Hiemstra het sy LLB-graad aan die Universiteit van Kaapstad – en nie Stellenbosch nie – verwerf.) In 'n artikel behandel WJ Hosten 'n ou onderwerp, naamlik "Kodifikasie in Suid-Afrika – 'n heroorweging?". Met ons konstitusionele probleme wat voorlê en 'n oorweging van inheemse reg voorsien ek nie gou 'n kodifikasie nie hoewel ons gelukkig is om moontlike outeurs te hê. Die voordeel van hierdie artikel is dat dit verwys na omtrent alles wat reeds oor kodifikasie geskryf is. Ek weet dat die nie-woord "huidiglik" vandag populêr geword het, maar was dit nodig vir Hosten om dit twee maal in sy artikel te gebruik? In "Noodweg in breëre perspektief" stel CG van der Merwe 'n denkbeeldige probleem en probeer daarop 'n antwoord te gee met verwysing na vele bronne. Dit sal nuttig wees wanneer 'n soortgelyke stel feite voor die hof kom. HJO van Heerden stel ook 'n denkbeeldige probleem (wat in die praktyk kan opduik) in 'n bydrae getitel "The 'passing on' defence". Hy probeer ook 'n antwoord gee met verwysing na skrywers en hofbeslissings. In "Skoktoediening: 'Wie sal die aftreksom maak?' " behandel JC van der Walt die uitbreidingstendens wat daar bestaan oor die aanspreeklikheid vir skoktoediening in die Suid-Afrikaanse reg. Wat mens opval in byna al die bydraes is die voldoende verwysing na skrywers en hofbeslissings wat aantoon dat goeie en waardevolle navorsing gedoen is. 'n Welkome bydrae is dié van Ellison Kahn oor "Law and English style" waarin hy, soos vantevore in die *South African Law Journal*, styl- en taaljuweeltjies uit uitsprake van regters delf – hierdie keer uit Amerikaanse, Engelse en Suid-Afrikaanse uitsprake. Met sy tong in die kies sê hy ewe plegtig (88): "I know a moderate amount of law; only little English language and literature; and almost nothing of linguistics". Mens hoef net na sy regsboeke en na die *South African Law Journal* te kyk om te sien watter statuur die man het. Ellison Kahn is 'n unieke figuur in die regswêreld van Suid-Afrika in hierdie eeu. In sy bydrae word daar onder meer na Toon van den Heever verwys. Ek onthou dat in sommige van sy Engelse uitsprake woorde verskyn wat selfs Engelssprekendes in 'n woordeboek moet opsoek. Dit wys wat 'n boerseun van die hoëveld kan doen.

Ek wil afsluit deur te sê dat die bundel as geheel, en ook die bydraes van die oud-studente van Willem, die gehuldigde werklik waardig is. Die redakteur het goeie werk gedoen en die bundel behoort deur elke juris aangeskaf te word.

F RUMPFF
Voormalige Hoofregter van die Hooggeregshof van Suid-Afrika

COMMENTARY ON THE CRIMINAL PROCEDURE ACT
deur E DU TOIT, FJ DE JAGER, A PAGES, A ST Q SKEEN en S VAN DER MERWE
Juta Kaapstad Wetton Johannesburg 1987
Prys R176,00 + AVB

Commentary on the Criminal Procedure Act is 'n handige losbladpublikasie wat 'n volledige kommentaar oor die Strafproseswet bevat. Hierdie werk sal ongetwyfeld om twee belangrike redes deur lede van die regsberoep (én regstudente) verwelkom word.

In die eerste plek hou 'n losbladpublikasie oor die strafprosesreg besondere voordele in aangesien hierdie gebied van die reg feitlik jaarliks veranderings ondergaan. Ondervinding het geleer dat bestaande gebinde publikasies oor die strafprosesreg om hierdie rede 'n besondere kort lewensduur het wat periodiek nuwe uitgawes noodsaak. 'n Losbladpublikasie is in hierdie opsig kostebesparend aangesien net die bladsye waarop die wysigings betrekking het, jaarliks vervang hoef te word. Hierbenewens is die gebruiker ook verseker dat die publikasie van jaar tot jaar met die nuutste wysigings tred hou.

