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Anomalieë in die Suid-Afrikaanse trustreg*

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SUMMARY

Anomalies in South African trust law

A definition of the true nature of the trust in South African law is not easy to give. It is, in a certain sense, easier to approach this task in a negative way by saying, for example, that the trust in South African law cannot be equated with the English trust or by stating that the trust should not be treated as a form of *fideicommissum*. To this may be added the statement, which is important for this contribution, that the trust is not a juristic person or an entity with legal personality. This view, however, leads to various anomalies if trust theory and trust practice are compared. These anomalies are identified in this article by way of an analysis of matters relating to the registration of immovable property as well as problems relating to insolvency, taxation, the limited liability of the trustee, the trust as beneficiary and the "trust estate" at the death of the trustee. It is argued that the positive side of this uncertainty as to the true legal nature of the trust is translated into the fact that the trust is seen as a highly flexible and adaptable institution. On the other hand, this situation poses the challenge "to articulate a justification which can reconcile coherence with diversity and prevent fragmentation becoming disorder". In the final instance the question is asked whether the conferment of legal personality on the trust should not be the next logical step. It is argued that, in order to protect the integrity of the "trust idea", considerations other than practical ones such as administration and taxation should be decisive in this regard.

1 INLEIDING

'n Anomalie is, volgens die woordeboekbetekenis daarvan, 'n afwyking van die gewone reël, 'n inkonsekwentheid, selfs 'n onreëlmatigheid of abnormaliteit.[1] Die vraag is nou: openbaar die Suid-Afrikaanse trustreg anomalieë in hierdie sin van die woord? Hierdie vraag kan slegs beantwoord word indien daar eenstemmigheid bestaan oor die maatstaf waaraan die trust gemeet moet word. Afwykings of inkonsekwenthede kan immers eers uitgewys word indien die norm waaraan gemeet word, geïdentifiseer is. Die identifikasie van hierdie norm of

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* Referaat gelewer by geleentheid van 'n seminaar oor trusts aangebied deur die Departement Privaatreg, Universiteit van Suid-Afrika, op 1992-06-12.

1 Vgl Terblanche en Odendaal *Afrikaanse woordeboek (verklarend met woordafleidings); Concise Oxford dictionary of current English; Collins pocket reference thesaurus.*

norme kan egter natuurlik self reeds tot omstredenheid aanleiding gee. Dit is nietemin nie die oogmerk met hierdie bydrae om laasgenoemde tot 'n debatspunt te verhef nie. Vir huidige doeleindes sal ek aanvaar dat die trust beoordeel moet word, eerstens aan die hand van daardie beginsels of reëls wat inherent is aan die regsfiguur waarmee gewerk word, en tweedens aan die hand van die beginsels en reëls wat vergelykbare of analogiese regsfigure reguleer.

Die dilemma is natuurlik dat daar reeds onduidelikheid oor die eerste van hierdie maatstawwe bestaan: dit is nie 'n eenvoudige taak om die ware aard van die trust in die Suid-Afrikaanse reg aan te dui nie. Soos elders geargumenteer word,[2] moet 'n mens in hierdie verband eintlik maar tevrede wees met 'n aantal negatiewe stellings. So is dit byvoorbeeld na die appèlhofuitspraak in *Braun v Blann and Botha*[3] veilig om te verklaar dat die trust nie bloot 'n verskyningsvorm van die *fideicommissum* is nie. Ook is dit duidelik dat die trust in die Suid-Afrikaanse reg nie met die Engelse trust gelykgestel kan word nie.[4] Verder, en later word in besonderhede hierna teruggekeer, is dit so dat die trust nie 'n regspersoon is nie.[5]

Ook die tweede maatstaf wat hierbo genoem is, naamlik die vergelyking met analogiese regsfigure, is nie sonder probleme nie. In privaatregtelike konteks is die enigste regsfigure wat hulle hier aan die hand doen eintlik die *fideicommissum*, die stigting, die *modus* en miskien ook die vruggebruik. In die besigheidsfeer kan 'n vergelyking tussen die sogenaamde bedryfstrust en ondernemingsvorme soos die maatskappy, die beslote korporasie en die vennootskap interessante resultate oplewer.[6] Uiteindelik kan die trust egter nie in enige van hierdie kategorieë ingedeel word nie. Die regsbeginsels en regsreëls wat ten opsigte van al hierdie regsfigure uitgekristalliseer het, kan dus nie op die trust toegepas word nie – of selfs nie eers altyd gerieflik as vergelykende materiaal gebruik word nie.

Teen hierdie agtergrond, en met hierdie voorbehoude steeds in gedagte, sal ek nou voortgaan om enkele van die sogenaamde anomalieë in die Suid-Afrikaanse trustreg kortliks uit te lig. Die identifisering en ontleding van hierdie anomalieë sal egter nie die fokus van hierdie bydrae vorm nie. Daarom wil ek nie voorgee dat wat hieronder volg 'n uitputtende lys is of dat daar 'n volledige ontleding van die betrokke items gegee word nie. Die fokus sal uiteindelik op 'n meer fundamentele vraag val: wat vertel dié anomalieë ons aangaande die huidige stand van die Suid-Afrikaanse trustreg? Enige gevolgtrekking sal 'n mens dan ook ten slotte dwing om aandag te gee aan 'n laaste vraag: watter implikasies hou sodanige gevolgtrekking vir die aanwending, ontwikkeling en voortbestaan van die trustfiguur in die Suid-Afrikaanse reg in?

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2 De Waal en Theron "Die aard van die trust in die Suid-Afrikaanse reg – skikking na aanleiding van behoefte?" 1991 *TSAR* 499.

3 1984 2 SA 850 (A).

4 *Braun v Blann and Botha* 1984 2 SA 850 (A); Honoré en Cameron *Honoré's South African law of trusts* (1992) 16–18.

5 *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A).

6 Vgl in die algemeen Theron "Die besigheidstrust" 1991 *TSAR* 268; Wunsh "Trading and business trusts" 1986 *SALJ* 561.

2 ENKELE ANOMALIEË IN DIE SUID-AFRIKAANSE TRUSTREG

2 1 Registrasie-aangeleenthede

Die praktyk betreffende die registrasie van trustgoed in verskeie kontekste weerspieël nie die teoretiese uitgangspunt[7] dat die trust as sodanig nie 'n persoon is of oor regspersoonlikheid beskik nie. Dit word in die eerste plek geïllustreer deur die wyse waarop onroerende trustgoed in die akteskantoor oorgedra en geregistreer word.

Betreffende die testamentêre trust bepaal artikel 40 van die Boedelwet[8] dat, indien 'n trustee aangestel is om enige goed van 'n oorledene ingevolge sy testament te administreer, die eksekuteur

> "die bepalings van die testament, of 'n verwysing daarna, vir sover dit op die administrasie betrekking het, teen die titelbewys van die goed wat onroerend is . . . [moet] laat aanteken . . ."

Hierdie prosedure is blykbaar van toepassing ongeag[9] of dit 'n normale trust is (die trustee is dus eienaar van die trustgoed)[10] of 'n sogenaamde bewindtrust (die trustbegunstigdes verkry eiendomsreg en die trustee administreer slegs die goed).[11] (In hierdie bydrae val die klem, tensy anders aangedui word, slegs op die eerste vorm waarna verwys is – dus die trust ingevolge waarvan die trustee eienaar van die trustgoed word. Waar van toepassing word daarna verwys as die "normale trust" ten einde dit te onderskei van die bewindtrust.) Die statutêre plig wat ingevolge die Wet op die Beheer oor Trustgoed[12] op 'n trustee rus om trustgoed behoorlik as sodanig te identifiseer, word ook uitdruklik aan hierdie bepaling in die Boedelwet onderworpe gestel.[13] 'n Endossement ingevolge artikel 40 van die Boedelwet het die uitwerking dat eiendomsreg aan die trustee oorgedra word – dit stel dus 'n sogenaamde "buitengewone oordrag"[14] daar.[15] Laasgenoemde feit – dit wil sê dat die *trustee* eienaar van die trustbates word – blyk egter nie uit die bewoording van die betrokke endossement nie.[16] Trouens, in die praktyk word dieselfde endossement gebruik ongeag of met die normale trust of met die bewindtrust gewerk word.[17] Die registrasiepraktyk by die trust *inter vivos* is selfs meer eienaardig. In die algemeen geskied registrasie óf in die naam van "die trustees vir die oomblik"[18] ("the trustees for the time being")[19] van die betrokke trust óf in die naam van die trust self.[20] Beide hierdie metodes bied natuurlik 'n oplossing vir die praktiese

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7 Sien *supra* 2.
8 Wet 66 van 1965.
9 Honoré en Cameron 227.
10 Vgl a 1(vi)(a) van die Wet op die Beheer oor Trustgoed 57 van 1988.
11 Vgl *idem* a 1(vi)(b).
12 A 11.
13 Honoré en Cameron 227 242 – 243.
14 Laurens *Inleiding tot die studie van aktebesorging* (1988) 66 ev.
15 *Holness v Pietermaritzburg City Council* 1975 2 SA 713 (N); Honoré en Cameron 227 – 228; Laurens 71; Nel *Jones: Conveyancing in South Africa* (1991) 282.
16 Vgl die vbe verskaf deur Honoré en Cameron 228 en Nel 283.
17 Olivier *Trustreg en praktyk* (1989) 66.
18 *Idem* 67.
19 Gauntlett "Trusts" 31 *LAWSA* par 428.
20 Honoré en Cameron 228-229; Olivier 66 – 68; West "Deeds office practice: the Trust Property Control Act 57 of 1988" 1992 *De Rebus* 27 – 28; Wunsh 1986 *SALJ* 570. Vgl ook bv *Dickinson v Shearing and Lister* (1911) 32 NLR 476; *Ex parte Hood* 1931 NLR 324; *Ex parte Milton* 1959 3 SA 347 (SR).

probleem in verband met 'n verandering van trustees tydens die bestaan van die trust – geen verdere formele oordragshandeling na die nuwe trustee of trustees is nodig nie.[21] Tog word dit as só anomalies aangevoel dat skrywers oor sowel die trustreg[22] as aktesregistrasie[23] aanpassings in die reg op hierdie punt aan die hand doen. (Die skrywer oor die trustreg (Olivier) wil die Akteswet wysig en die skrywer oor aktesregistrasie (Heyl) voel die trustreg behoort aangepas te word.) Veral die registrasie van die trustgoed in die naam van die *trust* stry natuurlik met die uitgangspunt dat die trust nie 'n regspersoon is nie.[24] In elk geval verskaf nie een van die twee metodes wat genoem is 'n antwoord op 'n vraag wat nog dieper lê nie – wie is naamlik eienaar van die trustgoed vandat die amp van trustee vakant raak totdat 'n nuwe trustee aangestel is?[25] Die praktyk om die trust vir registrasiedoeleindes as 'n regspersoon te behandel, verander immers nie aan die teorie dat dit nie een is nie.

Die praktyk om die trust vir registrasiedoeleindes as 'n regspersoon te behandel, of dit ten minste dan indirek te doen, kom in die tweede plek ook buite die konteks van die registrasie van onroerende trustgoed voor. Ek volstaan met twee voorbeelde. Indien aandele in 'n ongenoteerde maatskappy trustgoed is, word sodanige aandele dikwels in die naam van die trust geregistreer.[26] In artikel 4 van die Wet op Finansiële Instellings (Belegging van Fondse)[27] bepaal die wetgewer ook uitdruklik dat 'n direkteur of amptenaar van 'n finansiële instelling wat trustgoed namens 'n kliënt belê, die belegging in die naam van die betrokke trust mag doen.

2 2 Insolvensie-aangeleenthede

Wanneer na die teoretiese konstruksie van die trust gekyk word, lyk die regsgevolge van insolvensie in die konteks van die trust voorspelbaar. Omdat die trustee volgens die normale konstruksie eienaar van die trustgoed is, behoort dit kragtens artikel 20 van die Insolvensiewet[28] by die insolvensie van die trustee in laasgenoemde se insolvente boedel te val. Omdat die trust aan die ander kant nie oor 'n afsonderlike identiteit of persoonlikheid beskik nie behoort daar nie sprake te wees van iets soos die insolvensie van die trust nie. Die waarheid is egter presies die teenoorgestelde van elk van hierdie stellings.

Betreffende die insolvensie van die trustee is daar reeds vir baie lank gepoog om juis die logiese uitwerking van insolvensie te versag deur te argumenteer dat trustgoed, indien dit behoorlik afgeskei word, nie deel uitgemaak het van die trustee se persoonlike boedel nie. Of hierdie standpunt korrek was al dan nie is nie meer ter sake nie: in die Wet op die Beheer oor Trustgoed word nou uitdruklik statutêre beslag aan die standpunt gegee. Artikel 12 van die wet bepaal naamlik dat trustgoed nie deel van die trustee se persoonlike boedel vorm nie, behalwe vir sover hy as trustbevoordeelde daarop geregtig is.

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21 Honoré en Cameron 242; Olivier 68.
22 Vgl Olivier 68.
23 Heyl *Grondregistrasie in Suid-Afrika* (1977) 305 ev.
24 Sien *supra* 2.
25 Vgl Honoré en Cameron 241 – 242 vir moontlike oplossings; sien ook par 2 6 *infra*.
26 Wunsh 1986 *SALJ* 570.
27 Wet 39 van 1984.
28 Wet 24 van 1936.

Dat ook die tweede stelling hierbo nie korrek is nie blyk duidelik uit die beslissing in *Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly*.[29] In dié saak moes die hof uitspraak gee of 'n trust ingevolge die bepalings van die Insolvensiewet gesekwestreer kon word. Dit sou slegs kon gebeur indien 'n trust tuisgebring kon word onder die omskrywing van "skuldenaar" ("debtor") in artikel 2 van die Insolvensiewet. Ten einde hieroor duidelikheid te kry, noem die hof verskeie aspekte wat as besondere kenmerke van die trust beskou kan word. Hieronder word ingesluit die trust se bevoegdheid om deur middel van die trustees geld te leen, verpligtinge op te loop en "to possess an estate".[30] In navolging van *Ex parte Milton*[31] beslis die hof dat die trust inderdaad ingevolge die omskrywing in die Insolvensiewet 'n "debtor in the usual sense of the word" is en gevolglik gesekwestreer kon word. Ten einde hierdie gevolgtrekking te bereik, moes die moontlikheid eers uitgeskakel word dat die trust eerder as 'n regspersoon of maatskappy ingevolge die bepalings van die Maatskappywet[32] gelikwideer moes word. Volgens die hof is dit egter duidelik dat laasgenoemde weg nie gevolg kan word nie:

> "Accepting that in certain respects a trust does possess legal personality, I am of the opinion, applying *Ex parte Milton*, that it is insufficient to constitute it a body corporate within the meaning of this term as used in the sections of the Acts referred to. Consequently it could not be placed in liquidation. It follows that sequestration is the appropriate remedy."[33]

Wat opval in hierdie aanhaling is die opmerking dat die trust *in sekere opsigte* wel oor regspersoonlikheid kan beskik. Wat die hof egter nie verduidelik nie, is hoe 'n regsfiguur in sekere opsigte regspersoonlikheid kan hê maar wesenlik steeds nie 'n regspersoon is nie.[34]

2 3 Belastingaangeleenthede

In *CIR v MacNeillie's Estate*[35] was dit onder andere vir die appèlhof nodig om te beslis of 'n trust as 'n "persoon" vir doeleindes van sekere artikels[36] van die Boedelbelastingwet[37] aangemerk kon word.[38] In die beantwoording van hierdie vraag vind die hof 'n aanknopingspunt by sy beslissings in *Estate Smith v CIR*[39] en *CIR v Emary*[40] wat pas tevore gerapporteer is. In laasgenoemde sake moes die hof 'n verbandhoudende vraag beantwoord. Die vraag was naamlik of 'n bestorwe boedel as 'n belasbare entiteit vir doeleindes van die Inkomstebelastingwet[41] behandel moes word en, indien nie, of die eksekuteur van die bestorwe boedel as 'n verteenwoordigende belastingpligtige aanspreeklik gehou kon word. Albei hierdie vrae word ontkennend beantwoord. In die *Emary*-saak

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29 1984 1 SA 160 (W); vgl ook De Waal en Theron 1991 *TSAR* 501; Honoré en Cameron 485–486; Wunsh 1986 *SALJ* 575.
30 163A-B.
31 1959 3 SA 347 (SR).
32 Wet 61 van 1973.
33 163H.
34 Vgl De Waal en Theron 1991 *TSAR* 501.
35 1961 3 SA 833 (A).
36 A 5(1)(b) 11(a)(i).
37 Wet 45 van 1955.
38 Vgl De Waal en Theron 1991 *TSAR* 500.
39 1960 3 SA 375 (A).
40 1961 2 SA 621 (A).
41 Wet 31 van 1941. Lg wet is later herroep deur die Inkomstebelastingwet 58 van 1962.

verklaar die hof spesifiek dat die Inkomstebelastingwet (soos dit toe gegeld het) geen aanduiding bevat dat 'n bestorwe boedel 'n persoon vir doeleindes van die wet is nie.[42] Met verwysing na hierdie gevolgtrekking word die volgende in die *MacNeillie*-saak gesê:

> "[M]uch of what was said in *Commissioner for Inland Revenue v Emary NO* 1961 2 SA 621 (A) in regard to the alleged legal personality of a deceased estate for income tax purposes is apposite in regard to the inclusion of a trust as a taxable entity within the meaning of 'person', for the purposes of estate duty. Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a *persona* or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our Courts have recognised it as such a *persona* or entity."[43]

In die onlangse beslissing in *Friedman v CIR: In re Phillip Frame Will Trust v CIR*[44] steun die hof onder andere op hierdie uitlating vir sy bevinding dat 'n trust nie 'n "persoon" vir doeleindes van die Inkomstebelastingwet[45] is nie. Gevolglik word beslis dat belasting nie op onuitgekeerde trustinkomste gehef kon word nie en dat die trustees ook nie as verteenwoordigende belastingpligtiges aangespreek kon word nie.[46] Die intrige rondom die presiese status en regsaard van die trust het verdiep toe die wetgewer kort na die *Friedman*-saak ingegryp en die omskrywing van "persoon" in die Inkomstebelastingwet verander het[47] om nou ook in te sluit

> "'n trustfonds bestaande uit kontant of ander bates wat deur 'n persoon wat in fidusiêre hoedanigheid optree, geadministreer en beheer word, waar daardie persoon ingevolge 'n trustakte of ooreenkoms of ingevolge 'n testament van 'n oorlede persoon aangestel is".

2 4 Beperkte aanspreeklikheid van die trustee

Trustskuldeisers kan hulle vir die bevrediging van hulle eise in beginsel slegs na trustgoed wend en nie na die persoonlike boedel van die trustee nie.[48] Die trustee moet in hierdie verband in sy amptelike en nie in sy persoonlike hoedanigheid nie aangespreek word. Die posisie is dus anders as in die Engelse reg waar eksekusie wel teen die persoonlike boedel van die trustee gehef kan word.[49] In hierdie konteks is daar dus nog altyd aanvaar dat daar twee afsonderlike boedels bestaan, naamlik 'n trustboedel en die persoonlike boedel van die trustee. Hierdie beperkte aanspreeklikheid is dan ook een van die groot voordele wat die sogenaamde bedryfstrust inhou.[50] Beperkte aanspreeklikheid is natuurlik nie absoluut nie en die trustee kan wel persoonlik aanspreeklik gehou word indien

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42 Na die *Estate Smith*- en die *Emary*-saak *supra* is a 1 van die Inkomstebelastingwet gewysig met die effek dat "persoon" ook 'n bestorwe boedel sal insluit.
43 840F-G.
44 1991 2 SA 340 (W).
45 Wet 58 van 1962.
46 Vir 'n bespreking van die *Friedman*-saak sien Davis "The taxation of a trust" 1991 *SALJ* 225; De Waal en Theron 1991 *TSAR* 499; Eden en Emslie "The taxation of a trust in South African law or can a trust be taxed?" 1991 *SALJ* 231. Vgl ook *Crundall Brothers (Ptk) Ltd v Lazarus* 1992 2 SA 423 (ZS).
47 A 2(1)(d) Wet 129 van 1991.
48 Honoré en Cameron 22; Theron "Enkele gedagtes oor die regsaard van 'n trust en die aanspreeklikheid van 'n trustee vir trustskulde" 1991 *De Jure* 324–328; Wunsh 1986 *SALJ* 574–579.
49 *Ibid*.
50 Wunsh 1986 *SALJ* 574.

hy nie in 'n verteenwoordigende hoedanigheid opgetree het nie, trustbreuk gepleeg het of moontlik ook in enkele ander gevalle wat Wunsh identifiseer.[51]

2 5 Die trust as begunstigde[52]

Volgens die feite van *Burnett v Kohlberg*[53] is 'n trust *inter vivos* opgerig welke trust later as 'n begunstigde ingevolge die oprigter se testament benoem is. In die testament is onder andere bepaal dat met die bates gehandel moes word soos in die trustakte uiteengesit. Benewens die vraag of hierdie nie 'n ontoelaatbare "incorporation by reference" daargestel het nie, is die vraag ook geopper of sodanige bemaking aan 'n trust wel uitvoerbaar kan wees in die lig van die feit dat 'n trust nie oor regspersoonlikheid beskik nie.[54] In die hof se uitspraak, wat in appèl bekragtig is,[55] word laasgenoemde vraag bevestigend beantwoord. Dit word gedoen sonder om die korrektheid van die *MacNeillie*-saak[56] te bevraagteken maar wel deur die geval vanuit 'n heel ander hoek te benader. Volgens die hof word *in casu* nie te doen gekry met 'n bemaking aan 'n trust nie maar in werklikheid met 'n bemaking aan die trustees van die trust in hulle amptelike hoedanigheid. Nogtans is die hof maar 'n spreekwoordelike tree verwyder van die erkenning dat die trust ook oor 'n afsonderlike persoonlikheid vir hierdie doel beskik waar ter motivering soos volg verduidelik word:

> "From this it follows, in my view, that although a trust cannot strictly be a beneficiary under a will, a bequest can be made to the trustee *qua* trustee for the benefit of an existing trust and he can adiate in favour of the 'separate entity' which is the trust estate. It makes no difference if the bequest is to the trust and not the trustee so long as the intention is clearly to benefit the trust, which can only happen if the trustee takes the property."[57]

2 6 Die trustboedel by die dood van die trustee

Met verwysing na die regsposisie wat sou ontstaan indien 'n trustee sterf sonder dat hy deur 'n oorblywende trustee oorleef word, verklaar Honoré en Cameron:[58]

> "When a trustee dies leaving no surviving trustee . . . a new trustee must be appointed. Until that happens the trust assets should be treated as forming part of the trustee's deceased estate in order to avoid their becoming res nullius open to seizure by the first taker. They will vest in the trustee's executor when one is appointed but *as a separate estate of the deceased* not subject to the claims of his creditors, heirs, legatees or the fiscus."[59]

Ook hier word die trustboedel dus om doelmatigheidsredes as 'n afsonderlike entiteit behandel, afgesonder van die ander boedelbates. Dit is sekerlik nie nodig om op die talle dogmatiese vrae in te gaan wat in verband met die ontstaan,

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51 *Idem* 575 – 579; sien ook Honoré en Cameron 22.
52 Vgl De Waal en Theron 1991 *TSAR* 500; Honoré en Cameron 30.
53 1984 2 SA 134 (OK).
54 Betreffende die agtergrond tot hierdie tipe trust sien Jaffe en Wunsh "Incorporation by reference in a will: the case for an amendment of the Wills Act 7 of 1953" 1982 *De Rebus* 529.
55 Vgl *Kohlberg v Burnett* 1986 3 SA 12 (A).
56 Sien *supra* 5 – 6.
57 142E-F.
58 489 – 490.
59 My kursivering.

bestaan en tenietgaan van hierdie afsonderlike entiteit gevra kan word nie. Hierdie siening van die skrywers – en dit lyk nie of die situasie eintlik anders verduidelik kan word nie – impliseer egter dat die trustboedel 'n bestaan heel onafhanklik van die trustee kan voer.

3 DIE VEELSYDIGHEID EN AANPASBAARHEID VAN DIE TRUSTFIGUUR

In 'n onlangse resensie-artikel oor drie boeke wat op die gebied van die Engelse trustreg verskyn het, skryf die resensent, Moffat, die volgende:[60]

> "Yet the student or other reader of trusts books soon learns that one of the virtues claimed for the trust device is adaptability. This is manifested by its comtemporary pervasiveness in a wide range of personal and commercial contexts. There can, for instance, be trusts to protect the wealthy, trusts to protect the handicapped, trusts to benefit employees, trusts to defeat creditors, trusts to provide pensions, trusts as a method of arranging collective investment, and even trusts for the carrying on of a business. This lengthy list does not even begin to take account of trusts imposed as a consequence of conduct deemed unacceptable or unconscionable, and to which some trust-like liability should be attached."[61]

Hierdie stelling word met verwysing na die Engelse trustreg gemaak. Dit is egter natuurlik ewe waar vir die Suid-Afrikaanse trustreg. Ook die oorsig van die anomalieë in die trustreg hierbo dien as illustrasie hiervan. Hierdie word dan ook deur skrywers as een van die fassinerendste kenmerke van die trust in die Suid-Afrikaanse reg voorgehou. Só word na die trust in ons reg onder andere verwys as "vital and highly adaptable",[62] "flexible",[63] "autonomous",[64] "multifarious"[65] en "veelfasettig".[66] Ek hoef nie hier voorbeelde van die wye aanwending van die trust in die Suid-Afrikaanse reg te gee nie: die voorbeelde van Moffat geld in die breë ook vir die Suid-Afrikaanse reg.

4 DIE TEORETIESE GRONDSLAG OF PRESIESE REGSAARD VAN DIE TRUST

Dit is ironies dat miskien die sterkste punt van die trust, sy veelsydigheid en aanpasbaarheid, 'n teenpool vind in die onsekerheid aangaande sy teoretiese grondslag of presiese regsaard. Want die behandeling van die anomalieë illustreer myns insiens ook 'n ander waarheid: die verhouding tussen trustteorie en trustpraktyk het 'n toestand van aansienlike spanning bereik. Veral één aspek blyk duidelik: teoreties is die trust nie 'n regspersoon of 'n entiteit met afsonderlike persoonlikheid nie maar prakties word dit gereeld, en om 'n veeltal redes,

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60 "Trusts law: a song without end?" 1992 *MLR* 124. Die boeke wat Moffat bespreek, is Gardner *An introduction to the law of trusts* (1990); Hackney *Understanding equity and trusts* (1987); Hayton *The law of trusts* (1989).

61 Vgl ook vir die Engelse reg Hayton 1990 *LQR* 87: "Since then, lawyers advising on family, taxation and commercial matters have used and built on the flexibility inherent in the trust idea."

62 Honoré en Cameron v.

63 *Idem* 14; Wunsh 1986 *SALJ* 569.

64 Honoré en Cameron 14.

65 *Ibid.*

66 De Waal en Theron 1991 *TSAR* 501.

as een behandel. En die grondslag waarop dit telkens gedoen word, is heel uiteenlopend. Soos geïllustreer is, geskied dit om die beurt na aanleiding van spesifieke wetgewing, 'n bepaalde beoordeling in die regspraak of bloot weens dwingende praktyksbehoeftes.

Die spanning waarna verwys is, kan dus in 'n hoë mate teruggevoer word na die waas van onsekerheid wat die presiese regsaard van die trust omhul. Die vraag na die presiese regsaard van die trust is natuurlik, soos dit al met verwysing na 'n ander aspek van die trustreg gestel is, een van "perennial fascination".[67] Somtyds word die vraag heel pragmaties hanteer, soos om die gerieflike en veilige standpunt in te neem dat die trust 'n regsfiguur *sui generis* is.[68] In hierdie kategorie hoort ook diegene wat bloot die standpunt inneem dat die trust, behalwe vir sover dit ingevolge spesifieke wetgewing vir belastingdoeleindes as sodanig behandel word, nie 'n regspersoon is nie maar dat die trustboedel wel vir sekere doeleindes as 'n afsonderlike entiteit behandel word.[69] Die feit dat hierdie standpunt uit 'n teoretiese en dogmatiese oogpunt verwarrend en selfs onsuiwer is, word dan met die opmerking ondervang dat dit nie tot praktiese probleme aanleiding gee nie.[70]

Vir ander is juis hierdie teoretiese onsuiwerheid onaanvaarbaar. Voorstelle om dit te beredder, sluit in die toekenning van regspersoonlikheid aan die trusteeamp,[77] die erkenning van 'n regspersoon in die vorm van 'n "bestuursliggaam" wat uit die hof, die meester en die trustee(s) bestaan[72] of die verheffing van die trust as instelling tot regspersoon.[73]

Die vraag kan gestel word of die nastreef van teoretiese suiwerheid op hierdie regsgebied in finale instansie nodig is. Ek glo dat die antwoord tog bevestigend moet wees. In hierdie verband sluit ek weer aan by Moffat waar hy sê:[74]

> "[D]oes this chameleon-like quality [of the trust] undermine the integrity of the subject itself? Pervasiveness can all too quickly become fragmentation. Then, the tension between fragmentation of the subject-matter of study and the notion of the trust idea as a unifying feature may be strained to breaking point . . . The challenge for those interested in preserving the law . . . of trusts as an academic entity is to articulate a justification which can reconcile coherence with diversity and prevent fragmentation becoming disorder."

Moffat sê verder by implikasie dat die integriteit van die trustreg ondermyn word deurdat dieselfde instelling aan die een kant aangewend kan word vir oogmerke wat heilsaam is, soos liefdadigheid en die bewaring van bates, en aan die ander kant vir oogmerke wat soms die grense van regmatigheid toets, soos die vermyding (ontduiking?) van belasting en die frustrering van skuldeisers. Die manier waarop orde, eenheid en integriteit herstel kan word, lê volgens hom uiteindelik in die erkenning dat die trustidee 'n fundamentele een is, in sowel die reg as die samelewing.[75] Die taak is dan om die interaksie tussen *die trust* as 'n

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67 Vgl Honoré en Cameron *The South African law of trusts* (1985) vi.
68 Vgl *Braun v Blann and Botha* 1984 2 SA 850 (A) 859.
69 Honoré en Cameron 55 – 57.
70 *Idem* 57.
71 Olivier 63 – 65. Vgl Theron 1991 *De Jure* 321 se kommentaar op hierdie standpunt.
72 Van Zyl "Die regsubjek van 'n trustvermoë" *Gedenkbundel HL Swanepoel* (1976) 1.
73 De Waal en Theron 1991 *TSAR* 504; Heyl 289 – 294; Murray "Is a trust or an estate a legal *persona*?" 1959 *SALJ* 371, 1962 *SALJ* 37.
74 1992 *MLR* 126 137.
75 *Idem* 137.

regsinstelling en die *begrip trust* as 'n samelewingsfenomeen na te vors en te ontleed.[76] Die ontdekking kan dan wees dat die regsvorm nie alleen 'n gemeenskapsopvatting weerspieël nie maar moontlik selfs daaraan gestalte help gee.[77] 'n Praktiese illustrasie van dié proses sou die volgende kon wees:[78]

> "Delineating the boundaries and scope of fiduciary relationships in commerce, or clarifying the rights of employees in pension funds, are contentious precisely because they involve determining how far relations of trust should be afforded priority in market activities."

5 GEVOLGTREKKING EN BEOORDELING

Die holistiese benadering wat Moffat aan die hand doen, hou, glo ek, ook 'n uitdaging in vir die wyse waarop die Suid-Afrikaanse trustreg benader kan word. Hierdie slotopmerkings lê egter eers op 'n ander vlak. Daar word aan die hand gedoen dat die anomalieë soos hierbo uiteengesit minstens gedeeltelik 'n saak daarvoor uitmaak dat ook ons trustreg 'n behoefte aan eenheid en orde het. Eenheid en orde kan tot 'n sekere hoogte verkry word deur 'n proses van eksterne regulering soos wat tans in die Wet op die Beheer oor Trustgoed bestaan en soos wat aan die hand gedoen word betreffende beter beheer oor die bedryfstrust en belastingaspekte rakende die trust.[79]

Uiteindelik sal die fundamenteler vraag na die presiese regsaard van die trust egter ook om hierdie rede nie onbepaald vermy kan word nie. 'n Eerlike analise van die situasie soos dit tans daar uitsien, maak die gevolgtrekking onvermydelik dat 'n sekere stukrag in die rigting van die toekenning van regspersoonlikheid aan die trust waarneembaar is in wetgewing, die regspraak en die trustpraktyk.[80] Daar is ook akademiese en teoretiese aanknopingspunte vir sodanige ontwikkeling. Laat my dit egter nou duidelik stel: dit is nie noodwendig die oplossing wat ek aan die hand doen nie. Argumente waarom die oplossing *nie* op hierdie weg lê nie sal myns insiens egter op ander oorwegings gebou moet word as dié dat die trust wat 'n regspersoon is byvoorbeeld moeiliker geadministreer sal word, gelikwideer sal moet word of veral uit 'n belastingoogpunt minder aantreklik sal wees.[81] Die behoud van die integriteit van die trustidee vereis dat veel dieper as oorwegings soos laasgenoemde gekyk sal moet word. Die ideaal met enige oplossing moet egter onder andere ook wees dat wat tans as anomalieë in die trustreg voorkom uiteindelik niks meer sal wees as verdere voorbeelde van die inherente veelsydigheid en veeldoeligheid van dié regsfiguur nie.

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76 *Ibid.*
77 *Ibid.*
78 *Idem* 123 138.
79 Vgl in die algemeen Theron 1991 *TSAR* 268; Theron "Die trust as belasbare entiteit – met spesifieke verwysing na anti-vermydingsbepalings" 1991 *TSAR* 649; Wunsh 1986 *SALJ* 561.
80 Sien par 2 *supra*.
81 Vgl Olivier 62–63; Theron 1991 *De Jure* 324.

Direkteure se vertrouenspligte en die grondslag van aanspreeklikheid vir die verbreking daarvan[1]

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SUMMARY

Directors' fiduciary duties and the basis of liability for a breach of these duties

Directors' common-law fiduciary duties and duties of care and skill are supposed to provide some means of control over directors in the exercise of their powers. Unfortunately little research has so far been done on the basis of liability when directors breach their fiduciary duties. Hence, it is uncertain which remedies are available and consequently the enforcement of these duties is almost impossible. It is therefore not surprising that this area of company law is clouded with dissatisfaction.

In this article the historical roots of the fiduciary duties of directors are traced back to the English law of trust as developed by the courts of equity. The diverging approaches of these courts and their significance are discussed. South African company law has inevitably been influenced by these approaches as reliance is mainly placed on English precedents in order to establish what the fiduciary duties of directors are.

It is well-established that the basis of liability for a breach of directors' fiduciary duties is neither contractual nor delictual, but of a *sui generis* nature. It is submitted, however, that the basis of liability should be the *actio legis Aquiliae*. The reasons for this proposition and its soundness and some of its consequences are analysed.

1 INLEIDING

Sommige wyses waarop die maatskappy beskerm word teen misbruik deur maatskappyfunksionarisse is suiwer gemeenregtelik van aard. Voorbeelde hiervan is die vertrouenspligte[2] van die direkteur teenoor sy maatskappy en sy pligte van sorgsaamheid en vaardigheid.[3] Op die gebied van kontraksluiting tussen die maatskappy en die direkteur lê die beskerming vir die maatskappy daarin

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1 Dié bydrae is hoofsaaklik geskoei op 'n gedeelte van die outeur se LLD-proefskrif *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* (UOVS 1990).

2 Fourie "Vertrouenspligte en intrakorporatiewe verhoudings" 1985 *TRW* 127 vn 59 (en die bronne waarna daar verwys word). Naudé *Die regsposisie van die maatskappydirekteur* (1970) 110 stel dit so: "[D]irekteure se vertrouensverhouding in die maatskappyereg . . . beskerm in die eerste plek die maatskappy, en in 'n ekonomiese sin derhalwe sy lede, teen die direkteure."

3 Naudé "Kontraksluiting tussen direkteur en maatskappy" 1970 *THRHR* 142 ev; Cilliers, Benade *et al Korporatiewe reg* 233 par 17.20 – 234 par 17.22.

dat gemeenregtelike reëls en statutêre bepalings mekaar aanvul.[4] In ander gevalle, soos die toestaan van lenings aan direkteure en ander beamptes, is dit hoofsaaklik statutêre bepalings wat beskerming aan die maatskappy bied.[5]

Hierdie bydrae handel primêr oor die gemeenregtelike vertrouenspligte tussen direkteur en maatskappy en die grondslag van aanspreeklikheid vir die verbreking van hierdie pligte. In die verbygaan word daar egter ook aan direkteure se pligte tot sorgsaamheid en vaardigheid aandag geskenk. Laasgenoemde pligte hou verband met die vertrouenspligte van direkteure en verskaf waardevolle perspektief op die grondslag van aanspreeklikheid vir die verbreking van sodanige pligte. Wat vertrouenspligte betref, word 'n oorsig van die historiese ontwikkeling daarvan gegee; verder word gekyk na voorbeelde wat vandag as tipiese vertrouenspligte bestempel word en na die misnoeë oor hierdie pligte; en laastens word gesoek na oplossings om bestaande onsekerhede uit die weg te ruim.

Om ondersoek na 'n direkteur se pligte teenoor sy maatskappy in te stel, is van besondere belang aangesien daar wêreldwyd kommer heers oor die misbruik deur direkteure van hul vertrouensposisie. Verder gaan daar dikwels stemme op dat die vertrouenspligte wat op direkteure rus so wyd is dat dit feitlik onmoontlik is om vas te stel presies wat die omvang daarvan is. Die gevolg van hierdie wye omvang is, anders as wat met die eerste oogopslag verwag sou word, dat dit moeilik is om te bewys presies wanneer 'n direkteur die pligte skend. Juis daarom word die oproep uit verskillende oorde gedoen dat die pligte gekodifiseer moet word. Alvorens 'n mening oor die wenslikheid van kodifikasie uitgespreek word, sal eers vasgestel moet word wat die grondslag van aanspreeklikheid vir 'n verbreking van die pligte in die Suid-Afrikaanse reg is en of hierdie grondslag aanvaarbaar is. Hierna kan beginselstandpunt ingeneem en op die gevolge van dié standpunt gewys word.

2 PLIGTE TOT SORG EN VAARDIGHEID

2 1 Oorsig van pligte tot sorg en vaardigheid

In *Fisheries Development Corporation of SA Ltd v Jorgensen*[6] is daar leiding te vind oor hoe hierdie pligte beoordeel moet word.[7] Regter Margo noem dat

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4 *Idem* 240 par 17.34 – 243 par 17.41. Kyk verder Sen *Company actions in the modern set-up* (1969) 34 – 35.

5 A 226 van die Maatskappywet 61 van 1973 (hierna die wet); Cilliers en Benade *Korporatiewe reg* 238 – 239 par 17.30. Kyk in die algemeen McLennan *Aspects of common-law powers and duties of company directors* (LLM-verhandeling Universiteit van die Witwatersrand 1984); McLennan "Directors' fiduciary duties and the Companies Act" 1983 *SALJ* 417 ev; McLennan "Misapplication of company funds – a proposal for reform" 1983 *SALJ* 644 ev; Henning "Lenings aan en voorsiening van sekuriteit vir beslote korporasies. Enkele anomalieë en die wysiging van artikels 226 en 55(3)" 1989 *TRW* 65 ev; Oosthuizen "Sekerheidstelling in stryd met artikel 226 van die Maatskappywet – enkele aspekte" 1988 *TSAR* 134 – 137; Oosthuizen "Toestemming ingevolge artikel 226 van die Maatskappywet" 1988 *THRHR* 306.

6 1980 4 SA 156 (W).

7 165F – G. In kl 45 van die Companies Bill 1978 [47-12 van 1978 – 47/4] (versprei as deel van *Changes in company law* Cmnd 7291 Department of Trade HMSO Londen (1978)) is daar 'n poging aangewend om hierdie pligte te kodifiseer: "(1) In the exercise of the powers and the discharge of the duties of his office in circumstances of any description,

daar onder andere na die volgende faktore gekyk kan word:[8]

(a) Die aard van die maatskappy se besigheid;

(b) die besondere verpligtinge wat deur die direkteur aanvaar of aan hom opgedra is;

(c) die aard van sy ampsbekleding (byvoorbeeld of hy 'n uitvoerende of nie-uitvoerende direkteur is);[9]

(d) die sorg wat deur die besondere direkteur aan die dag gelê is – by die beoordeling van die redelikheid van sy optrede, moet sy besondere kennis en ervaring in ag geneem word;[10] en

(e) die besondere omstandighede wat gegeld het toe die betrokke direkteur die pligte wat deur *ander funksionarisse* uitgeoefen is, beoordeel het (byvoorbeeld of daar enige agterdogwekkende omstandighede bestaan het wat hom op sy hoede moes plaas om nie blindelings die inligting en advies van die *ander funksionarisse* te aanvaar nie).[11]

Daar word aan die hand gedoen dat die *Jorgensen*-saak[12] nie spesifieke beginsels neerlê of 'n *numerus clausus* faktore daarstel nie, maar eerder tipiese feitelike oorwegings uitwys wat in ag geneem kan word om te bepaal of die pligte tot sorg en vaardigheid verbreek is. Die uiteensetting in hierdie saak oor die betekenis van die begrippe "sorg" en "vaardigheid" is immers net 'n

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vervolg van vorige bladsy

a director of a company owes a duty to the company to exercise such care and diligence as could reasonably be expected of a reasonable prudent person in circumstances of that description and to exercise such skill as may reasonably be expected of a person of his knowledge and experience. (2) Subsection (1) above shall have effect instead of the rules of law stating the duties of care and diligence and of skill owed by a director."

8 165F-G. Hierdie samevatting is hoofsaaklik geskoei op die nuttige uiteensetting van die "drie breë stellings" aangaande die *Jorgensen*-saak wat verskyn in Cilliers en Benade *Korporatiewe reg* 233 – 234 par 17.21.

9 Vgl bv Brusser "The role and liability of non-executive directors" 1983 *SACLJ* 12 13; Luiz "Extending the liability of directors" 1988 *SALJ* 790; MacKenzie "A company director's obligations of care and skill" 1982 *Journal of Business Law* 47. Kyk ook *In re Forest of Dean Coal Mining Company* (1878) 10 ChD 450 452.

10 Vgl bv *Cronje v Stone* 1985 3 SA 597 (T) 613F; Ellington en Fletcher "1. Responsibilities and liabilities of directors and officers of insolvent corporations in the UK" 1988 *International Business Lawyer* 492.

11 In die Amerikaanse saak *Smith v Van Gorkom* Del Supr 488 A 2d 858 (1985) 872 word hierdie plig treffend soos volg verduidelik: "Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing. But fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director *an affirmative duty to protect those interests and to proceed with a critical eye in assessing information* [inligting verskaf deur die hoof uitvoerende beampte – Van Gorkom – oor die prys per aandeel wat by die oorname aanvaar moes word] of the type and under the circumstances [die prys wat deur Van Gorkom voorgestel is, is nooit noukeurig deur die direksie ondersoek nie] present here" (eie beklemtoning). Vgl die opmerkings van Baxt "Commercial law" 1990 *Aust LJ* 348 (kol 2) en dié van Kirby R in *Metal Manufacturers (Pty) Ltd v Lewis* 1988 13 NSWLR 315 (CA) 318G – 319A: "The time has passed when directors and other officers can simply surrender their duties to the public and those with whom the corporation deals by washing their hands, with impunity, leaving it to one director or a *cadre* of directors or to a general manager to discharge their responsibilities for them."

12 1980 4 SA 156 (W).

samevatting van die resultaat van verskeie Engelse sake oor die aangeleentheid.[13] Trouens, dit bevat eintlik net 'n uiteensetting van 'n gedeelte uit *In re City Equitable Fire Insurance Company Limited*.[14] Wat laasgenoemde saak betref, is daar al oortuigend aangetoon dat elemente daarvan slegs op nie-uitvoerende direkteure van toepassing kan wees[15] en dat die riglyne daarin neergelê beswaarlik nog kan dien as absolute gidsbakens vir hedendaagse omstandighede.[16]

2 2 Grondslag van aanspreeklikheid

By die skending van sy sorgsaamheidsverpligtinge is die direkteur se aanspreeklikheid teenoor die maatskappy gebaseer op die beginsels van die *actio legis Aquiliae*.[17] Hierdie grondslag is aanvaarbaar.

'n Probleemvraag waarop daar soms gewys word, is of die verbreking van hierdie pligte objektief of subjektief beoordeel moet word.[18] Daar word aan die hand gedoen dat dit onnodig is om hierdie vraag breedvoerig te probeer beantwoord; word aanvaar dat die grondslag van aanspreeklikheid deliktueel is, dan moet elke saak tog aan die hand van die beginsels van die Suid-Afrikaanse deliktereg beoordeel word. Alvorens die direkteur aanspreeklikheid vir die skending van hierdie pligte kan opdoen, sal die hof immers eers moet vra of sy optrede onregmatig was en of hy met die nodige skuld opgetree het.[19] Die wyse

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13 Cilliers en Benade *Korporatiewe reg* 233 par 17.21.

14 1925 1 Ch 407 428 – 430. Kyk in die algemeen *The conduct of company directors* Cmnd 7037 Department of Trade (1977) 1 par 4.

15 Brusser 12. Vgl ook Davies "Management of the company" in *Palmer's company law* (reds Schmitthoff *et al*) (1987) 932 par 62 – 15. Goldstone R noem *obiter* dat wat hul pligte teenoor die maatskappy betref, die onderskeid tussen uitvoerende en nie-uitvoerende direkteure ondiensvaardig is en selfs tot verwarring kan lei – *Howard v Herrigel* 1991 2 SA 660 (A) 678A – B: "In my opinion it is unhelpful and even misleading to classify directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company in his dealings on its behalf." Daar word aan die hand gedoen dat hierdie uiteensetting 'n ware weergawe van die regsposisie is maar in Amerika het die praktyk getoon dat dit katastrofiese gevolge inhou as nie-uitvoerende direkteure inderdaad aan dieselfde pligte as uitvoerende direkteure gebonde gehou word – kyk Du Plessis *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* 486 – 489 par 14 3 3 3.

16 MacKenzie 474 – 475: "Clearly, the judgements of *Re city Equitable* and other old cases have outlived their usefulness, and are no longer safe guides to the standards of care and skill required, current commercial practice being more likely to set the standards which the courts will adopt as the law today." Vgl Cassim "Fraudulent or 'reckless' trading and section 424 of the Companies Act" 1981 *SALJ* 171. Vir 'n treffende uiteensetting van die veranderings wat veranderde omstandighede in direkteure se pligte meegebring het, kyk Sen 33 – 41. Kyk in die algemeen ook *Report of the Commission of Inquiry into the winding-up of the short-term insurance business of the AA Mutual Insurance Association Limited* (Melamet-verslag) (1988) 77 – 82.

17 Naudé *Regsposisie van die maatskappydirekteur* 155 – 157. Kyk in die algemeen McLennan "Directors' duties and misapplication of company funds" 1982 *SALJ* 398; Botha "Holding and subsidiary companies: fiduciary duties of directors (conclusion)" 1984 *De Jure* 178; Henning 1989 *TRW* 73 vn 44.

18 Cilliers en Benade *Korporatiewe reg* 233 par 17.20; *The conduct of company directors* (1977-verslag) 1 par 4; MacKenzie 461; JB (pseud) "Directors' duties – an unreported decision" 1980 *Company Lawyer* 39.

19 Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 15 – 16 50 58 ev 115 ev; Neethling, Potgieter en Visser *Deliktereg* (1992) 4 8 ev 31 ev 113 ev.

waarop hierdie twee elemente van die onregmatige daad beoordeel word, vervang die nodigheid daarvan om in maatskappyregtelike verband te probeer vasstel of pligte objektief of subjektief beoordeel moet word. In beginsel is daar nie eiesoortige deliktuele probleme voorhande as die skuld van direkteure vasgestel moet word nie. Die vraag na hul skuld behoort bloot gesien te word as 'n *species* van die probleem wat opduik ter bepaling van die skuld van deskundiges.[20]

3 VERTROUENSPLIGTE

3 1 Historiese perspektief

Die gemeenregtelike reëls oor die vertrouensverhouding tussen direkteure en hulle maatskappye is primêr in die Engelse *courts of equity* ontwikkel.[21] In hierdie howe is onveranderde trustbeginsels gedurende die agttiende en negentiende eeu in verskeie opsigte op verskillende soorte Engelsregtelike vertrouensbekleërs toegepas. Hierdie verskynsel is nie verbasend nie want die trustreg was gedurende hierdie tyd reeds 'n deeglik ingeburgerde en welbekende vertakking van die Engelse privaatreg.[22]

Die *courts of equity* was die aangewese forum vir die beregting van maatskappyregtelike sake omdat dit juis dié *courts* was wat aanvanklik vennootskapsregtelike sake bereg het; dit was gevolglik 'n natuurlike stap dat hul ook jurisdiksie oor maatskappyregtelike sake sou aanvaar.[23] 'n Gebied waarin die trustee-analogie feitlik onveranderd aanwending begin vind het, was die verhouding tussen direkteur en maatskappy. Trustbeginsels is gedurig aangewend ter vasstelling van direkteure se regsposisie.[24] Trouens, hulle is eenvoudig as

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20 Neethling, Potgieter en Visser 129 verduidelik soos volg: "Die redelike deskundige is in alle opsigte soos die redelike man maar dan aangevul deur 'n redelike mate van die toepaslike deskundigheid. Die standaard van deskundigheid word as 'redelik' beskryf omdat daar nie gewerk word met die hoogste mate van deskundigheid in die betrokke professie of beroep nie, maar met die algemene en gemiddelde vlak van deskundigheid wat daar heers." Kyk verder Van der Merwe en Olivier 140 – 141. Op 141 verduidelik dié skrywers soos volg: "In soverre die redelike man, by die toets of die dader se gedrag beantwoord aan die standaard wat die reg vereis, steeds in dieselfde omstandighede as die dader geplaas word, is dit duidelik dat die toets nie volkome objektief is nie . . . Volkome subjektief is die toets ook nie omdat, behalwe voorheen in die geval van kinders en deskundiges, geen ag geslaan word op die persoonlike eienskappe van die dader nie." Kyk in die algemeen De Koker *Gesamentlike en afsonderlike aanspreeklikheid as 'n statutêre sanksie in die maatskappyereg en die beslote korporasiereg* (LLM-verhandeling UOVS 1989) 102 vn 366.

21 Sealy *Company law and commercial reality* (1984) 36; Sealy "Directors' 'wider' responsibilities – problems conceptual, practical and procedural" 1987 *Monash Univ LR* 167 – 168; Mitchell *Directors' duties and insider dealing* (1982) 26; Blackman *The fiduciary doctrine and its application to directors* (PhD-proefskrif UK 1970) 7. Vgl ook die opmerkings in die betoogshoofde van *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 171.

22 Sealy *Company law and commercial reality* 37 38; Wedderburn (Lord) "Trust, corporation and the worker" 1985 *Osgoode Hall LJ* 212 vn 33; Ellington en Fletcher 497; Volpe "The duties of company directors in Zimbabwe" 1979 *Zimbabwe LJ* 125.

23 Sealy *Company law and commercial reality* 36. Cooke *Corporation trust and company: an essay in legal history* (1950) 85 verduidelik dat "the superior machinery and remedies of the Chancery" die onderliggende rede was waarom die *courts of equity* feitlik die enigste howe was wat vennootskaps- en maatskappyregtelike sake bereg het.

24 *Charitable Corporation v Sutton* 26 ER 642 644 – 645.

trustees beskou.[25] Hierdie beskouing was gedurende die middel van die negentiende eeu nie onvanpas nie, want soos Gower *et al*[26] verduidelik,

> "[p]rior to 1844 most joint stock companies were unincorporated and depended for their validity on a deed of settlement vesting the property of the company in trustees. Often the directors were themselves the trustees and even when a distinction was drawn between the passive trustees and the managing board of directors the latter would quite clearly be regarded as trustees in the eyes of a court of equity in so far as they dealt with the trust property".

Die vertrouensverhouding tussen direkteur en maatskappy is egter nie slegs deur die algemene beginsels van die trustreg beïnvloed nie maar ook deur die besondere kenmerke van die Engelse *courts of equity*. 'n Belangrike kenmerk van die *courts of equity* was dat hulle berekend vae regsreëls neergelê het. Sodoende kon daar in 'n wye verskeidenheid omstandighede regshulp verleen word aan benadeeldes wat nie in die *courts of law* geholpe kon raak nie.[27] Die saak *North-Eastern Railway Company v Martin*[28] bied 'n uitstekende voorbeeld van die gees wat gedurende hierdie tyd (1848) in die Engelse *courts of equity* geheers het.[29]

Sealy[30] verwys in die verbygaan na 'n verdere insiggewende kenmerk van die vroeëre Engelse *courts of equity*. Dit was naamlik dat "the early courts of chancery had very inadequate means for hearing evidence and getting at the facts".[31] Hierdie leemte word bevestig deur 'n treffende verduideliking van die heersende probleem in *Ridgway v Wharton*:[32]

> "In a court of equity judges have not the same advantage that they have in courts of law, of estimating the value of the evidence by seeing the witnesses. Unfortunately

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25 *Gaskell v Chambers (No 3)* 53 ER 937 938 (The Master of the Rolls, Romilly R): "I am of opinion that the directors are trustees . . ."; Sealy "The director as trustee" 1967 *Cam LJ* 83 ev; Sealy *Company law and commercial reality* 38; Sealy 1987 *Monash Univ LR* 165 167. Kyk in die algemeen Levi *Commercial law of the world* vol I (1854) 164.

26 *Principles of modern company law* (1979) 571. Vir 'n treffende samevatting van die vindingryke aanwending van die trustfiguur (tot ongeveer die helfte van die vorige eeu) in die Engelse reg, kyk Naudé *Regsposisie van die maatskappydirekteur* 43. Kyk in die algemeen Schmitthoff "Introduction" in *Palmer's company law* (1987) 7 par 2 – 03; Mitchell *Insider dealing and directors' duties* (1989) 62 – 63; Sealy 1987 *Monash Univ LR* 165; Stewart *The role of the general meeting of shareholders in the corporate structure* (LLM-verhandeling Unisa 1973) 8 – 9.

27 Blackman *The fiduciary doctrine and its application to directors* 91. Oor die ontwikkeling van en verskille tussen die Engelse *common law courts* en *courts of equity*, kyk Du Plessis "Spesifieke nakoming in die kollig" 1988 *MB* 122 – 124; Blackman *The fiduciary doctrine and its application to directors* 78 – 80. Shepherd *The law of fiduciaries* (1981) 8 bied die vaagheid van die konsep *fidusiêre verpligtinge* aan as verklaring vir die vaagheid van hierdie reëls, maar wys tog later op die invloed van die wisselwerking tussen die Engelse *common law courts* en *courts of equity* (kyk *idem* 13 – 14).

28 41 ER 1136.

29 1138: "It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this Court [Chancery Division] to exercise this jurisdiction [matters of account]. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties." Daar moet onthou word dat die formele onderskeid tussen die *common law courts* en die *courts of equity* eers deur die Judicature Act van 1873 beëindig is: kyk Du Plessis 1988 *MB* 124 vn 33 – 34.

30 *Company law and commercial reality* (1984) 38.

31 *Ibid.*

32 10 ER 1287.

> they are examined behind the back of the judge, and therefore there is no rule upon which he can act in estimating the value of the evidence except that of looking at the collateral facts."[33]

Sealy doen aan die hand dat die onvermoë van die *equity*-regter om deur die ondervraging van getuies die feite van sake te ontrafel daartoe aanleiding kon gee dat sommige reëls wat in hierdie howe ontwikkel is, uiters streng toegepas is.[34] Sodoende is voorkom dat daar te veel op die feitelike meriete van 'n betrokke saak ingegaan moes word.[35] Ook Shepherd[36] wys op die streng toepassing van bepaalde reëls, maar verklaar dit aan die hand van die absolute onsekerheid wat daar geheers het oor die inhoud van die begrip *fidusiêre verpligtinge.*

Uit voorafgaande saaklike historiese perspektief is dit opsigtelik dat besonder versigtig te werk gegaan moet word as die gemeenregtelike vertrouensposisie van direkteure positiefregtelik ontleed word. Eerstens is die reëls wat daaroor neergelê is sterk deur die Engelse trustreg beïnvloed. Verder is daar in die forum, naamlik die *courts of equity*, waarin hierdie reëls ontwikkel is, duidelik gebruik gemaak van twee uiteenlopende benaderings. Enersyds het dié howe algemene reëls neergelê om soveel moontlik benadeeldes te hulp te kom. Andersyds is hierdie reëls verabsoluteer omdat daar nie behoorlike regsmiddele bestaan het om getuies direk aan te hoor nie.

3 2 'n Oorsig van vertrouenspligte

Die Suid-Afrikaanse reg het op die gebied van die vertrouensverhouding tussen direkteur en maatskappy nie die invloed van die Engelse reg vrygespring nie; in ons regsliteratuur ontbreek dit derhalwe nie aan verwysings na Engelse gesag

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33 1311. Vgl ook Ford *Principles of company law* (1990) 465 par 1518.

34 As voorbeeld gebruik Sealy *Company law and commercial reality* 38 die volgende reël: "If a trustee has gained some benefit or advantage as a result of something connected with his trust, he must give it up, even if he has acted with the utmost bona fides, and even though he could show, if given the chance, that everything was above board. Indeed the court will not allow itself to inquire into the question of good faith, or into any question of honesty and fairness." Kyk in die algemeen *Marzetti's Case (In re Railway and General Light Improvement Company)* 28 WR 541 542 (per James R): "Now a director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees." In *Bray v Ford* 1896 AC 44 51 word verwys na die "inflexible rule of a Court of Equity", naamlik "that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict". Die wyse woorde van Wormser *Disregard of the corporate fiction and allied corporation problems* (1929) 40 bied 'n ondubbelsinnige waarskuwing teen die eng formulering van regsreëls: "I have learned to realize that the formulation of legal propositions which can be applied with meticulous exactitude is a highly dangerous undertaking."

35 Sealy *Company law and commercial reality* 38.

36 8: "The indirect result of the vagueness of the concept is a tendency in the courts to rely very heavily upon specific rules rather than on general principles. While reliance on rules has a place in judicial decision-making, simplifying the process, if taken to extremes it can lead to the overly mechanical or technical application of those rules without any consideration of their underlying rationale." Vir verdere verklarings van die streng reëls wat in die *courts of equity* toegepas is, kyk Ford *Principles of company law* (1990) 465 par 1518.

nie.[37] Juis daarom is dit geen wonder nie dat in Suid-Afrika, net soos in Engeland,[38] die vertrouensposisie van die direkteur meesal verduidelik word deur gebruikmaking van bepaalde klasse vertrouenspligte wat op hom van toepassing is.[39]

Naudé[40] doen aan die hand dat

> "die reëls van die positiewe reg, wat die vertrouensposisie van direkteure betref . . . niks anders [behoort] te wees as uitgekristaliseerde [*sic*] toepassings van twee basiese beginsels nie, naamlik dat 'n direkteur (a) sy bevoegdhede te goeie trou moet uitoefen, en (b) 'n botsing tussen sy eie belange en dié van die maatskappy moet vermy".

Hierdie twee basiese beginsels word dan nader toegelig deur sewe verskillende klasse vertroueskendende optredes te identifiseer.[41] Cilliers en Benade[42] verklaar dat

> "[t]eenoor sy maatskappy staan 'n direkteur in 'n vertrouensverhouding wat die verpligting meebring dat hy in goeie trou teenoor sy maatskappy moet handel, sy bevoegdhede as direkteur tot voordeel van sy maatskappy moet aanwend en 'n botsing tussen sy eie belange en dié van die maatskappy moet vermy".

Hierna word vier gevalle van tipiese verbrekings van die direkteur se vertrouenspligte behandel.[43] Fourie[44] verduidelik weer dat

> "[b]y 'n bespreking van die vertrouensplig van direkteure word gewoonlik gesê dat hulle *bona fide* in belang van hul maatskappy moet optree, 'n botsing van belange moet vermy, nie hulself mag bevoordeel nie, nie hulle bevoegdhede vir 'n onbehoorlike doel mag aanwend nie en dat hulle hul diskresie onbelemmerd moet handhaaf".

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37 Naudé *Regsposisie van die maatskappydirekteur* 109; Fourie 1985 *TRW* 122. Ook in Australië is die invloed van die Engelse reg opsigtelik: *Darvall v North Sydney Brick & Tile Co Ltd* 15 ACLR 230 231 284.

38 Gower *Modern company law* 572–602; Farrar *et al Company law* (1988) 325: "[T]he following duties have been identified. Directors must act bona fide in the interests of the company and must not exercise their powers for any collateral purpose. A director must not place himself in a position where his duty to the company and his personal interests conflict and he must not profit from his position as a director. In addition he must exercise reasonable care and such skill as might reasonably be expected of a person of his knowledge and experience." Uiteraard kom hierdie klasse vertrouenspligte ook voor in ander jurisdiksies wat op die Engelsregtelike lees geskoei is – kyk Ffrench *Guide to company law* (1990) 164–176; Farrar "The duties of controlling shareholders" in *Contemporary issues in company law* (red Farrar) (1987) 188; Baxt "Judges in their own cause: the ratification of directors' breaches of duty" 1978 *Monash Univ LR* 20–21 29–49.

39 Kyk in die algemeen ook Volpe 1979 *Zimbabwe LJ* 126–131.

40 *Regsposisie van die maatskappydirekteur* 110–112. Vgl ook De Wet en Van Wyk *De Wet en Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 654.

41 Onder beginsel (a) word vier (111–116) en onder beginsel (b) drie (116–142) voorbeelde van vertroueskending behandel.

42 *Korporatiewe reg* 226 par 17.08.

43 *Idem* 228 par 17.10–232 par 17.19. Die vier gevalle wat behandel word, is "(a) 'n Botsing van belange", "(b) Oorskryding van bevoegdheidsbeperkings", "(c) Versuim om sy diskresie onbelemmerd te handhaaf" en "(d) Versuim om sy magte aan te wend vir die doel waarvoor dit verleen is".

44 1985 *TRW* 127 vn 59. Vgl ook Meskin *et al Henochsberg on the Companies Act* vol 1 (1985) 388–393; Havenga "Company directors – fiduciary duties, corporate opportunities and confidential information" 1989 *SA Merc LJ* 122; Cassim 1981 *SALJ* 168; Blackman "Directors' duty to exercise their powers for an authorised business purpose" 1990 *SA Merc LJ* 6; McLennan "No contracting out of fiduciary duty" 1991 *SA Merc LJ* 86.

3 3 Toenemende ongemak

Ten einde die toenemende ongemak oor hierdie deel van die maatskappyereg te aksentueer, word daar vervolgens gekyk na die benaderings van Britse parlementêre komitees daaroor, die misnoeë van Britse en Suid-Afrikaanse kommentatore in hierdie verband en die onsekerheid wat tans oor toepaslike remedies by vertroueskending heers. Daarna word voorstelle oor die toekomstige hantering van hierdie pligte aan die hand gedoen.

3 3 1 Britse parlementêre komitees

Die vertrouenspligte van direkteure het in feitlik alle Britse maatskappyregtelike komiteeverslae aandag geniet. Reeds in 1844 word aanbeveel dat "due provision be made for defining and declaring the duties of the several officers of the Company".[45] In 1926 wys die Greene-komitee[46] daarop dat direkteure soms hul vertrouensposisie misbruik, maar, word onomwonde verklaar, "[t]o attempt by statute to define the duties of directors would be a hopeless task . . ."[47] In 1962 blyk die ongemak waarmee direkteure se vertrouenspligte in die Engelse reg bejeën word besonder duidelik uit die Jenkins-komitee se verklaring dat dié pligte uit omvattende en hoogs ingewikkelde gewysdes ontstaan het.[48] Dit is te wagte dat so 'n moeilik verwerkbare regsgebied besonder maklik tot onsekerhede aanleiding kan gee. Na oorweging van die voorstel dat die fidusiêre[49] verpligtinge van direkteure nader omskryf moet word, wys die Jenkins-komitee daarop dat enige vorm van kodifikasie van vertrouensverpligtinge kan lei tot 'n onaanvaarbare verenging van die beskerming wat deur die gemeenregtelike vertrouenspligte gebied word.[50] Skaars elf jaar na die Jenkins-verslag, naamlik in 1973, was daar egter weer in Engeland voorstelle oor die kodifikasie van direkteure se vertrouenspligte.[51] In die 1978-Bill word weer eens voorgestel dat die volgende bepalings op die Engelse wetboek geplaas word:

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45 *First report of the select committee on the joint stock companies* House of Commons (Reports of Committees vol 7 1 ev) (hierna die 1844-verslag) (1844) *xiii*.

46 *Report of company law amendment committee* (Cmd 2657/1925 – 26) (1926).

47 *Idem* 20 par 46.

48 *Report of the company law committee* Cmnd 1749 (1962) (hierna Jenkins-verslag) 30 par 86. Kyk ook *Final report of the commission of enquiry into the working and administration of the present company law of Ghana* (hierna Gower-verslag) (1961) 145 par 1.

49 Vir 'n ontleding van die begrip "fiduciary relationships", kyk Sealy "Fiduciary relationships" 1962 *Cam LJ* 72 – 74. Vgl verder Blackman *The fiduciary doctrine and its application to directors* 77; Wedderburn 1985 *Osgoode Hall LJ* 221. Die begrip "fiduciary" is egter nog nooit werklik suksesvol omskryf nie – kyk Shepherd 4. Trouens, Shepherd (kyk oa 35 – 42 347 – 350) onderneem een van die eerste deurgronde ondersoeke na hierdie begrip.

50 Jenkins-verslag 30 par 87. Vir 'n kort maar raak samevatting oor die moeilike verteerbaarheid van die begrip *vertrouensverhouding*, kyk Fourie 1985 *TRW* 124 – 125. Kyk in die algemeen MacKenzie 1982 *Journal of Business L* 471; Volpe 1979 *Zimbabwe LJ* 137.

51 Milman "1967 – 1987: a transformation in company law?" 1989 *Anglo-American LR* 109 vn 3. Verder het die Companies Bill 169 van 1973 voorsiening gemaak vir die verpligte aanstelling van nie-uitvoerende direkteure. Dit het bepaal dat elke maatskappy met meer as 1 500 werknemers of "total net assets" (kyk omskrywing in kl 5) van meer as £5 miljoen (kl 1(5)) ten minste drie nie-uitvoerende direkteure (kl 1(1)) moet hê. Hul primêre funksie sou wees om 'n volledige verslag oor die bestuur ("an annual statement of their view of the management of the company") van die maatskappy saam te stel (kl 3) en hul onafhanklikheid is probeer verseker deurdat hul vergoeding, ondanks enige bepaling in die statute, deur die algemene vergadering vasgestel sou word (kl 1(4)). Daar is weer in 1978 gepoog om hierdie voorstelle geïmplementeer te kry – kyk die Companies Bill 38 van 1978.

"(1) A director of a company shall observe the utmost good faith towards the company in any transaction with it or on its behalf and owes a duty to the company to act honestly in the exercise of the powers and the discharge of the duties of his office.

(2) A director of a company shall not do anything or omit to do anything if the doing of that thing or the omission to do it, as the case may be, gives rise to a conflict or might reasonably be expected to give rise to a conflict, between the duties of his office and his private interests or, without prejudice to the foregoing, between those duties and any duties he owes to any other person."[52]

Weens 'n regeringsverandering is hierdie wetsontwerp nooit deurgevoer nie.

3 3 2 Britse kommentatore

Oor die aard en omvang van direkteure se vertrouenspligte word daar al 'n hele aantal jare hewig in die Engelse reg gedebatteer,[53] maar nogtans het oplossings agterweë gebly. Daar word gevolglik steeds met omvattende en hoogs ingewikkelde gewysdes gewerk ten einde te bepaal wat die direkteur se vertrouenspligte teenoor sy maatskappy is.[54] Bowenal bestaan daar tans talle statutêre bepalings wat op direkteure in Engeland van toepassing is. Die gekompliseerde aard van hierdie gebied word treffend geïllustreer deur 'n oorsiglys wat Horrocks[55] aan die bedagsame direkteur voorhou. Hierdie lys bevat nege en twintig items wat die behoedsame uitvoerende direkteur deurentyd voor oë moet hou om potensiële persoonlik-nagevolge te vermy.[56] Daarbenewens word drie punte van algemene advies verskaf waarvolgens hierdie direkteure behoort op te tree in gevalle

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52 Soos na verwys in Gower *Modern company law* 576. Kyk verder kl 44(2) van die Companies Bill 1978 [47-12 van 1978 – 47/4] (versprei as deel van *Changes in company law* Cmnd 7291 Department of Trade HMSO Londen (1978)) wat soos volg gelui het: "(2) A director of a company shall not do anything or omit to do anything if the doing of that thing or the omission to do it, as the case may be, gives rise to a conflict, *or might reasonably be expected to give rise to a conflict, between his private interests and the duties of his office*" (eie beklemtoning). Hierdie bewoording is later weer eens gewysig – kyk Gower *Modern company law* 576 vn 37a. Kyk in die algemeen Gower-verslag 145 – 146 (let veral op die opsigtelike ooreenkomste in die bewoording van a 203 van die Ghanese Companies Code (Act 179) en kl 44 van die 1978-Bill); *Changes in company law* Cmnd 7291 Department of Trade HMSO Londen (1978) "Explanatory Notes" 5 – 6; *The conduct of company directors* (1977-verslag) 1 par 3 en 4; MacKenzie 1982 *Journal of Business L* 460 471 476. Wat Australië betref, kyk a 232(2) – (4) van die Corporations Act 1989; Ford *Principles of company law* (1990) 446 par 1503; Baxt 1990 *Aust LJ* 345. Ook in Amerika is daar al ernstig aandag geskenk aan die vraagstuk hoedat direkteure se algemene pligte nader omskryf kan word – kyk Leech en Mundheim "The outside director of the publicly held corporation" 1976 *Business Lawyer* 1801.

53 *In re City Equitable Fire Insurance Company Limited* 1925 1 Ch 427 428 – 430; Ryan *The functions and responsibilities of directors* (PhD-proefskrif Universiteit van Londen 1968) 453.

54 Kyk oa Ellington en Fletcher 491 – 492. Hierdie gebied word verder gekompliseer deurdat die verbreking van vertrouenspligte klaarblyklik bestaan naas ander, moeilik onderskeibare vorme van aanspreeklikheid – kyk *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* 1983 2 All ER 563 (CA) 587g: "The distinction between mere negligence, failure to satisfy a director's duty of care to his company, on the one hand and misfeasance or 'gross negligence amounting to misfeasance' on the other hand, must, I apprehend, lie in the state of mind of the director."

55 "Guidelines and checklist for the responsible director: prevention is better than cure" 1987 *Insolvency Law & Practice* 170 ev.

56 *Idem* 170 – 176.

waar probleme wel opduik,[57] en word daar ook gewys op 'n stuk of nege slaggate vir nie-uitvoerende direkteure.[58]

Sugarman[59] spreek hom sterk teen die howe se benadering oor vertrouenspligte uit en kom onder andere tot die slotsom dat "[t]he basis of equity's intervention has become submerged in a swamp of artificial factual distinctions and constricted legal principles".[60]

MacKenzie[61] laat die klem op direkteure se pligte van sorg en vaardigheid val. Hy verwys na die mate waarin die 1978-Bill hierdie pligte sou kodifiseer[62] maar is skepties oor die nut daarvan om verouderde vertrouenspligte eenvoudig te probeer kodifiseer.[63] Hy stel vernuwing voor,[64] wys daarop dat daar in die Engelse reg nog geen bevredigende antwoord op die probleem rakende direkteure se verpligtinge is nie[65] en rig 'n ernstige oproep tot voortgesette nastrewing van nadere riglyne oor wat die verantwoordelikhede van direkteure is.[66]

Ook Wedderburn[67] is hoofsaaklik krities as hy die trustee-beïnvloede vertrouenspligte van direkteure ontleed. Oor die algemene plig wat op direkteure rus om belangebotsings te voorkom, merk hy onder andere op dat die bestaan van hierdie verpligting in werklikheid min betekenis het omdat die maatskappy, deur bepalings in die statute of die ratifikasie van belangebotsings, die streng gemeenregtelike reëls vir direkteure draagliker maak.[68]

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57 *Idem* 176.

58 *Idem* 176 – 177.

59 *The conceptual and policy basis of directors' fiduciary duties under English company law: part I* (hierna Sugarman (deel 1)) Working Paper no 4 Faculty of Business Studies and Management Middlesex Polytechnic (1982) 6: "These duties are expressed in terms of hallowed verbal formulae, ever repeated like holy incantations – which offers little real assistance in ascertaining the reason for these duties."

60 Sugarman *The conceptual and policy basis of directors' fiduciary duties under English company law: part II* (hierna Sugarman (deel 2)) Working Paper no 5 Faculty of Business Studies and Management Middlesex Polytechnic (1982) 84. Kyk verder MacKenzie 1982 *Journal of Business L* 464 – 471; Farmery "A heightened awareness of regulation: some potential pitfalls for directors of companies involved in carrying out investment business" 1987 *Insolvency Law & Practice* 143.

61 1982 *Journal of Business L* 460 ev.

62 *Idem* 471 – 472.

63 *Idem* 474 – 475. Vgl ook Sealy "A company law for tomorrow's world" 1981 *Company Lawyer* 199.

64 MacKenzie 472: "Innovation is necessary in order to improve the efficiency and performance of management. It is no longer sufficient for a director to display only such skills as he posesses. He ought to be equipped with directorial skills which are reasonably necessary for the job, before he is invested with a directorship."

65 *Ibid.*

66 *Idem* 474: "The pursuit must continue, particularly since recent proposals regarding directors, at least in large companies, indicate the need for clarification of their responsibilities." Kyk in die algemeen JB (pseud) 39: "In this area, if change is thought to be desirable, it must be done by legislation."

67 1985 *Osgoode Hall LJ* 213 – 221; Wedderburn (Lord) "The social responsibility of companies" 1985 *Melbourne Univ LR* 23 – 24.

68 Wedderburn 1985 *Osgoode Hall LJ* 214: "[I]n real life, most of these duties are made tolerable for the director (and senior manager) by reason of their waiver in advance or by subsequent ratification after their breach. A resolution in the shareholders' meeting is normally not a matter of difficulty for the board of directors." Kyk ook Wedderburn 1985 *Melbourne Univ LR* 22.

Dat ortodokse opvattings nie bloot meer aanvaar word nie, blyk verder uit Gower[69] se kritiek op die saak *Regal (Hastings) v Gulliver*.[70] Hy wys onder andere daarop dat, uit 'n maatskappyregtelike oogpunt beoordeel, die eng trustbeginsels wat in hierdie uitspraak aangewend is, ietwat te ver gevoer is.[71]

Sealy[72] verwys na verskeie gevalle waarin die wye omvang van direkteure se vertrouenspligte dien as "quite a powerful array of weapons to keep directors' conduct under control", maar lig dan een van die ernstigste leemtes in dié verband uit:

> "They are also subject to the potentially serious flaw that all these breaches of duty (ultra vires, illegality and 'fraud' apart) have always been considered capable of being ratified or condoned by the shareholders (consistently with the trust principle on which they are based), so that the ultimate control does not rest with the courts. This has led to a breakdown in the effectiveness of the law in the many modern instances where there is substantial identity between directors and controlling shareholders."[73]

Vervolgens moet die opvattings van Suid-Afrikaanse kommentatore onder die loep geneem word.

3 3 3 Suid-Afrikaanse kommentatore

Word die indelings wat voorgehou word as vertroueskendende optrede met mekaar vergelyk,[74] word dit spoedig duidelik dat hulle van skrywer tot skrywer verskil.[75] Daar kan geargumenteer word dat hierdie verskille niks meer as subtiele klemverskuiwings is nie, maar diepere ontleding ontbloot dat hier 'n gebied voorhande is waarop talle strydvrae opduik en uiteenlopende menings aan die orde van die dag is.[76] 'n Skrywer soos Fourie[77] lê die skuld vir hierdie onbevredigende stand van sake voor die deur van die howe, want "die howe [was] tot nou toe geneig . . . om eerder spesifieke reëls te beklemtoon as om

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69 *Modern company law* 592 – 594.

70 1942 1 All ER 378 (HL).

71 Gower *Modern company law* 592 – 594. Kyk verder *Canadian Aero Service Ltd v O'Malley* 1973 40 DLR (3d) 371 (SCC) 383 390; Beck "The quickening of fiduciary obligation: Canadian Aero Services v O'Malley" 1975 *Can Bar R* 772 775 – 776 782.

72 1987 *Monash Univ LR* 168 – 169.

73 *Idem* 169. Vgl verder Gower-verslag 146 par 9; Clogg "Directors' duties" in *Tolley's company law* (reds Barc, Bowen en Braune) (1990) D30/32 par D3033; Wedderburn 1985 *Osgoode Hall LJ* 214; Horrocks 172; Sealy 1987 *Monash Univ LR* 181 – 182; Sealy 1989 *Cam LJ* 28; Baxt "Commercial law" 1989 *Aust LJ* 350 ev; Hadden "The control of company fraud" 1968 (vol 34 Broadsheet 503 September) *Planning* 299; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* 1983 2 All ER 563 (CA) 586d – g. Vir 'n besonder treffende bespreking van die problematiek rakende die ratifikasie van 'n direkteur se vertroueskendende optrede, kyk Baxt "Judges in their own cause: the ratification of directors' breaches of duty" 1978 *Monash Univ LR* 16 ev, maar veral 29 – 49.

74 Vgl die benaderings van verskillende skrywers in par 3 2 *supra*.

75 Volpe 1979 *Zimbabwe LJ* 126: "These duties are usually expressed in the form of various rules. There is, however, no uniformity to be found in the various textbooks."

76 Meskin *et al* 388 wys tereg daarop dat die onderwerp oor die vertrouenspligte van direkteure 'n uitgebreide en omvattende een is en dat "on several aspects there is controversy". Brusser 8 ev verduidelik die rol en aanspreeklikheid van die nie-uitvoerende direkteur, maar sy slotsom (13) is dat "[t]he law as set out above is unsatisfactory". Om 'n idee te vorm oor die ingewikkelde aard van die vertrouensverpligtinge van nie-uitvoerende direkteure, kyk Davies "Fiduciary duties of non-executive directors" 1984 *SALJ* 567 ev, maar veral 577 – 578; Botha 1984 *De Jure* 180. Kyk in die algemeen Shepherd 5 – 8.

77 1985 *TRW* 124. Vgl verder Shepherd 5; Havenga 131.

algemene beginsels neer te lê''. McLennan blameer die wetgewer vir die wyse waarop sommige gemeenregtelike reëls gekodifiseer is[78] en doen voorstelle aan die hand hoedat bestaande statutêre bepalings hervorm kan word;[79] hy erken egter ook die nut daarvan dat leemtes in die gemeenregtelike reëlings oor die vertrouensverhouding tussen direkteur en maatskappy deur statutêre bepalings uit die weg geruim moet word.[80]

3 3 4 Onsekerheid oor remedies

Naudé[81] dui aan dat daar primêr drie remedies tot die maatskappy se beskikking is op grond van vertroueskending deur direkteure. Dit is naamlik dat 'n tersydestellingsbevel verkry kan word vir die handeling wat onder vertroueskendende omstandighede aangegaan is, dat die maatskappy 'n *verhaalsreg* teen die direkteur het vir vermoënsbenadeling aan die kant van die maatskappy of vir 'n vermoënsvoordeel wat deur die direkteur verwerf word[82] en dat dreigende vertroueskending deur 'n interdik voorkom kan word.[83]

Word teruggegaan na die beslissings waarin eersgenoemde twee remedies die aandag van die Suid-Afrikaanse howe geniet het, dan blyk dit dat hulle die resultaat is van remedies wat in verskeie regstelsels, en bowenal in meer as een regsgebied in hierdie stelsels, aangewend is. In *Transvaal Cold Storage Co Ltd v Palmer*[84] word onder andere daarop gewys dat die beginsels onderliggend aan hierdie remedies reeds in die Romeinse reg erken is, dat dit in die Romeins-Hollandse reg toegepas is, dat dit verder in Engeland en Amerika ontwikkel en uitgebou is en herhaaldelik deur die Suid-Afrikaanse howe aanvaar is.[85] Die wye verskeidenheid bronne waarna regter Mason verwys, spreek duidelik van die invloed van talle regstelsels.[86] In latere sake word egter veral na Engelse gesag verwys. So is dit hoofsaaklik Engelse beslissings waarna al die regters in *African Claim and Land Co Ltd v Langermann*[87] verwys as hulle die remedies en die beginsels onderliggend daaraan verduidelik.[88] Regter Solomon weer verklaar in *Hargreaves v Anderson*[89] dat

> ''it is clear law, both in this country and in England, that an agent, employed to sell, cannot legally purchase the property entrusted to him for sale, and that his principal, on discovery of the fact, is entitled to repudiate the sale''.[90]

In *Robinson v Randfontein Estate Gold Mining Co Ltd*[91] noem regter Innes dat ''the remedies available to a principal who discovers that he has purchased his agent's own property depend upon some nicety''.[92] Die regter wys egter

78 McLennan 1983 *SALJ* 422–423 426–427 434 440.
79 *Idem* 646–648.
80 *Idem* 653 662–663.
81 *Regsposisie van die maatskappydirekteur* 142. Kyk ook *Darvall v North Sydney Brick & Tile Co Ltd* 15 ACLR 230 248 (par 6); Ffrench 181–182.
82 Naudé *Regsposisie van die maatskappydirekteur* 142.
83 *Ibid.*
84 1904 TS 4.
85 19–20.
86 33–36.
87 1905 TS 494.
88 505 518 523–524.
89 1915 AD 519.
90 522.
91 1921 AD 168.
92 178.

daarop dat "[o]bviously he [the principal] is not bound by the contract unless he chooses: he may elect therefore either to repudiate or confirm",[93] en verduidelik dan hierdie beginsel verder deur swaar te steun op Engelse gesag wat oor direkteure gehandel het[94] omdat "a director is, of course, an agent".[95] In verskeie latere beslissings word daar verwys na die aard van die verhouding tussen vertrouensbekleërs en diegene aan wie hulle trou verskuldig is maar nie na die remedies op grond van trouskending nie.[96]

Die ineenstrengeling van die beginsels wat op direkteure en dié wat op verteenwoordigers toegepas is,[97] het so subtiel plaasgevind dat dit beswaarlik vandag moontlik is om te sê of daar werklik enige verskille op hierdie gebiede bestaan. Hierdie punt word treffend geïllustreer deur 'n vergelyking van die moderne handboeke oor die Suid-Afrikaanse verteenwoordigings- en maatskappyereg. In hierdie handboeke word feitlik dieselfde reëls aangetref by die verteenwoordiger se pligte van sorg en goeie trou teenoor sy prinsipaal[98] as by die direkteur se vertrouenspligte teenoor sy maatskappy.[99] Die vermenging van hierdie beginsels is so volkome dat dit vandag 'n ernstige strydvraag is of verteenwoordigerskap nie die enigste bron van direkteure se vertrouenspligte is nie.[100]

Teenswoordig bestaan daar groot onsekerheid oor die toepaslikheid van die remedies wat op hierdie gebied aanwending vind. De Wet[101] verklaar byvoorbeeld dat dit regsteoreties onjuis is om te verklaar dat die prinsipaal daarop geregtig is om die kontrak, waarin die verteenwoordiger sy eie saak aan die prinsipaal verkoop, te vernietig. Hy verduidelik:

> "It is submitted that a person cannot as representative of another contract with himself for the simple reason that a contract can only come into being by agreement between at least two persons. Where the representative purports to contract with himself there is simply no contract which the principal can elect to set aside or confirm and this is the position even if there is no conflict between interest and duty."[102]

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93 *Ibid.*
94 *Idem* 178 – 181.
95 *Ibid.* Die analogie tussen direkteure en verteenwoordigers het 'n lang geskiedenis. Grant *A practical treatise on the law of corporations in general as well aggregate as sole* (1850) 199 verklaar bv soos volg: "[I]n equity the members of the governing body of a corporation are looked upon as agents of the corporation; and if they exercise their functions for the purpose of injuring the interests, and alienating its property, they are held personally liable for any loss occasioned thereby . . ."
96 *S v De Jager* 1965 2 SA 616 (A) 625B – C; *S v Heller* 1971 2 SA 29 (A) 43H – 44B; *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 3 SA 539 (W) 542D; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 64F – 67E.
97 Dieselfde beginsels vind klaarblyklik ook aanwending in die Suid-Afrikaanse trustreg (Honoré *The South African law of trusts* (1985) 274 – 276) en elemente daarvan onderlê ook die vennootskapsreg (Henning en Delport *Partnership* (1984) 293 – 294 par 400).
98 Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 211 – 225; Kerr *The law of agency* (1979) 132 – 149; Silke *De Villiers & Macintosh: The law of agency in South Africa* (1981) 326 – 330 337 – 346; Van Jaarsveld "Verteenwoordigingsreg" in *Suid-Afrikaanse handelsreg* (red Van Jaarsveld) vol 1 (1988) 264 – 266. Wat die Engelse reg betref, kyk Reynolds *Bowstead on agency* (1985) 156 – 207.
99 Kyk bronne na verwys in par 3 2 *supra.*
100 Kyk par 3 5 3 *infra.*
101 "Agency and representation" 1 *LAWSA* 80 par 108.
102 *Ibid.*

Kerr[103] onderskryf klaarblyklik hierdie opvatting en doen aan die hand dat as die appèlhof weer die geleentheid kry hy die benadering in die *Robinson*-saak aangaande die maatskappy se remedie om hierdie kontrakte te kan vernietig, in heroorweging moet neem.

Joubert[104] is nie krities oor hierdie remedie nie maar verklaar dit eenvoudig soos volg:

> "Die versuim om die relevante feite bekend te maak, maak die kontrak vernietigbaar ingevolge die keuse van die prinsipaal. Die klaarblyklike rede is die wanvoorstelling van die verteenwoordiger . . ."

Wat betref die samehang tussen die maatskappy se reg om hierdie kontrakte te vernietig en sy verhaalsreg teenoor die direkteur is daar nie alleen 'n totale afwesigheid van definitiewe riglyne in die gewysdes nie, maar skrywers waag dit ook selde om oplossings aan die hand te probeer doen. In *African Claim and Land Co Ltd v Langermann*[105] word na albei hierdie remedies verwys maar dit is allesbehalwe duidelik of die maatskappy *altyd* die keuse het om die kontrak te vernietig of dit in stand te hou en, ongeag wat die keuse ook al was, of dit steeds 'n verhaalsreg teen die direkteur het.[106] In *Robinson v Randfontein Estate Gold Mining Co Ltd*[107] het regter Innes weer eens na beide remedies verwys maar sonder om die geheimenisse rondom die samehang tussen hierdie remedies en die omstandighede waarin dit toepassing sou vind, op te klaar.[108]

Die onsekerheid oor die omstandighede waarin die remedies by trouskending aanwending vind, word treffend geïllustreer deur die opsigtelike verskille in

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103 144 vn 2.

104 *Die Suid-Afrikaanse verteenwoordigingsreg* 217.

105 1905 TS 494.

106 Vgl 505 – 506 518 525. Sommige van die probleme wat ervaar word met die samehang tussen die verhaalsreg teen die direkteur en die vernietigbaarheid van die kontrak word duidelik geïllustreer deur Mason R (518) se verduideliking: "If the profit claimed be the difference between the cost of the property and the price at which the company purchases from the director, that seems to me a claim for confiscation and not for compensation, and I know of no authority in these cases entitling a company to demand a penalty for a breach of duty . . . If the profit claimed be the difference between the market value at the time of sale to the company and the sale price, there are in my opinion substantial grounds in equity and in authority to support such claim whether it be under the head of profit or damages, *but the weight of English decisions is perhaps against the existence of any other remedy than rescission of contract*" (eie beklemtoning). In *Uni-erections v Continental Engineering Co Ltd* 1981 1 SA 240 (W) 253B – C word verwys na die kopstuk in die *Palmer*-saak as grondslag van die verhaalsreg teenoor die verteenwoordiger: "It [the liability to account for profits] is a distinct remedy afforded a principal, master or partner where there has been breach of the duty of good faith by the agent, servant or co-partner. It is not necessary that loss or harm or damages should be proved."

107 1921 AD 168.

108 179. In *Uni-erections v Continental Engineering Co Ltd* 1981 1 SA 240 (W) 253D – E word daar verwys na *Mallison v Tanner* 1947 4 SA 681 (T) as gesag vir die stelling dat "the duty to account extended to anything received by the agent as a result of a violation of his duty of loyalty to the principal and anything unexpected or incidental, whether or not received in violation of such duty". In werklikheid het die remedies wat in hierdie gevalle aanwending vind geen kritiese aandag in die *Mallison*-saak geniet nie; hierdie stelling in die kopstuk is slegs gebaseer op 'n direkte aanhaling uit 'n Amerikaanse bron – kyk 687.