Hierdie werk is in die tweede plek uniek omdat dit die eerste Engelse kommentaar oor die strafprosesreg is – 'n feit wat sekerlik deur veral Engelssprekende regstudente en dalk ook deur sommige Engelssprekende regspraktisyns verwelkom sal word.

Die boek bevat die komponente wat 'n kieskeurige gebruiker van 'n handboek oor die strafprosesreg sou verlang: die volledige teks van die Strafproseswet, tesame met uitvoerige kommentaar op elke artikel; die regulasies afgekondig ingevolge artikel 79 (1.1); 'n bronnelys, wat ook 'n lang lys van besliste sake oor verskeie artikels insluit (met 'n verwysing na die betrokke artikel langs elke saak); en 'n algemene indeks wat alfabeties volgens onderwerpe opgestel is.

Die kommentaar word deur vyf skrywers, elk oor 'n afsonderlike deel van die wet, behartig. So 'n werksverdeling bied die voordeel dat elke skrywer in diepte navorsing kon doen oor 'n spesifieke gedeelte van die strafprosesreg. Dat sodanige navorsing wel gedoen is, blyk nie net uit die uitvoerige kommentaar wat in die werk verskyn nie, maar ook uit die veelvuldige bronneverwysings. Die outeurs maak van die "Harvard-metode" gebruik (waar bronneverwysings tussen hakies in die teks – en nie in voetnote nie – voorkom). Persoonlik vind ek hierdie metode ietwat steurend waar daar lang verwysings na bronne in die teks voorkom, veral as die gebruiker net vlugtig op die hoogte wil kom van die regsposisie oor 'n bepaalde onderwerp en dan nie soseer belangstel in die bronne waarna verwys word nie. Hierdie opmerkings weerspieël egter net 'n persoonlike voorkeur en moet beslis nie as 'n negatiewe refleksie op 'n puik publikasie gesien word nie.

In die geheel gesien is *Commentary on the Criminal Procedure Act* 'n uitstekende publikasie wat deur akademici, studente en praktisyns met groot vrug geraadpleeg sal kan word en in die toekoms 'n onmisbare handboek oor die strafprosesreg sal wees.

CR BOTHA
Universiteit van Suid-Afrika

KATALOG DER BIBLIOTHEK VON WOLFGANG KUNKEL

Kyushu University Library Fukuoka 1988; xiv en 660 bl
Prys nie vermeld nie

As beroemde Romanis het Wolfgang Kunkel (1902–1981) sekerlik geen bekendstelling nodig nie. In Suid-Afrika sal hy selfs buite die "Romanistiese kring" onthou word as die outeur van die formidabele *Römische Rechtsgeschichte*, stellig een van die bes gekonstrueerde en helderste geskiedenisboeke waarmee 'n student in die Romeinse reg hom kan besig hou.

Vir die Suid-Afrikaanse Romanisties-geörienteerde regsgeleerde is die belang van die verskyning van 'n katalogus van die Kunkel-versameling in 'n so verafgeleë oord as die Kyushu universiteitskampus beslis niks meer as "bloot akademies" nie: mens kan jou sekerlik maar net daaraan verwonder dat 'n universitêre instelling vandag oor soveel fondse beskik om die ganse inhoud van só 'n spog "Gelehrtheitsbibliothek" (wat bestaan uit ongeveer 3 000 boeke oor die Romeinse reg, algemene Romeinse geskiedenis, antieke regsgeskiedenis en moderne privaatregsgeskiedenis; naastenby 1 300 tydskrifbande; en meer as 8 000 oor- en herdrukke van regswetenskaplike artikels uit tydskrifte, "Festschrifte" en dies meer) aan te skaf.