Pennington en Naudé se opvattings hieroor. Pennington[109] verduidelik dat as algemene reël die maatskappy slegs 'n verhaalsreg teenoor die direkteur het as die kontrak *gekanselleer* word. Hierdie reël word egter onmiddellik verder gekwalifiseer:

> "The inability of the company to recover profits without rescinding, of course, assumes that the director has not been guilty of a breach of his fiduciary duties. If he has done so, by failing to warn the board of the company that the contract is unfair to it (if that is so), or by procuring the contract simply in order to make a personal profit, the director will be accountable for the profit he has obtained, whether the company rescinds the contract or not."[110]

Naudé[111] swyg oor wat die gevolge is as die kontrak gekanselleer word maar verskaf 'n aantal riglyne oor wanneer die maatskappy die reg sal hê om *winste* van die direkteur te verhaal as die vernietigbare kontrak *nie gekanselleer word nie*. Hy argumenteer dat die antwoord op hierdie vraag regstreeks afhanklik is van beide die interne bevoegdheidsreëling van direkteure in die maatskappy en die vraag of die belanghebbende direkteur die *merx* van die kontrak voor of na sy ampsaanvaarding bekom het. Sy argument lui dat daar onderskei moet word tussen direkteure wat individueel regshandelinge namens die maatskappy mag aangaan en dié sonder sodanige bevoegdhede. By eersgenoemde klas direkteure word dit eenvoudig geag dat die ooreenkoms ten behoewe van die maatskappy gesluit is; gevolglik sal enige winste van hom verhaal kan word as hy die *merx* van die kontrak na sy ampsaanvaarding bekom het. Daarenteen kan die tweede groep direkteure vrylik met die maatskappy meeding behalwe as hulle vertroulike inligting benut wat danksy hul ampsbekleding bekom is.

3 4 Beginselstandpunt

3 4 1 Kodifikasie

In 'n nuusvrystelling op 15 Junie 1989 het die Vaste Advieskomitee oor Maatskappyereg, aan die hand van aanbevelings deur die Melamet-kommissie,[112] verklaar dat "[c]onsideration will have to be given to the possibility of codification of directors' duties in general".[113] Daar word aan die hand gedoen dat die kodifikasie van die vertrouensverpligtinge van direkteure nie bestaande probleme op hierdie gebied uit die weg sal ruim nie. Die grootste gevaar van kodifikasie lê daarin dat die trefwydte die vertrouensverpligtinge in 'n gekodifiseerde vorm óf te wyd óf te eng sal wees.[114] Deur gebruikmaking van algemene

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109 *Directors' personal liability* (1987) 76.

110 *Ibid*. In 'n onlangse Engelse beslissing, nl *Logicrose Ltd v Southend United Football Club Ltd* 1988 1 WLR 1256 (Ch) (kyk veral 1260F – 1263C) was daar weer eens 'n ontleding van die remedies wat tot die prinsipaal se beskikking is as sy verteenwoordiger regshandelinge namens hom gesluit het in omstandighede waar daar 'n botsing was tussen die verteenwoordiger se persoonlike belange en sy pligte teenoor die prinsipaal. Vir 'n bespreking van hierdie saak, kyk Reville "Principal remedies for an agent's breach of fidelity" 1989 *Business LR* 182.

111 *Regsposisie van die maatskappydirekteur* 128 – 130 304; Naudé 1970 *SALJ* 198 – 199.

112 Melamet-verslag 82 102.

113 *Future development of company law* (hierna VAKM-nuusvrystelling (1989)) Verklaring van die Vaste Advieskomitee oor Maatskappyereg Bloemfontein 1989-06-15 7 par 9.

114 Vir 'n treffende uiteensetting van die gevare verbonde aan die kodifikasie van direkteure se fidusiêre verpligtinge, kyk Sealy 1981 *Company Lawyer* 199 par 4. Tov kodifikasie in die algemeen, kyk Goode "The codification of commercial law" 1988 *Monash Univ LR* 135; Hahlo "Here lies the common law: rest in peace" 1967 *Mod LR* 242; Gower "Here lies the common law: rest in peace – a comment" 1967 *Mod LR* 259; Palmer "The death of a Code – the birth of a Digest" 1988 *Tul LR* 221; Barnes "Towards a normative framework for the Uniform Commercial Code" 1989 *Temple LR* 117.

woorde, soos voorgestel in die 1978-Bill,[115] word geensins nader beweeg aan 'n oplossing vir die probleem nie juis omdat die vertrouenspligte van direkteure te vaag is.[116] Dieselfde besware geld ook ander gevalle waarin vertrouenspligte statutêr beliggaam word. Artikel 42 van die Wet op Beslote Korporasies 69 van 1984 reël byvoorbeeld die statutêre beliggaming van die lede van 'n beslote korporasie se vertrouensposisie. In artikel 42(2) word egter uitdruklik verklaar dat hierdie bepaling nie afbreuk doen "aan die algemeenheid van die uitdrukking 'vertrouensverhouding'" nie. Al word artikel 42 van die Wet op Beslote Korporasies *mutatis mutandis* op direkteure van toepassing gemaak, los dit juis nie die probleem ten opsigte van die vaagheid van die begrip *vertrouensverhouding* op nie. Daarenteen is enige statutêre bepaling gedoem wat sou poog om spesifieke pligte te identifiseer, want dit sou juis meebring dat dié pligte wat nie genoem word nie skuiwergate bied aan direkteure wat berekend hul vertrouenspligte sou wou skend.

3 4 2 Indeling van vertrouenspligte in bepaalde klasse

Die hoofrede vir die onbevredigende stand van sake op die gebied van die vertrouensposisie van direkteure is die ingewikkelde en uiteenlopende aard van die sake wat hieroor beslis is. Ten einde sin uit die vroeëre gewysdes te probeer maak, het die howe en handboekskrywers die vertrouenspligte van direkteure in bepaalde klasse begin indeel.[117] Ongelukkig word hierdie indelings, wat uit vroeëre Engelsregtelike gewysdes ontstaan het, dikwels oorbeklemtoon en sodoende word perspektief verloor op "die onderliggende regsgrondslag of beginsel"[118] waarop hierdie reëls geskoei is. Bowenal is dit uiters selde dat die reëls in die regte historiese perspektief gesien word.

Daar word onder andere dikwels uit die oog verloor dat die vroeëre Engelse gewysdes sterk deur suiwer trustbeginsels beïnvloed is[119] en dat die streng trustee-analogie in die geval van direkteure 'n feilbare een is.[120] In die toepassing van hierdie klasse vertrouenspligte op hedendaagse omstandighede is dit

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115 Kyk vn 53 *supra*. Vgl verder tov Australië a 232(2) – (4) van die Corporations Act 1989; Sealy 1987 *Monash Univ LR* 166 vn 2.

116 Die tipiese kringloop wat hier voorkom, word goed geïllustreer deur die wyse waarop Hadden 1968 *Planning* 279 – 302 redeneer. Hy bepleit nl die daarstelling van kragtiger regsmiddele om maatskappyfunksionarisse wat misbruik van hul bevoorregte posisies maak aan die pen te laat ry, stel voor dat direkteure se vertrouenspligte aan die hand van die Ghanese voorbeeld (a 203 van die Ghanese Companies Code (Act 179) – Gowerverslag 145) statutêr beliggaam moet word (Hadden 1968 *Planning* 302) en vervolg onmiddellik soos volg: "Such provisions *must of course be stated in general terms*. It is the *task of the courts* to come to a decision *on the facts of each particular dispute* . . ." (eie beklemtoning).

117 Kyk par 3 2 *supra*.

118 Fourie 1985 *TRW* 124.

119 Kyk par 3 1 *supra*.

120 *Marzetti's Case (In re Railway and General Light Improvement Company)* 28 WR 541 542 (per James R): "Now a director should not be held liable upon any very strict rules such as those, in my opinion, too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees"; *In re City Equitable Fire Insurance Company Limited* 1925 1 Ch 407 426; Sealy 1967 *Cam LJ* 83 ev; Sealy *Company law and commercial reality* 37 – 39; Mitchell *Insider dealing and directors' duties* 62. Kyk ook Naudé *Regsposisie van die maatskappydirekteur* 43 – 45; MacKenzie 1982 *Journal of Business L* 464. Vgl verder Wedderburn 1985 *Osgoode Hall LJ* 213 – 223; Wedderburn 1985 *Melbourne Univ LR* 23 – 24.

verder fataal om uit die oog te verloor dat die reëls hul oorsprong in die Engelse *courts of equity* gehad het. Soos voorheen aangetoon is,[121] het hierdie howe breë reëls neergelê. Hierdie reëls is egter dikwels streng toegepas ten einde 'n inherente prosessuele leemte, naamlik dat daar nie behoorlike regsmiddele bestaan het om getuies persoonlik te daag nie, die hoof te bied.

Die klasse vertrouenspligte wat vandag deur kommentatore voorgehou word, kan derhalwe nog 'n nuttige funksie vervul[122] maar dan moet dit met die regte historiese perspektief voor oë beoordeel word. Sodoende is die beoordelaar van die gemeenregtelike reëls aangaande die vertrouenspligte van direkteure veel beter in staat om te weet wanneer aanpassings aan die reëls nodig is ten einde dit vir hedendaagse omstandighede bruikbaar te maak.

3 4 3 Gevolge van beginselstandpunt

In die lig van die standpunt dat nóg die kodifikasie nóg die indeling van vertrouenspligte in bepaalde klasse enige oplossing bied vir die verwarring wat daar op hierdie gebied heers, moet daar vervolgens na 'n oplossing gekyk word. Daar word aan die hand gedoen dat die oplossing daarin te vind is dat die aanvaarde grondslag van aanspreeklikheid vir vertroueskending in heroorweging geneem moet word.

3 5 Grondslag van aanspreeklikheid

3 5 1 Agtergrond

Die gemeenregtelike vertrouenspligte stel "'n algemene beskermende regsbeginsel" daar[123] wat die basis vorm van "geregtelike kontrole oor die uitoefening van die vertrouenspersoon se bevoegdhede".[124] Hierdie stellings verteenwoordig egter net een deel van die geheel. Ten einde te verseker dat die gemeenregtelike vertrouenspligte as deeglike grondslag dien vir die geregtelike kontrole-funksie wat daarmee beoog word, moet daar sekerheid bestaan oor beide wat bedoel word met vertrouenspligte[125] en wat die remedies is as hierdie pligte verbreek

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121 Kyk par 3 1 *supra*.

122 Fourie 1985 *TRW* 124.

123 *Idem* 122. Vgl ook Botha "Holding and subsidiary companies: fiduciary duties of directors" 1983 *De Jure* 234; Botha 1984 *De Jure* 171 179; Sealy 1987 *Monash Univ LR* 168 – 169: "[T]he trust law does have some advantages. By setting high standards of loyalty and integrity it acts as salutary prophylactic, important wherever people have power over other people's property."

124 Fourie 1985 *TRW* 126. Farrar *et al* 324 verskaf verdere waardevolle perspektiewe op die belang van direkteure se vertrouenspligte: "Having sanctioned the granting of practically unlimited powers to the board of directors [kyk Du Plessis *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* par 2 6 1 2 2], the next concern is to devise some means of controlling the directors in the exercise of those powers. A balancing act is required: management must not be stifled but neither can unfettered, unsupervised, absolute discretion be permitted. The law's response has been to impose strict prophylactic rules designed to ensure certain minimum standards of behaviour from directors, backed up by onerous disclosure rules designed to prevent directors shrouding their transactions in secrecy. The consequences of breach of these rules can be severe."

125 *In re Brazilian Rubber Plantations and Estates Limited* 1911 1 Ch 425 437; *In re City Equitable Fire Insurance Company Limited* 1925 1 Ch 407 427.

word.[126] Oor nie een van hierdie twee elemente bestaan daar sekerheid in die Suid-Afrikaanse reg nie. Enersyds, soos duidelik uit die bespreking hierbo blyk, is die kritiek teen die vaagheid en ingewikkeldheid van die vertrouenspligte van direkteure steeds aan die toeneem. Andersyds bestaan daar groot onsekerheid oor die remedies wat tot die maatskappy se beskikking is as hierdie pligte verbreek word.

Daar sal nooit duidelikheid oor enigeen van hierdie aangeleenthede kom as daar nie eers op besliste wyse standpunt oor die grondslag van aanspreeklikheid vir 'n verbreking van hierdie pligte ingeneem word nie. Hoofsaaklik op gesag van die menings van regters Innes en Solomon in *Robinson v Randfontein Estate Gold Mining Co Ltd*[127] word vandag algemeen aanvaar dat die grondslag van direkteure se aanspreeklikheid op grond van vertroueskending *sui generis* van aard is,[128] maar hierdie opvatting is nog nooit werklik krities ontleed nie. In *Cohen v Segal*[129] word weliswaar genoem dat die aanspreeklikheid van direkteure "need not necessarily be based on fraud or delict",[130] maar daar word geen duidelike standpunt oor die spesifieke grondslag van aanspreeklikheid ingeneem nie.[131] Dit is derhalwe van besondere belang om te oorweeg of die stelling dat die grondslag van aanspreeklikheid in die geval van vertroueskending 'n *sui generis* vorm van skuldlose[132] aanspreeklikheid is, suiwer is.

3 5 2 'n Kritiese ontleding van die aanvaarde grondslag van aanspreeklikheid

Dit is opvallend dat in die *Robinson*-saak[133] nóg regter Innes nóg regter Solomon enige spesifieke gesag aanhaal vir die stelling dat die grondslag van aanspreeklikheid vir vertroueskending *sui generis* van aard is. Daar word slegs

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126 Sealy 1987 *Monash Univ LR* 177: "A supposed legal duty which is not matched by a remedy is a nonsense." Vgl ook Boyle "Directors' fiduciary duties: the continuing problem of effective enforcement" 1987 *Forum Internationale* 1: "Fiduciary duties (like any other branch of civil law) can only have 'teeth' if those affected by their infringement may without undue hindrance bring claims before the courts . . . Any system which places substantial barriers in the path of such litigants . . . takes away with one hand what it gives with another. High sounding and morally demanding fiduciary and trustee obligations remain largely a dead letter to the extent that effective enforcement is denied."

127 1921 AD 168 199 242. Vgl egter ook die mening van Juta R 262–263.

128 *Cohen v Segal* 1970 3 SA 702 (W) 706G; Naudé *Regsposisie van die maatskappydirekteur* 142–143; Cilliers en Benade *Korporatiewe reg* 227–228 par 17.09; Meskin *et al* 388; Volpe 1979 *Zimbabwe LJ* 134. Tov die Engelse reg kyk Walton "Companies" in *Halsbury's laws of England* (red Hailsham) vol 7(1) (1988) 428 par 614: "Where directors exercise their powers improperly, this may give rise to a claim by the company against them based on breach of duty." Wat Australië betref, kyk Ffrench 170.

129 1970 3 SA 702 (W).

130 706G.

131 706H–707H.

132 Naudé *Regsposisie van die maatskappydirekteur* 142–143: "'n Direkteur se aanspreeklikheid op grond van trouskending is onafhanklik van die bestaan van 'n kontraktuele verhouding [en] *skuld is in beginsel geen vereiste nie* . . . Die aanspreeklikheid is derhalwe nie te verklaar as 'n *obligatio* wat *ex contractu* of *ex delicto* ontstaan nie." (Beklemtoning in die eerste sin is self aangebring.) Ffrench 170 verduidelik tov hierdie aanspreeklikheid in die Australiese reg soos volg: "To establish a breach of this duty, it is not necessary to prove fraud, dishonesty, use of power for an improper purpose, loss caused to the company, or profit made which the company could have obtained for itself but for the breach of duty."

133 1921 AD 168.

terugverwys na die menings van die regters in die hof *a quo*.[134] Hierdie saak is ongelukkig nooit gerapporteer nie en ondanks die feit dat verskeie weë gevolg is, kon die saak ook nie opgespoor word nie.[135]

Dat die *a quo*-saak uiters belangrike inligting moes bevat, blyk onder andere uit die volgende: Dieselfde drie regters wat in die *a quo*-saak van *Robinson* gesit het,[136] moes in *Robinson v Randfontein Estate Gold Mining Co Ltd*[137] beslis of 'n kommissie *de bene esse* belê moes word al dan nie. Al drie regters het saamgestem met die uitspraak van regter Wessels. Dit is insiggewend dat hy geen twyfel daaroor gehad het dat *dolus* wel 'n vereiste vir aanspreeklikheid op grond van vertroueskending is nie. Hy verklaar onder andere:

> "It is alleged that the defendant abused his fiduciary position as chairman and director of the Randfontein Estate, and that he acquired for himself property that he ought to have acquired for the company . . . A charge of that kind *involves dolus undoubtedly* . . .[138]
>
> The nature of the *dolus* charged is also very important, for *dolus* may range from gross deceit to culpable negligence. *Dolus* may be the result of dishonesty or it may be the result of a misconception of the law on the part of the person concerned.
>
> In this case the inquiry appears to turn on the question of an abuse of a fiduciary relationship. Such an abuse may be the result of deliberate dishonesty or it may be that the defendant thought that he was entitled to do what he actually did."[139]

Skrywers se opvatting dat hierdie aanspreeklikheid *sui generis* is,[140] word derhalwe nie gestaaf deur die benadering wat deur dieselfde drie regters in *Robinson v Randfontein Estate Gold Mining Co Ltd*[141] gevolg is nie. Dit kan ook nie aan die hand van die beginsels van die Suid-Afrikaanse trustreg verklaar word nie, want in die trustreg bied die beginsels van die *actio legis Aquiliae* juis die grondslag van aanspreeklikheid vir vertroueskending deur trustees.[142] Skuld is derhalwe 'n vereiste vir aanspreeklikheid.[143]

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134 199 242.

135 In die appèlhofargief is daar deur alle leêrs (no 1172) gewerk waarin die oorspronklike stukke wat voor die appèlafdeling gedien het, bewaar word. Hierdie saak is opgeneem in vol 5 van die gedrukte stukke wat voor die hof gedien het (skrywe van Van Hulsteyn, Feltham en Ford aan FS Webber gedateer 1920-12-08), maar ongelukkig word vol 5 vermis. 'n Skrywe aan die Transvaalse Argiefbewaarplek het ook niks opgelewer nie. Hiermee betuig ek ook my opregte dank aan Anton Trichardt wat, ondanks 'n besige program as nuut-praktiserende advokaat van die Johannesburgse Balie, self die moeite gedoen het om in die argiewe na hierdie saak te gaan soek.

136 Dit was nl Wessels R, Mason R en Gregorowski R – vgl *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 169; *Robinson v Randfontein Estate Gold Mining Co Ltd* 1918 TPD 420.

137 1918 TPD 420.

138 421 – eie beklemtoning.

139 423. Vgl ook *Meyerson v Health Beverages (Pty) Ltd* 1989 4 SA 667 (K) 675I.

140 Naudé *Regsposisie van die maatskappydirekteur* 142 – 143: "'n Direkteur se aanspreeklikheid op grond van trouskending is onafhanklik van die bestaan van 'n kontraktuele verhouding [en] *skuld is in beginsel geen vereiste nie* . . . Die aanspreeklikheid is derhalwe nie te verklaar as 'n *obligatio* wat *ex contractu* of *ex delicto* ontstaan nie." (Beklemtoning in die eerste sin is self aangebring.).

141 1918 TPD 420.

142 Honoré 278 – 279 par 227.

143 *Idem* 279 par 227. Vir 'n insiggewende ontleding van veranderde opvattings wat deur die Amerikaanse howe jeens fidusiêre verpligtinge in sommige tipes maatskappye geopenbaar word, kyk Mitchell "The death of fiduciary duty in close corporations" 1990 *Univ of Penn LR* 1675 ev, maar veral 1676 1677 1680 1687 1688 1692 1715 – 1716 1718 1720 en 1722.

Daar word aan die hand gedoen dat die enigste oorblywende verklaring vir hierdie benadering is dat dit onder invloed van die Engelse reg staan. In daardie land bestaan daar historiese redes waarom onder andere skuld nie as vereiste gestel word vir direkteure se aanspreeklikheid op grond van vertroueskending nie en waarom die maatskappy se eis nie vir *skade* was nie.[144] Dit is naamlik dat die vroeëre *courts of chancery* nie werklik in staat was om die skuld van die vertrouensbekleër of die skade van die maatskappy vas te stel nie aangesien die regsmiddele om getuies persoonlik aan te hoor uiters beperk was. Juis daarom is verskeie trust-beïnvloede billikheidsreëls, wat later op direkteure toegepas is, absoluut toegepas.[145]

Dit wil voorkom of die beginsels van die *actio legis Aquiliae* erken moet word as grondslag vir die aanspreeklikheid van direkteure op grond van vertroueskending in die Suid-Afrikaanse maatskappyereg. Daar bestaan geen rede waarom Engelsregtelik-beïnvloede trustbeginsels, wat opsigtelik weens eiesoortige Engelsregtelike historiese redes ontwikkel is en waaroor daar bowenal min tevredenheid in die Engelse reg self bestaan, steeds die Suid-Afrikaanse maatskappyereg moet beïnvloed nie.

3 5 3 Die bronne van direkteure se vertrouenspligte

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*[146] is die hof, op gesag van die mening van regter Solomon in *Robinson v Randfontein Estate Gold Mining Co Ltd*,[147] van oordeel dat direkteure se vertrouenspligte slegs ontstaan uit hoofde van hul hoedanigheid van verteenwoordigers.[148] In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*[149] betwyfel die hof die korrektheid van hierdie opvatting.[150] Regter Goldstone is in laasgenoemde saak *obiter*[151] die mening toegedaan dat "a director of a company is a trustee for his company and that a fiduciary relationship arises therefrom".[152]

Benewens verteenwoordigerskap en trusteeskap (daar word vir huidige doeleindes aanvaar dat regter Goldstone die begrip *trustee* in wye sin gebruik)[153]

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144 Kyk die benadering van Naudé *Regsposisie van die maatskappydirekteur* 142 – 143.
145 Kyk par 3 1 *supra*.
146 1981 2 SA 173 (T).
147 1921 AD 168 216. Solomon R se benadering blyk ook duidelik uit 228 – 229.
148 *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 198D – E. Vgl ook *Dawson International Plc v Coats Paton Plc* 1988 5 PCC 362 (Ct Sess) 375 – 376.
149 1988 2 SA 54 (T).
150 65C. Daar moet egter op gewys word dat Van Dijkhorst R in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) nie onbuigsaam in sy benadering is nie. Hy wys nl daarop dat die algemene reël is dat een persoon nie normaalweg as besturende direkteur van twee mededingende maatskappye sal kan optree nie (198H), maar onmiddellik hierna kwalifiseer hy hierdie algemene reël soos volg: "On the other hand common sense dictates that the mere creation by a managing director, whose services have been terminated and who is serving his month's notice, of a future alternative means of employment, albeit in competition with his present company, need not necessarily create a conflict of interest greater than that of an ordinary director serving on the boards of two competing companies."
151 Havenga 1989 *SA Merc LJ* 124.
152 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 65C – D. Kyk in die algemeen Dillon "Director's duties – competing with the company" 1989 *BML* 227.
153 Henning "Algemeen" in *Trust en boedelbeplanning – Consulta 4* (1980) 6.

is daar ook gesag vir die standpunt dat, veral in die geval van uitvoerende direkteure, bykomende fidusiêre pligte uit hoofde van dienskontraktuele oorwegings ontstaan.[154] Die feit dat daar verskillende grondslae vir direkteure se vertrouenspligte is, dui daarop dat hulle in talle omstandighede in 'n vertrouensverhouding teenoor die maatskappy te staan kan kom.

Die probleem om slegs 'n enkele grondslag vir die direkteur se vertrouenspligte te probeer soek, is daarin geleë dat daar voortdurend vir uitsonderings voorsiening gemaak moet word. 'n Illustrasie hiervan word gevind in die bronne wat verteenwoordigerskap as grondslag van direkteure se vertrouenspligte aanvaar. Hierdie bronne wys gewoonlik daarop dat dit die nie-uitvoerende direkteur vrystaan om met die maatskappy mee te ding omdat hy in dié hoedanigheid geen algemene magtiging of verpligting het om kontrakte ten behoewe van die maatskappy te sluit nie.[155] Die probleem is egter dat daar dan altyd gekwalifiseer moet word dat hierdie algemene reël onderworpe is aan dié uitsondering dat die betrokke direkteur nie van vertroulike inligting gebruik mag maak wat hy danksy sy ampsbekleding bekom het nie.[156] Daar word aan die hand gedoen dat dit onnodig is om 'n enkele grondslag vir die vertrouenspligte van die direkteur te probeer soek. Met inagneming van die feit dat Aquiliese aanspreeklikheid hierdie verhaalsreg ten grondslag lê, behoort die deeglike beoordeling van elke saak deurgaans aanvaarbare resultate te bied.

3 5 4 Deeglike beoordeling van elke saak

Daar bestaan gesag vir die benaderingswyse dat dit eintlik ongewens is om te probeer soek na 'n bepaalde grondslag vir direkteure se fidusiêre verpligtinge. So bied die benadering van regter Innes in die *Robinson*-saak,[157] waarna regter Goldstone in die *Sibex*-saak verwys,[158] steun vir hierdie standpunt. Regter Innes stel dit naamlik verskeie kere duidelik dat die vertrouensverpligtinge onafhanklik van verteenwoordigerskap is[159] en meld ook dat die grondslag van

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154 Kyk Du Plessis *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* par 10 6 3.

155 *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 216 (Solomon R); *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 198E; Naudé "Mededinging deur 'n direkteur met sy maatskappy" 1970 *SALJ* 199; Davies 1984 *SALJ* 574. Vgl verder die verduideliking van hierdie standpunt in *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 65C; Havenga 1989 *SA Merc LJ* 124.

156 In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 198E word die algemene reël verduidelik; dan word tussen hakies vervolg: "(This does not pertain to the divulging or use of confidential information accessible to him as director.)" Naudé 1970 *SALJ* 199 noem weer dat "[d]ie een uitsondering op die reël doen hom voor waar so 'n direkteur in sy mededingingsbedrywighede vertroulike inligting benut wat hy danksy sy ampsbekleding bekom het". Davies 1984 *SALJ* 475 (vgl ook 578 par 4 5) argumenteer dat vóórdat die direksie oor 'n bepaalde "opportunity within the scope of the company's business" besluit het, die nie-uitvoerende direkteur self hierdie geleentheid kan benut sonder om homself bloot te stel aan vertroueskending teenoor die maatskappy. Kyk verder die opmerkings van De Wet en Van Wyk 656 vn 877; Pretorius *Die "corporate opportunity"-leerstuk en die toepassing daarvan in die Suid-Afrikaanse reg* (LLB-skripsie RAU 1985) 25. Kyk in die algemeen Brews "Defining corporate opportunity – in search of an acceptable approach" 1986 *SACLJ* 9 – 10.

157 1921 AD 168 180.

158 1988 2 SA 54 (T) 65D – E.

159 *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 180 196 197.

hierdie pligte in elke geval afsonderlik vasgestel moet word.[160] Regter Innes se illustrasie, naamlik dat daar vertrouenspligte ontstaan vir 'n persoon wat verseker dat hy, deur maatreëls wat hyself ontwerp het, in 'n dominerende posisie bly, lig duidelik toe dat die basis van vertrouenspligte na gelang van die omstandighede aansienlik kan varieer.[161]

Ook McLennan[162] poog nie om 'n enkele grondslag vir direkteure se vertrouenspligte te identifiseer nie; hy argumenteer dat dit aansienlik meer bevredigend is om eenvoudig te aanvaar dat geen persoon wat in 'n vertrouensposisie staan, die verantwoordelikhede kan ontduik wat aan daardie posisie gekoppel is nie. Die opvatting van Beuthin[163] is in pas hiermee. Hy ontleed "corporate opportunities", wys daarop dat "the evil against which the law sets its face is the possible conflict of interest and duty" en kom dan by die spilpunt uit:

> "Basically, and in principle, what is required in each case is a determination of what in fairness and equity the duty of the director may be, and this can be achieved only by a careful consideration of all the relevant facts, including the precise relationship in which the director stands to his company, and the nature of the economic opportunity in question. The crucial inquiry will then be whether what he has done has placed him in a position in which his self-interest is in conflict with that duty."

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160 180. Dit is ongelukkig nie moontlik om enige definitiewe afleiding te maak of Innes R in *African Claim and Land Co Ltd v Langermann* 1905 TS 494 504–506 van oordeel is dat verteenwoordigerskap die grondslag van aanspreeklikheid is (die primêre indruk is dat dit wel sy bedoeling is) en of sy benadering is dat elke saak op eie meriete beoordeel moet word nie (vgl bv die stelling op 504 dat "[t]here may be cases in which special conditions or circumstances of his appointment require him not to engage in any outside business, and to acquire no rights which fall within the scope of its operation save for the benefit of the company"). Kyk in die algemeen *Cook v Deeks* 1916 AC 554 (PC) 561; *Canadian Aero Service Ltd v O'Malley* 1973 40 DLR (3d) 371 (SCC) 383 390 391; Beck 1975 *Can Bar R* 772 792 793; Ziegel "Bora Laskin's contributions to commercial, contract, and corporate law" 1985 *Univ of Toronto LJ* 418–419.

161 *Robinson v Randfontein Estate Gold Mining Co Ltd* 1921 AD 168 197: "A man, who procures the election of a board of directors under circumstances which make it impossible for them to exercise an independent judgement, must, in my opinion, observe the utmost good faith in his dealings with the company, which he has, of set purpose, deprived of independent advice. *The duty to do so arises from the circumstances which he has chosen to bring about*" (eie beklemtoning).

162 1982 *SALJ* 403: "It is eminently more satisfactory to apply the 'no power without responsibility' principle, and simply to say that if a person is in fact in a position of trust – be he agent, mandatory, director or whatever – he cannot escape the duty that inevitably attaches to that trust."

163 "Corporate opportunities and the no-profit rule" 1978 *SALJ* 468. Brews 1986 *SACLJ* 5–12 ontleed verskillende toetse wat al in verskeie jurisdiksies aangewend is ter beantwoording van die vraag wat "corporate opportunities" is, toon 'n voorkeur vir die sg "Line of Business Test" (14–15), maar gee ten slotte toe dat "no test can be seen as a magic wand, or final solution to the problems encountered. *Each case will still have to be treated on its merits, considering its facts*" (eie beklemtoning). Vir 'n verdere ontleding van 'n aantal toetse wat by "corporate opportunity"-gevalle aangewend kan word, kyk Pretorius *Die "corporate opportunity"-leerstuk* 5–14 23–47 en vgl dan die steun vir die benadering dat elke geval eintlik net op die meriete beoordeel moet word (*idem* 53 55 56). Kyk in die algemeen *Boardman v Phipps* 1967 2 AC 46 (HL) 124C waar Upjohn R se benadering besonder realisties voorkom, maar ongelukkig moet die *Boardman*-saak, om verskeie redes (kyk bv Shepherd 7–8), maar veral in maatskappyregtelike verband, met omsigtigheid bejeën word – kyk Gower *Modern company law* 595 vn 65 609. Ook in Nieu-Seeland word daar nie gesoek na 'n enkele grondslag van 'n direkteur se vertrouenspligte nie – kyk *Coleman v Myers* 1977 2 NZLR 225 275 (r 12–13) (verwysing na *a quo*-saak) 324 (r 19–33) 331 (r 43) tot 332 (r 6).

Word aanvaar dat die beginsels van die *actio legis Aquiliae* as grondslag vir aanspreeklikheid in die geval van vertroueskending dien,[164] moet die feite van elke saak deeglik ontleed word ten einde vas te stel of al die elemente van die onregmatige daad teenwoordig is.[165] Uiteraard sal dan gevra moet word of die optrede van die direkteur onregmatig is. Hier word met inagneming van die regsopvattings van die gemeenskap (*boni mores*) ondersoek of hy 'n subjektiewe reg van die benadeelde geskend het, dan wel of sy optrede neerkom op die verbreking van 'n regsplig[166] tussen hom en die benadeelde.[167] Verder moet bepaal word of hy die gevolge van sy handeling gewil het terwyl hy bewus was van die onregmatigheid van sy optrede, dan wel of sy optrede afgewyk het van die optrede wat in dieselfde omstandighede van 'n redelike man verwag sou kon word.[168] Soos in die geval van die pligte tot sorg en vaardigheid, behoort die vraag na sy skuld gesien te word as 'n *species* van die probleem wat opduik ter bepaling van die skuld van deskundiges.[169] Daar moet ook vasgestel word of die direkteur se handeling, in feitelike en juridiese sin, die oorsaak was van die skade wat die benadeelde ondervind.[170]

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164 Kyk die aanbeveling in par 3 5 2 *supra*.

165 Vir 'n treffende toepassing van deliktuele beginsels op die aanspreeklikheid van die invorderingsbank, kyk Pretorius "Professionele aanspreeklikheid, die invorderingsbank en regshervorming" 1987 *MB* 59 ev. Hierdie benadering is egter teengestaan in *Worcester Advice Office v First National Bank of Southern Africa Ltd* 1990 4 SA 811 (K) 814J – 815A 819F – 820A. (*Contra* nou *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) (redakteur).)

166 Hierdie is die gebruiklike toetse wat aangewend word ter bepaling van onregmatigheid – kyk Neethling, Potgieter en Visser 33 ev 44 – 51; Van der Merwe en Olivier 50 vn 63. Kyk in die algemeen Van Heerden "Die mededingingsprinsiep en die *boni mores* as onregmatigheidsnorme by onregmatige mededinging" 1990 *THRHR* 151 ev; Visser "Die rol van opset en die *boni mores* by onregmatige mededinging" 1989 *THRHR* 118 – 120.

167 *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 694D – E; Du Plessis "Onregmatigheid is alleenlik geleë in die skending van 'n 'regsplig'" 1985 *TRW* 98 – 99. Vgl ook *William Grant & Sons Ltd v Cape Wine & Distillers Ltd* 1990 3 SA 897 (K) 916H – 917B. In *African Claim and Land Co Ltd v Langermann* 1905 TS 494 word daar geensins te kenne gegee dat die grondslag van die direkteur se aanspreeklikheid weens vertroueskending deliktueel van aard is nie, maar dit is insiggewend om daarop te let dat die benadering van Innes R (506) in werklikheid een is wat sterk herinner aan oorwegings wat vandag ter sprake kom ter bepaling van verweerder se onregmatigheid al dan nie: "He [die respondent-direkteur] was not obliged to go about obtaining business for the company; and . . . there *was no legal duty upon him* to bring every option of which he became aware to the notice of the board instead of acquiring it for himself."

168 Hierdie is die gebruiklike toetse wat aangewend word ter bepaling van onderskeidelik opset en nalatigheid – kyk Neethling, Potgieter en Visser 116 122 – 123; Van der Merwe en Olivier 115 126. Kyk in die algemeen *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 693I – 694C.

169 Kyk vn 21 *supra*. Vgl Pretorius 1987 *MB* 67 vn 90 68 par 2 3 2.

170 Hierdie is die gebruiklike elemente wat in ag geneem word ter bepaling van kousaliteit – kyk Neethling, Potgieter en Visser 160 ev 169 ev. Vir 'n voortreflike uiteensetting van die oorwegings wat 'n rol kan speel by feitelike en juridiese kousaliteit, kyk *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700E – 704A. *In casu* het dit gehandel oor die vraag na die gemeenregtelike aanspreeklikheid van 'n ouditeur vir nalatig voorbereide finansiële state. Dit is geen vereiste dat skade met presiesheid vasgestel moet kan word nie – kyk *William Grant & Sons Ltd v Cape Wine & Distillers Ltd* 1990 3 SA 897 (K) 917B – C. Wat skade betref, vgl verder *Cohen v Segal* 1970 3 SA 702 (W) 707C – H, maar neem in ag dat dit eintlik eers na 1979 (*Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A)) was dat die uitgebreide trefwydte van die *lex Aquilia* in die Suid-Afrikaanse reg tot wasdom gekom het – kyk bv *Worcester Advice Office v First National Bank of Southern Africa Ltd* 1990 4 SA 811 (K) 814F – I.

3 5 5 Die houdbaarheid van hierdie standpunt

Die nodigheid om streng regsreëls op vertrouensbekleërs van toepassing te maak, word lank reeds in die Suid-Afrikaanse reg besef. Dit is naamlik, soos regter Innes dit in *Transvaal Cold Storage Co Ltd v Palmer*[171] stel,

> "well that those who occupy fiduciary positions should realise that they are bound not only to refrain from acting dishonestly, but to exhibit to those whose interests they represent the fullest good faith and render them the fullest information in all matters directly or indirectly connected with their business".[172]

In wesenlik ooreenstemmende trant verduidelik regter Holmes in *S v Heller*:[173]

> "[I]t is the policy of the law, in sustaining the fiduciary relationship between the parties, to avoid and not to encourage or facilitate . . . [conflict between his duty to his principal and his personal interest]."[174]

Onlangs weer merk regter Goldstone op dat "the Courts should recognise and strictly enforce the 'strict ethic' in this area of the law".[175]

Daar kan derhalwe gevra word of die erkenning van deliktuele beginsels nie direkteure se aanspreeklikheidsrisiko in 'n onaanvaarbare mate vereng nie. Daar kan byvoorbeeld geargumenteer word dat as die grondslag van aanspreeklikheid in die geval van vertroueskending besonder wyd is,[176] die aanspreeklikheidsrisiko immers ook besonder wyd is. Daarenteen dien onder andere die elemente van die onregmatige daad as aanspreeklikheidsbegrensingsfaktore.[177]

Wat egter nie uit die oog verloor mag word nie, is dat alom aanvaar word dat die vertrouenspligte van direkteure te vaag omlyn is en dat dit tot onsekerhede aanleiding gee.[178] In werklikheid het hierdie oënskynlik wye aanspreeklikheidsgrondslag tot 'n vereng van die aanspreeklikheidsrisiko gelei, juis omdat dit so wyd was en gevolglik tot onsekerhede aanleiding gegee het.[179] Is die grondslag van aanspreeklikheid egter deliktueel van aard, dan word die verbreking van hierdie pligte beoordeel binne die geordende sisteem van die deliktereg. Desnietemin word die uitgebreide trefwydte van die *lex Aquilia* vandag gekenmerk deur soepelheid en sodoende behoort daar ook in die geval van die verbreking van vertrouenspligte voortdurend tred gehou te word met veranderende omstandighede. Verder is daar onder andere by die beoordeling van die onregmatigheids- en nalatigheidsvraag genoeg ruimte dat die *sui generis*-aard[180] van

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171 1904 TS 4.
172 23 – 24.
173 1971 2 SA 29 (A).
174 44A – B.
175 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 67E. Vir 'n ooreenstemmende benadering in Australië, kyk *Darvall v North Sydney Brick & Tile Co Ltd* 15 ACLR 230 231 266.
176 Soos klaarblyklik die geval is as die grondslag van aanspreeklikheid *sui generis* is, want dan word nóg skuld nóg skade vereis – kyk par 3 5 2 *supra*.
177 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832H – 833B. Vgl ook Neethling, Potgieter en Visser 2 170 – 171; Van der Merwe en Olivier 15 – 16 314 316; Pretorius 1987 *MB* 66.
178 Kyk veral par 3 3 *supra*; Shepherd 7 – 10.
179 Shepherd 10: "As the complexities increase, litigants see more opportunity to find support for their own fiduciary arguments. In some cases, the litigants can even rely on the tendency to mechanical application of the rules as a smokescreen, inhibiting the courts from seeing or even looking at the essential fairness or justice of the individual fact situation."
180 Naudé *Regsposisie van die maatskappydirekteur* 45.

direkteure se regsposisie steeds verreken sal word. Bowenal kan hierdie aanspreeklikheidsgrondslag dien as die basis van geregtelike kontrole oor die uitoefening van die bevoegdhede van ander maatskappyfunksionarisse, byvoorbeeld senior werknemers.[181]

3 5 6 Enkele gevolge van hierdie standpunt

Die onderhawige voorstel behoort duidelikheid te bring oor die remedies wat in geval van vertroueskending tot die maatskappy se beskikking is. Hierdie aangeleentheid is tans in groot onsekerheid gedompel[182] en gevolglik behoort die aanvaarde deliktuele remedies regsekerheid in die hand te werk.[183]

As aanvaar word dat die grondslag van aanspreeklikheid vir vertroueskending deliktueel van aard is, onderlê dieselfde beginsels aanspreeklikheid op grond van sowel die skending van die sorgsaamheids- en vaardigheidspligte as vertrouenspligte. 'n Verdere gevolg van hierdie voorstel is dat dit onnodig raak om steeds 'n streng onderskeid te handhaaf tussen die skending van sorgsaamheids- en vaardigheidspligte enersyds en die skending van vertrouenspligte andersyds. Hierdie konsolidasie vereenvoudig sodoende die gebied van direkteure se vertrouens-, sorgsaamheids- en vaardigheidspligte en vergemaklik ook die hantering daarvan. Regsteoreties beoordeel is hierdie pligte in elk geval nie veronderstel om deur eksakte grense van mekaar onderskei te word nie.

4 SAMEVATTING EN GEVOLGTREKKINGS

Die gemeenregtelike vertrouens-, sorgsaamheids- en vaardigheidspligte dien as geregtelike kontrole oor die uitoefening van vertrouensbekleërs se bevoegdhede. In die regsliteratuur is daar egter 'n groot mate van ontevredenheid te bespeur oor die huidige aard en omvang van die pligte.

Wat die pligte van sorg en vaardigheid betref, bestaan daar in *Fisheries Development Corporation of SA Ltd v Jorgensen*[184] 'n mate van leiding oor die manier waarop hulle beoordeel moet word. Daar is egter aan die hand gedoen dat die voorbeelde wat in die saak genoem word net feitelike riglyne neerlê en nie as uitputtend gesien moet word nie. In die geval van probleemareas, byvoorbeeld of daar van objektiewe of subjektiewe maatstawwe gebruik gemaak moet word om te bepaal of die pligte verbreek is, is voorgestel dat antwoorde in die aanspreeklikheidsgrondslag te vind is. Aanspreeklikheid is hier gebaseer op die beginsels van die *actio legis Aquiliae*. Die elemente wat bewys moet word en die toetse wat aangewend word om vas te stel of hierdie elemente bewys is, verskaf grense om aanspreeklikheid vir die verbreking van hierdie pligte binne aanvaarbare perke te hou.

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181 *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 66I – 67E; *Canadian Aero Service Ltd v O'Malley* 1973 40 DLR (3rd) 371 381 383 391; Blackman 4 *LAWSA* 212 par 219; Meskin *et al* 326; *Havenga* 1989 *SA Merc LJ* 125; Gower *Modern company law* 574 – 575; Beck 1975 *Can Bar R* 771 ev 792 793; Shepherd 357. Vir die onsekerheid wat in die geval van senior werknemers bestaan, kyk *Peachey Property Corporation Limited – Investigation under section 165(b) of the Companies Act 1948* (Kidwell en Samwell-verslag) Department of Trade (1979) 153 par 513.

182 Kyk par 3 3 4 *supra*.

183 Wat deliktuele remedies betref, kyk Neethling, Potgieter en Visser 259 – 267; Van der Merwe en Olivier 226 – 291.

184 1980 4 SA 156 (W).

In die geval van vertrouenspligte is dit van besondere belang om perspektief te behou op die historiese milieu waarin die reëls, wat vandag nog daarop van toepassing gemaak word, ontstaan het en verder uitgebou is. Dit is naamlik in die Engelse *courts of equity* ontwikkel.

Om verklaarbare redes het die invloed van suiwer trustbeginsels op hierdie reëls nie agterweë gebly nie en bowenal is hierdie reëls beïnvloed deur die eiesoortige kenmerke van die howe waarin dit ontwikkel is. 'n Oorsig van die vertrouenspligte wat deur bronne voorgehou word, ontbloot dat daar aansienlike verskille bestaan in die voorbeelde wat as vertrouenspligte voorgehou word. Dit is derhalwe nie vreemd nie dat misnoeë oor hierdie gebied van die maatskappyereg aan die toeneem is.

Ten einde voorstelle vir die toekomstige hantering van hierdie struikelblokbesaaide gebied aan die hand te doen, moes daar beginselstandpunt ingeneem word. Daar is voorgestel dat kodifikasie nie die antwoord bied nie omdat die trefwydte van direkteure se vertrouenspligte in 'n gekodifiseerde vorm óf te wyd óf te eng sal wees. Verder is voorgestel dat die indeling van vertrouenspligte in bepaalde klasse 'n nuttige rol kan vervul maar dan slegs as hierdie klasse met die regte historiese perspektief voor oë beoordeel word. In die lig van hierdie beginselstandpunt is ter oorweging gegee dat ordening op hierdie gebied teweeggebring kan word deur die erkenning van die beginsels van die *actio legis Aquiliae* as grondslag van aanspreeklikheid vir 'n verbreking van vertrouenspligte.

Word dié aanspreeklikheidsgrondslag erken, raak dit onnodig om te soek na 'n enkele bron van die vertrouensbekleër se vertrouenspligte, want alvorens die direkteur aanspreeklikheid opdoen, sal alle elemente van die onregmatige daad bewys moet word. Elke saak word gevolglik op eie meriete beoordeel en behoort sodoende deurgaans tot bevredigende resultate te lei. Bowenal lei hierdie benadering outomaties daartoe dat die *sui generis*-aard van direkteure se regsposisie verreken word en dat vertrouenspligte ook kan dien as die basis van geregtelike kontrole oor die uitoefening van die bevoegdhede van ander maatskappyfunksionarisse, byvoorbeeld senior werknemers. Dit kan nog steeds nuttig wees om die vertrouenspligte van onderskeidelik die uitvoerende en nie-uitvoerende direkteure uit te spel, maar dié riglyne beïnvloed nie die algemene beginsel dat elke saak op eie meriete beoordeel moet word nie.

Dit is derhalwe duidelik dat die erkenning van deliktuele beginsels as grondslag van aanspreeklikheid by vertroueskending regsekerheid in die hand werk, aangesien die vaag omlynde vertrouenspligte binne aanvaarbare perke gehou word en daar meteens ook groter sekerheid ontstaan oor die remedies wat tot die maatskappy se beskikking is as die direkteur vertroueskendend optree. Die tweede gevolg van hierdie voorstel is dat dit onnodig raak om steeds 'n streng onderskeid te handhaaf tussen die skending van enersyds sorgsaamheids- en vaardigheidspligte en andersyds vertrouenspligte. Hierdie konsolidasie vereenvoudig die gebied van direkteure se vertrouens-, sorgsaamheids- en vaardigheidspligte en het tot gevolg dat gesonde beginsels die aanspreeklikheid op grond van die skending van hierdie pligte onderlê.

Aspekte van die *privilegia militum* in die Romeinse reg

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SUMMARY

Aspects of the *privilegia militum* in Roman law

While the first three centuries of the Empire saw the substantial disappearance of the distinction between citizen and peregrine, it witnessed the rise of another – that between *milites* and *pagani*. The peculiar position of a *miles*, spending the best years of his life in camp, far away from home and family, with little or nothing in common with the private citizen, subjected him to various disqualifications and entitled him to important privileges: the *privilegia militum*.

A brief overview is given of the most remarkable effluxes of the *ius militare*, such as the *testamentum militare* and the *peculium castrense*. Attention is focussed on *restitutio in integrum*, *beneficium competentiae* and *praescriptio militum*. The combined protection afforded by these was probably so effective in practice that no dire or compelling need existed for more comprehensive moratory measures such as the suspension of all civil legal remedies against *milites*.

In a following contribution attention will be given to various aspects of the *privilegia militum* in Roman-Dutch law.

1 INLEIDING

Hoewel gedurende die Republiek relatief min aandag aan die sivielregtelike posisie van *milites* afgestaan is,[1] het 'n redelik drastiese verandering ingetree tydens die Prinsipaat met die koms van 'n staande leër en die toenemende politieke mag van die legioene.[2] Terwyl die onderskeid tussen *civis* en *peregrinus* gedurende hierdie tydperk substansieel afgeneem het, het dié tussen *milites* en *pagani* verskerp.[3] Die besondere posisie van die *miles* wat die beste jare van sy lewe in die kamp verwyl, ver van huis en familie, met weinig of niks in gemeen met die gewone burger wie se aandag in beslag geneem is deur die sorge en vreugdes van sy familie, sy besittings en sy besigheid of beroep nie, het hom nie net onderworpe gestel aan sekere onbevoegdhede nie maar ook geregtig gemaak op sekere voorregte oftewel *privilegia*.[4]

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1 Sander "Das Recht des römischen Soldaten" 1958 *Rhein Mus für Phil* 181: "Während der Republik hat sich niemand um den Soldaten gekümmert."
2 Bauer "Die Römer" in Von Muller (red) *Handbuch der klassischen Altertumswissenschaft* (1899) 268; Sander 1958 *Rhein Mus für Phil* 180; Jones *The later Roman Empire* (1973) 488 – 489; Karlowa *Römische Rechtsgeschichte* (1885) 496 – 497.
3 Muirhead *Historical introduction to the private law of Rome* (1899) 320.
4 Sander 1958 *Rhein Mus für Phil* 180; Muirhead *Private law* (1899) 319 – 320.

Hoewel pertinente vermelding van die verlening van *novae tabulae*,[5] 'n *rescriptum moratorium*[6] of 'n *dilatio*[7] spesifiek en uitsluitlik vir soldate of krygslui nie in die oog val nie, hou 'n hele aantal van die na-klassieke *privilegia militum*[8] verband met die bevoorregte posisie van soldate as *litigantes*.[9] Voorop moet egter gestel word dat sekere strydvrae in dié verband, veral oor die *iurisdictio* van verskillende burgerlike en militêre funksionarisse, nog nie bygelê is nie.[10] Boonop is inligting oor die regsposisie van *milites* in die algemeen, en oor die *privilegia militum* in die besonder, relatief karig.[11] Die gedeelte *de re militari*[12] beslaan byvoorbeeld minder as een duisendste van die *Digesta* en handel bykans uitsluitlik oor die militêre strafreg.[13]

Die aandag word eerstens kortliks op 'n aantal *privilegia* in die algemeen gevestig. Hoewel nie almal 'n invloed op verdere regsontwikkeling uitgeoefen het of in die Romeins-Hollandse reg geresipieer is nie, vorm dit tog deel van die geheelbeeld van die *ius militare* in hierdie konteks, oftewel van die *sui generis*-regsposisie van *milites*. Daarna word enkele spesifieke reëlings in meer besonderhede beskou wat van meer direkte belang vir 'n ondersoek in respytregtelike konteks is. Dit sluit in *restitutio in integrum*, *beneficium competentiae* en *praescriptio militum*.

2 ALGEMENE AGTERGROND

2 1 Inleiding

Aangeleenthede waaraan gewoonlik deur Romaniste ietwat meer aandag afgestaan word, soos die informele aard van die *testamentum militare*,[14] die *peculium*

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5 Sien Feller "Moratory legislation. A comparative study" 1933 *Harv LR* 1062; Mayer *Studien über das Moratorium des Altertums und Mittelalters im Rahmen der gleichzeitigen Kreditwirtschaft* (1917) 8: "[M]assregeln . . . ähnlich denen in der Seisachtheia angeordnet."

6 Vgl *C Th* 1 2 3; *C* 1 19 2; *C* 1 19 4.

7 Vgl *C* 7 71 8.

8 Sien oor die inhoud van die begrip *privilegium D* 50 17 196; Bleicken *Lex publica. Gesetz und Recht in der römischen Republik* (1975) 199: "Die klassische Zeit kennt den Begriff vor allem als eine Rechtsbegünstigung von bestimmten Gruppen von Personen . . . besonders Soldaten."

9 Sien veral Voet *De jure militari* (1705) 6 1 – 6 29; Voet *Commentarius* 5 1 104; Sander 1958 *Rhein Mus für Phil* 152; Sander "Das römische Militärstrafrecht" 1960 *Rhein Mus für Phil* 290 – 291; Sander "Germanisches und Antikes im deutschen Soldatenrecht" 1940 *ZfWR* 127 – 129; Koltisch "Praescriptio und exceptio" 1959 *ZSS(RA)* 267 – 268.

10 Vgl Brand *Roman military law* (1968) 7. Die strydvrae het later in die Romeins-Hollandse reg weerklank gevind. 'n Omvattende uiteensetting van die *iurisdictio* van *dignitates militares* en ander funksionarisse belas met regspleging oor Romeinse soldate is aan te tref in Voet *Commentarius* 5 1 103; Voet *De jure militari* 7 2; Karlowa *Rechtsgeschichte* 860 – 863; Kaser *Das römische Zivilprozessrecht* (1966) 436; Kuntze *Excurse über römischen Rechts* (1880) 648 – 658; Wlassak "Anklage und Streitbefestigung im Kriminalrecht der Römer" 1917 *Sitzungsberichte der Oesterreichischen Akademie der Wissenschaften in Wien* 112.

11 Sien bv Bleicken *Lex publica* 162.

12 *D* 49 16; sien ook *C* 12 36.

13 Brand *Military law* 43 – 45.

14 Gaius *Inst* 2 109 – 114; *I* 2 11; *D* 29 1; *C* 6 21; Corbett, Hahlo en Hofmeyr *The law of succession in South Africa* (1980) 44; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 209 – 210; Kaser *Das römische Privatrecht I: Das altrömische, das vorklassische und klassische Recht* (1971) 680; Buckland *A text-book of Roman law from Augustus to Justinian* (1950) 287.

castrense van die *filiusfamilias*[15] en die *ius postliminii* van teruggekeerde krygsgevangenes,[16] vorm opsigtelike fasette van die kleurryke mosaïek waaruit die geheelbeeld van die *sui generis*-regsposisie van krygslui saamgestel is, hoewel dit nie noodwendig direk met 'n betalingsrespyt of met prosesregtelike verademing verband hou nie.[17]

2 1 1 Testamentum militare

Voorop in hierdie konteks staan die informele aard van die *testamentum militare* waardeur 'n streep getrek is deur al die streng voorskrifte van die *ius civile* en die *praetor* rakende die formaliteite en inhoud van 'n testament.[18] 'n Vroeë vorm van soldatetestament, die *testamentum in procinctu*, het vroeg reeds in onbruik verval. Later is 'n bevoorregte soldatetestament deur Julius Caesar ingevoer. Verskeie keiserlike verordeninge het daarna die aangeleentheid gereël.[19] Die vernaamste vergunnings het kortliks daarop neergekom dat 'n soldaat op aktiewe diens oor sy bates kon beskik sonder om aan enige formaliteite te voldoen. Slegs sy bedoeling om 'n testament te maak, is as vereiste gestel.[20] Dit het die uitwerking gehad dat sekere persone wat nie andersins bevoeg was om 'n testament te maak of iets daaronder te ontvang nie, wel deur 'n *testamentum militare* sodanige bevoegdheid kon uitoefen. Selfs 'n ongeldige testament gemaak voor die aanvang van militêre diens het geldig geword terwyl die soldaat op aktiewe diens was mits hy daartydens te kenne gegee het dat hy dit as sy testament wou hê.[21] Die *testamentum militare* het geldig gebly vir een jaar na die soldaat se ontslag.[22]

2 1 2 Peculium castrense

Die *peculium castrense* was die vermoë wat 'n *filiusfamilias* tydens sy militêre diens verwerf het en waaroor hy vryelik kon beskik.[23] Dit het byvoorbeeld oorlogsbuit,[24] soldy en geskenke ingesluit.

Aangesien 'n *filiusfamilias* in beginsel nie *sui iuris* was nie, dien as besondere voorbeeld van 'n spesifieke privilegiëring in hierdie konteks die verskaffing van

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15 *D* 49 17; Van Zyl *Romeinse privaatreg* 83; Buckland *Roman law* 280; Kaser *Privatrecht I* 344.

16 *D* 49 15; Van Zyl *Romeinse privaatreg* 76; Buckland *Roman law* 67; Kaser *Privatrecht I* 290.

17 Vgl Muirhead *Private law* 319–320; Kuntze *Römischen Recht* 648; Sander 1958 *Rhein Mus für Phil* 152.

18 Muirhead *Private law* 320.

19 Van Zyl *Romeinse privaatreg* 209; Muirhead *Private law* 319; Buckland *Roman law* 360; Thomas *Textbook of Roman law* (1976) 485.

20 Nogtans is die soldaat nie onthef van die nakoming van sekere basiese reëls van die *ius civile* nie (sien *I* 2 11 *pr*; Van Zyl *Romeinse privaatreg* 210).

21 Sien veral *I* 2 11 3–4; Van Zyl *Romeinse privaatreg* 210; Muirhead *Private law* 322; Thomas *Textbook* 485–486.

22 *I* 2 11 3. Sien verder Gaius *Inst* 2 109–111; *D* 29 1; *C* 6 21; Van Zyl *Romeinse privaatreg* 210; Corbett, Hahlo en Hofmeyr *Law of succession* 44–45; Buckland *Roman law* 360; Kaser *Privatrecht I* 680; Muirhead *Private law* 320–322; Thomas *Textbook* 485–486; Ledlie *Sohm's Institutes of Roman law* (1935) 548; Spiller *A manual of Roman law* (1986) 145–146; Ter Heider *Kort begrip van Romeins recht* (1967) 241.

23 *D* 49 17; Van Zyl *Romeinse privaatreg* 83 211; Buckland *Roman law* 280; Kaser *Privatrecht I* 344; Muirhead *Private law* 322.

24 Sien hieroor Gaius *Inst* 1 2 69; *I* 2 1 17; *D* 49 15; Henning "Die *occupatio* van *res hostiles*" 1970 *Meditationis Medii* 50.

die testeerbevoegdheid aan soldate *filiifamiliarum* ten opsigte van *peculium castrense*.[25] Hierdie privilegie wat deur Augustus ingevoer is, het aanvanklik gestaak sodra die *filius* se militêre diens verstryk het.[26] Hadrianus het die privilegie egter uitgebrei om ook oudgediendes in te sluit.[27] Hierdie privilegiëring is van besondere belang aangesien dit die begin was van regsontwikkeling wat grootliks afbreuk sou doen aan die vermoënsregtelike betekenis van die *patria potestas*.[28]

2 1 3 Ius postliminii

Vyande wat tydens 'n oorlog gevange geneem is, het slawe geword. Eweneens was dit die geval met Romeinse soldate en burgers wat deur die vyand gevange geneem is.[29] By die terugkeer van so 'n krygsgevangene na Rome het sy eertydse regte en bevoegdhede onderworpe aan sekere reëls ingevolge die sogenaamde *ius postliminii* herleef.[30] Die reëling het uiteraard nie gegeld vir soldate wat na die vyand oorgeloop het of hul *non sine flagitio* aan die vyand oorgegee het nie.[31]

Sou herstel nie plaasvind nie, sou 'n Romeinse krygsgevangene getref word deur die *maxima deminutio capitis*, die verlies van burgerskap en nasionaliteit, insluitend *ingenuitas*, die privilegies verbonde aan vrye geboorte en alle ander regte.[32]

2 1 4 Paraatheidsmaatreëls

'n Hoë premie is op militêre weerbaarheid en paraatheid geplaas. Derhalwe is getrag om afwesigheid uit eenhede te voorkom en te verseker dat soldate hul volle aandag aan militêre diens wy.[33] Dit blyk onder andere uit maatreëls dat 'n soldaat:

- nie as getuie gedagvaar kon word nie;[34]
- nie 'n dienskontrak met 'n burgerlike kon sluit of hom tot enige burgerlike diensbetrekking kon verbind of die verpligtinge van enige burgerlike amp op hom kon neem nie;[35]

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25 Watson *Society and legal change* (1977) 122; Van Zyl *Romeinse privaatreg* 211.
26 Watson *Legal change* 124: "Augustus' ruling is obviously a privilege granted to soldiers."
27 Sien verder *D* 14 6 2; *D* 49 17 12; *D* 49 17 4; Watson *Legal change* 122 – 124; Muirhead *Private law* 322.
28 Watson *Legal change* 122 – 124; Muirhead *Private law* 322 – 323.
29 *I* 1 3 4; *D* 1 5 5 1; Van Zyl 76; Phillipson *The international law and custom of ancient Greece and Rome II* (1911) 267; Buckland *Roman law* 67; Kaser *Privatrecht I* 290.
30 *I* 1 12 5; *C* 7 50; *D* 19 15 19 *pr*: "Postliminium est ius amissae rei recipiendae ab extraneo et in statum pristinum restituendae inter nos ac liberos populos regesque moribus legibus constitutum." Sien verder Van Zyl *Romeinse privaatreg* 76; Sander 1958 *Rhein Mus für Phil* 174 – 179.
31 *D* 49 15 19 4; *D* 49 15 2 2.
32 Phillipson *International law* 267 – 277.
33 Vgl *C* 4 65 31: "[A]rmis autem, non privatis negotiis occupentur, ut numeris et signis suis iugiter inhaerentes rem publicam, a qua aluntur, ab omni bellorum defendant." So ook *C* 12 35 (36) 15: "Milites . . . solis debent publicus utilitatibus occupari . . . propriae muniis insudare militiae"; *D* 49 16 13; *N* 8 7 *pr*.
34 *D* 22 5 3 6; *D* 22 5 8.
35 *D* 49 16 21 1; *C* 12 35 (36) 16; *N* 8 7. Dieselfde reëling kom reeds voor in *lex* 7 van Rufus *Leges militares*, soos aangehaal in Brand *Military law* 151.

- verbied was om op te tree as die *conductor* van *res aliena* of as 'n *procurator*, *fideiiussor* of *mandator* van so 'n *conductor*;[36]
- verbied was om as *tutor* op te tree en derhalwe van *tutela* uitgesluit was;[37]
- nie 'n plaas kon koop in 'n gebied waar hy militêre diens verrig nie;[38]
- nie aan boerderybedrywighede kon deelneem nie;[39]
- nie sonder spesiale vergunning kon handel dryf nie;[40]
- aanvanklik nie toegelaat was om 'n regsgeldige huwelik te sluit nie;[41]
- onkunde van die reg kon pleit aangesien soldate meer van wapens as die reg behoort te weet;[42]
- nie verplig was om opgawes vir tolgelde in te dien nie;[43]
- nie belasting betaal het op sy soldy nie hoewel sy private inkomste wel belasbaar was;[44]
- verbied was om as informant vir die *fiscus* op te tree;[45]
- in sekere omstandighede die sakeregtelike eienaar van roerende oorlogsbuit geword het, aangesien *res hostiles* as *res nullius* beskou is en die *occupatio* van *res hostiles* 'n oorspronklike wyse van eiendomsverkryging daargestel het;[46]
- se wapenuitrusting deur die staat aan hom voorsien is[47] (Daarom moes met sorg daarna omgesien word. 'n Soldaat wat sy wapens sou verkoop of aan iemand sou skenk, is in vredestyd as 'n deserteur beskou. In oorlogstyd is hy die doodstraf opgelê.[48]);
- geregtig was op soldy, inkwartiering en gratis mediese behandeling.[49]

Bogenoemde is bedoel as 'n beknopte seleksie en nie as 'n *numerus clausus* nie. Veral die talle uiteenlopende en soms tydsgebonde voorregte van oudgediendes word daargelaat.

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36 *C* 4 65 31. Die verbod in *lex* 6 van Rufus *Leges militares* is wyer: "Milites neque procuratores, neque conductores, neque fideiussores sive mandatores alienorum fiunt." Vgl Brand *Military law* 150.
37 *I* 1 25 14; *D* 26 5 21 3; *N* 123 5. Vgl Buckland *Roman law* 151; Muirhead *Private law* 320; Thomas *Textbook* 458.
38 *D* 49 16 9; *D* 49 16 13. 'n Soortgelyke reëling is vervat in *lex* 8 van Rufus *Leges militares*. Vgl Brand *Military law* 150.
39 *C* 3 25 1; *C* 12 35 (36) 15; *C* 12 35 (36) 13. 'n Absolute verbod te dien effekte verskyn in *lex* 7 van Rufus *Leges militares*. Vgl Brand *Military law* 150.
40 *Ibid*.
41 Van Zyl *Romeinse privaatreg* 95; Kaser *Privatrecht I* 317: "Sehr umstritten sind Grundlage, Datierung, Inhalt und Reichweite der Massnamen, die den Soldaten zur Wahrung der Disziplin für die Dauer der Dienstzeit den Ehestand verbieten."
42 *C* 1 18 1; Kaser *Privatrecht I* 242; Postma *Militêre regspraak in die Suid-Afrikaanse reg en ook in die regstelsels van enkele ander state* (ongepubliseerde werkstuk PU vir CHO 1966) 29.
43 *C* 4 61 3. Die ander voorregte van oudgediendes vervat in *D* 49 18 word daargelaat.
44 *C Th* 7 13 6.
45 *D* 49 14 17 6.
46 Henning 1970 *Meditationes Medii* 50–51.
47 *C* 12 35 (36) 15 *pr*.
48 *D* 49 16 14 1.
49 Voet *De jure militari* 6 8 6 18; Caldwell en Giles *The ancient world* (1966) 402.

3 ENKELE MAATREËLS IN DIE BESONDER

3 1 *Restitutio in integrum*

Deur *restitutio in integrum* is 'n herstel in vorige stand beveel op grond van billikheidsoorwegings,[50] byvoorbeeld afwesigheid vanweë militêre diens.[51] Die regsfiguur het neergekom op die tersydestelling van 'n regshandeling omdat dit onbillik of onregverdig sou wees om die gevolge daarvan in die besondere omstandighede te handhaaf.[52]

Aanvanklik moes *restitutio in integrum* binne 'n jaar na verstryking van die periode van afwesigheid aangevra word. Hierdie termyn is later na vier jaar verleng.[53]

Die gevolg van die verlening van *restitutio in integrum* kon in 'n bepaalde geval in effek wees dat nóg verkrygende nóg bevrydende verjaring teen 'n soldaat op aktiewe diens, of andersins afwesig vanweë militêre diens, gedurende sy tydperk van werklike afwesigheid geloop het.[54] Trouens, hy is in vorige stand herstel. Dit is naamlik die regsposisie waarin hy was toe die tydperk van afwesigheid 'n aanvang geneem het.[55] So gesien, kan die uiteindelike effek van restitusie tot 'n sekere hoogte tog vergelykbaar wees met dié van die opskorting van die verpligting om die een of ander regshandeling te verrig vir die duur van die *miles* se dienstydperk.[56] Uit dié oogpunt beskou, kan die uiteindelike uitwerking van die regsmiddel *restitutio in integrum* in 'n besondere sin en sekere mate vergelyk word met dié van 'n soort *moratorium*,[57] en "in dem Sinne dass ihm der durch Rechtsgeschäfte erlittene Schaden wieder gutgemacht wird".[58]

Dit beteken egter nie dat sonder meer te kenne gegee kan word dat 'n *miles* sodoende in enige en alle omstandighede *ipso iure* geregtig was op "eine Art Moratorium" terwyl hy militêre diens gedoen het nie. Trouens, *in integrum restitutio* was by uitstek 'n billikheidsmaatreël, 'n regsmiddel wat aangewend is op grond van die tersaaklike billikheidsoorwegings.[59] Bowendien moes restitusie

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50 *D* 4 6; *C* 2 50 (51): Van Zyl *Romeinse privaatreg* 384; Van Warmelo *Die oorsprong en betekenis van die Romeinse reg* (1978) 312; Jolowicz en Nicholas *Historical introduction to the study of Roman law* (1972) 229; Kaser *Privatrecht I* 251; Kaser *Zivilprozessrecht* 330; Hijmans *Romeinsch verbintenissenrecht* (1927) 286–287; Van Oven *Leerboek van Romeinsch privaatrecht* (1948) 320; Ledlie *Institutes* 296; Thomas *Textbook* 113–114.

51 *D* 4 6 17; *C* 2 50 (51) 1–8; *C* 2 51 (52) 1–2.

52 Van Zyl *Romeinse privaatreg* 384; Van Warmelo *Romeinse reg 313*; Jolowicz en Nicholas *Roman law* 230; Kaser *Zivilprozessrecht* 331; Buckland *Roman law* 722.

53 *D* 7 4 1 3; Van Warmelo *Romeinse reg* 312.

54 *C* 2 51 (52) 3.

55 *D* 4 6 35 9. Die tydperk van afwesigheid word dus as 't ware geag nie deel te vorm van die verjaringstermyn of enige ander termyn waarbinne 'n handeling verrig moes word om die intrede van die een of ander regsgevolg te verhoed nie, bv 'n aksie wat ingestel moes word om verjaring te stuit.

56 Maw of verjaring nou van meet af opgeskort word of later regtens geag word nie plaas te gevind het nie; hoewel die tegnieke en regsgevolge uiteraard verskil, is die eindresultate in finale instansie prakties nie sonder meer onvergelykbaar nie.

57 Sien *C* 2 50 (51) 2: "Postulata in integrum restitutione omnia in suo statu esse debere, donec res finiatur, perspicui iuris est, idque curabit is, ad cuius partes ea res pertinet."

58 Sander 1958 *Rhein Mus für Phil* 180.

59 Van Warmelo *Romeinse reg* 312; Van Zyl *Romeinse privaatreg* 384; Buckland *Roman law* 719; Jolowicz en Nicholas *Roman law* 229; Kaser *Zivilprozessrecht* 330; Hijmans *Romeinsch verbintenissenrecht* 287; Van Oven *Romeinsch privaatrecht* 320; Ledlie *Institutes* 294.

eers in 'n besondere geval plaasvind[60] voordat daar enigsins van 'n vergelyking met die praktiese uitwerking van 'n van meet af verleende respyt sprake kon wees. Restitusie is dus uit die aard van die saak terugwerkend of retroaktief, terwyl *moratorium* in hierdie konteks eerder as voorkomend of proaktief beskryf behoort te word.[61]

Indien 'n soldaat 'n erflating aanvaar het wat tydens sy afwesigheid in vreemde hande beland het, kon hy nie slegs teen die eerste verkryger regshulp verkry nie maar ook teen alle latere kopers.[62] Aan die ander kant kon ook teen die *miles* 'n *actio rescissoria* beskikbaar wees indien vanweë sy bevoorregting sekere termyne verstryk het en sy skuldeisers benadeel is. Dan was beide op gedeeltelike restitusie geregtig.[63] Hierdie reëling het nie slegs vir manskappe gegeld nie maar ook vir offisiere.[64]

'n *Miles* word geag afwesig te wees van die dag wat hy sy standplaas verlaat totdat hy terugkeer;[65] 'n *miles* met gemagtigde verlof is dus steeds afwesig op diens tydens sy reis na en van sy eenheid maar nie terwyl hy fisies tuis was nie.[66]

Die trefwydte van *in integrum restitutio* as billikheidsreëling is later deur Alexander, Diokletianus en Maximianus uitgebrei om die eggenote van 'n soldaat in te sluit wat saam met haar man afwesig was terwyl hy militêre diens gedoen het.[67] Op sy beurt het Justinianus die aanwendingsgebied daarvan beperk sodat dit net betrekking gehad het op die tydperk wat die soldaat aktief betrokke was by 'n militêre ekspedisie, en nie ook op 'n tydperk wat hy daartydens afwesig was en vanweë die een of ander rede nie daadwerklik met die verrigting van militêre diens besig was nie.[68]

3 2 *Praescriptio militiae* en afstanddoening

3 2 1 Praescriptio fori en *praescriptio militiae*

Die regsposisie van soldate as *litigantes*, veral gedurende die voorklassieke tydperk, is nie heeltemal duidelik nie.[69] Uiteenlopende standpunte oor die presiese afbakening van veral die strafregtelike jurisdiksie van verskillende burgerlike

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60 Van Warmelo *Romeinse reg* 312: "[D]aarom beveel die *praetor* . . . dat die toestand ongedaan gemaak moet word. Dus as die toestand so is dan word die betrokke *magistratus* genader . . ." Sien ook Schulz *Principles of Roman law* (1936) 178.

61 Die verskil is dat in eg geval die ongewensde regsgevolge reeds ingetree het en daarna dmv restitusie uit die weg geruim moet word, terwyl in lg geval die betrokke gevolge in der waarheid nie tydens die respyt intree nie. Restitusie is dus terugwerkend en moratorium in die konteks voorkomend. Dit wil voorkom of Sander 1958 *Rhein Mus für Phil* 180 nie altyd voldoende met die onderskeid rekening gehou het nie. Nogtans is dit opmerklik dat in moderne regstelsels soms steeds 'n vermoënsregtelike *restitutio* aan soldate verleen is. Sien die Duitse *Hypothekenordnung* van 1783-12-20; *Reichs-Militär-Gesetz* van 1874-05-02; *Wehrgesetz* van 1935-10-09; Sander 1940 *ZfWR* 125.

62 *D* 4 6 17.

63 *D* 4 6 28 6.

64 *D* 4 6 35.

65 *D* 4 6 35 9.

66 *D* 4 6 34; *D* 4 6 35 9; *C* 2 50 (51) 8.

67 *C* 2 51 (52) 1; *C* 2 51 (52) 2.

68 *C* 2 50 (51) 8.

69 Sander 1960 *Rhein Mus für Phil* 289.

en militêre funksionarisse[70] en kwelvrae oor die *imperium maius* gedurende die Republiek,[71] kan vir huidige doeleindes liefs daargelaat word.

Dit is voldoende om daarop te let dat hoewel daar nie sekerheid oor die regsposisie gedurende die voorklassieke tydperk is nie, dit tog duidelik is dat die *imperium militae* van die *consul* of ander bevelvoerende generaal aanvanklik in beginsel onbeperk was en die *iurisdictio* oor alle soldate onder sy bevel ingesluit het.[72]

Wat die siviele prosesreg betref, is die vroegste bekende vorm van prosedure dié wat by wyse van die sogenaamde *legis actiones* plaasgevind het.[73] Die *formula*-prosedure het teen die einde van die voorklassieke tydperk sterk na vore getree.[74] In beide gevalle moes die eiser toesien dat die verweerder voor die betrokke instansie kom om op sy eis te antwoord. Hierdie instansie was aanvanklik die priesters en koning en later die *praetor*. Die eiser moes die verweerder in elk geval formeel voor die gereg daag by wyse van wat as *in ius vocatio* bekend gestaan het.[75] Die eiser daag die verweerder deur die uitspreek van formele woorde om voor die gereg te verskyn. As die gedaagde nie vrywillig *in iure* verskyn nie, kon hy ten minste aanvanklik met geweld gedwing word terwyl getuies teenwoordig is.[76] Volgens Kaser[77] was die *in ius vocatio*

> "ein Akt formalisierter Eigenmacht, der es dem Ladenen gestattet, den widerstrebenden Gegner mit erlaubter Gewalt vor Gericht zu führen".

In dié stadium is dit duidelik hoe die beginsel van eierigting nog steeds gehandhaaf word.[78] Later kon die verweerder 'n *vindex* vind om vir hom as borg van sy verskyning *in iure* op te tree. Nog later kon hy eenvoudig 'n belofte aflê dat hy sou verskyn, die sogenaamde *vadimonium*.[79]

Die vraag of 'n soldaat gedurende dié tydperk soos 'n gewone verweerder by wyse van *in ius vocatio* voor 'n origens bevoegde burgerlike gereg gedaag kon word, is omstrede.[80]

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70 Sien Brand *Military law* 7; Karlowa *Rechtsgeschichte* 860–863; Kaser *Zivilprozessrecht* 436; Kuntze *Römischen Recht* 648–658; Wlassak 1917 *Sitzungsberichte der Oesterreichischen Akademie der Wissenschaften in Wien* 184; Sander 1958 *Rhein Mus für Phil* 152; Sander 1960 *Rhein Mus für Phil* 289; Sander 1940 *ZfWR* 125.

71 Sien Ehrenberg "Imperium maius in the Roman republic" 1953 *American Journal of Philology* 113.

72 Brand *Military law* 36–37 66–67; Van Zyl *Romeinse privaatreg* 14.

73 Gaius *Inst* 4 12; Van Zyl *Romeinse privaatreg* 369; Van Warmelo *Romeinse reg* 233; Kaser *Zivilprozessrecht* 24.

74 Gaius *Inst* 4 30; Van Zyl *Romeinse privaatreg* 373; Kaser *Zivilprozessrecht* 107; Van Warmelo *Romeinse reg* 255.

75 Van Warmelo *Romeinse reg* 235–236 325; Van Zyl *Romeinse privaatreg* 378; Kaser *Zivilprozessrecht* 47; Buckland *Roman law* 630–631; Thomas *Textbook* 74; Thomas *Introduction* 20.

76 Buckland *Roman law* 631; Thomas *Textbook* 74. Volgens Van Warmelo *Romeinse reg* 235 het 'n mens hier, altans aanvanklik, blykbaar te doen met 'n vorm van die sg *legis actio per manus iniectionem*.

77 Kaser *Zivilprozessrecht* 47–48.

78 Van Warmelo *Romeinse reg* 235–236; Buckland *Roman law* 610.

79 Van Zyl *Romeinse privaatreg* 378; Kaser *Zivilprozessrecht* 47–51; Buckland *Roman law* 610 619; Thomas *Textbook* 85; Muirhead *Private law* 194–195.

80 Vgl *D* 2 4 2; *D* 5 1 7; *D* 49 16 4 8; Voet *De jure militari* 6 15–16; Voet *Commentarius* 2 4 3; 2 4 39; Van der Linden *ad Voet* 2 4 3; Kaser *Zivilprozessrecht* 182; Wlassak 1917 *Sitzungsberichte der Oesterreichischen Akademie der Wissenschaften in Wien* 112; Koltisch 1959 *ZSS(RA)* 264. Sien ook Jones *Roman empire* 487–489.

Een standpunt is dat 'n soldaat se teenwoordigheid voor 'n burgerlike gereg nie deur geweld verkry kon word indien dit tot gevolg sou hê dat hy van sy krygstake af weggeroep word nie. 'n Verbale dagvaarding sou moontlik wel toelaatbaar wees. Op dié wyse word hy nie van krygsdiens weggeroep nie. Indien hy nie voor die regbank verskyn nie, kon hy weliswaar veroordeel word maar wanneer hy goeie rede vir sy afwesigheid verskaf, is hy in vorige stand herstel.[81]

Die *communis opinio* is dat jurisdiksie oor soldate in siviele sake tydens die Prinsipaat en Dominaat in die eerste plek by die *praeses provinciae* berus het en dat die bevoegdheid minstens tot aan die begin van die na-klassieke tydperk behou is.[82] Gedurende die Dominaat is die *formula*-prosedure afgeskaf. In die plek daarvan het 'n prosedure ontwikkel wat as *cognitio extraordinaria* bekend gestaan het. Ingevolge die prosedure is 'n geding aanhangig gemaak deur 'n dagvaarding, die *libellus conventionis* genoem.[83] Nogtans was dit in die praktyk waarskynlik vir 'n burgerlike eiser steeds bykans onmoontlik om die teenwoordigheid van 'n soldaat voor 'n gewone hof te verkry sonder die medewerking van laasgenoemde se bevelvoerder. Selfs indien die eiser vonnis teen die soldaat verkry het, kon waarskynlik geen tenuitvoerlegging daarvan sonder die toestemming van die bevelvoerder plaasvind nie.[84]

Gedurende die Dominaat en die regeringstydperk van Justinianus, oftewel die sogenaamde na-klassieke tydperk, het *constitutiones* van Gratianus, Valentinianus en Theodosius in 386,[85] Honorius en Theodosius in 413,[86] Theodosius en Valentinianus in 439,[87] Anastasius in 492[88] en 502[89] en van Justinianus in 531[90] dit in elk geval duidelik gestel dat alle regsprosesse teen 'n soldaat, insluitend siviele aksies en gedinge tussen soldate en tussen 'n burgerlike eiser en 'n militêre verweerder, in die algemeen slegs deur 'n bevoegde militêre hof verhoor en besleg

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81 Voet *De jure militari* 6 15 – 16 steunende op *D* 2 4 2, *D* 22 5 3 5 en *D* 22 5 8.

82 Kaser *Zivilprozessrecht* 436; Karlowa *Römische Rechtsgeschichte* 862.

83 Van Zyl *Romeinse privaatreg* 384; Buckland *Roman law* 665; Van Warmelo *Romeinse reg* 326; Kaser *Zivilprozessrecht* 460; Thomas *Textbook* 120; Muirhead *Private law* 362.

84 Jones *Roman empire* 487 steunende op *N Th* 4 *pr*; *C* 12 5 3; *C* 3 3 6.

85 *C* 1 29 1: *Magistri militum* het geen jurisdiksie oor burgerlikes nie en die *praefectura* ook nie enige oor soldate nie. Vgl Jolowicz en Nicholas *Roman law* 446; Kaser *Zivilprozessrecht* 436.

86 *C* 3 13 6: Siviele sake tussen soldate, of tussen 'n burgerlike eiser en militêre verweerder, word deur die *magistri militum* besleg. Vgl Kaser *Zivilprozessrecht* 436; Jolowicz en Nicholas *Roman law* 448.

87 *C* 31 25 1: Alle staatsamptenare *cum non armata militia praediti sunt* mag hul nie op die *praescriptio fori* beroep nie en is onderworpe aan die jurisdiksie van die *rector provinciae*. Vgl Kaser *Römische Rechtsgeschichte* (1967) 209; Jolowicz en Nicholas *Roman law* 446 428: "*[M]ilitia* is the usual word for an official position, from which real military service is distinguished as *militia armata*."

88 *C* 12 35 (36) 18: Sowel straf- as siviele sake waarby soldate betrokke is, word verhoor deur óf die *magister militum* óf die *dux* onder wie se bevel hul resorteer. Vgl Jolowicz en Nicholas *Roman law* 427; Kaser *Zivilprozessrecht* 436.

89 *C* 3 13 7: Soldate val nie onder die jurisdiksie van diegene belas met toesig oor professies en beroepe nie.

90 *C* 2 3 29: 'n Soldaat kan in 'n skriftelike ooreenkoms afstand doen van die *praescriptio fori*; *C* 3 1 17: "Certi iuris est, quod concessa est militaribus hominibus iudicandi facultas. quid enim obstaculi est homines, qui cuiusdam rei peritiam habent, de ea iudicare? cum scimus et militares magistratus et omnes tales homines per usum cottidianum iam esse approbatos, ut et audiant lites et eas dirimant et pro sui et legis scientia huiusmodi altercationibus fines imponant."

kon word.[91] Appèl teen 'n uitspraak van die *duces* of *magistri militum* moes aan die keiser self gerig word.[92] Vir dié doel is 'n hof bestaande uit die *magister officiorum* en die *quaestor sacra palatii* deur Justinianus ingestel.[93] Moontlik het die praktyk reeds lank voor 413 bestaan dat soldate hul op die jurisdiksie van 'n militêre hof beroep wanneer hul as verweerders in siviele sake aangespreek is en het die *constitutiones* bloot die bestaande stand van sake bevestig.[94]

'n Aksie teen 'n soldaat wat in enige ander hof ingestel is, kon, behoudens enkele uitsonderings, met die *praescriptio fori* oftewel die *praescriptio militiae* ontsenu word.[95] Jolowicz en Nicholas[96] verduidelik dat "a privilege of this sort means that the privileged persons cannot be made defendants in any court except their own".

Volgens Arrius Menander[97] kon 'n persoon wat hom by die leër laat inskryf het met die doel om litigasie teen hom te bemoeilik, weens dié rede uit die leër ontslaan word. Sodanige ontslag was nie oneervol nie en die persoon kon na afhandeling van die geding weer by sy eenheid aansluit.[98] Sou die soldaat egter die geding laat vaar of skik, behoort ontslag nie plaas te vind nie.[99] Ulpianus deel mee dat indien 'n geding teen 'n persoon ingestel is voordat hy 'n soldaat geword het, die soldaat hom nie op die *praescriptio militiae* kon beroep nie aangesien hy as 't ware geantisipeer is.[100] Het die skuldoorsaak ontstaan voordat hy soldaat geword het maar die geding is eers daarna ingestel, kon hy hom wel op die *praescriptio militiae* beroep, natuurlik tensy hy met 'n bedrieglike oogmerk by die leër aangesluit het om litigasie teen hom te bemoeilik.[101]

3 2 2 Afstanddoening

Van die *praescriptio fori* kon regsgeldig in 'n skriftelike ooreenkoms deur 'n soldaat afstand gedoen word "cum alia regula est iuris antiqui omnes licentiam habere his quae pro se introducta sunt renuntiare".[102]

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91 Sien ook *N Th* 4; *N Mc* 1 5–7. So ook Kaser *Zivilprozessrecht* 436 en Jones *Roman empire* 339–340 448. Sien Voet *Commentarius* 5 1 103 en Kaser *Zivilprozessrecht* 436 vir 'n uiteensetting van die verskillende beamptes wat oor soldate reg kon spreek. Die slotwoorde van *C* 3 1 17 werp twyfel op 'n gevolgtrekking dat selfs siviele gedinge suiwer *secundum militarem disciplinam* beslis moes word.

92 *C Th* 11 30 30; *C* 7 62 38; *C* 7 67 2; Kaser *Zivilprozessrecht* 436.

93 *C* 7 62 38; Kaser *Zivilprozessrecht* 436.

94 Jones *Roman empire* 487–488 met 'n beroep op *C Th* 2 1 2; *C* 3 13 6; *N Th* 2 4; *N Th* 2 3; *C* 3 23 2; *C* 3 25 1. Sien ook Kaser *Zivilprozessrecht* 428 met 'n beroep op *N Th* 7 4 *pr*; *C* 1 29 1; Sander 1958 *Rhein Mus für Phil* 229.

95 *C* 3 25 1; *C* 3 13 7; *C* 8 35 (36) 13; Kaser *Zivilprozessrecht* 478.

96 *Roman law* 448.

97 Hy was in die *consilium* van Severus en Caracalla en het vier boeke *de re militari* geskryf. Vgl Krüger *Geschichte der Quellen und Litteratur des römischen Rechts* (1912) 226; Fitting *Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander* (1908) 79.

98 *D* 49 16 4 8.

99 *Ibid.*

100 *D* 5 1 7.

101 *Ibid*; *D* 49 16 4 8. Sien ook Voet *Commentarius* 5 1 106.

102 *C* 2 3 29. Sien ook *C* 1 3 50 (51): "Si quis in conscribendo instrumento sese confessus fuerit non usurum fori praescriptione propter sacerdoti praeroativam, sancimus nonlicere ei adversus sua pacta venire et contrahentes decipere, cum regula est iuris antiqui omnes licentiam habere his quae pro se introducta sunt renuntiare. Quam generalem legem in omnibus casibus obtinere sancimus, qui necdum per iudicalem sententiam vel amicalem conventionem sopiti sunt."

Dit wil voorkom of die *praescriptio fori* as 'n persoonlike voorreg van die betrokke *miles* beskou is en nie as 'n aangeleentheid wat die belange van die staat geaffekteer het nie. Sodanige afstanddoening is klaarblyklik nie teen die openbare belang beskou nie aangesien die reël dat niemand afstand kan doen van dit wat in openbare belang verleen is[103] in die geval nie ter sprake gekom het nie.[104]

3 3 *Beneficium competentiae*

Indien 'n siviele aksie deur 'n krediteur ingestel is teen 'n *miles* of oudgediende wat sy militêre dienstydperk met goeie gevolg voltooi het of andersins sy ontslag eervol oftewel met goeie rede ontvang het, was hy geregtig op die sogenaamde *beneficium competentiae*. Die *condemnatio* is derhalwe beperk tot *id quod facere potest*.[105] Sodoende is beide *infamia* en boedeloorgawe vermy terwyl soveel bates behou is as wat nodig was vir lewensonderhoud.[106] Dieselfde het in die geval van 'n *filiusfamilias* gegeld. In sy geval is die *condemnatio* natuurlik deur die omvang van sy *peculium castrense* beperk.[107]

3 4 Kumulatiewe uitwerking

Die eindresultaat van die besondere ontwikkeling van die regsposisie van die soldaat, onder meer as kontraks- en prosesparty, was in die praktyk waarskynlik so doeltreffend dat die formele verlening van 'n addisionele betalingsuitstel en opskorting van siviele regsmiddels nie óf op grond van billikheidsoorwegings óf vanweë militêre doelmatigheid as *sine qua non* beoordeel is nie.

Op die keper beskou, kan vanweë die uitgebreide en gekombineerde werking en uitwerking van die *praescriptio militiae* en *restitutio in integrum* asook die *beneficium competentiae* en ander *privilegia militum*, veral gedurende die na-klassieke tydperk, nie ligtelik tot die gevolgtrekking gekom word dat daar werklik 'n nypende praktyksbehoefte vir die verlening van 'n addisionele omvattende onderstand, hetsy in die vorm van 'n prosesregtelike verademing, hetsy in die vorm van 'n betalingsrespyt, kon bestaan het nie.