In 'n woord ter inleiding (iii–v) vermeld professor Dieter Nörr van München dat dit 'n merkwaardige neiging van Japanese universiteite is om Duitse regsversamelinge *in toto* aan te skaf. Hy noem as vroeëre voorbeelde van hierdie "Wanderung Deutscher Bibliotheken nach Japan" die boekversamelings van Wendt, O Gierke, Zitelmann en Seckel. Nörr wys daarop dat die vestiging van Kunkel se persoonlike biblioteek in Japan beslis simboliese waarde het, veral wat die invloed van daardie groot juris, asook die lewenskragtigheid van sy navorsingsgebiede, betref.

Die katalogus bevat, benewens Nörr se bydrae wat 'n kort biografie van Kunkel insluit, 'n bondige voorwoord deur professor Yoshihiro Hirashima van die Universiteit van Kyushu, enkele bylaes waarin die skema van elke katalogusinskrywing uitvoerig verduidelik word, asook 'n lys van afkortings. Die katalogusinskrywings self is goed gesistematiseer in normale alfabetiese volgorde; die druk is duidelik en die tipografiese afwerking van hoë gehalte.

JOHAN SCOTT
Universiteit van Pretoria

A CATALOGUE OF EARLY LAW BOOKS IN THE UNIVERSITY OF THE WITWATERSRAND LAW LIBRARY

Saamgestel deur JEAN COWLEY Redakteur: JE SCHOLTENS

Library of the University of the Witwatersrand Johannesburg 1987; iv en 147 bl
Prys R25,00 + AVB (sagteband)

Die *Catalogue of early law books* is die nuutste in 'n reeks publikasies van die biblioteek van die Universiteit van die Witwatersrand wat ten doel het om besondere kategorieë boeke bekend te stel.

Hierdie universiteit beskik oor 'n besondere versameling ou bronne, en aangesien slegs enkele vakspesialiste van die inhoud en omvang daarvan bewus is, is daar gevoel dat 'n katalogus van die versameling van groot waarde vir regsgeleerdes sal wees.

Die meeste van die boeke handel oor die Romeins-Hollandse reg, maar daar is ook 'n aantal werke van belangrike vroeë Italiaanse, Nederlandse, Franse, Duitse en Engelse juriste.

Die werke wat in die katalogus opgeneem is, strek vanaf uitgawes (en reproduksies van uitgawes) van die *incunabula*-tydperk tot aan die einde van 1806. Latere uitgawes en vertalings is ook ingesluit, en die katalogus bevat altesaam 1 018 items.

Die katalogus word, soos gebruiklik, alfabeties volgens outeur aangebied en bevat 'n aantal baie nuttige registers: 'n register van vertalers; 'n register van drukkers en uitgewers tot 1600; 'n register van plekke, met drukkers, tot 1600 (wat besonder waardevol is aangesien die moderne plekname naas die antieke aangegee word); en, ten slotte, 'n outeursregister met bladsyverwysings. Die katalogus word geïllustreer met dertig pragtige afdrukke uit sommige van die werke.

Die samesteller, redakteur en biblioteek van die Universiteit van die Witwatersrand moet gelukgewens word met hierdie netjiese publikasie, en bedank word vir hulle groot moeite met die opstel daarvan. Dit sal ongetwyfeld van veel nut vir alle regsgeleerdes wees wat enigsins regshistoriese navorsing doen.

RENA VAN OOSTEN
Universiteit van Suid-Afrika

The judge in the performance of his calling is under the influence of the tradition of culture because he is a human being of flesh and blood, and not an automaton, or rather because he is not merely a biological but also a cultural phenomenon. He looks on his activity as a task in the service of the community. He wishes to find a decision that shall not be the fortuitous result of mechanical manipulation of facts and paragraphs, but something which has purpose and meaning, something which is "valid" (*per* Alf Ross *On law and justice* (1958) 99).