4 SLOT

Selfs 'n vlugtige oorsig van die *sui generis*- sivielregtelike posisie van die Romeinse soldaat laat 'n blywende indruk van 'n besonder wydlopende privilegiëring, veral gedurende die Dominaat. Hoewel die weë van *moratorium* en *miles* nie permanent in die Romeinse reg sou kruis nie, was die eindeffek van die werking van die *praescriptio militum*, *restitutio in integrum*, *beneficium competentiae* en

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103 *D* 30 55. Sien ook Perezius *ad C* 8 54 37; Kaser *Privatrecht I* 257.
104 Sien Wessels *The law of contract in South Africa* (1951) 36 108 572 704.
105 *D* 42 1 6; *D* 42 1 18. Vgl Voet *De jure militari* 6 20; Voet *Commentarius* 42 1 46; Jolowicz en Nicholas *Roman law* 218; Thomas *Textbook* 343; Kaser *Privatrecht I* 483.
106 Kaser *Privatrecht I* 482; Buckland *Roman law* 661; Muirhead *Private law* 320; Thomas *Textbook* 404 425; Ledlie *Institutes* 289; Hijmans *Romeinsch verbintenissenrecht* 150–151.
107 *D* 49 17 7.

sekere ander *privilegia militum* na alle waarskynlikheid sodanig dat daar nie 'n deurlopende of nypende praktyksbehoefte daarvoor bestaan het nie. Bowendien sou van die *privilegia*, soos die *testamentum militare* en *restitutio in integrum*, die toets van die tyd deurstaan om in verskeie jurisdiksies gedurende die twintigste eeu voort te leef as deel van die regsmondering van die moderne krygsman.

In 'n opvolgende bydrae sal aandag geskenk word aan enkele aspekte van die tersaaklike *privilegia militum* in die Romeins-Hollandse reg.

The conflict of personal laws: wills and intestate succession

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OPSOMMING

Internasionale privaatreg: testamente en intestate erfopvolging

Hierdie bydrae ondersoek die vraag of inheemse gewoontereg dan wel die gemenereg in gevalle van testate of intestate erfopvolging toegepas behoort te word. Artikel 23 van die Swart Administrasiewet 38 van 1927 bevat aanwysingsregsreëls met betrekking tot testate erfopvolging. Hulle bepaal dat persone wat aan gewoontereg onderworpe is nie testamentêr oor roerende "huis"-eiendom of grond wat onder erfpagvoorwaardes gehou word, mag beskik nie. Hieruit volg dat daar wel testamentêr oor sogenaamde "familie"-eiendom beskik mag word ten spyte daarvan dat gewoonteregtelike familiebelange in die testament ignoreer sou kon word. Die outeur stel voor dat die betrokke wetgewing gewysig word sodat individue slegs oor persoonlike eiendom mag beskik. Hy stel verder voor dat die erflater se persoonlike reg aangewend behoort te word ten einde dubbelsinnige bepalings in die testament te interpreteer.

Die aanwysingsregsreëls met betrekking tot intestate erfopvolging word in regulasies, uitgevaardig ingevolge die Swart Administrasiewet, bevat (GK R200 van 1987). Enige eiendom (wat nie "huis"-eiendom of erfpaggrond is nie) vererf volgens die gemenereg indien die erflater (a) van die werking van gewoontereg vrygestel is of (b) 'n gemeenregtelike (christelike) huwelik gesluit het en 'n huweliksvoorwaardeskontrak aangegaan het, én ook nie 'n party tot 'n bestaande gewoonteregtelike huwelik was nie. In alle ander gevalle is gewoontereg van toepassing tensy 'n potensiële erfgenaam die minister (en dit is onseker watter minister) kan oortuig dat dit meer gepas is om die gemenereg aan te wend. Die outeur argumenteer dat groter buigsaamheid in hierdie reëls ingebou behoort te word ten einde die howe 'n groter diskresie te gee om 'n regstelsel toe te pas wat in ooreenstemming met die lewenstyl en finansiële omstandighede van die erflater en sy of haar familie is.

1 INTRODUCTION

The conflict of laws is a body of rules designed to select the law which the parties to a suit would reasonably have expected to apply to their dispute.[1] In succession cases, because of the profound differences distinguishing customary and common law, the decision to apply one or other legal system has far-reaching implications. Hence it is as well to have in mind the main features of these laws before looking at the choice-of-law rules.

In the first place, under customary law the transmission of property and status is strictly controlled by predetermined rules of intestate succession, rules that

1 Bennett *The application of customary law in southern Africa* (1985) 105.

the deceased is not at liberty to ignore. In contrast, the common law favours testamentary succession which gives a testator freedom to determine the devolution of his or her estate regardless of the needs of the survivors. Secondly, the common law is concerned principally with the devolution of property; it would be better to call this a law of inheritance than a law of succession. Customary law, on the other hand, is concerned with the transmission of status. Thirdly, and this proposition is linked to the previous one, individual ownership of property is one of the bastions of the common law. Customary law is characterised by shared interests in family estates. Finally, the common law of succession is gender-blind, in other words, the same rules apply to the estates of both men and women. In customary law different rules govern succession to the estates of men and women.[2]

2 WILLS

2 1 Testamentary capacity and freedom of testation

The common law allows every person, provided that he or she has the requisite mental capacity, a generous freedom to dispose of property to whomever he or she might choose.[3] The institution of the will complements the common-law emphasis on inheritance (as opposed to succession) and individual ownership of property.[4] Thus, in sharp contrast to customary law (which guarantees the intestate heirs' right of succession), a testator may ignore the expectations or financial needs of his or her intestate heirs.

In view of the destructive effect that an imprudent will may have on a family's material security and social cohesion, governments in many parts of Africa were reluctant to extend testamentary capacity to persons subject to customary law.[5] In South Africa, however, this issue has never been seriously considered. It has always assumed that anyone, irrespective of his or her personal law, can make a will.[6] To this general principle the legislature introduced two exceptions that

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2 For the customary law of succession see Olivier *et al Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) ch 12; Bekker *Seymour's customary law of southern Africa* (1989) ch 11.

3 This was the law under *Glazer v Glazer* 1963 4 SA 694 (A). See the South African Law Commission *Review of the law of succession* (1991) par 6. Now a surviving spouse can claim maintenance under the Maintenance of Surviving Spouses Act 27 of 1990. Unfortunately the act will probably not apply to spouses of a customary marriage because the term "survivor" is defined to mean the spouse of a *marriage* dissolved by death, and marriages do not normally include customary unions.

4 Bennett (fn 1) 217–219.

5 See Morris "Attitudes towards succession law in Nigeria in the colonial period" 1970 *Journal of African Law* 5 and the Nigerian case of *Yunusa v Adesubokan* (reported in 1970 *Journal of African Law* 56 and 1972 *Journal of African Law* 82). In Kenya and Uganda, Africans were not permitted to make wills. It was only in 1972 that people subject to customary law in Kenya were given testamentary capacity, following the 1968 Government Commission of Inquiry into Succession, for which see Ollennu "Comments with special reference to customary law" 1969 *East African LJ* 98–102.

6 Bennett (fn 1) 218–219. The leading case on this question is *Fraenkel v Sechele* 1964 HCTLR 70 (also reported in 1967 *Journal of African Law* 51).

prohibit the bequest of certain categories of property.[7] Section 23 of the Black Administration Act[8] provides:

> "(1) All movable property belonging to a Black and allotted to him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.
>
> (2) All land in a location held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-section (10).
>
> (3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will."

Section 23(1) is the most significant safeguard of the interests of customary-law heirs. It applies to movable "house" property.[9] This concept is a consequence of the structure of polygynous households in certain systems of southern African customary law, whereby each wife creates an independent establishment for herself and her children. The heir to each house is destined to inherit the property in that house, and for this reason property must be kept strictly separate. If property is transferred from one house to another, an interhouse debt is created, which must be settled when the head of the household dies.[10]

A civil or Christian marriage does not create a house,[11] and so, logically, section 23(1) cannot apply where the testator contracted this form of marriage. Similarly, it is arguable that the section will not apply where the testator is a wife, because wives' property is not strictly speaking house property. Customary law seldom allows wives outright ownership in property, but, when it does, such property is not invariably inherited by the house heirs. Hence, if a wife were to bequeath her property to someone outside the family, the house heir would have no complaint.[12]

In a society where polygynous marriages are a rare exception, section 23(1) seems incongruous. This aside, if a man has only one wife, is it appropriate to speak of the creation of a "house"? A literal reading of section 23(1) may

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7 Before he dies, the head of a household may make arrangements for the distribution of his assets by various types of oral disposition: Kerr *The customary law of immovable property and of succession* (1990) 109 – 111; Bennett *A sourcebook of African customary law for southern Africa* (1991) 408. Because these are not the same as wills, they do not fall foul of the provisions of s 23, and they should accordingly be permissible.

8 38 of 1927.

9 See s 35 of the Black Administration Act for a definition of the term "house": "[T]he family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Black woman." The definitions contained in the Natal and KwaZulu Codes, Proc R151 of 1987 and Act 16 of 1985 resp, are more specific: "'house property' means property vested in and pertaining specially to any house in a family home; such property is acquired by donations, earnings or apportionment and by receipt of *lobolo* in respect of the girls of the house." S 23(1) also applies to property accruing to the wife of a customary marriage which was automatically terminated by a later civil/Christian marriage by the husband to another woman: Bekker (fn 2) 316 – 317. Such property is protected by s 22(7) of the Black Administration Act which is discussed below.

10 See *Sijila v Masumba* 1940 NAC (C&O) 42 44 – 47.

11 *Tonjeni* 1947 NAC (C&O) 8; *Ngcwayi* 1950 NAC 231 (S); *Thekiso v Mogorosi* 1951 NAC 17 (C). Francis "Two problems with Bantu civil marriages" 1967 *Acta Juridica* 150 says that this section will not apply to tribes that have a so-called "simple" system of polygyny; in other words, their marriages do not create houses.

12 Francis *ibid*. The customary rules governing succession to women's estate are fragmentary and poorly documented: Bennett (fn 7) 424 – 425.

suggest that the prohibition against bequests of house property applies even to the movable property that accrues or is allotted to the wife of a monogamous marriage;[13] but it is equally plausible to regard property in a monogamous marriage as "family" property, and thus devisable by will.

Ironically perhaps, the latter interpretation should, as a matter of policy, be avoided: wherever possible, the head of a household should be permitted to bequeath movables to his wife, because she is usually the person most in need of material support to maintain herself and to raise any dependent children. Under the customary law of intestate succession, a widow may find herself in serious straits when her husband dies. In the first place, because a woman may not inherit from a man, she is left with no means of raising dependants apart from a personal right to demand maintenance from the estate.[14] In the second place, most property acquired by a wife during her marriage is deemed to be her husband's, and in consequence it falls into his estate to be distributed amongst his male heirs.[15] (This problem can only be finally cured by reforming the wife's proprietary capacity, that is, by giving her real rights in property she acquires that can be asserted against her husband and his family.[16])

There are particular historical reasons for the inclusion of section 23(2) in the act. When Africans were given the right to acquire land under quitrent title, the government was concerned to prevent the fragmentation of plots into uneconomic holdings amongst a number of customary-law heirs. Accordingly, succession was regulated by statute, specially modified to approximate the customary order of intestacy.[17] Provision was made, in the first instance, for "the deceased's eldest son of the principal house or, if he be dead, such eldest son's senior male descendant, according to Black custom" to inherit title to the land. Again, this section was inapplicable where the deceased had married according to civil or Christian rites, since this type of marriage does not create a house. In *Ex parte Minister of Native Affairs: In re Magqabi v Magqabi*,[18] however, the Appellate Division, undeterred by logic or technicality, held that sons of civil marriages were not excluded from the terms of the enactment: the deceased's eldest son would inherit, and in the event of competition between the sons of more than one marriage (of whatever form), it would simply be the deceased's eldest son who inherits.[19]

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13 A construction supported by the definition of "house" in the Natal and KwaZulu Codes, Proc R151 of 1987 and Act 16 of 1985 resp: "the family and property, rights and status which commence with, attach to and arise out of the customary marriage of any Black woman". But compare the definition of "house property" in the codes given in fn 9 above.

14 This right is so hedged round with restrictions that its value is considerably diluted: Bennett (fn 7) 418–419.

15 Bennett (fn 7) 325 ff.

16 The courts have been careful to point out that a widow has no proprietary right in the estate: *Xulu* 1938 NAC (N&T) 46 48; *Macubeni* 1952 NAC 270 (S). Stewart "The widow's lot – a remedy? The application of spoliation orders in customary succession" 1983-4 *Zimbabwe LR* 72 ff, however, argues that a widow's use of possessory interdicts, which do not depend on proof of ownership, may be a valuable remedy. See *Ngwenya v Zwane* 1959 NAC 28 (NE).

17 Derived from s 23 of Proc 227 of 1898 and currently contained in Annexure 24 of the Black Areas Land Regulations R188 of 1969.

18 1955 2 SA 428 (A).

19 See the discussion by Kerr (fn 7) 158 ff and Visser "Die interne aanwysingsreg ten aansien van erfregkonflikte tussen die gemenereg en outochtone reg" 1981 *De Jure* 326 ff.

It is implicit in section 23 that the two main categories of property amenable to disposition by will are immovables and what is now called "family" property. As the word suggests, "family" property is not in the exclusive patrimony of the deceased,[20] and in these circumstances it seems odd that the bequest of such property is allowed. The law in most African countries provides the converse: only personal property may be willed.[21] Admittedly, Roman-Dutch law does allow testators to dispose of things they do not own,[22] but the testator cannot create rights he never had. The will merely obliges the executor to acquire or pay over the value of the property bequeathed.[23] In any event, this is an exceptional situation and one would expect legislation to cater for the norm.

Apart from this, the anomaly should be corrected if only to avoid the following type of problem. If a person can bequeath property in which others have interests, what title does the beneficiary acquire? Although the principle *nemo dat quod non habet* is obviously applicable, West-African courts have bowed to social pressure and have allowed wills to convert title.[24] Thus where a will purports to bequeath a common-law title in family property, full effect is given to its terms, thereby converting the customary interests into a fee simple. The reverse is also possible: a common-law title may be converted into a customary interest.[25] The will therefore does not merely designate the person entitled to inherit from the testator, but also operates to determine the nature of the rights that the beneficiary will receive.[26]

There is no South African precedent to determine what rights the legatee of land held subject to customary law should receive. Customary law has no equivalent of the common-law right of ownership,[27] nor does it have a technical vocabulary to describe land tenure. Tribal authorities may allot the head of a household a tract of land for his family's residential and agricultural requirements;[28] on his death or departure from the chiefdom, this interest is extinguished and the land reverts to the headman or chief for reallocation. Can a

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20 For a full definition see Bennett (fn 7) 237 – 238.

21 Okoro *The customary laws of succession in eastern Nigeria* (1966) 226.

22 Even property belonging exclusively to a third party may be bequeathed, provided that the testator was aware, when he or she made the will, that it did belong to someone else: Corbett *et al The law of succession in South Africa* (1980) 224 – 226; *Receiver of Revenue v Hancke* 1915 AD 64 73; *Estate Brink* 1917 CPD 612; *Attridge v Lambert* 1977 2 SA 90 (D). Similarly, a testator may bequeath property that belongs to himself and others in common. In this case it is presumed that the testator intended to bequeath only his share. If the property belonged to the testator and the heir or legatee, the beneficiary acquires outright ownership in terms of the bequest: *McMunn v Powell's Executors* 1896 13 SC 27.

23 *Hancke*'s case *supra* 73.

24 "A dual system of land tenure: the experience of Southern Nigeria" 1965 *Journal of African Law* 16.

25 Most of the cases involved conversion of an English-law title into customary family property, eg, *Jacobs v Oladunni Bros* 1935 12 NLR 1 and *George v Fajore* 1939 15 NLR 1. Cf *Coker* 1938 14 NLR 83 and *Coker* 1943 17 NLR 55. See, generally, Lloyd "Family property among the Yorubas" 1959 *Journal of African Law* 105.

26 This is an extreme example of the operation of the all-or-nothing principle in the conflict of laws: the law applicable to one issue affects all related issues. See Allott *New essays in African law* (1970) 118.

27 Bennett "Terminology and land tenure in customary law: an exercise in linguistic theory" 1985 *Acta Juridica* 173.

28 Descriptions are given in Kerr (fn 7) ch 8 and Jeppe *Bophuthatswana: land tenure and development* (1980) 15 ff.

family head now convert his precarious interest into something more permanent simply by willing the land to a named legatee? Land subject to the Black Areas Land Regulations may not be bequeathed,[29] but, in those areas where the regulations do not apply, it is an open question what the effect of a will would be.[30] Presumably the courts will fall back on the *nemo dat* principle. The position is simpler with regard to urban land. Titles here, notably leaseholds in land and buildings subject to the Black Local Authorities Act[31] and houses bought or built under the former Regulations governing Urban Black Residential Areas,[32] are statutory, and special provision is made for transmitting them by will.[33]

A problem analogous to the bequest of land arises in respect of guardianship clauses, that is, directions in wills that guardianship of the testator's minor children is to go to a particular person. In customary law, provided that bridewealth has been paid, the rights to children vest in the father's family, not in the father personally. What if the testator were to transfer these rights to a person outside the family? Or, what if the testator were the mother, who in customary law has no legal right of guardianship at all?[34] It could be argued that these dispositions would be invalid, unless guardianship had been given to someone who had an independent entitlement under customary law.[35]

2 2 The law applicable to wills

A will is a juristic act peculiar to the common law. According to the general principles of the conflict of laws, the mode of execution, the capacity of the testator (and the witnesses), the mode of revocation or amendment, and the interpretation of the document should all be subject to the same legal system.[36]

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29 Reg 53(5) of Proc R188 of 1969. Here it is provided: "No testamentary disposition of any right of a Black in or to any arable or residential allotment held by him in his lifetime shall be of any force or effect . . ." Instead, under reg 53(1), "[u]pon the death of the registered holder . . . such allotment shall . . . revert to the commonage and become available for re-allotment in accordance with the provisions of subsection (3)".

30 And it is likely to become an urgent issue since the promulgation of the Upgrading of Land Tenure Rights Act 112 of 1991.

31 102 of 1982.

32 GN R1036 of 1968, repealed by s 12 of the Conversion of Certain Rights to Leasehold Act 81 of 1988.

33 S 54(5)(*d*) of the Black Communities Development Act 4 of 1984 provides that the right of leasehold, once registered, entitles the holder thereof to bequeath his interest. See Prinsloo "Inheritance of immovable property in urban black townships" 1990 *SALJ* 494. These limited rights (and quitrent titles) will disappear when holders avail themselves of the opportunity under the Upgrading of Land Tenure Rights Act 112 of 1991 to upgrade their titles to full ownership.

34 In Zimbabwe this type of disposition used to be specially regulated by s 3 of the African Wills Act ch 240, but this statute was repealed by s 24 of the current Wills Act 13 of 1987. The courts, however, would also intervene to protect the best interests of the child: Stewart in Armstrong (ed) *Women and law in southern Africa* (1987) 94.

35 This does not apply in the case of civil or Christian marriages, where custody and guardianship are governed by the common law: *Msomi* 1968 BAC 29 (NE); *Ramokhoase* 1971 BAC 163 (C) 167 and *Madlala* 1975 BAC 96 (NE) 99.

36 Daniels *The common law in West Africa* (1964) 388; Okoro (fn 21) 257. Most systems of customary law permit disinheritance and the disposition of property *mortis causa*: see

Where the terms of the will are clear and unambiguous, effect is given to them, and no further evidence may be adduced to prove that the testator had intended something else.[37] Words are given their ordinary meaning, unless they are technical or legal, in which event they carry the special meaning usually attributed to them.

If a person subject to customary law executed a will, there may be good reason to take into account his or her personal legal regime when interpreting the terms of the document.[38] This is obvious where the testator used terms peculiar to a particular system of customary law, but there is also good reason for using the testator's personal law to construe terms that are ambiguous. In a leading Nigerian decision in point, *George v Fajore*,[39] the court was quite prepared to construe the English word "heirs" in terms of customary law, since the will as a whole evinced an intention that the testator's property should be governed by that system.[40] In other Nigerian cases, where the term "my children" was ambiguous (because there were issue from both civil and customary marriages), a similar approach was taken.[41]

2 3 Partial testacy

Logically it would seem to follow that if a person died partially testate and partially intestate, customary law should apply to the intestate portion of the estate. Section 23(9) of the Black Administration Act, however, may suggest a different approach.

> "Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of

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continued from previous page

fn 7 above. None of these practices, however, is the same as a will: the customary dispositions are executed orally; the family council must approve; and the deceased may not stray too far from the established order of intestate succession. Note that s 12 of the Zimbabwean Wills Act 13 of 1987 makes special provision for these dispositions. What if a disposition of property *mortis causa* qualified as a common-law will (because it had been written, duly signed and witnessed), but had not been approved by the family council (as required by customary law)? Which legal system should be used to judge the validity of such a disposition? According to a Kenyan case, *Public Trustee v Wambui* (reported in 1978 *Journal of African Law* 188) the issue had to be determined in accordance with the testator's intention: if he intended to make use of an institution peculiar to the common law, the document had to be judged by that system.

37 Although extrinsic evidence will be admitted to rectify an error in the will.

38 Kerr 1969 *SALJ* 25 draws attention to a related issue, one that arose in *Nxasana* 1967 BAC 35 (NE). The testator had bequeathed property subject to a *fideicommissum*; the will specified that on the termination of the *fideicommissum* the property was to pass to the heir according to customary law. If the *fiduciarius* were married by civil rites in community of property, reg 2(c)(i) (discussed below) would direct that the common law apply to the devolution of his or her estate, a conclusion quite at variance with the terms of the will. Visser "Interne aanwysingsreg ten aansien van erfregkonflikte tussen die gemenereg en outochtone reg" 1982 *De Jure* 125 says that this is only an apparent problem, because overriding effect must be given to the terms of the will. Kerr raises a further difficulty: could the *fiduciarius* disinherit the customary-law heir (which he would be permitted to do in customary law), thereby upsetting the terms of the will? Here it would seem that he may do so if the testator's intention were merely that the estate devolve in accordance with customary law; but if the testator intended a named beneficiary to inherit, then his intentions may not be disregarded.

39 1939 NLR 1 3.

40 Cf *Branco v Johnson* 1943 17 NLR 70.

41 *Coker* 1938 14 NLR 83 85–86 and *Sogbesan v Adebiyi* 1941 16 NLR 26.

so much of his estate as does not fall under sub-section (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act No 24 of 1913)."

This provision has been interpreted to mean that the common law must apply to the devolution of property not governed by a will, a choice of law that is vindicated on the basis of the testator's intention.[42] But there is another, even more convincing interpretation of section 23(9). The reference it contains to the Administration of Estates Act implies that only the *administration* of the estate is subject to the common law, not the *devolution* of property, which is an entirely separate issue.

3 INTESTATE SUCCESSION

In this case choice of law is governed by regulations promulgated in terms of the Black Administration Act.[43] These provide as follows:

"(2) If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

(*a*) If the deceased was, during his lifetime, ordinarily resident in any territory outside the Republic other than Mozambique, all movable assets in his estate after payment of such claims as may be found to be due shall be forwarded to the officer administering the district or area in which the deceased was ordinarily resident for disposal by him.

(*b*) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu law, the property shall devolve as if he had been a European.

(*c*) If the deceased, at the time of his death, was –

(i) a partner in a marriage in community of property or under antenuptial contract; or

(ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptial contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,

the property shall devolve as if the deceased had been a European.

(*d*) When any deceased Black is survived by any partner –

(i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or

(ii) with whom he had entered into a customary union; or

(iii) who was at the time of his death living with him as his putative spouse;

or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part

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42 Visser (fn 38) 124 – 125. S 1(4)(*b*) of the Intestate Succession Act 81 of 1987 does not take the matter much further: "Intestate estate includes any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act does not apply."

43 S 23(10) of Act 38 of 1927. The current regulations, contained in GN R200 of 1987, were originally promulgated in substantially the same form in 1929. They were amended in 1947, repealed and replaced in 1966, and then again repealed and replaced in 1987. See Kerr (fn 17) 165 – 167 and Visser (fn 38) 133 – 135 regarding which version of the regulations should be applied in particular cases.

thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

(*e*) If the deceased does not fall into any of the classes described in paragraphs (*a*), (*b*), (*c*) and (*d*), the property shall be distributed according to Black law and custom."

3 1 Foreigners

This section governs the estates of Africans ordinarily resident outside the Republic. If normal principles of conflict were to be applied, such cases would be dealt with according to the rules of private international law, in terms of which the *lex ultimi domicilii* of the deceased would prevail.[44] This law may very well not be the same as the law of the place in which the deceased was ordinarily resident.

The departure from the norm was no doubt occasioned by the system of migrant labour, in particular by a desire to avoid the complex process of discovering the deceased's domicile, and, even more to the point, to avoid administering the estate in terms of a foreign law.[45] It would be far easier for a South African employer to hand the entire problem over to an administrative official in charge of the area in which the deceased resided; this would involve simply dispatching the deceased's assets to his or her country of origin. In view of the decline in numbers of foreigners recruited for work on South African mines, it is now questionable whether there is any good reason for treating foreign Africans any differently to persons subject to the common law, especially where the deceased had acquired a South African domicile or was not domiciled in the country of ordinary residence.

3 2 Persons exempt from customary law

Persons exempted from customary law become subject to the common law, which would naturally include the law of intestate succession. Regulation 2(*b*) gives the misleading impression that exemption can be claimed only from the provisions of the Natal Code. In fact, section 31 of the Black Administration Act has a far broader ambit: it allows any person in the country who is subject to customary law to apply for exemption.[46] However, given the fact that very few people have ever applied for exemption, this provision will seldom be applicable.

3 3 Married persons

As we have seen, movable house property must devolve according to customary law and the devolution of land held under quitrent tenure is governed by statutory tables of succession.[47] In the absence of a will, all other property is subject

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44 Forsyth *Private international law* (1990) 315.

45 Given patterns of migrant labour in former times, the applicable law would probably be Zimbabwean, Zambian or Malawian law. A further question (never broached in South Africa) may then arise whether the customary or common law of those countries should apply to the estate.

46 Bekker (fn 2) 321. And in this regard s 1(4)(*b*) of the Intestate Succession Act 81 of 1987 provides that the act will apply to intestate estates "in respect of which section 23 of the Black Administration Act does not apply".

47 Provided in Annexure 24 of Proc R188 of 1969, as read with reg 35.

to choice of law rules contained in regulation 2(*c*)–(*e*). In broad terms, the applicable system is determined by the cumulative use of two connecting factors – the form of the deceased's marriage and the matrimonial proprietary regime – factors that are supposed to reflect the qualities of the deceased's lifestyle.[48]

3 3 1 Persons married by civil/Christian rites in community of property

One would expect the nature of the marriage to dictate the application of the common law to intestate succession, but regulation 2(*c*) has an extra connecting factor that saves people who marry by civil/Christian rites from being caught unawares by the law associated with their marriage.[49] If common law is to apply, the spouses must have been married in community of property or with an antenuptial contract, and, in addition, the deceased must not be party to a valid, subsisting customary marriage.[50] The result is that the majority of estates are governed by customary law.

For purely legal reasons, few deceased estates can comply with all these requirements. Before 2 December 1988, civil/Christian marriages did not automatically produce a community of property. When the Black Administration Act was enacted in 1927, Africans were given a special dispensation to prevent them from being inadvertently subjected to an unfamiliar matrimonial property system.[51] Section 22(6) of the act provided that their marriages would be out of community of property unless they had made a prenuptial declaration before a magistrate, commissioner or marriage officer.[52] Few Africans availed themselves of this opportunity.[53] In 1984 the common law of matrimonial property was changed by the Matrimonial Property Act[54] to make all marriages automatically in community of property, but this legislation had no effect on marriages contracted by Africans. Four years later, the Marriage and Matrimonial Property Law Amendment Act[55] finally repealed section 22(6) of the Black Administration Act, with the result that all African civil/Christian marriages are now in community of property, a rule that may be varied only by antenuptial contract. The amending legislation, however, was not made retrospective.[56]

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48 The assumption being, to quote from Nigerian cases, that the choice of a civil/Christian form of marriage would be "sufficient to show that it was their [the spouses'] intention that the marriage contract and all the consequences flowing therefrom should be regulated exclusively by English law": *Cole* 1898 1 NLR 15; *Asiata v Goncallo* 1900 1 NLR 41. See Visser (fn 38) 138.

49 In other words, choice of law is also based on something additional and *active*: Visser (fn 38) 130.

50 Visser (fn 38) 132 discovered the following anomaly: if a person had married first by customary law, had then contracted a marriage by civil rites in community of property, had dissolved the second marriage, and had then died survived by the customary-law wife, what law would apply? Both reg 2(*c*) and (*d*) would seem to be applicable.

51 Bekker (fn 2) 250.

52 This section did not exclude their power to execute an antenuptial contract.

53 See Coertze *Die familie-, erf- en opvolgingsreg van die Bafokeng van Rustenburg* (1971) 241. And see Burman in Hirschon (ed) *Women and property/women as property* (1984) 124.

54 S 25(1) of Act 88 of 1984.

55 3 of 1988.

56 Although provision was made to allow spouses, whose matrimonial property system was governed by s 22, to harmonise the consequences of their marriage with the new law by execution and registration of a notarial contract: s 4 of Act 3 of 1988, inserting s 25(3) into Act 88 of 1984.

Accordingly, most marriages are still out of community of property, and thus intestate succession is still governed by customary law.[57]

The net result is that a customary-law system of succession will apply to most civil/Christian marriages, and, since the laws of succession are designed to complement the law of marriage, certain problems may occur. The most serious is the plight of the surviving wife. Persons may deliberately marry according to civil rites to escape the strictures of customary law; wives in particular gain special advantages from their status under the common law. But, although the widow may have lived her married life according to the common law, on the death of her husband she is reduced again to the position of a customary-law widow, dependent for her support on maintenance paid by the heir[58] provided she remains with the estate.[59] The fact that she may support herself from her separate estate will provide cold comfort in view of women's restricted proprietary capacity and their less favourable earning ability.

A more technical problem occurs where the deceased had contracted a civil/Christian marriage out of community of property after dissolving an earlier marriage (which might have been under customary law or the common law). Would the surviving sons of the two marriages qualify as heirs of "house" property along the lines suggested with regard to succession to land held under quitrent tenure? When this problem was first considered in *Dlalo v Ndwe*,[60] the court held that the eldest son of the first marriage (which happened to be a customary union) inherited the property acquired during that union and the eldest son of the second union (a civil marriage) inherited property acquired during that marriage. But later, in *Mdlozini*,[61] the court held that the eldest son of the first union (which was by Christian rites) should inherit the entire, unallotted estate because all unallotted property accrues to the first (or great) house as family property.

The courts had the option either to treat the marriages as separate or to treat them as constituting a polygynous household, in which case the civil marriage would be deemed, notionally at least, to have established a house. In *Mboniswa*[62] it was held that the marriages do not create one family. Instead, the heir of the civil marriage is entitled to inherit only the property acquired during that marriage. In the circumstances, this is probably the most equitable solution,[63] although there is persuasive authority for the other approach in the Appellate Division's decision in *Ex parte Minister of Native Affairs: In re Magqabi v Magqabi*.[64]

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57 Prinsloo (fn 33) 496 makes some pertinent observations about the implications of this legal regime for the family house, which is normally the most valuable asset in the estate.
58 *Mnani* 1977 BAC 264 (S). See Kerr (fn 7) 171.
59 *Sonamzi v Nosamana* 3 NAC 297 (1914); *Mavuma v Mbebe* 1948 NAC (C&O) 16; *Tulumane v Ntsodo* 1953 NAC 185 (S) – although the wife would presumably qualify under the Maintenance of Surviving Spouses Act 27 of 1990 to apply for maintenance from the estate, and thus be free from the irritating restrictions imposed by customary law.
60 4 NAC 189 (1922); and see *Tonjeni* 1947 NAC (C&O) 8.
61 5 NAC 196 (1927).
62 1952 NAC 235 (S) 239–240. See too *Moloto* 1953 NAC 91 (NE).
63 Advocated by Francis (fn 11) 152–156 and Kerr (fn 7) 170.
64 1955 2 SA 428 (A). But this case was concerned with s 23(2) of the act, and can therefore be distinguished.

Quite apart from the problem of deciding who should inherit, it may be almost impossible to determine what property was acquired during a particular marriage. For instance, if property from the first marriage were traded and increased during the second, who would be entitled to the increase?[65]

3 3 2 Persons married out of community of property or under customary law

Customary law applies to the estate of a person who is survived by a customary-law spouse or children (or remoter issue) or a person who had married by civil rites but out of community of property. Despite its intricate wording, this provision does not cover all the situations to which it was obviously intended to apply. What of a person who had married by customary law, but who died leaving no surviving spouse or children? Presumably, *a contrario* the terms of the section, the common law would apply.[66] Another ambiguity is the position of a person who had divorced his or her spouse: customary law will continue to apply to the estate regardless of the absence of the critical choice of law factor – the customary marriage.

If the application of customary law under regulation 2(*d*) seems inappropriate or inequitable, potential beneficiaries may petition the Minister of Development Aid for a directive that the common law be applied instead. This saving provision is hardly satisfactory. Choice of law becomes an administrative process, and, although this saves the cost of litigation, it may preclude argument from all interested parties.[67]

3 3 3 Discarded wives: the problem of dual marriages

Section 22(7) of the Black Administration Act provides:[68]

> "No marriage contracted after the commencement of this Act [1 January 1929] but before the commencement of the Marriage and Matrimonial Property Law Amendment Act 1988 [2 December 1988] during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

This section was originally inserted into the act to cure some of the inequities of allowing civil/Christian marriages to override customary unions. Formerly, if a man were to marry according to customary law, and if he were then to marry another woman by civil rites, the second marriage would automatically extinguish the first.[69] Section 22(7) preserved the property rights of the customary-law wife, with the curious result that on the death of the husband *both* civil and customary wives (and their progeny) ranked equally in so far as devolution of the estate was concerned. Customary law applied to regulate

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65 Kerr (fn 7) 170.
66 Cf the Natal and KwaZulu Codes below.
67 Kerr (fn 7) 171; Bennett (fn 1) 170.
68 This is the version substituted by s 1 of Act 3 of 1988.
69 *Nkambula v Linda* 1951 1 SA 377 (A).

their rights.[70] And it continues to apply to the unfortunate victims of dual marriages contracted between 1929 and 1988.

Can a man, who terminated his customary marriage by a civil/Christian union, protect his second spouse by making a will that bequeaths to her property acquired during the civil marriage? A concerned husband might in this way avoid the full rigour of section 22(7) by ensuring that his common-law widow was not subjected to a customary-law regime. Alternatively, if he did not make a will, could his widow appeal to the Minister of Development Aid under regulation 2(*d*) for an order that the common law will apply? Kerr[71] maintains that both these courses of action are available. But, it is submitted, however desirable they may be, such escape routes are barred. Section 22(7) is explicit in saying that the civil marriage shall not in any way affect the material rights of the customary marriage and that the one widow's rights shall not outweigh the other's. Appeal to ministerial discretion would also seem to be excluded because section 22(7) is not a choice of law rule. Regulation 2(*d*) is primarily concerned with choice of law and it does not appear to encompass the problems generated by section 22(7).

The intention of the legislature is clear: to protect the so-called "discarded" wife and her children. This is a perfectly laudable intention, but one that is likely to harm innocent parties, that is, the civil-law wife and children. To make the best of a bad situation, it may be preferable to abandon the customary marriage, which for all legal purposes has been extinguished (and may in reality have been terminated many years before), in favour of the second marriage.

3 4 Unmarried persons

Because choice of law is predicated in regulation 2(*c*) – (*d*), in the first place, upon the form of the deceased's marriage, the rules do not cater for the unmarried.[72] Instead, regulation 2(*e*) applies: if the deceased does not fall into any of the previous categories, customary law governs devolution of his or her estate. Evidently it was assumed that if a person was subject to customary law that legal system would apply by default: the deceased had the opportunity of avoiding application of this law during his or her lifetime by making a will.[73] There might be good reasons, on the facts of particular cases, however, for devising a more flexible choice of law rule by, for example, taking the deceased's lifestyle into account.

3 5 Natal and KwaZulu

In the Natal and KwaZulu Codes, special provisions have been enacted that override the Black Administration Act and the regulations described above. The codes stipulate that estates of Africans married by civil rites, regardless of the matrimonial property system, are to devolve according to common law.[74]

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70 This meant that the civil-law widow was entitled to no more than maintenance out of the estate: *Tukuta v Panyeko* 5 NAC 194 (1927); *Khabane* 1952 NAC 295 (C) 298.

71 (Fn 7) 173.

72 Visser (fn 38) 130.

73 And an appeal to the minister for application of the common law instead is precluded, since this device is permitted only under reg 2(*d*).

74 Viz, the Succession Act 13 of 1934, as amended. See s 79(3) and 81(5) of the Natal and KwaZulu Codes, Proc R151 of 1987 and Act 16 of 1985 resp.

4 PROPOSALS FOR REFORM

Various anomalies and inconsistencies in the law have been dealt with in the text of this article above. In this section I propose to examine more general issues regarding the conflict of personal laws in relation to reform of the law of succession.

A general code of succession law that amalgamated principles of customary and common law would be politically desirable; but it would involve difficult policy decisions for which there is currently insufficient empirical evidence to inform the policy-maker. For instance, the legislature would be forced to decide which social unit should be used as the model for reform: the nuclear family, on which the common law is based, or the deceased's patriline, on which customary law is based. To choose the former would result in preference for the deceased's surviving spouse and children; to choose the latter would result in their exclusion. Partly for this reason, a wholesale reform of intestate succession seems a distant prospect, although a code of testamentary succession, sensitive to both customary and common law, is a more easily attainable goal.[75]

If the general merger of customary and common law cannot be undertaken in the foreseeable future, then conflict of laws problems will remain a live issue in the courts. This being so, a consolidation and amendment of the existing choice of law rules would be an advance on the present medley of (sometimes anomalous) rules and regulations. But a warning must be sounded. Any reform in choice of law will be no more than a technical improvement if related issues of substance in both customary and common law are ignored. For example, the unhappy position of the customary-law widow cannot be solved without extending proprietary capacity to women. Further, if persons subject to customary law are to benefit from various reforms in the common law, such as the Maintenance of Surviving Spouses Act,[76] customary marriages must be given full recognition on a par with civil/Christian marriages.

The most immediate change necessary in the present choice of law rules involves introducing a measure of flexibility. Use of the form of marriage as the major connecting factor should be carefully reconsidered. By participating in a culturally marked ritual (the marriage ceremony) the deceased is presumed to have intended a particular law to apply to all rights and duties (including succession) related to that act. This choice of law rule may have the advantage of providing a simple solution for conflict problems, but it may not reflect the actual intention of the spouses. Many Africans contract Christian marriages in accordance with the dictates of their religion; they may have no wish to opt out of customary law.[77] (And, of course, many people marry according to both customary and Christian rites.) The association between the marriage ceremony and the devolution of the estate is really too remote to justify the rigid application of this choice of law rule.[78] Moreover, whatever justification the rule may find in the deceased's presumed intention, it seems arbitrary in relation to the spouses' children and other third parties: these people, after all, had

75 Along the lines of the Wills Act 13 of 1987 adopted in Zimbabwe.
76 87 of 1990.
77 *Smith* 1924 5 NLR 102 104.
78 *Coleman v Shang* 1959 GLR 390 401, confirmed on appeal to the Privy Council 1961 AC 481.

nothing to do with the spouses' decision to marry according to a particular rite.[79]

Against these considerations should be weighed an alternative connecting factor: the lifestyle of the deceased. Executors and others charged with administering and distributing deceased estates are not necessarily trained in the intricacies of the conflict of laws, and the choice of law process is potentially long and complex. It would complicate matters considerably if the deceased's lifestyle had to be investigated in each case. In these circumstances, a simple, easily ascertainable choice of law rule is preferable. None the less, particular cases may require a different approach, which would be a good reason to introduce some flexibility into the choice of law. Thus, other factors (whether matters of substance, such as the financial position of the surviving spouse and children, or a formal connecting factor, such as the deceased's lifestyle) could be used by way of exception to vary the basic choice of law rule.

In conclusion, it must be appreciated that the conflict of laws plays an ambiguous and potentially obstructive role in relation to the enforcement of social policy and law reform. According to orthodox thinking at least, a court must ignore differences between the potentially applicable legal systems when deciding what law to apply. The process of choosing the applicable law is supposed to be entirely neutral: the court is not concerned with the results of selecting common law or customary law.[80] Impartiality may be seen as the greatest strength or the greatest weakness of the conflict process: opinion varies depending on the emphasis placed on social policy and law reform.

This is not to say that the conflict of laws is always or can be entirely unbiased. When we say that a court is supposed to select the law that the parties would have expected to apply, it must be appreciated that the court's objectivity is immediately compromised when it decides to give effect to the expectations of certain interested parties at the expense of others. In the case of succession the choice lies between the expectations of the deceased and those of the survivors. In South Africa the courts (and the legislature) have consistently favoured only the deceased. By doing so, the problem of establishing which category of survivors should be given preference – those determined by the common law or the customary law of intestacy – is avoided, and latent issues of social policy are suppressed.

The conflict of laws not only suppresses these issues, but also blunts the need for reform. The choice of law process assumes that customary and common law are different and that they remain different. In other words, it does not contemplate a progressive unification of the laws it arbitrates. (And, in view of this assumption, the conflict of laws sanctions perpetuation of the ossified code of customary law we have inherited from the apartheid era.) There is a glib answer to the demand for change in customary law: apply the common law instead. This solution obscures the question whether we should not rather strive to develop customary law in ways that are unique to the system.[81]

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79 Visser (fn 38) 137.

80 Cf Sawyerr "The 'choice of law' approach and the application of law in Ghana" 1972 *Univ of Ghana LJ* 173.

81 Admittedly, there has been a common tendency in most legal systems to achieve the same goal: to secure for a surviving spouse the financial wherewithal to meet the burden of raising dependants. The various statutory amendments to the Roman-Dutch law of succession demonstrate clearly how the common law has gradually been changed to meet precisely this goal. See Van Warmelo "Die abintestaat erfopvolging" 1959 *THRHR* 99 and, more generally, Glendon *The new family and the new property* (1981) 239.

Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg[1]

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SUMMARY

Revised proposals for a system of preventive control of contractual freedom in South African law

The proposed system of judicial and preventive control of contractual freedom according to good faith, flowing from Project 47 of the South African Law Commission, was further refined, and published in Pietermaritzburg during July 1990. The point that the courts should be enabled by statute to perform their specific duty to control misuse of contractual freedom, was well received. The further aspect of preventive control was greeted with less enthusiasm. The decision in *Bank of Lisbon v De Ornelas* 1988 3 SA 580 (A), however, reinforced the latter argument. This also stimulated further refinement of the original proposals. They were then subjected to expert scrutiny on a symposium held during September 1991 and refined even further.

Three remaining matters are considered in this article: First, the question of how the proposals rate within the internationally accepted tripartite division of control systems into three generations, is scrutinised. Secondly, further reasons for the proposed general criterion for control, namely good faith, are provided. Thirdly, further refinements are made to the proposed system of preventive control and the guidelines for it.

First, second and third generation control systems are explained. Third generation systems require that individual disputes be handled by the courts, applying the general criterion of good faith, reinforced by an open set of guidelines. To this should be added preventive control by a body empowered to negotiate, from a position of strength, settlements and model contracts to take interim steps and advise on final steps whilst throughout receiving inputs from consumer and employer organisations, and functioning in tandem with bodies responsible for improving levels of competition in the economy and guarding against harmful business practices. Such systems exist today in most countries with whom South Africa has important trade links. This makes it most important for South Africa to introduce a full-blown third generation system such as is proposed.

Concerning judicial control, the original proposal that the general criterion be reinforced with an open set of guidelines to enhance legal certainty, is retained in order to widen the scope of application, because courts tend to restrict general criteria if left alone. If, however, this is unacceptable, the guidelines could be made applicable only to preventive control.

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1 Verwerking van 'n referaat gelewer tydens die kongres van die Vereniging van Universiteitsdosente in die Regte gehou in Pretoria op 1991-07-08.

Preventive control could, perhaps, initially be undertaken only with regard to standard contract terms. The proposed general criterion and guidelines should be applied by a subcommittee of the Harmful Business Practices Committee, to perform the special task of preventing the misuse of contractual freedom to the detriment of the other party.

Several additional arguments in favour of a general criterion in terms of *good faith* rather than *public policy*, are offered. Amongst other reasons, good faith is locally and internationally acknowledged as the term in which the ethical requirement set by public policy is expressed when public policy is considered in the contractual field. Using public policy will lead to the question who the public in public policy is. Employing *fairness* to express the general criterion would not improve matters either, because it will also have to be made specific. *Reasonableness* should also not be used as the general criterion, because it stresses generalism and stands in stark contrast to the individualistic bent of our law of contract. Good faith thus represents the collective experience of our legal culture and has been integrated into our approach to contractual relationships as well as that of comparable legal systems.

The inclusion of an adaptable, open set of guidelines is substantiated further by stressing that it is necessary for legal certainty, would enhance the possibility of settling disputes instead of litigating, would favour negotiations about model contracts and codes of conduct and in general would make enlightened self-control more easily attainable. Such guidelines would have to be applicable to all types of contract and party, although more guidelines could be qualified so that experienced people cannot misuse them.

The level of contractual justice experienced in South Africa will be greatly enhanced if a direct, judicial and preventive control system were to be introduced through legislation, without in any way endangering the many positive aspects of our legal and commercial systems.

1 INLEIDING

Die verdere verfyning van vroeëre voorstelle gerig op die bereiking van kontraktuele geregtigheid is die oogmerk met hierdie bydrae.[2] Wanneer sodanige voorstelle gemaak word terwyl veranderende omstandighede in die land meebring dat daar baie meer as voorheen oor geregtigheid gepraat en gedink word, en die voorstelle te make het met fundamentele aspekte van kontraktuele geregtigheid, kan dit kwalik anders as om kritiese belangstelling vanuit 'n wye verskeidenheid oorde te wek. Die rol van die kontrak as regsinstrument waarmee die aansprake op relatief skaars goedere, dienste en geleenthede toegewys en van die een regsgenoot na die ander verskuif kan word, is so sentraal tot die instandhouding en effektiewe funksionering van die gemeenskap en sy lede dat versigtige oorweging van die voorstelle beslis nodig is. Sonder duidelike, beginselgeoriënteerde kontrakteregtelike reëlings kan daar haas nie van 'n regsgeordende algemene gemeenskapslewe of kragtige ekonomiese lewe sprake wees nie.[3] Dit is so ongeag die tipe gemeenskapstruktuur of ekonomiese stelsel wat

2 Die oorspronklike voorstelle is vervat in vol 1 van die Hoofverslag van die werkspan vir Projek 47: *Onbillike kontraksbedinge en die rektifikasie van kontrakte*, die ondersoek wat in opdrag van die Suid-Afrikaanse Regskommissie gedoen is en op 1989-10-11 by die kommissie ingedien is. Daardie voorstelle is in 'n geringe mate verfyn in 'n referaat wat in Julie 1990 in Pietermaritzburg gelewer en gepubliseer is as Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367. Op 1990-09-25 is 'n simposium van belanghebbendes in Potchefstroom gehou waartydens die aangepaste voorstelle krities bespreek is. Nav die bespreking is die voorstelle verder aangepas in die vorm wat dit in Bylae 1 tot hierdie bydrae het (sien hieronder 80).

3 Nie-juridiese wyses waarmee mense hulle samelewing kan laat orden (soos ogv sosiale, godsdienstige en ekonomiese oorwegings) bly in hierdie bydrae buite beskouing. Hoewel nie-juridiese oorwegings prakties belangrik is, is daar nog nie genoeg regsosiologiese navorsing gedoen om dit ook by hierdie bespreking te kan betrek nie. Gras *Standaardkontrakten: een rechtssociologische analyse* (1979) en "Het standaardcontract en die verhouding recht/maatschappij" 1983 *RM Themis* 6 het hieroor begin werk.

geld. Selfs in die mees outoritêre gemeenskappe waarvan ons weet, het die kontraksinstrument nog nooit opgehou om 'n rol te speel nie; trouens, die rol daarvan het nie net voortbestaan nie maar is inderdaad steeds uitgebrei.[4] In gemeenskappe waar individuele keusevryheid 'n belangrike waarde is, is dit uiteraard des te meer die geval.[5] Samevattend kan gesê word dat die mate van spanning wat ontstaan wanneer voorstelle oor die beheer van kontrakteervryheid ter oorweging gegee word, juis aanduidend is van die sentrale plek wat die kontraksinstrument beklee. Daarmee saam toon dit duidelik hoe diep die oortuigings agter gedagtes soos individuele wilsvryheid, handelsvryheid en regsekerheid gesetel is.

Sedert 1986 is talle voordragte reeds gehou en sedert 1984 het vele publikasies die lig gesien waarin verskillende aspekte van die werk verbonde aan en die voorstelle voortspruitende uit Projek 47 bespreek is.[6] Om nou weer na al daardie aspekte terug te keer is onprakties. In hierdie bydrae word veral op drie aspekte gekonsentreer:

- Die onderhawige voorstelle word geplaas teen die agtergrond van die bekende indeling van beheerstelsels in drie generasies;
- die standpunt dat die aangewese algemene maatstaf aan die hand waarvan beheer oor kontrakteervryheid moet geskied, die goeie trou is, word verder gemotiveer; en
- die aspek van voorkomende beheer en die verdere verfyning van die voorgestelde riglyne met die oog daarop kom aan die orde.

Doelmatigheidshalwe is dit egter tog belangrik om deurgaans die hele ondersoek en aanbevelings daaruit voor oë te hou.[7] Voorheen is die volgende aspekte reeds afdoende gedek:

(a) As uitgangspunt is aanvaar dat dit ongeoorloof is as een regsgenoot sy kontrakteervryheid op so 'n wyse gebruik dat hy die teenparty se kontrakteervryheid hom geheel of gedeeltelik tot sy nadeel ontneem. Dit gaan daarby nie oor die verengde benadering tot geoorloofdheid as 'n totstandkomingsvereiste vir kontrakte nie,[8] maar oor die vereiste dat sowel die inhoud en uitvoering van kontrakte as die afhandeling van mislukte kontrakte aan die vereiste van goeie trou moet voldoen[9] – die openbare beleid oor die bereiking van kontraktuele geregtigheid vereis dit.[10]

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4 Van der Walt 1991 *THRHR* 380–383.

5 Elders is vollediger geargumenteer dat die idee van private outonomie sedert die 19de eeu grootliks oorspan is en dat dit self weer die behoefte aan beperkings op kontrakteervryheid versterk het. Hierop word nie nou weer ingegaan nie. Kyk daaroor 1991 *THRHR* 374 ev asook Van der Walt "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 658–661. Die volledige betoog is opgeneem in hfst 2 vol 1 (Hoofverslag deur CFC van der Walt) van die Projek 47-verslag (sien *supra* vn 2)).

6 'n Lys van meer as 55 voordragte en meer as 40 publikasies is opgeneem in die bylaes tot die Projek 47-verslag vol 5.

7 'n Algemene oorsig van die projek is weergegee in Van der Walt "Die Suid-Afrikaanse Regskommissie se ondersoek na die beheer oor onbillike kontraksbedinge" 1989 *Obiter* 147.

8 Sodanige verenging is maar net een van die gevolge van die oorbeklemtoning van die wilsbenadering wat sedert die 19e eeu voorkom.

9 Kyk Projek 47-verslag hfst 2.

10 Van der Walt "Enkele uitgangspunte vir 'n Suid-Afrikaanse ondersoek na beheer oor onbillike kontraksbedinge" 1989 *THRHR* 81; Van Loggerenberg "Onbillike uitsluitingsbedinge in kontrakte: 'n pleidooi vir regshervorming" 1988 *TSAR* 407.

(b) Die ekonomiese, sosiale en ander denkagtergronde van ons klassieke kontrakteregsbeginsels, massafikasie van die handelsverkeer, die standaardbedingverskynsel, veranderde mens- en gemeenskapsbeskouings, veranderde omstandighede en beskouings in Suid-Afrika, en hoe dit die kontrakteregsverkeer kan raak.[11]

(c) Die ontoereikendheid van ons gemeenregtelike en statutêre maatreëls om aan teenpartye wat die slagoffers van té verreikende kontraksbedinge is, effektiewe remedies te verskaf.[12]

(d) Die politieke en ekonomiese omgewing waarbinne enige beheerstappe kontraktuele geregtigheid in 'n nuwe Suid-Afrika moet help bevorder.[13]

(e) Rigtinggewende voorbeelde vanuit die wye regsvergelykende studie wat onderneem is.[14]

(f) Benewens die voorgaande aspekte wat breed bespreek is, is talle voordragte gelewer en gesprekke gevoer oor spesifieke knelpunte met van die mees tegniese maatreëls op besondere terreine, met belanghebbende praktisyns uit die betrokke spesialisgebiede (soos banke, versekeraars, talle vertakkinge van die bou- en konstruksiebedryf, die owerheid en openbare ondernemings ensovoorts). Die gesprekke het veral gehandel oor voorstelle ter verhoging van die mate waarin probleme opgelos kan word deur die verfyning van die uiteindelike voorstelle, en die verbetering en/of konsolidasie van bestaande wetgewing waarin reeds sekere beskerming aan teenpartye verskaf word.

(g) Die voorgestelde geregtelike beheer aan die hand van 'n algemene maatstaf (met of sonder riglyne), en voorkomende (abstrakte) beheer van 'n administratiewe aard aan die hand van daardie algemene maatstaf en riglyne, is veral oorweeg tydens 'n simposium wat op 25 September 1990 in Potchefstroom gehou is. Dit is deur 'n veertigtal deskundiges en belanghebbendes bygewoon. Die verrigtinge is getranskribeer en ontleed. Dit het tot die slotsom gelei dat slegs bogenoemde drie vrae verder behandel behoort te word.

2 FAKTORE WAT BEHEER OOR KONTRAKTEERVRYHEID IN SUID-AFRIKA NOODSAAK

Die algemene redes vir beheer oor té verreikende kontrakteervryheid geld ook hier te lande. Dit sluit in:

- Die klassieke ekonomiese uitgangspunte en mens- en gemeenskapsbeelde van die 19de eeu het plek gemaak vir ingrypend veranderde sienings van die individu,

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11 Kyk Projek 47-verslag hfst 2; 1991 *THRHR* 375 ev; Eiselen *Die beheer oor standaardbedinge, 'n regsvergelykende ondersoek* (LLD-proefskrif PU vir CHO 1988) hfst 4; "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 516.

12 Projek 47-verslag hfst 3.1; 1986 *SALJ* 646.

13 1991 *THRHR* 367.

14 Projek 47-verslag hfst 3.2 4 5 6; Eiselen *Die beheer oor standaardbedinge* 207-460; Kötz "Controlling unfair contract terms: options for legislative reform" 1986 *SALJ* 405; Van der Walt "Die beheer oor onbillike kontraksbedinge in die VSA" 1988 *De Jure* 96; "Die beheer oor onbillike kontraksbedinge in Kanada" 1987 *De Jure* 321; "Die beheer oor onbillike kontraksbedinge in Australië" 1988 *TSAR* 396 496. Meer as nege regstelsels is by die ondersoek betrek. Literatuurstudie is opgevolg deur persoonlike onderhoude met meer as 40 deskundiges in Engeland, Duitsland, Israel, Nederland, België (Raad van Europa) en Bophuthatswana.

groepe en ondernemings, die owerheid, en oor ekonomiese uitgangspunte. In Suid-Afrika is hierdie verskuiwing in grondoortuigings tans sterk in die brandpunt.[15]

- Die vraag na die uitwerking van kontraktuele bepalings op die partye en die openbare belang het gelei tot 'n hernieude besef dat die etiese element 'n onontbeerlike rol in die kontraktereg te vervul het.[16]

- Politieke, ekonomiese en maatskaplike uitdagings waarvoor Suid-Afrika te staan gekom het, maak dit dringend noodsaaklik dat opnuut na die formulering en nastrewing van kontraktuele geregtigheid gekyk word;[17] dit geld proporsioneel meer die posisie van verbruikers maar is beslis nie tot hulle beperk nie.

- Die veranderende samestelling van die ekonomiese dryfkragte en die toenemende rol van standaardkontrakte maak gepaste beheer ten minste daaroor belangrik en dringend.

Wat Suid-Afrika betref, is daar talle faktore wat ons algemene kwesbaarheid weens té verreikende kontrakteervryheid verhoog:

- Daar word in talle opsigte, danksy die skrapping van rasgebaseerde wetgewing, wat sommige deelnemers aan die handelsverkeer betref tans eintlik opnuut 'n fase "from status to contract" binnegegaan. Dit geld veral die terrein van grondtransaksies en bring talle nuwe toetreders tot die handelsverkeer, wat ook nuwe soorte kontrakte gaan insluit.

- Die informele sektor van die ekonomie word al hoe belangriker ('n groot deel van ons bruto binnelandse produk word reeds toegeskryf aan verskynsels soos SABTA, Spaza's, Stokvels ensovoorts). Deregulering help ook hier om groter klem op kontraksluiting te plaas as wat vroeër die geval was toe ons ekonomie in 'n groter mate sentraal beheer is.

- Nuut verworwe kontrakteervryheid rus in die hande van mense wat grootliks in hulle derde of vierde taal kontrakteer.

- 68% van die bevolking is ongeletterd en die breë onderwyspeil moet nog baie verhoog word.

- Verstedeliking bring nuwe behoeftes en blootstelling aan die moderne handelsverkeer na vore wat net deur die sluit van nuwe soorte kontrakte bevredig kan word.

- Tegelykertyd heers groot onkunde oor die reg en wantroue in die regsprosesse en dit word vererger deur die bekende gebrek aan toeganklikheid tot die regsprosesse vir die meeste mense.

- 'n Menseregtebedeling lê vir Suid-Afrika voor.

- Skrynende armoede kom wyd voor.

- Regstellende optrede sal lei tot stygende verwagtings en meer middele om dit te verwesenlik.

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15 Elders, tw 1991 *THRHR* 367, is reeds op aspekte hiervan ingegaan.

16 Projek 47-verslag hfst 2; Volpe "Good faith in the law of contract" (Intreerede Fort Hare 1987); Pienaar "Regsosiologie: sentimentele humanisme of nugtere realisme?" (Intreerede, Monografie H.109 PU vir CHO 1987). Kyk verder par 3 3 2 hieronder.

17 1991 *THRHR* 367. Kyk ook die uiteensetting hieronder.

- Wantroue in en agterdog teenoor die vryemarkstelsel belemmer effektiewe deelname.
- Apatiese verbruikers en die gebrek aan sterk verbruikersorganisasies vorm 'n hindernis vir effektiewe deelname aan die handelsverkeer.
- Die strawwe binnelandse handelsmededinging in sekere sektore, gepaard met die konjunktuurgevoeligheid van ons ekonomie (ook weens "ingevoerde" knelpunte) laat min ruimte vir toeskietlikheid teenoor swakker partye in die handelsverkeer.

3 DIE VOORGESTELDE BEHEERSTELSEL IN PERSPEKTIEF BESKOU

Ten einde die voorstelle in perspektief te plaas, kan gekyk word na die bekende indeling van beheerstelsels in drie generasies.[18]

3 1 Beheermaatreëls van die eerste generasie[19]

Die eerste generasie-stappe in verband met beheer oor onbillike kontraksbedinge behels gewoon dat die toepassing van die gemeenregtelike regsmiddele teen onbillike kontraksbedinge, soos dit deur die howe ontwikkel is en op individuele kontrakte toegepas word, vergemaklik word deur dit in wetgewing saam te vat. Die hoofoogmerk daarmee is verhoging van regsekerheid deur bereiking van groter eenvormigheid in regstoepassing deur die howe wanneer hulle met dispute oor individuele kontrakte gekonfronteer word.[20] Selfbeheer is in sodanige stelsels afhanklik van die spontane navolging van hofuitsprake deur kontrakopstellers.[21] Hier is dus sprake van wetgewing om die howe in staat te stel om stappe te doen wat hulle in elk geval (of moontlik nie[22]) gemeenregtelik sou kon doen.

3 2 Beheermaatreëls van die tweede generasie[23]

Die tweede generasie-stappe word gewoonlik beskou as die een of ander vorm van abstrakte (in die sin van "los van geskille in individuele kontrakte") beheer deur 'n instansie anders as 'n hof. Dit gaan dus nie oor beheer oor individuele kontrakte nie hoewel van die stappe tog onregstreeks daardie uitwerking kan hê. Sodanige beheer is tipies administratief van aard.[24] Dit steun swaar op die bereiking van onderhandelde skikkings maar met die nodige dwangmiddele om partye om die onderhandelingstafel te kry en toe te sien dat onderhandelde

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18 Hondius *Unfair terms in consumer contracts* (1987) 223 ev is die bron van inligting hieroor.
19 Hiervan is eintlik slegs dié van Italië en Spanje voorbeelde.
20 Italië het in 1942 die leiding hiermee geneem maar het daarby vasgesteek. Spanje verkeer ook nog in die eerste fase.
21 Daarvan kom in die praktyk selde veel tereg: gebrek aan publisiteit en opvolging asook die neiging tot omseiling en risiko-aanvaarding is hoofsaaklik hiervoor verantwoordelik.
22 Na aanleiding van die uitspraak in *Bank of Lisbon v De Ornelas* 1988 3 SA 580 (A).
23 Hiervan bied eintlik nog net Frankryk 'n voorbeeld.
24 Swede het hierin die leiding geneem terwyl Frankryk die enigste Europese land is wat nou nog in die tweede fase vassit. Bophuthatswana se beheerstelsel bied 'n goeie voorbeeld van hoofsaaklik tweede generasie-beheer met eienskappe van die derde generasie.

standaardbedinge, gedragskodes of modelkontrakte nageleef word.[25] Die bevoegdheid om bevele te maak om tydelik of permanent op te hou om sekere kontraksbedinge te gebruik, kom algemeen in hierdie stelsels voor.

Tweede generasie-beheer oor standaardbedinge vertoon twee kante, naamlik enersyds abstrakte, *ex post facto* optrede om onderhandelde standaardbedinge, modelkontrakte of gedragskodes te bereik, en andersyds die beskikbaarheid van 'n instansie (meestal 'n spesiale hof of tribunaal) om die onderhandelingsproses te laat vlot[26] met tussentydse stappe,[27] finale bevele asook deur arbitrasie waar die beheerliggaam en gebruikers nie skikkings kan bereik nie.[28]

Voorkomende beheer kan optrede deur 'n publiekregtelike of privaatregtelike instansie behels. Die beheer kan dan ook meer of minder burokraties of demokraties wees, selfs ongeag die tipe instansie wat dit uitvoer omdat so iets eerder van die styl van die betrokke mense as van strukture afhang.

- Waar die beheer in die hande van 'n privaatregtelike instansie geplaas word, funksioneer dit veral as ingeligte selfbeheer wat deur individuele ondernemers asook deur professionele of bedryfsliggame toegepas word. Sodanige stappe kan byvoorbeeld deur standaardbedinge/modelkontrakte, etiese kodes en dissiplinêre optrede versterk word. Hoewel van hierdie klas stappe ook met dispute in individuele gevalle te make kan hê en selfs dikwels deur klagtes voortvloeiend uit individuele gevalle geïnisieer sal word, is die oogmerk daarmee steeds abstrakte, voorkomende beheer. Die stappe wat daaruit volg, is dan ook veral gemik op ondernemings- of bedryfswye toepassing volgens neergelegde of ooreengekome standaarde van optrede. Die nodige rugsteun vir die afdwing van sodanige stappe kan bestaan in die plasing op 'n swartlys, inkorting van lidmaatskapsvoorregte, skorsing van lidmaatskap ensovoorts.
- Beheer deur 'n publiekregtelike of openbare liggaam dra dikwels die karakter van uitvoerende optrede omdat amptenare daarmee belas word.[29] Dit laat dan onmiddellik vrae ontstaan oor die verhouding tussen die owerheid en die privaatsektor. Niks verhoed egter dat sodanige beheer aan 'n statutêre liggaam wat buite die staatsdiens staan, toevertrou word nie al word dit hoofsaaklik uit die staatskas gefinansier. Aanvullende befondsing kan dan uit die privaatsektor en in 'n geringe mate deur die verkoop van dienste verkry word.[30] In

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25 Borrie "Estate agents and bankers – regulation or self-regulation?" 1990 *Current Legal Problems* 31 – 33. Let ook op die bevoegdhede van die Sakepraktykekomitee ingevolge a 9 van die Wet op Skadelike Sakepraktyke 71 van 1988.

26 Iets soos die Sakepraktykekomitee en die spesiale hof (a 13) ingevolge die Wet op Skadelike Sakepraktyke.

27 Bv ingevolge a 8(5) en 4(1)(c) van die Wet op Skadelike Sakepraktyke, soos gewysig deur Wet 64 van 1991, tov die terrein van handelspraktyke.

28 Hondius (1987) 224.

29 Hiervan is die Franse stelsel 'n voorbeeld. Ingevolge a 35 tot 38 van die *Loi sur la protection et l'information des consommateurs de produits et de services* 78 – 23 van 1978-01-10, berus die beheer by 'n *commission des clauses abusiv*, wat na oorweging van 'n geval aanbevelings aan die betrokke minister doen en wat hy dan kan opvolg. Die howe het weinig seggenskap hieroor. Sedert 1988-01-05, kragtens Wet 88-14, het verbruikersorganisasies ook *locus standi* om die howe te nader vir skrapping van kontraksbedinge uit spesifieke kontrakte, of om 'n soort kontrak of modelkontrak wat deur ondernemers aan verbruikers gebied word (inligting ontleen aan Commission of the European Communities *Proposal for a council directive on unfair terms in consumer contracts* SPC/022/89 EN – Rev 8 ORIG July 1990).

30 Hiervan is die *Verbraucherzentrale* en *Verbraucherschutzverein* in Duitsland, asook die *Office of Fair Trading* in Engeland voorbeelde.

laasgenoemde soort stelsel hou die beswaar van oormatige betrokkenheid van die staat meestal minder steek. Desondanks word administratiewe beheer ten opsigte van té verreikende kontrakteervryheid nie as 'n sukses beskou nie.[31]

Beheerstappe van die tweede generasie word dikwels aangevoor deur kwessies wat waghondliggame, soos verbruikers- of werknemersorganisasies (uit eie beweging of namens hulle individuele lede) onder die beheerinstansie se aandag bring.[32] Die bydrae wat sodanige waghondliggame kan maak, blyk reeds groter as wat verwag is.[33] Hulle het dikwels hulle eie inspektorate[34] of ander klagte-infrastruktuur, en kom hulle in die loop van hulle werksaamhede op knelpunte af, word dit ondersoek en stappe daarteen gedoen.

Beheerliggame, ongeag of hulle van 'n privaat- of publiekregtelike aard is, is dikwels ook met kwasie-regsprekende bevoegdhede toegerus waarkragtens hulle van 'n skeidsregterlike tot 'n judisiële funksie kan vervul.[35] Dink hier net aan die rol van die nywerheidshof in sekere gevalle, of die werkswyse van die Sakepraktykekomitee by die ontvang en aanhoor van vertoë ingevolge die Wet op Skadelike Sakepraktyke.

Uitvoerende stappe van die tweede generasie, byvoorbeeld ondersoeke deur die Sakepraktykekomitee, kan ook in talle gevalle volg. Ook ingesluit is tussentydse stappe om die misbruik van handelsvryheid teë te gaan, byvoorbeeld waar bemarkingsmetodes op bevel gestaak moet word, ensovoorts.[36]

Nog 'n vorm van tweede generasie-beheer is enige stelsel van goedkeuring of registrasie van standaardbedinge voordat dit gebruik word. Dit kan voorts met inkorporasie met die oog op sekere besigheid (byvoorbeeld versekering of kredietkaartbesigheid of depositoneming) gekoppel word, of andersins met lisensiëring verband hou.

'n Ernstige nadeel van tweede generasie-beheer oor kontrakteervryheid is die moeilike uitvoerbaarheid en hoë koste daarvan. Die klem wat dit plaas op die bereiking van standaardbedinge, modelkontrakte of gedragskodes en skikkings deur middel van *onderhandeling* tussen die beheerliggaam en verbruikers, gebruikers of hulle verteenwoordigende liggame, maak dit duur en omslagtig. Min verbruikersliggame het die kundigheid of middele om so iets sinvol te laat werk.[37]

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31 Hondius "The legal control of unfair contract terms in consumer contracts" in Bourgoignie (red) *Unfair terms in consumer contracts* (1983) 52.

32 Hierdie waghondrol word verder versterk indien aan sodanige liggame *locus standi* verleen word om die geregtelike beheerstelsel ook te gebruik.

33 Hondius (1987) 226 ev.

34 Die rol van ondersoekbeamptes in 'n beheerstelsel blyk duidelik uit die uitbreiding van hulle bevoegdhede ivm beheer oor skadelike sakepraktyke kragtens a 7 van die wet, ingevolge die Wysigingswet op Skadelike Sakepraktyke Wet 64 van 1991.

35 Projek 47-verslag 170 – 172.

36 Hondius (1987) 227. Die Sakepraktykekomitee se bevoegdheid om in dringende gevalle 'n staakbevel uit te reik, het die komitee ook voluit by die tweede fase gebring (kyk bv *Beeld* van 1991-07-01 9).

37 Kyk bv Hondius (1987) 224 – 225. Gesprekke met prof Deutsch (regsadviseur van die vakbondorganisasie Histradut), dr Ernst (regsadviseur van die Israel Consumer Council) en mnr Zysblat (Deputy Attorney General) in Israel, asook met Frau Hancke (Verbraucherzentrale) en Frau Heidemann (Verbraucherschutzverein) in Berlyn en dr Erkelenz (Arbeitsgemeinschaft der Verbrauchersverbände) in Bonn, het hierdie ervaring van Hondius bevestig.

3 2 1 Vergelyking van privaatregtelike en publiekregtelike beheerliggame

(a) Daar kan verwag word dat 'n openbare beheerliggaam geredeliker 'n ondersoek wat self geïnisieer is, ter tafel sal neem en deurvoer. By klagtes van individuele regsgenote sal die beheerliggaam eers oortuig moet word dat dit oor iets handel wat *in die openbare belang* aan beheer onderwerp behoort te word.[38] In hierdie opsig het 'n privaatregtelike beheerinstansie 'n voorsprong bo 'n publiekregtelike beheerliggaam.[39]

(b) Wat die beskikbaarheid van afdwingingsmeganismes betref, is 'n publiekregtelike beheerliggaam egter weer beter daaraan toe. Sodra so 'n liggaam egter oormatige klem plaas op die nastreef van onderhandelde skikkings, word enige sanksies waaroor dit mag beskik, ondergrawe.[40] Hierteenoor kan privaatregtelike liggame ook aansienlike druk uitoefen, byvoorbeeld deur die verlening van publisiteit, boikotte, die hef van ooreengekome strafbedrae op gebruikers ensovoorts.[41]

(c) Waar die privaatregtelike instansie dikwels vinniger kan optree en groter beweegruimte vir die bereiking van skikkings geniet,[42] is optrede deur 'n publiekregtelike beheerliggaam meestal langsamer en minder beweeglik. Dit is so vanweë die talle vereistes wat eers nagekom moet word. Openbare liggame tree gewoonlik terughoudend op omdat hulle noodwendig groot klem plaas op die verdeling van verantwoordelikhede wat eie is aan die burokrasie en besondere moeite moet doen om vooraf *noukeurigheid* te bereik deur wye *raadpleging van alle belanghebbendes* binne die owerheidsektor en die hele politieke spektrum, en om maksimale *sekerheid* te kry dat die gewensde resultate wel bereik sal word.

(d) Publiekregtelike beheerliggame het die neiging om steeds meer burokraties te word selfs al is deregulering en privatisering oral[43] aan die orde van die dag. Privaatregtelike liggame wat selfbeheer moet toepas, is weer geneig om toenemend knievalle voor die gebruikers van standaardbedinge te doen.[44]

3 2 2 Bestaande tweede generasie-maatreëls ten opsigte van kontrakteervryheid in Suid-Afrika

Sommige voorkomende maatreëls wat *onregstreeks* op die beperking van kontrakteervryheid neerkom, bestaan lankal hier te lande. Bekende voorbeelde hiervan is voorskrifte ten opsigte van formaliteite en voorgeskrewe of verbode bedinge in kontrakte.[45] Allerlei voorskrifte met die oog op beheer oor gesondheidsaangeleenthede, soos die neerlê van standaarde ten opsigte van sindelikheid en veiligheid, asook dié met betrekking tot handelspraktyke, soos dié

38 A 8(2) van die Wet op Skadelike Sakepraktyke bepaal dit uitdruklik.

39 Hoewel koste- en ander praktiese oorwegings (soos die beskikbaarheid van kundigheid, mannekrag, die weerbaarheid van die individuele klaer of groep waartoe die klaer behoort) ook in hierdie gevalle tot priorisering moet lei.

40 Thompson "Self-regulation in advertising – some observations from the Advertising Standards Authority" in Woodroffe (red) *Consumer law in the EEC* (1984) 59 ev.

41 Dieselfde word in Engeland bereik ingevolge die Fair Trading Act (kyk Hondius (1987) 225).

42 Vanweë allerlei redes, soos botsende persoonlikhede, politieke en ander vooroordele, kan hierdie "voordeel" dikwels hoogs teoreties wees.

43 Hier te lande en ook elders (kyk Hondius (1987) 226–227).

44 Borrie "Estate agents and bankers – regulation or self-regulation?" 1990 *Current Legal Problems* 24.

45 Dink net aan die verskillende wette mbt verhandelbare dokumente, grondtransaksies en kredietverlening.

rakende die aanvaarbaarheid, bemarking en verpakking van produkte, mates en gewigte, kan ook onregstreeks as tweede generasie-beheer ten opsigte van onbillike kontraksbedinge aangewend word. Gebeur dit, word die verskillende uitgangspunte en oogmerke van beheer oor handelspraktyke en kontrakteervryheid egter deurmekaar geroer.

3 3 Beheermaatreëls van die derde generasie

Die derde generasie-beheermaatreëls ten opsigte van té verreikende kontrakteervryheid behels regstreekse, *ex post facto* geregtelike beheer in die geval van individuele geskille,[46] asook 'n kombinasie van ander maatreëls om soveel moontlik abstrakte, voorkomende optrede op dreef te kry. Hier word die kwessie van beheer oor die strekwydte van kontrakteervryheid breed gesien en die relatiewe bydrae wat vanuit elkeen van die moontlike invalshoeke gemaak kan word, word saam met die ander opgeweeg om 'n sintese te bereik wat vir die tyd en taak die geskikste is. Dit vervul deurgaans 'n reserwefunksie naas die bestaande materiële kontrakteregsreëls.[47] Dit gaan hier dus hoegenaamd nie om 'n poging tot kodifisering van die kontraktereg of 'n onderdeel daarvan nie.

Derde generasie-beheerstelsels werk met 'n algemene maatstaf aangevul deur 'n lys of lyste[48] met voorbeelde van onaanvaarbare bedinge. Sodanige lyste word in bykans[49] al die ondersoekte stelsels gebruik. Dit is so ongeag of dit oor geregtelike kontrole, administratiewe beheer of 'n kombinasie daarvan handel.[50] Wysiging of aanvulling van riglyne kan oral plaasvind of word tans voorgestel. In 'n stelsel waar verbruikers- of werknemerliggame 'n waghondrol moet vervul, is sodanige lyste onontbeerlik.[51] Die ervaring wat reeds in Suid-Afrika opgedoen is met beheer oor skadelike sakepraktyke het geleer dat voorkomende beheer nie kan werk sonder 'n stel riglyne waaruit blyk wat die heersende beleid is en hoe dit konkreet toegepas sal word nie.[52]

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46 Dit kan aanhangig gemaak word deur individue of waghondliggame soos verbruikers- en werknemersorganisasies. 'n Inherente probleem met verbruikersorganisasies is dat hulle dikwels elitisties is, in die sin dat die belange van die uitgesproke, bevoorregte middelklas verteenwoordig word. Minderheidsgroepe of ongevormde mense bly dus steeds onverteenwoordig (kyk Beale "Unfair contracts in Britain and Europe" 1989 *Current Legal Problems* 207 212).

47 'n Voorbeeld hiervan word ook gebied deur a 19 van die Wet op Skadelike Sakepraktyke.

48 Sogenaamde grys- en/of swartlyste.

49 Slegs in die VSA, waar riglyne aanvanklik nie in die *UCC* self opgeneem is nie maar die opstellers desondanks in die Official Comments breë riglyne aangedui het, is dit aan die howe oorgelaat om self riglyne te ontwikkel. Na byna 30 jaar het hulle nou 'n stel riglyne wat vergelykbaar is met wetgewing wat elders aanvaar is (kyk 1988 *De Jure* 96). Hierdie benadering moet oorweeg word teen die agtergrond van die federale stelsel in die VSA, asook die besondere konstitusionele posisie wat die howe daar beklee. Dit kan nie sonder meer elders herhaal word met dieselfde aanvaarbare gevolge nie.

50 Riglyne is aangetref in die stelsels van Duitsland, Nederland, Engeland, Kanada, Australië, Israel, Bophuthatswana, Amerika (kyk ook die vorige vn), die Raad van Europa, België (waar voorstelle vir 'n algemene maatstaf vir beheer oor standaardbedinge nog nie eens aanvaar is nie), Denemarke, Frankryk, Italië, Luxemburg, Portugal, Spanje en Oostenryk.

51 Hondius (1987) 230.

52 Let op die Wysigingswet op Skadelike Sakepraktyke se verandering aan a 4 van die wet.

3 3 1 Die voorgestelde beheer as derde generasie-stelsel

Teen die voorgaande agtergrond kan die voorstelle wat na aanleiding van Projek 47 aan die Suid-Afrikaanse Regskommissie gemaak is as behorende tot die derde generasie beskou word.[53]

● Die eerste gedeelte van die voorstelle sluit aan by beheer van die eerste generasie. Vanuit 'n bepaalde oogpunt beskou, is dit eintlik daarop gerig om die howe in staat te stel om dit te doen waartoe hulle waarskynlik in elk geval kragtens die gemenereg bevoeg was; sodoende kan hulle die toets van die goeie trou regstreeks op alle fases van kontrakte toepas. Hierdie stappe sal hulle doen wanneer hulle individuele geskille moet bereg en daar van hulle verwag word om hulle toetsingsbevoegdheid toe te pas. Indien aan verbruikers- of werknemersorganisasies *locus standi* verleen word, sal sodanige geskille ook namens hulle lede voor die howe gebring kan word.

● Talle van die tweede generasie-stappe bestaan lank reeds hier te lande, soos reeds gesê is. Hulle en die *ad hoc*-wette waarin dit gereël is, kan met enkele wysigings net so behou word.[54] Om die kern van die probleem van beheer oor té verreikende kontrakteervryheid – en veral met betrekking tot onhoudbare standaardbedinge – beet te kry, moet egter verder gegaan word.

● Die tweede been van die aangepaste voorstelle behels dat daar 'n stelsel van abstrakte, voorkomende beheer ten opsigte van standaardbedinge[55] aan die hand van die goeie trou-maatstaf, gerig op die bereiking van kontraktuele geregtigheid, ingevoer word. Dit is veral nodig om los te kom van die beperkings inherent aan enige stelsel gerig op verbruikersbeskerming[56] teen onaanvaarbare sakepraktyke,[57] asook om beter voorkomende beheer te bewerkstellig as geregtelike beheer. Geregtelike beheer deug hoegenaamd nie ter voorkoming nie omdat daarvoor 'n konkrete dispuut nodig is, partye gesofistikeerd genoeg moet wees, genoeg vertroue in die regsweg moet hê en oor aansienlike geldelike middele moet beskik om van die litigasiemodel gebruik te maak. Nóg belangriker as al die voorgaande voorwaardes vir geregtelike beheer is natuurlik dat die howe se jurisdiksie nie van meet af ingevolge 'n arbitrasiebeding heeltemal uitgesluit moet wees nie! Die voordeel van 'n voorkomende stelsel van die derde generasie is dat dit 'n wyer uitwerking sal hê as wat in die litigasiemodel moontlik is. Dit is ook soepeler omdat dit nie so van presedente afhanklik is nie. Met selfbeheer, wat tog eintlik die ideaal is, kan ook beter gevorder word waar regstreekse abstrakte beheer geld. Dit kan ruim geleentheid bied vir privaatregtelike beheerliggame om selfstandig op te tree. Dit laat ook baie ruimte vir die onderhandeling van modelkontrakte of gedragskodes deur samewerking tussen privaatregtelike liggame onderling of tussen 'n publiekregtelike instansie en die gebruikers van onbillike standaardbedinge. Dit bied ook geleentheid vir die

53 In Bylae 2 (hieronder 82) word die voorgestelde beheerstelsel skematies weergegee.

54 Waar toepaslik word wysigings ter vereenvoudiging van bestaande wetgewing in hfst 6 van die Projek 47-verslag aan die hand gedoen.

55 Dit word voorlopig beperk tot beheer oor standaardbedinge ten einde die aanvaarbaarheid van die voorkomende beheerstappe te verhoog.

56 Vanweë die onhoudbare knyptang-effek wat dit vir die kleinhandelaar het. Kyk hieroor veral Hondius (1987) 237 ev.

57 In Bylae 3 (hieronder 82) word die bestaande beskerming van verbruikers teen skadelike sakepraktyke skematies voorgestel. Deur dit met Bylae 2 te vergelyk, kom die verskille tussen beheer oor kontrakteervryheid en beheer tov skadelike sakepraktyke duidelik na vore.

opvoeding van verbruikers en vir waghondoptrede deur verbruikers- en werknemersorganisasies. Laasgenoemde funksie kan veral versterk word indien die proses uitgebou sou word deur aan sodanige liggame *locus standi* toe te ken om die geregtelike prosedure te gebruik.

● Die samevoeging van regstreekse geregtelike en voorkomende beheer ten opsigte van té verreikende kontraksbedinge tussen alle kontrakspartye[58] sal 'n stelsel voortbring wat voluit as die derde generasie aangemerk kan word. Sodanige stelsels bestaan reeds elders[59] en kan ook hier tot stand gebring word sonder groot koste of ontwrigting.

3 3 2 Goeie trou as die voorgestelde algemene maatstaf

Daar kan nou aanvaar word:

(a) dat regstreekse beheer aan die hand van 'n algemene maatstaf moet geskied en dat so 'n maatstaf in die hande van die howe geplaas moet word; voorts dat voorkomende beheer minstens ten opsigte van standaardbedinge nodig is en dat dieselfde algemene maatstaf daarvoor moet geld;

(b) dat so 'n algemene maatstaf by wyse van wetgewing ingevoer moet word; en

(c) dat dit ten diepste hier gaan om die inhoudelike geoorloofdheid van kontraktuele bepalings en gevolglik oor die etiese aspek van kontraktuele geregtigheid.[60]

Die vraag is of die algemene maatstaf ingevolge goeie trou uitgedruk moet word, soos voorgestel word, of ingevolge byvoorbeeld die openbare belang, redelikheid, billikheid of watter ander begrip ook al. In hierdie verband word die volgende aan die hand gedoen:

(a) Goeie trou is die vorm wat die openbare belang aanneem wanneer uitdrukkings soos billikheid en redelikheid gebruik word in die konteks van kontraktuele geregtigheid.[61]

(b) In die veranderende omstandighede waarin ons ons in Suid-Afrika bevind, is goeie trou minder gekontamineer as "openbare belang/openbare beleid/public policy".

(c) Goeie trou hou direk verband met die grondslag van gesonde handelsverkeer en bepaal dus ook die minimum mate van regsekerheid daarvoor.

(d) Goeie trou is 'n element van openbare beleid en wel daardie element wat in die kontraktereg spesifiek neerslag vind. Openbare beleid is dus die omvattender begrip wat vir die kontraktereg as "goeie trou" verbesonder is. Openbare belang/beleid het baie aspekte. Toepassing van die openbare belang as algemene maatstaf lei dus maar weer tot die vraag: watter aspek van die openbare beleid staan hier voorop? Dinge soos die handhawing van mededinging,

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58 Terwyl bestaande *ad hoc*-wette waar nodig verbeter en gekonsolideer word, soos voorgestel is.

59 In Wes-Duitsland, Engeland, die VSA, Swede, Israel, Nederland en Denemarke.

60 Daar is ook talle ander aspekte van kontraktuele geregtigheid, soos die ekonomiese, fisiese en estetiese, om net enkeles te noem.

61 Hierdie siening sit agter *Tuckers Land v Hovis* 1980 1 SA 645 (A) 651. Dit word ook elders so beskou – kyk Dubbink "De redelijkheid en billijkheid volgens artikel 3:12 NBW" 1990 *WPNR* 360 waar Meijers se standpunt soos volg saamgevat word: billikheid en goeie trou was vir Meijers sinonieme, en die vereiste van billikheid by kontraktuele verhoudinge word volgens Meijers aangedui as "dit wat aan die eis van goeie trou voldoen".

beperking van misleidende reklame en verpakking, handhawing van mates en gewigte en gesondheidsvoorskrifte, uitskakeling van skadelike sakepraktyke in verbruikerstransaksies, beheer oor likiditeit en in verband daarmee verbruikerskrediet is ook almal voorbeelde van stappe wat "in die openbare belang" gedoen word. In genoemde gevalle gaan dit nie elke keer oor dieselfde aspek van die openbare belang nie. Om met die oog op beheer oor té verreikende kontrakteervryheid net te sê die algemene maatstaf is die openbare belang, kan gevolglik nie tot groter duidelikheid en regsekerheid lei nie.

(e) Om spesifiek in verband met beheer oor té verreikende kontrakteervryheid die algemene maatstaf aan te dui as "die openbare belang", kan nie aan die aard van kontrakteervryheid en die partikuliere aard van kontraktuele verhoudinge reg laat geskied nie. In beginsel is kontraktuele verhoudinge nie oop vir insae of inmenging deur iemand buiten die partye tot die kontrak nie. Om dus kontraktuele verhoudinge sonder enige verdere kwalifikasie vir oorwegings soos openbare belang oop te gooi, verskuif net die vraag. Die volgende vraag moet noodwendig wees: wat is die vereistes wat in die openbare belang aan kontraktuele afsprake gestel word? Die antwoord wat in die verlede daarop gegee is,[62] bevredig kennelik nie meer nie. Daar moes dus uitgemaak word wat verder in die openbare belang vereis word. Uit die ondersoek het geblyk dat die openbare belang in die bereiking van kontraktuele geregtigheid vereis dat in alle fases van die kontrakteverkeer aan die maatstaf van goeie trou voldoen moet word.

(f) Met die eerste oogopslag kan 'n maatstaf soos goeie trou vaag en onseker lyk. Die reëlende reg gee egter by uitstek uitdrukking aan wat as in ooreenstemming met die minimum mate van kontraktuele geregtigheid beskou word. Hierdie beginsels sal van regsweë geld waar partye nie in die uitoefening van hulle keusevryheid daarvan afgewyk het nie. Die volgende stellings kan hieroor gemaak word:

(i) Die grondslag van wat in ooreenstemming met die goeie trou is, is diep gewortel in ons reg, vas te stel uit die positiewe reg, en oorbekend.

(ii) Dit verteenwoordig die kollektiewe ervaring en regsoortuigings van ons regsgemeenskap en weerspieël dus 'n groot deel van ons regskultuur.

(iii) Dit vertoon die sterk verbande wat bestaan tussen ons regstelsel en ander regstelsels wat met dieselfde kwessies gekonfronteer word en beklemtoon die groot nut van regsvergelykende werk op hierdie terrein.

(g) Goeie trou is ook die maatstaf wat voorgestel word vir die lidstate van die Europese gemeenskap.[63] Dit geld reeds in Duitsland,[64] Spanje,[65] Portugal[66] en word in Nederlandse literatuur[67] gepropageer. Ander uitdrukkings word wel

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62 Nl dat die vereiste slegs is dat partye wilsooreenstemming moet bereik het en dat voldoen moet word aan die geykte geoorloofdheidskriteria (dat 'n kontrak of beding ongeoorloof is as die oogmerk, inhoud of uitvoering daarvan in stryd met die wettereg of gemenereg of die openbare sedes is) en die ander vereistes vir kontraktuele gebondenheid (handelingsbevoegdheid, formaliteite en moontlikheid van prestasie).

63 Kyk Commission of the European Communities *Proposal for a council directive on unfair terms in consumer contracts* SPC/022/89 EN – Rev 8 ORIG July 1990.

64 As "Treu und Glauben" ingevolge a 242 *BGB*.

65 *Ley General sobre Consumidores y Usuarios* van 1984-07-19.

66 Wet 446/85 van 1985-10-25.

67 As die kernmoment van kontraktuele geregtigheid (Verhoefen *Algemene voorwaarden getoetst* (1989).

ook gebruik (soos "onredelijk bezwarend",[68] "gröblich benachteilicht",[69] "unconscionability",[70] "unreasonable",[71] "unfair"[72] en "clauses abusiv"[73]) maar die goeie trou-maatstaf kom die meeste voor. Uit die oogpunt van die herstel van handelsbande met lidstate van die Europese Gemeenskap, en veral met die oog op die mededingendheid van ons handelsaktiwiteite oral in die wêreld waar sowel kliënt-lande as mededingers reeds sodanige beheermaatreëls aanvaar het, is dit belangrik dat ons inval by 'n beheerstelsel en die formulering van 'n algemene maatstaf wat toenemend elders geld.

(h) Tensy 'n mens heeltemal positivisties te werk wil gaan, is die voorskrifte van die reëlende reg van groot belang maar kan daar nie net met 'n verwysing na die reëlende reg volstaan word as gevra word wat in die openbare belang van kontrakterende partye verwag word nie. Die reëlende reg *volg* meestal op gemeenskapsbehoeftes en probeer dit dan bevredig deur ordening. Voordat die punt bereik word waar ordeningsmaatreëls as reëls van die positiewe reg erken word, speel dinge soos handelsgebruike en ander buite-juridiese faktore soos bedryfsetiese, sosiale en ekonomiese oorwegings reeds 'n belangrike ordenende rol. Hierdie ander faktore verloor ook nie heeltemal hulle krag nadat iets as deel van die reëlende reg erken is nie. Openbare beleid is dus wyer as net dit wat in die reëlende reg neerslag vind. Daarom kan nie net met 'n verwysing na die reëlende reg volstaan word as na die eise van die openbare beleid gevra word nie.

(i) Die blote afwyking van die reëlende reg (al word dit ook aangevul met ander oorwegings soos so pas betoog is) is nie noodwendig strydig met die goeie trou nie. 'n Groot deel van ons kontrakteervryheid beteken juis dat ons van die reëlende reg kan afwyk. Slegs afwykings van die reëlende reg wat 'n party of 'n klas kan benadeel, kan in beginsel as strydig met die goeie trou en nie bevorderlik vir kontraktuele geregtigheid nie, aangemerk word.

(j) 'n Kriterium soos *billikheid* voer die argument nie verder nie. Dit moet eers van "handvatsels" voorsien word voordat dit met die behoud van regsekerheid toegepas sal kan word.

(k) 'n Kriterium soos *redelikheid* kan nie sonder meer ten opsigte van kontrakte aangewend word nie omdat dit onvoldoende rekening hou met die individualiteit van kontraktuele verhoudinge. Anders gestel, dit is 'n vae,[74] veralgemenende maatstaf wat die kollektiwiteit beklemtoon terwyl dit in die kontrakteverkeer nie soseer oor die deursnee kontraktant gaan nie, maar daaroor dat elke individuele deelnemer aan die kontrakteverkeer daarop moet kan staatmaak dat hy sy kontrakteervryheid sal kan uitoefen binne 'n sisteem wat die bereiking van kontraktuele geregtigheid moontlik maak en bevorder.

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68 Nederland: a 6.5.2A sub A *NBW*.
69 Oostenryk se *Konsumentenschutzgesetz* van 1979-03-08.
70 Amerika se *UCC* 2–302.
71 In die Britse *UCTA* 1977 en Noorweegse Wet 90 van 1981-12-18.
72 Luxemburg se *Burgerlike Wetboek* a 1135–1; die *Contracts Review Act* 1980 (NSW); asook Italië, waar so voorgestel is vir a 1341/2 van die *Codico Civile*.
73 Volgens die Franse Wet 78-23 van 1987-01-10.
74 So word dit ook in Engeland ervaar (kyk Beale "Unfair Contracts in Britain and Europe" 1989 *Current Legal Problems* 197).

(l) Deur die algemene maatstaf ingevolge die goeie trou te formuleer, word die onderhawige probleem duidelik: té verreikende kontrakteervryheid van een party loop daarop uit dat die teenparty sy kontrakteervryheid geheel of gedeeltelik ontneem word. Dit gaan dus oor beheer ten opsigte van die onderlinge verhouding van kontrakspartye. Dit is dus 'n baie spesifieke wanverhouding tussen die relatiewe kontrakteervryheid tussen die partye wat aan die hand van die algemene maatstaf in die lig van al die omstandighede aan beheer onderwerp moet word. Die toetssteen om te bepaal of 'n werklike ongelykheid in bedingingsmag[75] houdbaar is of nie, is om te toon dat daardie feitelike ongelykheid tot benadelende bedinge gelei het wat die eis van goeie trou geweld aandoen.

Die slotsom waartoe die voorgaande lei, is dat die goeie trou die geskikste grondslag vir 'n algemene maatstaf vir beheer oor té verreikende kontrakteervryheid daarstel.

3 3 3 Verfyning van die riglyne

Oor die wenslikheid, toepassingsveld en inhoud van riglyne word die volgende ter oorweging gegee:

(a) Ter wille van regsekerheid is riglyne onontbeerlik. Indien dit onaanvaarbaar sou wees om riglyne neer te lê met die oog op geregtelike beheer oor alle kontraksbedinge, moet dit minstens geskied met die oog op die voorgestelde abstrakte, voorkomende beheer oor standaardbedinge. Sodanige riglyne sal selfbeheer, onderhandelings oor die oplos van probleme, gedragskodes en modelkontrakte as dele van die antwoord op die behoefte aan groter kontraktuele geregtigheid grootliks aanhelp.

(b) Deur die riglyne uitdruklik slegs met die oog op voorkomende beheer oor standaardbedinge neer te lê, word enige besware teen moontlike ongewensde resultate van die oplê van 'n bewyslas as 'n sekere beding in 'n kontrak voorkom, ondervang.

(c) Riglyne moet in 'n ope lys opgeneem word ter omlyning van bedinge wat, as dit 'n teenparty tot nadeel kan strek, strydig met die goeie trou sal wees. Die lys moet aangepas kan word by veranderende omstandighede.

(d) Indien dit al is wat tans haalbaar is, moet riglyne voorlopig net op standaardbedinge van toepassing gemaak word. In so 'n geval sal 'n woordbepaling ingevoeg moet word. Dit kan soos volg lui:[76] "*Standaardbedinge: Skriftelike bedinge wat opgestel is met die oog daarop om dit in 'n aantal kontrakte op te neem.*"

(e) Riglyne moet tot die beskikking van alle deelnemers aan die handelsverkeer wees ten einde die knyptangeffek[77] te voorkom, maar van verbruikers moet nie dieselfde mate van ervaring en insig verwag word as van handelslui of professionele mense nie. Meer van die voorgestelde riglyne sou in ooreenstemming hiermee gekwalifiseer kon word.

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75 Wat 'n alledaagse feit is en aanvaar moet word.

76 Hierdie omskrywing stem grootliks ooreen met die omskrywing in a 6.5.2A.1 *NBW*.

77 Dit is waar die kleinhandelaar in sy kontraktuele verhoudinge met eindverbruikers aan beheer onderworpe is, maar die groothandelaars en vervaardigers nie aan dieselfde vereistes hoef te voldoen nie. Om hierdie rede is die benadering wat riglyne slegs tot die beskikking van verbruikers wil stel (kyk bv Van Ommeren "Rechterlijke toetsing van algemene voorwaarden van de overheid" 1990 *NJB* 134), nie aantreklik nie.

(f) Riglyne moet uitgebrei en aangepas kan word namate die ervaring van die instansie belas met voorkomende beheer toeneem en privaatregtelike liggame se ervaring met selfbeheer ook vermeerder.

Wanneer 'n regstreekse geregtelike en voorkomende beheerstelsel soos voorgestel ingevoer word, sal kontraktuele geregtigheid makliker binne bereik kom sonder dat afgedoen word aan die baie positiewe kenmerke van ons regs- en handelsverkeer.

BYLAE 1

Konsepwetsontwerp op die Beheer van Kontraksbedinge, 1991

1 Geregtelike beheer

'n Hof kan enige kontrak, of beding in 'n kontrak,

(a) wat ontstaan het in omstandighede wat, of

(b) wat 'n vorm, inhoud of strekking het wat, of

(c) die uitvoering of afdwinging waarvan,

in die lig van al die omstandighede meebring dat dit in stryd met die handhawing van goeie trou is,

(d) geheel of gedeeltelik nietig verklaar, of

(e) dit voor die afdwinging daarvan so wysig, of

(f) enige ander bevel maak wat nodig is,

om te voorkom dat enige kontraksparty daardeur benadeel word.

2 Voorkomende beheer

2(1) Die Subkomitee oor Standaardbedinge, ingestel ingevolge artikel 3 en beklee met die bevoegdhede bedoel in artikel 2(3) tot 2(8) en artikels 5 tot 11 van die Wet op Skadelike Sakepraktyke, 71 van 1988, oefen beheer oor standaardbedinge uit vir sover dit blyk dat sodanige standaardbedinge, indien dit in kontrakte opgeneem sou word, nie aan die vereiste van goeie trou bedoel in artikel 1 voldoen nie.

2(2) "Standaardbedinge" is skriftelike bedinge wat opgestel is met die bedoeling om dit in 'n aantal kontrakte op te neem.

2(3) By die toepassing van die algemene maatstaf ingevolge artikel 1, moet die volgende riglyne[1] neergelê deur die Subkomitee oor Standaardbedinge toegepas word, met dien verstande dat hierdie riglyne slegs in ag geneem hoef te word vir sover hulle in die betrokke geval relevant is, en verder met dien verstande dat geen hof by die toepassing van die Wet tot sodanige riglyne beperk is nie:[2]

(i) of die betrokke goedere of dienste elders verkry sou kon word sonder die beding waarteen beswaar gemaak word, tensy die kontrak in die loop van albei partye se professionele of handelsaktiwiteite gesluit word;

(ii) of ingevolge die beding eensydige beperkings op die verhaalsreg van 'n teenparty ten opsigte van skadevergoeding vir gevolgskade of vir persoonlike beserings geplaas word tensy die kontrak in die loop van albei partye se professionele of handelsaktiwiteite gesluit word;

(iii) of daar Latynse uitdrukkings in die beding voorkom, of dit andersins onredelik moeilik lees- of verstaanbaar is, tensy die kontrak in die loop van albei partye se professionele of handelsaktiwiteite gesluit word;

(iv) of die beding die geldende regsposisie eensydig of misleidend stel, tensy die kontrak in die loop van albei partye se professionele of handelsaktiwiteite gesluit word;

(v) of aan die gebruiker die bevoegdheid verleen word om 'n wesenlik ander prestasie as waarop ooreengekom is te lewer sonder dat 'n teenparty in so 'n geval die kontrak kan kanselleer, met teruggawe van wat reeds gepresteer is, sonder om enige bykomende verpligting op te doen;

(vi) of benadelende tydsbeperkings 'n teenparty opgelê word;

(vii) of die beding 'n nadelige verplasing van die normale handelsrisiko na 'n teenparty sal teweegbring;

(viii) of die beding oormatig moeilik is om na te kom, of nie redelikerwys nodig is om die gebruiker te beskerm nie;

(ix) of daar 'n gebrek aan wederkerigheid in 'n andersins wederkerige kontrak is;

(x) of 'n teenparty se bevoegdheid om bewys te lewer van enige aangeleentheid wat in verband met die kontrak of die uitvoering daarvan nodig mag wees, uitgesluit of beperk word; of die normale ligging van die bewyslas tot nadeel van die teenparty gewysig word;

(xi) of die beding bepaal dat 'n teenparty *geag* sal word 'n verklaring tot sy nadeel te gemaak het, of nie te gemaak het nie, indien hy iets doen of nalaat, tensy

(a) aan hom 'n gepaste tyd vir die maak van 'n uitdruklike verklaring daaroor gebied word, en

(b) die gebruiker onderneem om 'n teenparty se aandag by die aanvang van die termyn te vestig op die betekenis wat aan sy gedrag geheg sal word;

(xii) of die beding bepaal dat 'n verklaring deur die gebruiker, wat vir 'n teenparty van besondere belang is, *geag* sal word die teenparty te bereik het, tensy so 'n verklaring per voorafbetaalde, geregistreerde pos aan die gebruiker se gekose adres versend is;

(xiii) of die beding bepaal dat 'n teenparty sy bevoegdheid om nakoming te eis, in enige omstandighede geheel en onvoorwaardelik sal verbeur;

(xiv) of 'n teenparty se weerhoudingsreg weggeneem of beperk word;

(xv) of die gebruiker self die beoordelaar gemaak word van die deugdelikheid van sy eie prestasie; of 'n teenparty verplig word om eers 'n derde aan te spreek voordat hy teen die gebruiker sal kan optree;

(xvi) of die beding regstreeks of onregstreeks neerkom op die afstanddoening of beperking van 'n teenparty se bevoegdheid om skuldvergelyking toe te pas;

(xvii) of die gebruiker andersins tot nadeel van 'n teenparty in 'n posisie geplaas word wat wesenlik beter sal wees as die posisie waarin die gebruiker ingevolge die reëlende reg sou gewees het as dit nie vir die betrokke beding was nie.

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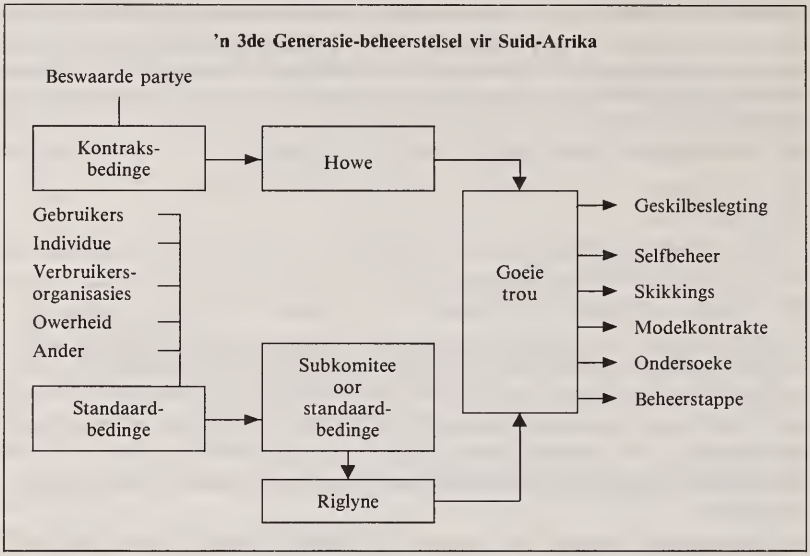
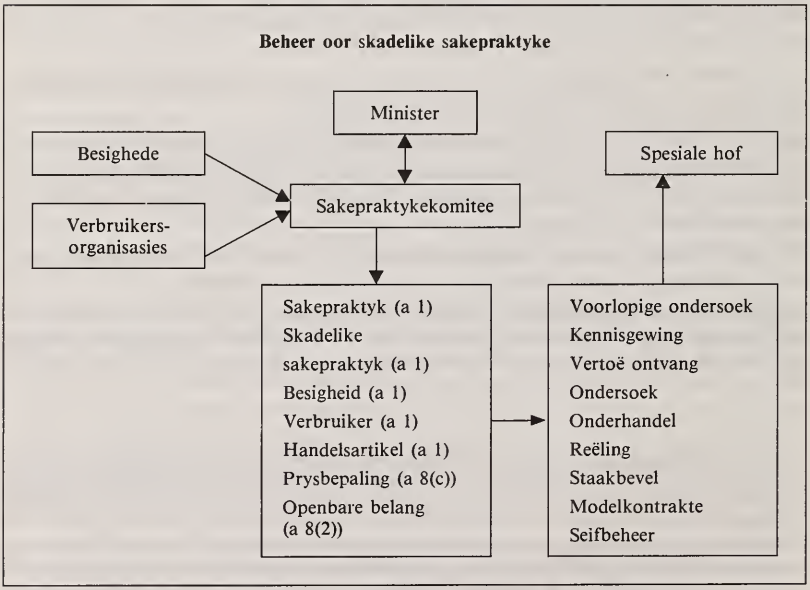
1 'n Vergelyking met die vorige voorstelle sal toon dat alle riglyne wat met formele aspekte van kontraksluiting te make het, nou weggelaat word. Dit beteken dat volstaan word met daardie riglyne wat 'n waardeoordeel impliseer – dws die riglyne wat met materiële aspekte te make het.

2 Riglyne vir beheer deur die Subkomitee oor Standaardbedinge kan in die wetgewing opgeneem word, maar dit kan ook aan die Subkomitee opgedra word om riglyne bekend te stel. Die voordeel van lg is groter soepelheid; die nadeel is verminderde bekendheid. Lg weg word voorgestel. Sodoende word die afkeer van riglyne in wetgewing vermy. Deur die vorige voorstel van 'n bewysvermoede nou weg te laat, word met die normale ligging van die bewyslas volstaan – wie dus beweer dat 'n beding vir beheer vatbaar is, sal dit moet aanvoer en bewys.

BYLAE 2



BYLAE 3



A perspective on abortion legislation in South Africa's bill of rights era

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OPSOMMING

'n Perspektief oor aborsiewetgewing teen die agtergrond van 'n Suid-Afrikaanse menseregtehandves

Straks 500 000 Suid-Afrikaanse vroue ondergaan jaarliks 'n aborsie. Baie min van hulle kry dit egter op 'n wettige en veilige manier. Meeste word gedwing tot gevaarlike agterstraat-aborsies. Sosio-ekonomiese faktore speel 'n deurslaggewende rol by die bepaling van watter vroue die moeilike prosedures deurloop wat deur die Wet op Vrugafdrywing en Sterilisasie voorgeskryf word.

Die debat oor aborsie moet tred hou met ontwikkelinge in Suid-Afrika en elders. Internasionaal word beweeg in die rigting van wettiging – soseer dat ongeveer 40% van die wêreldbevolking nou toegang tot aborsie op aanvraag het.

Daar bestaan oortuigende argumente vir die toelating van aborsie tot met die twintigste week van swangerskap. Hulle is hoofsaaklik gebaseer op die teorieë van breingeboorte en lewensvatbaarheid.

Die mens se intelligensie onderskei hom van diere; daarom behoort breingeboorte of die aanvang van vroeë kortikale breinaktiwiteit bepalend te wees vir die vraag wanneer lewe begin. Vir die funksionering van die brein is die ontwikkeling van selle, waar denke, emosie en bewustheid voorkom, noodsaaklik.

Lewensvatbaarheid, oftewel die tydstip wanneer die fetus onafhanklik buite die baarmoeder kan bestaan, word op twintig weke gestel (hierdie standpunt verskaf ook aan vroue 'n redelike keusetydperk, en sluit by die breingeboorteteorie aan). Voor lewensvatbaarheid kan die fetale organe nie onafhanklik, of selfs met hulp, funksioneer nie: die longe is nie in staat tot enige tipe asemhaling nie – nie eers met ondersteuning nie – en die respiratoriese netwerk, die niere en die immuniteitstelsels het nog nie ontwikkel nie.

Die toekoms van aborsie in Suid-Afrika word ondersoek in die lig van voorstelle om dit in 'n menseregtehandves te reël. Hierdie voorstelle word vergelyk met internasionale dokumente wat soortgelyke bepalings bevat. 'n Aborsieklousule word ten slotte in hierdie verband aan die hand gedoen.

INTRODUCTION

South Africa already has abortion on request. This is borne out by the fact that every year between 100 000 and 500 000[1] women have an abortion in this country.[2] Of these, legal abortions account for less than one per cent of the

1 Greathead, Director of Planned Parenthood Association of South Africa, reported in *South* 1990-12-13 to 1990-12-17.

2 See Sarkin-Hughes "Choice and informed request: the answer to abortion" 1990 *Stell LR* 372 where somewhere in the region of 250 000 is suggested.

total number. In fact the number of legal abortions for the year July 1989 to June 1990 was 868, down from the 963 of the previous year. However, the number of reported "operations for removal of residues of pregnancy", which are largely performed as an alternative means to achieve an abortion[3] was 38 020, three thousand higher than for the corresponding period during 1989/90.[4] Nevertheless, the actual number of these operations is far higher than the official 38 020, as many health care workers ignore the laborious reporting mechanisms[5] demanded by the Abortion and Sterilization Act.[6]

The effects of restrictive abortion legislation on the lives of women are far-reaching and destructive. In South Africa a high number of illegal abortions result in death or serious complications.[7] Backstreet abortions and the continuation of unwanted pregnancies in a context often devoid of pre-natal care are therefore causing irreparable harm to women's health. The damaging effects of poor health and unplanned children upon women's employment undermines their attempts to establish economic stability for existing family structures.

Pregnancy, planned or unplanned, often places rigid restrictions on women's employment opportunities, impeding their capacity to support their families. The financial burdens are disproportionately detrimental for poor women, who in South Africa are primarily black women,[8] the most oppressed group in our fundamentally patriarchal and racially discriminatory society. The relative position of black women is one of severe oppression and poverty. Many of these women are the sole sources of income for their families. Pregnancy often results in a loss of employment,[9] and if a woman is lucky enough to keep her job or find a new one, day-care is a financial drain.

For those women who carry their pregnancies to term, a 1985 study conducted in the Western Cape shows that 30% of mothers are aged 19 or younger, with 5% being under 16.[10] Other studies show that South African teenage mothers are more likely to give birth prematurely and have insufficient antenatal support.[11]

Of concern is the alarming illegitimacy rates that average 67% for black mothers, 81,6% for coloured mothers and 20% for white mothers.[12] Another study shows that in Cape Town and the Ciskei, 49% of black women had been pregnant by the age of 20.[13]

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3 Nash "Teenage pregnancy – need a child bear a child?" 1990 *SAMJ* 148.
4 Statistics from the reports of the Department of Health and Population Development.
5 Reported in the June 1991 letter from the South African Society of Obstetricians and Gynaecologists to its members.
6 Act 2 of 1975.
7 Richards, Lachman, Pitsoe and Moodley "The incidence of major abdominal surgery after septic abortion – an indication of complications due to illegal abortions" 1985 *SAMJ* 799.
8 The ANC Women's League pointed out in the *Sunday Times* of 1991-04-14 that the law currently discriminates against black women as they have little access to private doctors who can help them through the rigid procedures mandated by the act.
9 Cock, Emdon and Klugman *Child care and the working mother: a sociological investigation of a sample of urban African women in South Africa* (1983) 45–48.
10 De Villiers "Tienderjarige swangerskappe in die Paarl Hospitaal" 1967 *SAMJ* 301.
11 Nash 1990 *SAMJ* 148.
12 De Villiers 1967 *SAMJ* 301–302.
13 Roberts and Rip "Black fertility patterns in Cape Town and Ciskei" 1985 *SAMJ* 481.

POPULATION ISSUES

South Africa's population growth is a problem that the government has attempted to deal with for a number of decades with little success. It is believed that the country has the resources to accommodate about 80 million people, a figure which will be reached before the year 2020.[14]

After conducting a study of 116 countries, Mumford and Kessel[15] believe that no nation wishing to solve its population problems can do so without abortion. In the South African context, Woodrow,[16] examining the state of family planning, asserts that "there should be no question about whether [abortion] is right or wrong" while Spilhaus[17] asserts that no family planning programme has succeeded anywhere in the world without it.

Access to abortion is one of the most controversial issues humanity has had to deal with. In the United States, for example, it has become the leading electoral issue for the legislatures and the judiciary. Abortion philosophies range from that which is premised on the fact that life begins at the instant of conception to that which postulates that life does not commence until live birth has been achieved.[18]

RELIGIOUS VIEWS

The religions, as well, are far from uniform in their belief as to when life starts and should be protected. The view of the Catholic Church, known as the major protagonist of the right to life perspective, is that life begins at conception,[19] whereas a major Protestant[20] and Jewish view[21] is that life begins with live birth. Roman law also reflected the view that life only begins when live birth is completed[22] and it was only in the early Christian era and under Justinian that there was a move to criminalise abortion. It is, however, between these antitheses that the solution must lie.[23]

THE INTERNATIONAL CONTEXT

Important to the debate is the increased realisation, during the second half of the twentieth century in societies the world over, of the medical, social and economic repercussions of unwanted pregnancy and illegal abortion, and growing pressure by women to be acknowledged as competent and responsible for making

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14 Department of National Health and Population Development report in 1990 *SA Family Practice* 66.
15 "Is wide availability of abortion essential to national growth control and programmes? Experiences of 116 countries" 1984 *American Journal of Obstetrics and Gynaecology* 639.
16 "Family planning in South Africa" 1976 *SAMJ* 2103.
17 "The inter-uterine device in Soweto and other townships" 1974 *SAMJ* 1305.
18 Lupton "The legal status of the embryo" 1988 *Acta Juridica* 204.
19 Fortin "Legal protection for the unborn child" 1988 *Mod LR* 56.
20 Robertson "Ethical and legal issues in cryopreservation of human embryos" 1987 *Fertility and Sterility* 371 fn 13.
21 Feldman *Birth control in Jewish law* (1968) 251 – 294 and Hoffman "Political theology: the role of organised religion in the anti-abortion debate" 1986 *Journal of Church and State* 225.
22 Lupton 1988 *Acta Juridica* 205.
23 *Idem* 204.

decisions about their own lives and bodies. This has motivated a worldwide movement towards abortion reform. The last twenty years have seen more than fifty countries liberalising their abortion laws, a trend which included at least fourteen countries in the last five years[24] following this pattern, while only four[25] have restricted access. At present between twenty-six and thirty-five million legal abortions are performed annually, while illegal abortions account for between ten and twenty-two million, giving a total world-wide annual figure of somewhere in the range of thirty-six to fifty-three million abortions.[26]

Today, at least 40% of the world's population lives in countries where abortion on request is permitted, either because the law is so stated or because the laws condone a very wide and progressive view on circumstances that may give rise to an abortion. Less than 25% of the world's people live in countries where abortion is only permitted to save the life of the mother.[27] Significantly, in countries where the law has been liberalised, there has been a dramatic decrease in morbidity and mortality as a result of pregnancy termination[28] and in developed countries illegal, backstreet abortions have largely disappeared.[29] This pattern has not been mirrored in less developed countries as geographical factors and a lack of information often limit access to legal abortions, especially where there is a shortage of medical facilities.[30]

In South Africa we must look toward more realistic and relevant legislation in this area, in order to address the needs of as wide a cross-section of our varied population as possible. With this in mind, there are persuasive arguments for permitting abortion on request until the twentieth week of pregnancy. This is premised on women's rights and the theories of brain birth and viability.[31]

WOMEN'S RIGHTS

Recognising that a variety of attitudes exists in South Africa, it must be a woman's right, within limits, personally to assess the appropriateness of assuming the risks and burdens of having a child. The nature of conception, physical health, the relative danger of having an abortion, religious and societal pressure, financial situation and many other factors will influence a woman's decision whether to carry a pregnancy to term. This decision is one for which all women experience an "inescapable sense of deep responsibility", regardless of whether the circumstances are legal and safe or fraught with imminent danger.[32] The moral reasoning in each situation is unique, and similar levels in the maturity

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24 Belgium, Bulgaria, Czechoslovakia, Cape Verde, Canada, Cyprus, French Polynesia, Greece, Hungary, Liechtenstein, Malaysia, Rumania, Vietnam and the USSR.
25 Chile, Philippines, Japan and the United States.
26 Henshaw "Induced abortion: a world review" 1990 *International Family Planning* 64.
27 Tietze and Henshaw *Induced abortion: a world review* (1986); Dourlen-Rollier "Family planning and the law" 1989 *World Health* 8.
28 Grimes, Flock, Schultz and Catz "Hysterectomy as treatment for complications of legal abortions" 1984 *Obstetrics and Gynaecology* 462.
29 Henshaw 1990 *International Family Planning* 63.
30 India, Bangladesh, Ghana and Togo (see Henshaw *idem* 59).
31 See Sarkin-Hughes 1990 *Stell LR* 372.
32 Rothman *The tentative pregnancy* (1987) 182.

of the reasoning will result in decisions both for and against having an abortion.[33] Access has to be protected and the rights of individuals to make personal choices cannot be restricted and prohibited by others with different moral values and beliefs.

The rights of the woman and the rights of the foetus do conflict in this, one of the most controversial areas of rights, and the law as a mechanism of social engineering can serve a valuable function in harmonising and balancing competing interests. Where there are competing interests, as there are here, a balance has to be struck. The right-to-life view which confers all rights on the foetus and none on the mother, has to be balanced against the opposite view to ensure that the interest of the woman is also safeguarded. South Africa's abortion laws have until now demonstrated a preference for the rights of the foetus above that of the woman.

Denying women moral independence as decision-makers affects the physical, social, financial and psychological position of women far more than it significantly affects the number of women choosing to have an abortion. This results in a perpetuation of stereotypes of obligation and predefined roles which target women for repression of bodily freedom and autonomy that is unthinkable for others in society.[34] This type of repression arises from perceived threats to traditional value structures and gender-based roles which define the acceptable female identity in terms of passivity, dependence and submissiveness.[35] However, despite the fact that not every woman's decision will be in accordance with another's individual sense of morality, society's interest must be only an advisory one. Otherwise, we shall be left with the dangerous and oppressive situation of the state imposing a preconceived moral stance, which has been created in part from stereotypes of women's intellectual and psychological incapabilities. The state's past intransigence in determining and taking into account community feeling must not survive into a new dispensation. A true democracy has to mean that the group most affected by a particular decision is, in fact, part of the decision-making process: their will has clearly to outweigh that of any other group when any practice which affects that group is devised and executed.

State interest in the protection of life is nevertheless appropriate and laudable. This may, however, be pursued by other less prohibitive and more elective methods which should be used instead of infringing upon a pregnant woman's civil rights. Government can pursue family planning policies far more decisively and devoid of the political bias which haunted such family planning schemes in the past, to ensure that women become pregnant when they choose. Contraception and sex education must be made available to women and girls. The state should also support the bearing of children by ensuring that starvation, malnutrition, exposure, disease, violence and abuse are not features of the lives of many children.

A full-service approach to women's physical and psychological well-being must be implemented in conjunction with an option to abort on request. A short but

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33 Hyde *Half the human experience* (1985) 73 – 75.
34 Organizations committed to women's equality 1989 *Women's Rights Law Reporter* 267.
35 Coleman "The politics of abortion in Australia: freedom, church and state" 1988 *Feminist R* 88.

reasonable waiting period for the purposes of education and counselling must be offered in conjunction with a policy of abortion on request. The desperate lack of widespread family planning in South Africa,[36] inclusive of alternatives to abortion, and hopelessly inadequate sex education, undeniably necessitates such a waiting period, in order to ensure against an uninformed and rash decision. A suggested period of 48 hours would allow for the dispensing of information (via a variety of medias in consideration of the different languages and high illiteracy rates) and sensitive counselling without unnecessarily prolonging the difficult choice.[37] This will help to ensure that women are sufficiently prepared to make individually, morally correct decisions. Such a requirement is found in at least thirteen countries which mandate that non-directive counselling be provided to women seeking abortion.[38]

BRAIN BIRTH

Brain death is generally recognised as indicative of the end of life[39] and one should therefore ask whether brain birth should also not be determinative of when life begins.[40] This is premised on the notion that it is intelligence that distinguishes humans from other animals, and brain birth (or brain activity) is relevant in determining when life begins. For the brain to operate as a functioning organ, neocortal activity is critical since the neocortex cells must be developed for thought, emotion, and consciousness to occur. It is at around twenty four weeks that dendritic spines essential for brain circuitry suddenly appear.[41] Simultaneously, large-scale neural connections between brain cells in the neocortex occur which begin in limited amounts from the nineteenth week onwards. While there might be some involuntary limb movement from some time earlier, it is only at 22 weeks that the development of thalomocortical connections, which are prerequisites for neocortical reception of bodily sensation, occurs.[42] The twenty second week is therefore an important period from a brain birth perspective.

VIABILITY

It is crucial to evaluate the concept of viability *in tandem* with that of brain birth. Viability has been criticised as a criterion, on the ground that the point

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36 Richards, Lachman, Pitsoe and Moodley 1985 *SAMJ* 799.

37 See Sarkin-Hughes 1990 *Stell LR* 384.

38 Cook and Dickens "A decade of international changes in abortion laws: 1967-1977" 1978 *American Journal of Public Health* 637; "International developments in abortion laws: 1977-1988" 1988 *American Journal of Public Health* 1305.

39 Lupton 1988 *Acta Juridica* 209 citing Lockwood (ed) *Modern dilemmas in modern medicine* (1985) 11; Goldenring "Development of the fetal brain" 1982 *New England Journal of Medicine* 307 564.

40 Lupton *idem* 210; Sarkin-Hughes 1990 *Stell LR* 372.

41 Pupura "Morphogenesis of visual cortex in the preterm infant" in Brazier (ed) *Growth and development of the brain* (1975) 33.

42 Kostovic and Goldman-Raikie "Transient cholinesterase staining in the mediodorsal nucleus of the thalmus and its connections in the developing human and monkey brain" 1983 *Journal of Comparative Neurology* 431.

of viability is not stationary and continues to shift as technology develops.[43] This is a false premise as the earliest point of viability is exactly where it has always been, namely at 22 weeks.[44] While there have been advances in medical science which have been perceived as pushing the viability line further back, what has occurred is that the incidence of survival of foetuses born after viability has increased over the years.[45] No actual change to the viability threshold has occurred. Today additional aid can be given to these 22-week-old infants but in foetuses that are younger than this the organs have not developed sufficiently; so whatever aid, however technologically advanced, is given it will not assist the foetus to survive.[46]

Oxygen is essential for life to be sustained and for oxygen to enter the bloodstream there must be a network of interfaces between the air spaces in the lung and the blood vessels of the lung. In addition, there has to be a barrier of tissue separating the red blood cells from the air spaces.[47] In the pre-viability foetus the network has not evolved sufficiently, nor is the barrier thin enough to allow oxygenation of the blood to take place.[48] As the air sacs in the lungs are not sufficiently developed they will not operate even with the most sophisticated and advanced technology.

What is crucial is that at this stage the brain, lungs and kidneys have not developed sufficiently to allow these organs to perform their usual functions.[49] Unless these organs are functioning, life cannot be sustained even with aid. Additionally, the immune system has not reached a sufficiently developed stage and therefore complications will ensue.

The development of an artificial womb has been suggested as the invention that will rid us of the viability argument; however, at this stage the process of developing such a womb is not even understood.[50] We are therefore far from the actual development of any artificial womb. Even if it were to become a reality, this would not be of great significance as the viability point would remain, whether the foetus is accommodated in a real womb or an artificial one.

A reason for setting the cut-off point at 20 rather than 22 weeks is that estimates of gestational age have an approximate two-week margin of error[51] and hospitals and doctors in the United States adopt a cut-off date earlier than the accepted viability period to ensure accuracy.[52] An additional factor is that

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43 Justice O'Connor in *Akron v Akron Center for Reproductive Health* 462 US 416 (1983) in her dissenting judgment, held that trimesters in abortion were no longer workable and that the system was on "a collision course with itself".

44 Sarkin-Hughes 1990 *Stell LR* 380.

45 Pleasure, Dhand and Kaur "What is the lower limit of viability?" 1984 *American Journal of Diseases of Children* 783; Abbassi, Bhutani and Bowen "Improved survival and short-term outcome of unborn 'micropremises'" 1986 *Clinical Paediatrics* 393.

46 New York State Task Force on Life and the Law *Fetal extrauterine survivability* 12.

47 West *Respiratory physiology – the essentials* (1985) 21 – 22.

48 Sadler *Langman's medical embryology* (1985) 218 – 229; Whittle "Lung maturation" 1984 *Clinical Gynaecology* 354.

49 New York State Task Force 10.

50 Holmes "Morphological and physiological maturation of the brain in the neonate and young child" 1986 *Journal of Clinical Neurophysiology* 207 – 238.

51 King "The status of the fetus: a proposal for juridical legal protection of the unborn" 1979 *Mich LR* 1678.

52 Rhoden "Trimesters and technology: revamping Roe v Wade" 1986 *Yale LR* 641 662.

foetal defects can only be detected through amniocentesis which can be performed only after the 20th week.[53]

It is therefore within this context that the argument for drawing the line for abortion on request at 20 weeks is put forward. After this period the state can act to protect the potential of life in terms of the brain birth theory and the viability point linked to the maturity of organs.

SAFETY OF ABORTION

In many countries abortion has been sanctioned during the first twelve weeks on the basis of the *Roe v Wade* trimester system that considers the procedure safe during this period. The argument has been that abortions are not safe after this, but studies now indicate that abortion is safe at least all the way through the twentieth week and may be safely done by dilation (whether manually or by induced contraction) and by evacuation (rather than surgery).[54] In fact, many studies find that an abortion is about 25 times less likely to result in death than carrying a pregnancy to term.[55]

OPINIONS AND ATTITUDES

Before the promulgation of the present, very conservative act, a parliamentary commission of inquiry, composed exclusively of middle-aged white males, was appointed.[56] A parliamentary inquiry should, however, be held to gauge the true feelings of the populace as a whole. The appointment of such a commission of inquiry has been requested repeatedly but unsuccessfully both in and outside parliament. The then Minister of Health, who chaired the earlier commission, stated in 1983 and had repeated subsequently, that such a commission would serve no purpose as the act was working well. He quoted the South African Society of Obstetricians and Gynaecologists as having been satisfied with the act at the time the act was passed. But in fact, of the obstetricians and gynaecologists surveyed by Dommisse[57] in 1980, 82% favoured changes to the act, while 32% favoured abortion on request. This survey was repeated in 1990: the results show that 85% believed that the present act ought to be changed and 40% supported abortion on request.[58] Attitudes to abortion in South Africa have in the past generally been perceived to reflect the conservatism apparent in the legislature and the churches. Most studies which reflect a negative view regarding the revision of the abortion law have, however, been done solely among white people, while trends in the country as a whole seem to reflect a more positive attitude towards permissive legislation.[59]

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53 *Idem* 642.
54 Lilford and Johnsen "Surgical abortion at twenty weeks: Is morality determined solely by outcome?" 1989 *Journal of Medical Ethics* 85; Hyde *Half the human experience: the psychology of women* (1985) 266.
55 Moore (ed) *Public health policy implications of abortion: a government relations handbook for health professionals* (1990) 9.
56 Boberg *The law of persons and the family* (1977) 20 fn 23.
57 "The South African gynaecologists' attitude to the present abortion law" 1980 *SAMJ* 1044.
58 Dommisse 1990 *SAMJ* 702.
59 See Sarkin-Hughes 1990 *Stell LR* 372 fn 1.

ABORTION IN THE NEW SOUTH AFRICA

It is with this background in mind that the future of the abortion law must be evaluated. There is little doubt that there is movement towards abortion reform, but how far this will go, is uncertain. Article 2 of the ANC's draft Bill of Rights[60] reads:

> "1. Every person shall have the right to life.
> 2. No-one shall be arbitrarily deprived of his or her life.
> 3. Capital punishment is abolished and no further executions shall take place."

The South African Law Commission's draft Bill of Rights[61] reads:

> "The Rights set forth in this Part are fundamental rights to which every person in the Republic of South Africa shall be entitled and, save as provided in this Bill, no legislation or executive or administrative act of any nature whatever shall infringe those rights.
>
> *Article 1*
>
> The right to life: Provided that legislation may provide for the discretionary imposition of the death sentence in the case of the most serious crimes."

The abortion controversy is therefore not dealt with by either the ANC or the Law Commission although both discussed the issue and did not want to deal with it. How these clauses, if adopted, will impact on abortion is unclear.

The vexing question which has caused much conflict and debate is when "life" begins and whether the words "everyone", "human being" and "person" incorporate the protection of pre-natal life. This controversy has also arisen within the international human rights context with all of these instruments expressing the protection of life.[62] The only document that explicitly protects pre-natal life is the American Convention on Human Rights, which states:

> "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

All the other human rights documents simply protect the general concept of life. This protection may be couched in different terms; for example, article 6 of the International Covenant on Civil and Political Rights states that "[e]very human being has the inherent right to life", while article 3 of the Universal Declaration of Human Rights declares that "[e]very one has the right to life . . .", and article 4 of the African Charter on Human and People's Rights provides:

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person."

The problems of definition have been left to the various courts to adjudicate upon, a responsibility which they have often sought to evade. There are relatively few cases dealing with these issues and those that have occurred, have arisen in the regional human rights context. The only court that has spent much time evaluating these questions is the European Commission on Human Rights which was established pursuant to the European Convention on Human Rights, article 2(1) of which reads: "Everyone's right to life shall be protected by law."

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60 *A bill of rights for a new South Africa* (a working document by the ANC constitutional committee).

61 Working paper 25 Project 58: *Group and human rights* 471.

62 See Sieghart *The international law of human rights* (1983) 128.

In terms of this article, actions were brought by residents of Norway[63] and Austria[64] attacking the abortion laws of their countries. In both cases the court was easily able to avoid dealing with the substantive merits of the issues by dismissing the action on the ground that the plaintiffs, not being victims, lacked standing. However, in more recent cases before the Commission it has not been possible to deal with the questions as perfunctorily as was done in the Norwegian and Austrian cases. In Germany, a 1974 amendment to the German Criminal Code allowing abortion during the first trimester was declared unconstitutional by the Federal Constitutional Court in 1975; the legislature therefore enacted a new law in 1976 limiting the grounds for which abortions were authorised and imposed penalties for the transgression of this statute. In *Brueggemann and Schheuten v The Federal Republic of Germany* (1975) the plaintiffs attacked these sanctions before the European Commission in terms of article 8 which protects private and family life. The Commission found that pregnancy was not unique to private life as it is also connected to the developing foetus[65] but explicitly evaded the question whether the foetus could be considered as "life" in terms of article 2.[66]

In the case of *Paton v United Kingdom* (1980)[67] the husband of a pregnant woman seeking to frustrate his wife's attempts to obtain an abortion appealed to the European Commission against the finding of an English court that a foetus has no rights before birth. The Commission found that the term "everyone" is applied postnatally in nearly every other article and that the limitations in article 2 only pertain to persons who have already been born.

Analysing the meaning of life further, the Commission then compared the approaches to the problem of the various supreme courts in different countries and found little unanimity: in Germany the view is that life begins at implantation. In the USA it is deemed to commence at viability, while in Austria it originates at birth. The Commission then contemplated whether the article protecting the right to life should be construed as: (a) not including the foetus; or (b) acknowledging foetal rights but with qualifications; or (c) acknowledging absolute rights for the foetus.

Evaluating the three possibilities, the Commission dismissed the third option believing that this would give the foetus precedence over the mother and, as the article contained no express limitation on the right to life of pregnant women, it would be contrary to the aims and objectives of the Convention to find in favour of absolute rights for the foetus. The Commission also found that, at the time when the Convention was acceded to by the various countries, all of them bar one permitted abortion to save the life of the mother; therefore the implication could not have been to accord all rights to the foetus by prohibiting abortion.

The Commission none the less evaded the primary issue, finding that as there was no violation of the right to life in either of the other two possibilities, it

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63 *X v Norway* 867/60/4YB ECHR 270 (1961).
64 *X v Austria* 7045/75 (1976).
65 115 par 56.
66 Shelton "International law on the protection of the fetus" in Frankowski and Cole (eds) *Abortion and protection of the human fetus* (1987) 6.
67 8416/78 19DR 224.

would not have to decide between them as either the foetus is not protected at all, or else foetal rights must be weighed up against the women's health and life rights at least in the early stages of pregnancy. This conclusion allowed them to evade making a determination whether foetal rights are excluded entirely from the protection of the article and therefore clarity still does not exist even in terms of the European Convention.

Therefore, as there is still considerable indecision and confusion around this article which has already been subject to extensive litigation, the outcome in the South African context cannot be stated with certainty.

Even the ANC National Consultative Workshop on Gender and the Constitution, entitled "Gender today and tomorrow – towards a charter of women's rights" in November 1990 found the "right to life" clause in the ANC draft Bill of Rights ambiguous and believed it should be reconsidered. Undoubtedly the manner in which the present clause is drafted, leaves sufficient latitude for a future legislature to enact either restrictive or permissive abortion legislation. The real test will come when the validity of liberal abortion legislation, if enacted, is tested in terms of the court's constitutional review powers and issues such as the definitions of life, person or child[68] are examined.

What will happen, however, if the present restrictive legislation or a similarly worded law is retained, cannot be ascertained as the validity of this law may be challenged on other grounds contained in the Bill of Rights such as privacy,[69] dignity,[70] gender discrimination,[71] freedom of conscience,[72] religion[73] or belief,[74] integrity of the family[75] or equal protection.[76]

While it is likely that a court, possibly the constitutional court, would look to other similarly worded documents, it cannot be predicted whether they would follow the trends of these documents. Additionally, as the foreign standard setting contained in other international instruments that may be looked at for guidance will not provide much positive assistance, a court determining the constitutional position of abortion is permitted considerable latitude. For example, The United Nations Convention on the elimination of all forms of discrimination against women, while protecting foetal health, does so from the woman's position in that the function of reproduction is safeguarded.[77] Dismissal from employment because of pregnancy is also prohibited.[78]

Another document that may play a role is The convention on the Rights of the Child (1989) which in a carefully worded compromise[79] defines a child as

> "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier".

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68 ANC Bill of Rights a 9.
69 Law Commission Bill of Rights a 6.
70 Law Commission Bill of Rights a 2 and ANC Bill of Rights a 1(1) 2(5).
71 ANC Bill of Rights a 1 7.
72 ANC Bill of Rights a 2(32).
73 Law Commission Bill of Rights a 21 22.
74 ANC Bill of Rights a 5(2).
75 Law Commission Bill of Rights a 11.
76 ANC Bill of Rights a 1(3).
77 A 11(1)(f).
78 A 11(2).
79 Cohen "United Nations convention on the rights of the child" 1990 *The Review* 39.

The definition of a human being is left to the states party to the Convention. Problems arose before the drafting of the Convention was completed as this clause was seen by certain delegations to be not specific enough. A subsequent compromise was therefore reached[80] so that the Preamble of the Convention was expanded to include the following passage:

> "Bearing in mind that, as indicated in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1959, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *BEFORE* as well as after birth."[81]

While this statement could relate to access to abortion, the abortion debate *per se* was not discussed by the working group that drafted the document.[82] The deliberations on this issue went far beyond the abortion question to involve such questions as the right of the child to pre-natal maternal health care and to protection from foetal experimentation.[83] This declaration in the Preamble could, however, be used to interpret a child as including the foetus. This question hinges on the philosophy of the court doing the interpreting.

There is no doubt that the new South Africa will adopt most, if not all, of the international human rights documents on becoming a full member of the United Nations again. When this happens and the South African courts are guided by these documents when interpreting a bill of rights, the lack of clarity surrounding the right-to-life clause, together with the preamble of the Child Convention, could open the door to a restrictive interpretation to be read into the provision – thus allowing abortion only in the most limited circumstances.

However, in their study on *Group and human rights*[84] the Law Commission states that there is reasonable consensus regarding clauses that include the following:

> "No person's right to life, freedom and property shall be violated without observing a process prescribed by law."[85]

This clause protecting life has limitations in that the taking of life is not proscribed altogether; procedural safeguards are, however, imposed. Therefore, by implication, the door is left open for abortion legislation to be enacted. Thus a court could, while viewing life as including the foetus, still provide avenues for abortion if a legal process was first embarked on. If this version of the Law Commission's right to life were to be adopted, rather than their other clause or the ANC's version, it would not seem to lend as much support to the right-to-life lobby as the ANC's version, since it only provides procedural safeguards and does not totally prohibit the taking of life, however widely life is interpreted. To ensure the protection of abortion rights, an additional sentence should be added to a right-to-life clause to read:

> "Everyone has the right to life. This principle shall not be construed so as to restrict the right of women to procure an abortion within acceptable limits as determined by the legislature."

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80 *Ibid.*
81 Emphasis added.
82 Cohen 1990 *The Review* 39.
83 *Ibid.*
84 *Supra* fn 61.
85 414.

AANTEKENINGE

PRINCIPLES FOR PROCEDURAL LAW IN A NEW SOUTH AFRICA*

Introduction

South African society is about to enter the most radical reform programme in its history. No reform of this nature can be implemented without adequate legal procedures. Indeed, never before in the long and varied development of our legal system has procedure been of such vital importance.

Let law reform not be seen as just another "law job", but rather as an art. It is the art of making a normative response to ever-changing social reality. Hence, law reform agencies should lend an ear to the people. To this end I will draw your attention to a phenomenon which in South African legal circles still calls for in-depth study, namely the influence of alternative, informal or non-state law on official, formal or state law. In doing so, I will remain, as far as possible, within the confines of my new teaching commitment, which is procedural law. In effect, this narrows the subject-matter of my address down to the contribution which alternative courts have made towards the development of principles for procedural law in the history of our legal system.

Thusfar in the history of the South African legal system, the following two manifestations of alternative courts have been catalysts of reform: the merchants' courts of Europe's late Middle Ages, and the people's courts of our home-sprung South African Townships Revolution of the 1980s. In both instances people did not merely avoid discredited state courts, but in doing so forced the government of the day to comply with their demands.

The law merchant versus feudal law

(Akkerman "Schets van de rechtshistorische betekenis van het gildenwezen" 1971 *Tijdschrift voor Rechtsgeschiedenis* 3 – 72; Sanders "The characteristic features of the Civil law" 1981 *CILSA* 196 – 207; Smith *The development of European law* book II ("Interpretation of Roman and Germanic laws") section 32 ("The law merchant") (1928) (1979 reprint).)

A momentous episode in the establishment of an individualist, capitalist order in Europe was the struggle of the merchant class for a say in matters of state law. Frustrated by the archaic and oppressive rules and processes of feudal law, the merchants of Medieval Europe rebelled against the lords of the land, formulated

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* Inaugural address delivered at Vista University, Pretoria on 1992-11-05.

their own laws and set up their own courts. Thus an informal "law merchant" was born, which in the end the authorities had no option but to recognise, and which was to have in all matters commercial, such as trade, partnership, banking and insurance, a liberating and innovating effect on the official law and its procedure.

The merchant class was able to achieve this by organising itself into "guilds". The merchant guilds were an adaptation of the historic Germanic brotherhood institution, which had a religious connotation. In fact, the original meaning of the word "guild" is the collection of contributions for holding the sacrificial feast which accompanied brotherhood meetings; this is still reflected today in the denomination of the basic unit of the Dutch currency, the "gulden".

The merchant guilds were commercial, not religious, brotherhoods. None the less, ritual, in the form of the administration of an oath of allegiance and banquets, played a crucial role in cementing brotherhood ties. Likewise, in accordance with Germanic tradition, members of the guilds were required to attend meetings, and behind closed doors decisions were taken on the basis of consensus.

In all of Europe of those days, one of the most successful merchant guilds was the "Vereenigde Oost-Indische Compagnie" – the Dutch East India Company – which established in the course of its business, and under its administration and jurisdiction, a settlement at the Cape of Good Hope.

Colonial guilds

(Sanders "Legal philosophy as a political tool in South Africa" 1990 *THRHR* 203 – 210.)

In South Africa, European guilds were to play a role long after the demise of the Dutch East India Company. Following the British take-over of the Cape in 1806, "Freemasons" entered South Africa, and upon the formation in 1910 of the Union of South Africa, the "Afrikaner Broederbond" was established. Each of these guilds was in its own way to play a crucial role in the formulation of colonial policy within our country. Their common denominator was European domination. According to the ultimately stronger Afrikaner Broederbond, "apartheid" provided the solution to the problem of securing European hegemony. In 1948, apartheid became the colonial government's official policy and would remain so for forty-odd years. Its ignominious history is common knowledge.

People's law versus colonial law

(Abel *The politics of informal justice* vol 2 ("comparative studies") (1982); Bapela *The people's courts in a customary law perspective* Occasional paper, Institute of Foreign and Comparative Law, Unisa (1987); Bennett *A sourcebook of African customary law for Southern Africa* (1991) 90 – 109; Bila *et al* "A rare example of sociological jurisprudence and judicial realism in South Africa" 1989 *SALJ* 595 – 599; Burman and Schärf "Creating people's justice: street committees and people's courts in a South African city" 1990 *Law and Society* 693 – 744; Hund and Kotu-Rammopo "Justice in a South African township: the sociology of makgotla" 1983 *CILSA* 179 – 208; Motshekga *Alternative legal institutions in Southern Africa* Occasional paper, Institute of Foreign and

Comparative Law, Unisa (1987); Motshekga "People's courts" *Rights LHR* (Oct 1991) 39–42; Sanders "Towards a people's philosophy of law!" 1987 *Journal of African Law* 37–43; Schärf "Community policing in South Africa" 1989 *Acta Juridica* 206–233; Van Niekerk "People's courts and people's justice in South Africa" 1988 *De Jure* 292–305.)

From its inception, the colonial policy of apartheid met with vigorous popular opposition, culminating in the so-called Townships Revolution of the 1980s. It was this event which ultimately forced the colonial government to open the way to a free and common society, for which it received a mandate from its embattled European electorate in the referendum of 17 March 1992.

A vital ingredient of the Townships Revolution was the institution of "people's courts". These alternative courts operated under the umbrella of a township's "civic association". The civic associations of the various townships were aligned to the United Democratic Front (UDF), and the UDF's lifeline, in turn, was the African National Congress (ANC) which, a banned organisation at the time, had no option but to operate underground.

A people's court of the first instance was supposed to take the form of a people's meeting at "street committee" level. Its meetings were not restricted to heads of family within some or other tribal grouping, as often was the case with the vigilante-type of urban "makgotla" of the 1970s, but were open to the public. They were chaired by a team of adjudicators who would usually be street committee members, could be male or female and were often trade-unionists or students. The proceedings were informal yet inquisitorial, and decisions had to be made on the basis of consensus among those members of the public present at the hearing. Provision was made for appeal, in the last instance to the civic association. As for the law to be applied, unless the transgression related to some clearly defined community rules – for example, a rent or consumer boycott, a "stay-away" from work, or a compulsory contribution to a community fund – it was seldom articulated and solutions of a customary-law nature prevailed. Thus, if a case contained a criminal as well as a civil element – to employ a hard-worn European legal division – both elements were dealt with in conjunction. More significantly, mediation and conciliation were preferred to adjudication, and the emphasis was invariably on compensation of the victim, community service or a fine to be paid to a community fund.

Unfortunately, the model as described above often failed to materialise. As community leaders were arrested en masse, and extraordinarily lengthy political trials ensued, the people's courts were forced underground and left with insufficient control. In areas where the ANC-UDF alliance failed to establish or retain control, a criminal or "tsotsi" element, pretending to be "comrades" and collectively known as "com-tsotsis", would exercise a mafia-type of rule through so-called "people's courts" which in reality were mere kangaroo courts. But even in areas where the ANC-UDF alliance retained control, people's courts often failed to live up to their societal role. Witness, in particular, their intolerance of conservative viewpoints within the community.

Messages from the people's courts

(Sanders "Towards formulating the tenets of a communitarian order" in Vorster (ed) *Building a new nation – the quest for a new South Africa* (1991) 178–187.)

Excesses apart, the "people's courts" had a definite mission. According to the government of the day, their mission was to create anarchy. Government missed the point. Just as it had never been the intention of the European merchant guilds to bring about anarchy (although the feudal lords thought otherwise), so the civic associations had no interest in creating chaos. Whilst it is true that the civic associations, like the merchant guilds, were revolutionary, they were so only in the sense that they filled a critical vacuum in law enforcement, and were therefore able to force government, on punishment of losing all control, to comply with their wishes. As for the civic associations, their overriding wish was and remains that there be a government of the people and for the people. Basically, theirs is a public-interest approach.

The public-interest or community-directed approach highlights the value of "communitarianism". Underlying this value is a conception of the common good which assigns to the public interest, as distinguished from individual and group interests, a central role. Corner-stones of communitarian thinking are the concepts of participation and consensus.

In the field of procedural law, communitarianism stands for *a fair, participatory, accessible and cost-effective process.*

Fairness

In its present form, our official procedural law results daily in a great deal of unfairness. The adversarial mode of proceeding is largely responsible for this. Introduced to our country by the British, it finds support in the liberal fiction that all litigants are equal. In real life, however, there are the haves and the have-nots, the powerful and the powerless, and it is to the haves and the powerful that the adversarial mode of proceeding gives the advantage.

In a new South Africa, however, the judiciary should rather play an inquisitorial or activist role to bring about fairness. Operating under a clearly stated duty to ensure a fair trial, be it a civil or criminal trial, the judiciary should direct rather than umpire cases, and in this way equalise the abilities of the parties to engage in fact-finding and legal analysis. Furthermore, the courts should feel free to evaluate all available evidence on merit. This implies that jury-based exclusionary rules of evidence, inherited from the British and outdated now because of the abolition of jury trials in South Africa in 1969, should be abandoned.

Along the lines of African tradition, an inquisitorial process and a free system of evidence formed the mode of operation of the people's courts. Interestingly, a like approach is characteristic of the Continental European or Civil Law tradition.

A fair trial proceeding without an ensuing fair verdict would, of course, be meaningless. What a fair verdict implies is that, in the words of Roscoe Pound, the courts should render "moral" rather than "mechanical" judgments. To this end, the people's courts' emphasis on mediation, conciliation, compensation and rehabilitation will, it is hoped, serve as a pointer.

Finally, for a trial and a verdict to be fair, more than a fair judge is required. It is not enough that the courts are for the people; they must also be representative of the people and be open to them.

Participation

For justice to be done and seen to be done, the personnel of the courts will have to reflect the South African community in its entirety. Presently this is not the case. Especially in the higher echelons, the courts are almost exclusively staffed by South Africans of European stock. Needless to say, this imbalance holds little appeal for the majority of the people. Hence the rise of urban *makgotla* and people's courts.

Access

In a new South Africa not only the composition of but also access to the courts will have to be broadened considerably. The need for popular access to courts of justice was expressed, at least in principle, by the people's courts.

Access to the courts has a psychological as well as a material connotation.

At the psychological level, access to the courts calls for two things in particular: public awareness and intelligible court proceedings. To make people aware of the existence of courts and their communal role requires an educational programme well beyond the courts' means. When, however, it comes to making court proceedings more intelligible, the courts themselves are best positioned to initiate reform. From the lowest to the highest court in the country, proceedings should be conducted in a manner and language to which ordinary people can relate. Formalities should be limited to a functional minimum, and "court language" and all accompanying "legalese" should be translated into ordinary language. This formalism, which we inherited largely from the British, is not at all conducive to the reform process. The much less formal Civilian style would be better suited to a new South Africa.

At the material level, access to the courts requires the speediest processing of cases, at convenient places and at minimal economic costs or, if need be, at no economic cost at all to the individual; and in order to save costs, recognition should be given to "community" or "group" actions, better known in the European literature as "class actions".

Cost-effectiveness

Law-suits are always costly, if not economically then emotionally. They are therefore best avoided.

A cost-effective alternative to a law-suit is mediation. Mediation is particularly appropriate in disputes between parties involved in an ongoing relationship which they want to see preserved rather than destroyed by a "victorious" court decision. Small wonder, therefore, that mediation was preferred to adjudication in the people's courts.

If, however, a law-suit is unavoidable, its economic and emotional costs should be minimised by an application of the principles of fairness, participation and access, as advocated above.

The way ahead

(Bekker "The influence of recent legislation and constitutional changes on the application of African customary law" in Sanders (ed) *The internal conflict of laws in South Africa* (1990) 25 – 38; Bennett (ed) *Law under stress: South African law in the 1980s* (1988); Cappelletti "Access to justice as a theoretical

approach to law and a practical programme for reform'' 1992 *SALJ* 22 – 39; Corder (ed) *Essays on law and social practice in South Africa* (1988); Corder *Democracy and the judiciary* (1989); De Vos ''Die hervorming van die Suid-Afrikaanse siviele prosesreg vanuit 'n teoretiese perspektief'' 1989 *De Jure* 139 – 142; Erasmus ''The interaction of the substantive and procedural law: the Southern African experience in historical and comparative perspective'' 1990 *Stell LR* 348 – 371; Habscheid ''The fundamental principles of the law of civil procedure'' 1984 *CILSA* 1 – 31; Hund (ed) *Law and justice in South Africa* (1988); Jordaan ''Die openbare verdedigerstelsel as vorm van regshulp'' 1991 *THRHR* 685 – 704; Kahn ''Is there cause for the popular discontent with the administration of justice?'' 1989 *SALJ* 602 – 632; Kojo and Kojo ''The legal system of Japan'' in Reddon (ed) *Modern legal systems cyclopedia* vol 2 (''Pacific Basin'') (1989); Kriegler ''Toegang tot die reg'' 1991 *Stell LR* 318 – 327; McQuoid-Mason ''The right to legal representation: implementing Khanyile's case'' 1989 *SACJ* 57 – 66; McQuoid-Mason ''Public defenders and alternative service'' 1991 *SACJ* 267 – 275; Mokgatle ''The exclusion of blacks from the South African judicial system'' 1987 *SAJHR* 44 – 51; Mowatt ''Some thoughts on mediation'' 1988 *SALJ* 727 – 739; Mowatt ''Alternative dispute resolution: some points to ponder'' 1992 *CILSA* 44 – 58; Mowatt ''The high price of cheap adjudication'' 1992 *SALJ* 77 – 86; Olmsdahl and Steytler (eds) *Criminal justice in South Africa* (1983); Sachs *Protecting human rights in a new South Africa* (1990); Sanders (ed) *Southern Africa in need of law reform* (1981); Snyman ''The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems'' 1975 *CILSA* 100 – 111; Trollip *Alternative dispute resolution in a contemporary South African context* (1992). The following two journals, in particular, supply a constant flow of information pertinent to procedural law reform: *Consultus* – (the SA Bar Journal) and *De Rebus* – (the SA Attorneys' Journal).)

Only recently has the country's procedural law become a target of democratic reform.

Government response to public demands started as a trickle, with the enactment of the Small Claims Courts Act 61 of 1984, the Special Courts for Blacks Abolition Act 34 of 1986, and the Law of Evidence Amendment Act 45 of 1988 (which allows judicial notice of African customary law and relaxes the evidential hearsay rule). In 1991, the trickle became a flood, with the enactment of the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991, the Decriminalization Act 107 of 1991, the Probation Services Act 116 of 1991, the Magistrates' Courts Amendment Act 118 of 1991 (which facilitates the use of assessors in magistrates' courts, *inter alia*, in considering community-based punishment), and the Correctional Services and Supervision Matters Amendment Act 122 of 1991 (which provides for correctional supervision as an alternative to prosecution or upon passing sentence).

The above list of reform measures is not exhaustive, but ought to give an indication of the reformist mood within government circles. If corroboration of a new approach is needed, it will be found in the Department of Justice's ''public defenders pilot project'' and its early acknowledgment of the Alexandra Justice Centre, a pilot community mediation centre set up by academic and practising lawyers at the invitation of the Alexandra Civic Organisation, and heralded in the media as ''the first legal people's court''.

Sensing a change of climate, the legal profession, too, has climbed on the reform bandwagon. It was the attorneys' profession which took the lead and caught the headlines with "a first interview at nominal fee" scheme, a "contingency fee" system, albeit a watered-down one, and new entry routes for law graduates into the profession, notably via service at the offices of law clinics, public defenders and the like.

There can be no doubt that the messages from the people's courts came through loud and clear to both the government and the legal profession, and that the effected and proposed alterations in their laws, rules and regulations were more than just "amendments" but "amends" for years of neglecting the interests of the mass of the people.

The recent flood of "top-down" reform measures may, however, soon dry up in a wasteland of "gap politics". To prevent this happening, we need to channel the reform process. What direction this channel should take, is, of course, not for an interim or transitional government to decide.

In what follows, I shall be making some proposals which, together with the ones I made earlier, could be of help in a future "bottom-up" debate about the structure of the country's administration of justice. Underlying these proposals is a firm belief in a centralised and disciplined policy of reform, based on principles of fairness, participation, access and cost-effectiveness.

A centralised multi-door court system

Considerable progress has already been made towards the creation of a multi-door court system. Alas, for too many people, too many new doors are still out of reach. To remedy this situation, there will have to be added to each magistrate's court office a legal aid, mediation, small claims and public defender's department. Because of financial constraints, however, officers in the smaller centres may have to perform more than one of these functions.

A complicating factor is that the apartheid regime allowed "self-governing" and "independent" "black homelands" to follow their own course in the administration of justice. Compared with the rest of the country, these territories have fallen far behind in law reform. To bring them back into the fold ought to be a matter of urgency. In the light of the mobility of our country's population, it is clear that the administration of justice ought to be a national rather than a regional affair.

Another matter of concern is the recent tendency to "privatise" justice. I am not referring here to the people's courts. After the liberation movements were unbanned early in 1990, and a national negotiation process was set in motion, the people's courts ceased to function. This showed that they were never meant to endure. However, the theme of "alternative dispute resolution" (ADR) was then taken up by commercial law firms, organised labour and community offices. Indeed, mediation centres, allegedly operating alongside the official courts, have become an urban fashion reminding one of the guilds of old.

But once the country's judiciary is ready to handle all disputes fairly, should these private mediation centres be allowed to continue operating outside the judiciary's control? In my opinion, the answer to this question ought to be in the negative. Ideally, it is the judiciary which should ensure justice for all in all disputes, and therefore be in control of not only all adjudication but all mediation as well. In furtherance of this ideal, all the country's courts and tribunals

should constitute a single and clearly distinguishable judicial pyramid, existing side-by-side with, yet independent from the country's legislature and executive.

The rationale behind these proposals is twofold. In the first place, people, no matter the type of dispute they are involved in, are entitled to see their disputes resolved in an independent and authoritative manner. To this end, dispute resolution should be left in public rather than private hands. Secondly, only a centralised judiciary in control of all adjudication and mediation can ensure an orderly development of the law in a direction of nation-building.

Practical legal training

The formation of a centralised multi-door court system should go hand in hand with the introduction of a centralised practical legal training programme, under the aegis of the supreme court. Japan's "Legal Research and Training Institute" could serve as an example. Should it be decided to create a similar body for our country, it would then be the task of this body or Law Academy to train, at public expense, a constant flow of selected law graduates from tertiary educational institutions to become advocates, attorneys, notaries and conveyancers, legal aid officers, prosecutors, public defenders, mediators or adjudicators. Upon entering the Law Academy, students will make a more or less definite career choice, in favour of either the private or the public sector. To save costs, the theoretical part of the various career courses could be offered via contact tuition at already established tertiary educational institutions or by means of distance teaching. The practical part of the various courses should, of course, be conducted in the field, with the help of legal officers in the private and the public sector respectively. In respect of both parts of the courses the overall supervision and final examination of candidates should lie with the academy, acting for and under the authority of the supreme court.

It is my belief that a practical legal training programme as outlined above, contains the formula for a professional, co-ordinated and representative administration of justice in a new South Africa. Rather than assessors, lay judges or juries, the country needs a career judiciary, from the lowest to the highest level; and its corps of legal officers in the public as well as the private sector, ought to reflect society at large. Only a centralised and affirmative practical legal training programme can achieve this.

Conclusion

Of all the branches of government, the judiciary is the most vulnerable, and therefore the most susceptible to "alternative" arrangements. Other than public opinion, it has no power-base to fall back on. Only when the judiciary has the public firmly behind it, will it be strong enough to render justice without fear or favour, and withstand undue legislative and executive pressure. It is for this reason that in the democratisation process currently under way, the courts and the legal profession should be heard and seen as defenders of the public. They should be active in the law reform debate and come forward with an integrated set of proposals for a fair, participatory, accessible and cost-effective administration of justice. Failure on their part to live up to their public role will do the new South Africa endless harm.

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HERSIENING VAN DIE ERFREG

1 Inleiding

Die Wet tot Wysiging van die Erfreg 43 van 1992 (hierna die wet) bring ingrypende veranderings op verskeie gebiede van die erfreg aan. Dit is die resultaat van navorsing deur die Suid-Afrikaanse Regskommissie (sien *Verslag oor die hersiening van die erfreg* Projek 22, Junie 1991; hierna *Verslag*) en poog om probleemareas wat in die erfreg bestaan, uit die weg te ruim.

Hierdie aantekening het ten doel om die veranderings wat deur die wet aangebring is, te bespreek teen die agtergrond van die regskommissie se verslag; die oogmerk is nie om uitvoerig op al die implikasies van die nuwe wet in te gaan nie (sien verder hieroor Sonnekus 1992 *TSAR* 159; Skeen 1992 *SALJ* 138; Wunsh 1992 *De Rebus* 569).

Die wet bring wysigings in onder meer die volgende gebiede van die erfreg aan: testamentsformaliteite, die herroeping van testamente, die bevoegdheid van sekere begunstigdes om te erf, die erfregtelike posisie van aangenome kinders en substitusie van een begunstigde vir 'n ander. Verder bring die wet (a 2) die omskrywing van "meester" in die Wet op Testamente 7 van 1953 (hierna die hoofwet) in ooreenstemming met die omskrywing van meester in die Boedelwet 66 van 1965 en herroep dit artikel 8 van die hoofwet wat laasgenoemde wet op die voormalige Suidwes-Afrika van toepassing gemaak het (a 10). Die wet is op 18 Maart 1992 goedgekeur en het op 1 Oktober 1992 in werking getree.

Die wet (a 15) is nie van toepassing op die testamente van erflaters wat voor inwerkingtreding daarvan oorlede is nie. Dit is egter wel van toepassing op testamente wat verly is voor inwerkingtreding maar waarvan die testateur na inwerkingtreding oorlede is. Aangesien die wet nie die formaliteitsvereistes vir testamente strenger maak nie, sal 'n testament wat geldig ingevolge die ou wetgewing verly was, uitgesonderd die soldatetestament, steeds ingevolge die nuwe wetgewing geldig wees (oor die soldatetestament sien par 2 9 hieronder).

2 Wysigings aangebring deur wet 43 van 1992

2 1 'n Paraaf kwalifiseer ook as 'n handtekening by die ondertekening van 'n testament

Oor die vraag wat as 'n handtekening en wat as 'n merk vir doeleindes van artikel 2(1)(a) van die hoofwet beskou moes word, het baie verskil van mening bestaan en, in die woorde van die regskommissie, "tot 'n skouspel van uiteenlopende beslissings in die howe aanleiding gegee" (*Verslag* par 2 49). Aan die een kant was daar sake waarin 'n wye uitleg aan "handtekening" en 'n eng interpretasie aan "merk" gegee word en waarin die erflater of getuie se bedoeling om 'n handtekening aan te bring, as van deurslaggewende belang beskou word (*Ex parte Goldman and Kalmer* 1965 1 SA 464 (W); *Jhajbhai v Master* 1971 2 SA 370 (D); *Ex parte Singh* 1981 1 SA 793 (W); *Ex parte Jackson: In re Estate Miller* 1991 2 SA 586 (W)). Aan die ander kant was sommige howe nie bereid om die paraaf van 'n erflater of 'n getuie as 'n handtekening te beskou nie;

daar word geredeneer dat die bedoeling waarmee geteken word nie die maatstaf kan wees om te bepaal of 'n paraaf 'n merk dan wel 'n handtekening is nie (*Dempers v The Master (1)* 1977 4 SA 44 (SWA); *Mellvill v The Master* 1984 3 SA 387 (K); *Govindamall v Munsami* 1992 1 SA 676 (D)).

Die regskommissie het die "liberale" benadering van die *Singh*-saak verkies bo die "streng" benadering van die *Dempers*- en *Mellvill*-saak en voorgestel dat die woordomskrywing van "onderteken" in artikel 1 van die hoofwet uitgebrei moet word om die maak van 'n paraaf in te sluit (*Verslag* par 2 53 – 2 55).

Die wet (a 2) wysig dan ook die omskrywing van "onderteken" dienooreenkomstig en maak dit verder duidelik dat net 'n testateur met die maak van 'n merk mag onderteken. Sonnekus 1992 *TSAR* 162 is van mening dat onder die ou wetgewing die persoon wat namens en in opdrag van die testateur geteken het (die sg *amanuensis*), ook met 'n merk kon teken aangesien artikel 1 net bepaal het dat getuies nie met 'n merk kon teken nie (*contra* Corbett *et al The law of succession in South Africa* (1980) 53; Schoeman 1991 *THRHR* 624). Na dese is dit duidelik dat slegs die testateur met 'n merk mag teken (in welke geval addisionele formaliteitsvoorskrifte deur a 2(1)(a)(v) gestel word). Die testateur, *amanuensis* en getuies mag egter met die maak van 'n paraaf onderteken (sonder dat enige verdere formaliteitsvereistes voorgeskryf word).

2 2 Getuies hoef net die laaste bladsy van 'n testament wat uit meer as een bladsy bestaan, te onderteken

Volgens statistieke wat die regskommissie van die meester in Pretoria verkry het, was bykans 'n derde van testamente wat in die jaar van ondersoek afgewys is, verwerp vanweë die feit dat net die laaste bladsy van die betrokke testamente deur al die betrokke partye onderteken was. Die regskommissie het voorgestel dat artikel 2(1)(a)(iv) van die hoofwet gewysig word sodat slegs vereis word dat die testateur of *amanuensis* al die bladsye van die testament moet onderteken. Volgens die regskommissie sal die moontlikheid van bedrog nie werklik vergroot word as die getuies nie al die bladsye hoef te teken nie (*Verslag* par 2 75). Die wet (a 3(b)) skrap daarom die verwysing na 'n getuie in artikel 2(1)(a)(iv), wat tot gevolg het dat getuies voortaan net die laaste bladsy van die testament hoef te onderteken.

2 3 Die amp van sertifiserende beampte word beperk tot 'n kommissaris van ede

Na ontleding van statistiese gegewens het die regskommissie besluit dat daar nóg werklik 'n behoefte bestaan dat die kategorie persone wat die amp van sertifiserende beampte mag beklee, uitgebrei word, nóg dat die sertifiserende beampte 'n regsgraad moet hê (*Verslag* par 2 93, 2 94). Die regskommissie het voorgestel dat die omskrywing van sertifiserende beampte in bogenoemde twee artikels beperk moet word tot kommissarisse van ede, aangesien hulle vrylik en landwyd beskikbaar is. Die vermelding van notarisse, landdroste en vrederegters is onnodig want die persone is in elk geval ook kommissarisse van ede (*Verslag* par 2 94). Die wet (a 3(c) en 3(e)) gee gevolg aan hierdie voorstel deur die woorde "magistraat", "vrederegter" en "notaris" in artikel 2(1)(a)(v) en 2(1)(b)(iv) van die hoofwet te skrap.

2 4 'n Testament moet in die teenwoordigheid van die kommissaris van ede verly word indien 'n sertifikaat ingevolge artikel 2(1)(a)(v) of 2(1)(b)(iv) van Wet 7 van 1953 vereis word

Die wet (a 3(c) en 3(e)) wysig bogenoemde twee artikels deur 'n subartikel (aa) by albei in te voeg; daarin word vereis dat die testateur of *amanuensis* en die getuies in die teenwoordigheid van die kommissaris van ede moet onderteken of, in geval van 'n wysiging van die testament, die wysiging in sy teenwoordigheid moet bevestig.

Dit wil voorkom of die wet hiermee die formaliteitsvereistes in 'n mate "strenger" maak aangesien daar nie vroeër vereis is dat die kommissaris van ede by die verlyding van 'n testament teenwoordig moet wees nie. Die vereiste dat die getuies in die teenwoordigheid van die kommissaris van ede moet onderteken, impliseer verder dat die kommissaris van ede waarskynlik nie meer – soos vroeër wel moontlik was – as getuie tot die testament sal kan optree nie (sien *Ex parte Suknanan* 1959 2 SA 189 (D); *Naidoo v Chellamma* 1972 4 SA 354 (D)). Soos Sonnekus 1992 *TSAR* 165 aantoon, kan die kommissaris van ede tog nie "as getuie tegelyk in sy eie teenwoordigheid as kommissaris van ede . . . teken nie".

2 5 Die kommissaris van ede moet die sertifikaat ingevolge artikel 2(1)(a)(v) en 2(1)(b)(iv) van die hoofwet so gou doenlik na ondertekening van die testament of bevestiging van die wysiging deur die testateur of die amanuensis *en die getuies aanbring; hy mag dit ook na die dood van die testateur aanbring as die testateur net na ondertekening sou sterf*

In *Radley v Stopforth* 1977 2 SA 516 (A) het die appèlhof beslis dat bogenoemde sertifikaat nie na die dood van die testateur (*post mortem*) aangebring mag word nie, en dat dit normaalweg "kort nadat" die erflater en getuies onderteken het, aangebring moet word. Die hof het egter nie uitdruklik beslis dat die aanbring van die sertifikaat *uno contextu* moet geskied nie (Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 171). Die meeste regskrywers was van mening dat 'n *uno contextu*-verlyding nie deur ons reg vereis word nie (sien bv Joubert 1955 *THRHR* 272; Van der Merwe en Rowland 165 ev; Sonnekus 1978 *De Jure* 146; Cronjé en Roos *Erfreg vonnisbundel/Casebook on the law of succession* (1988) 27).

Die regskommissie was van mening dat wetswysiging nodig was om dit duidelik te maak dat die sertifikaat *uno contextu* na ondertekening of bevestiging van 'n wysiging aangebring moet word, en dat die sertifikaat selfs na die dood van die testateur, indien hy net na ondertekening of bevestiging sou sterf, aangebring mag word (*Verslag* par 2 82, 2 128).

In ooreenstemming hiermee wysig die wet (a 3(c) en 3(e)) artikel 2(1)(a)(v) en 2(1)(b)(iv) van die hoofwet deur eerstens 'n subartikel (aa) by beide in te voeg waarin vereis word dat die sertifikaat so gou doenlik na ondertekening of bevestiging van die wysiging aangebring moet word. Tweedens voeg dit 'n subartikel (bb) in wat bepaal dat die kommissaris van ede sy sertifikaat so gou doenlik na die dood van die testateur mag aanbring of voltooi indien die testateur sou sterf na ondertekening of bevestiging maar voordat die kommissaris van ede sy sertifikaat kon aanbring of voltooi. Die wet laat dus voortaan *post mortem*-sertifisering toe maar vereis terselfdertyd *uno contextu*-verlyding.

2 6 Die kommissaris van ede mag die sertifikaat ingevolge artikel 2(1)(a)(v) en 2(1)(b)(iv) van die hoofwet op enige bladsy van die testament aanbring; hy moet dan al die ander bladsye van die testament op enige plek onderteken

Daar was nie eenstemmigheid in die regspraak oor die betekenis van "aan die end daarvan" vir doeleindes van artikel 2(1)(a)(v) nie. Soms is daar vereis dat die sertifikaat ná en so digby as moontlik die testateur se merk moet wees (vgl *Stemmet v Die Meester* 1957 3 SA 404 (K); *Tshabalala v Tshabalala* 1980 1 SA 134 (O); *Gantsho v Gantsho* 1986 2 SA 321 (Tk)); die houding is egter ook ingeneem dat dit nie saak maak of die sertifikaat onder of bokant die testateur se handtekening verskyn nie (vgl *Philip v The Master* 1980 2 SA 934 (D)). Hierdie uiteenlopende uitsprake was uiteraard nie bevorderlik vir regsekerheid nie.

Indien die testament reeds aan die end daarvan deur die testateur onderteken is, bestaan daar volgens die regskommissie nie juis 'n risiko dat daar na aanbring van die sertifikaat aan die testament gepeuter kan word nie. Daarom het die regskommissie voorgestel dat die vereiste dat die sertifikaat aan die end van die testament aangebring moet word, geskrap word en dat die kommissaris van ede die sertifikaat op enige plek op die testament moet kan aanbring. Daarna moet hy al die ander bladsye van die testament waarop sy sertifikaat nie verskyn nie, op enige plek op daardie bladsye onderteken (*Verslag* par 2 96, 2 98).

Hierdie voorstel van die regskommissie is vervat in die gewysigde artikel 2(1)(a)(v).

2 7 'n Modelvoorbeeld van die sertifikaat wat deur artikel 2(1)(a)(v) en 2(1)(b)(iv) vereis word, word in die hoofwet ingevoeg; 'n testament sal egter nie ongeldig wees bloot omdat die modelvoorbeeld nie gebruik is nie

Die appèlhof het beslis dat die sertifiserende beampte nie die *ipsissima verba* van die wet hoef te gebruik by die aanbring van die sertifikaat nie. Hy moet net sorg dra dat die voorskrifte van die twee genoemde artikels substansieel nagekom is (vgl *In re Jennet* 1976 1 SA 580 (A); *Radley v Stopforth* 1977 2 SA 516 (A)). Nogtans was die regskommissie van mening dat daar 'n behoefte aan 'n voorgestelde modelsertifikaat is wat daartoe kan bydra om die geldigheid van testamente te verseker. 'n Testament moet egter nie ongeldig wees net omdat die modelvorm nie gebruik is nie (*Verslag* par 2 88).

Die wet (a 3(g)) gee uitvoering aan hierdie aanbeveling deur 'n nuwe sub-artikel 4 by artikel 2 van die hoofwet te voeg, wat bepaal dat die sertifikaat van die kommissaris van ede in die vorm uiteengesit in Bylae 1 (sertifikaat ingevolge a 2(1)(a)(v)) of Bylae 2 (sertifikaat ingevolge a 2(1)(b)(iv)) mag wees. Twee nuwe bylaes met die modelsertifikate word ook by die hoofwet aangeheg (a 11 van die wet).

2 8 'n Skrapping in 'n testament sluit ook 'n skrapping in wat nie met 'n skryfinstrument gedoen is nie, mits die skrapping nie die herroeping van die hele testament ten doel het nie

Daar was in die verlede onsekerheid oor die betekenis van "skrapping" in artikel 2(1)(b) van die hoofwet. Die begrip is nie omskryf nie en dit was nie seker of dit ook skrappings ingesluit het wat nie met 'n skryfinstrument gedoen is nie (vgl Beinart 1953 *SALJ* 292). Daar is ook aangevoer (Meyerowitz *Administration*

of estates (1990) par 4 12) dat as die testateur se handtekening uitgewis was, die gevolge daarvan onder herroeping van testamente tuisgehoort het en nie deur artikel 2(1)(b) geraak was nie.

Om die aangeleentheid op te helder het die regskommissie aanbeveel dat skrappings wat nie met 'n skryfinstrument aangebring is nie, ingesluit moet word onder die begrip "skrapping", mits 'n skrapping nie die herroeping van die hele testament tot gevolg het nie (*Verslag* par 2 111).

Die wet (a 2(d)) gee uitvoering aan hierdie voorstelle deur 'n omskrywing van "skrapping" in artikel 1 van die hoofwet in te voeg, wat bepaal dat "skrapping" enige skrapping, deurhaling of uitwissing is op welke wyse ook al bewerkstellig solank dit nie die herroeping van die hele testament beoog nie.

'n Skrapping wat nie met 'n skryfinstrument gedoen is nie (bv waar 'n begunstigde se naam met 'n skêr uitgeknip word) sal met ander woorde voortaan wel op 'n wysiging van die testament neerkom wat moet voldoen aan die formaliteitsvereistes van artikel 2(1)(b). Sou 'n testateur egter sy handtekening op die testament uitknip, sal dit waarskynlik as 'n herroeping van die testament beskou word en nie as 'n wysiging daarvan nie aangesien die herroeping van die hele testament klaarblyklik beoog was.

Die wet (a 2(e)) voeg terselfdertyd 'n omskrywing van "wysiging" in artikel 1 van die hoofwet in, waarvolgens dit 'n skrapping, deurhaling, byvoeging of tussenskrif is. Die uitdrukking "skrapping, byvoeging, verandering of tussenskrif" word oral waar dit in artikel 2(1)(b) en 2(2) van die hoofwet gebruik word, dienooreenkomstig deur die uitdrukking "wysiging" vervang (a 3(d), (e) en (f) van die wet).

2 9 Die soldatetestament word afgeskaf

Artikel 3 van die hoofwet het voorsiening gemaak vir 'n sogenaamde "soldatetestament"; dit was 'n bevoorregte testament omdat dit aan minder formaliteitsvoorskrifte as die gewone statutêre testament moes voldoen. Daar is min van hierdie testamentsvorm gebruik gemaak, en die regskommissie was van mening dat indien die kondonasiebevoegdheid wat hy voorgestel het aan die hof verleen sou word, dit enige vorm van bevoorregte testament onnodig sou maak (*Verslag* par 2 135). Die wet (a 5) skrap daarom artikel 3; gevolglik sal 'n soldatetestament wat gemaak is deur 'n testateur wat na die inwerkingtreding van die wet dood is, nie sonder meer deur 'n meester as geldig aanvaar mag word nie. Die hof mag natuurlik van sy nuutgegewe kondonasiebevoegdheid gebruik maak en die meester gelas om die testament as geldig te aanvaar (oor die sg kondonasiebevoegdheid, sien verder par 2 11 hieronder).

2 10 By buitelandse testamente word renvoi *uitgeskakel*

Volgens artikel 3*bis* van die hoofwet kan 'n testament ook geldig wees indien dit verly is ooreenkomstig die reg van sekere ander state. Die wet (a 6) wysig artikel 3*bis* deur die uitdrukking "reg", waar dit ook al voorkom, deur die uitdrukking "interne reg" te vervang, en deur 'n nuwe woordomskrywing van "interne reg" in artikel 1 van die hoofwet in te voeg, as synde die reg van 'n staat of gebied, uitgesonderd die reëls van die internasionale privaatreg van daardie staat of gebied (a 2(a)).

Die doel met hierdie wysiging is om 'n verwysing na die internasionale privaatregreëls van 'n ander regstelsel, en daarmee *renvoi*, uit te sluit (*Verslag* par 2 150 – 2 154).

2 11 Die hof verkry die bevoegdheid om 'n testament of wysiging aan 'n testament as geldig te aanvaar ten spyte daarvan dat dit nie aan al die formaliteitsvereistes vir die verlyding of wysiging van 'n testament voldoen nie, solank die hof oortuig is dat die testament of die wysiging daarvan bedoel was om die testateur se testament of wysiging daarvan te wees

Die regskommissie het aanbeveel dat 'n sogenaamde kondonasiebevoegdheid aan die hof verleen moet word om testamente wat nie aan die voorgeskrewe formaliteite vir 'n geldige testament voldoen nie, geldig te verklaar (*Verslag* par 2 29 ev). Sodanige diskresie word lankal reeds deur regskrywers bepleit (sien bv Cronjé en Roos 1984 *De Rebus* 260; Sonnekus 1984 *TSAR* 301). Volgens die regskommissie moet as enigste, absolute vereiste geld dat die testament op skrif moet wees (*Verslag* par 2 20). Verder moet die bevoegdheid uitgebrei word om ook die nie-voldoening aan formaliteite by die wysiging van 'n testament in te sluit (*Verslag* par 2 125).

Hierdie bevoegdheid is vervat in 'n nuwe artikel 2(3) van die hoofwet (ingevoeg deur a 3(g) van die wet).

2 12 Die meester moet die gemeenregtelike vermoede oor herroeping ignoreer en mag 'n duplikaat van die oorspronklike testament aanvaar

As gevolg van die weerlegbare vermoede van die gemenereg dat indien 'n testament, wat in besit van die testateur was, na sy dood nie gevind kan word nie, hy die testament vernietig het met die bedoeling om dit te herroep, het die meester nie sonder meer 'n afskrif of duplikaat van 'n testament aanvaar nie. As die oorspronklike van die testament nie beskikbaar was nie, was dit immers moontlik dat die testateur die testament herroep het. Die praktyke van die verskillende meesterskantore ten aansien van die oorweging van eksterne getuienis om te besluit of hulle 'n duplikaat van 'n testament kan aanvaar of nie, was boonop ook nie dieselfde nie (*Verslag* par 3 14, 3 16).

Omdat die meester nie ingerig is om die feitelike basis van die vermoedens te beoordeel deur die aanhoor van getuienis om te bepaal of die betrokke vermoede weerlê kan word of nie, het die regskommissie wetswysiging aanbeveel; dit behels dat die meester die vermoede oor herroeping moet ignoreer en 'n duplikaat-oorspronklike van 'n testament mag aanvaar sonder om enige getuienis af te neem (*Verslag* par 3 24).

Die wet (a 12) voer die regskommissie se aanbeveling uit deur 'n nuwe subartikel (4A en 4B) te dien effekte by artikel 8 van die Boedelwet 66 van 1965 in te voeg.

2 13 Die hof verkry die bevoegdheid om 'n testament of gedeelte daarvan as herroep te verklaar indien die hof oortuig is dat die testateur beoog het om sy testament of gedeelte daarvan te herroep en die testateur se bedoeling om te herroep uit die voorkoms van die testament of enige ander dokument blyk

Die hoofwet maak geen melding van die herroeping van testamente nie; die gemenereg het gevolglik die aangeleentheid beheers. Die regskommissie was nietemin van mening dat daar statutêr voorsiening gemaak moet word vir die verlening van 'n bevoegdheid aan die hof om in sekere omstandighede 'n testament of gedeelte daarvan as herroep te verklaar al is daar nie enige formaliteite

nagekom nie, solank die hof oortuig is dat die testateur bedoel het om sy testament te herroep. Die enigste vereiste moet wees dat die herroepingshandeling uit 'n dokument moet blyk, of volgens die voorkoms van die testament merkbaar moet wees (*Verslag* par 3 38).

In uitvoering van die voorstel voeg die wet (a 4) 'n nuwe subartikel 2A in die hoofwet in wat die omstandighede opnoem waarin die hof sy diskresie mag uitoefen. Die omstandighede wat hier relevant is, skyn net 'n bevestiging te wees van die omstandighede waarin 'n testament ook in die verlede as herroep beskou sou gewees het: waar die testateur 'n geskrewe aanduiding van sy bedoeling om die testament te herroep daarop aangebring of laat aanbring het (bv "gekanselleer" daaroor geskryf het – sien *Marais v The Master* 1984 4 SA 288 (D)); 'n "ander handeling" daarmee verrig of laat verrig het wat sy bedoeling om dit te herroep duidelik maak (bv waar hy die testament opgeskeur het); of waar hy 'n dokument wat nie 'n testamentêre geskrif is nie opgestel of laat opstel het waaruit sy bedoeling om sy testament te herroep, duidelik blyk.

'n Mondelinge herroeping van 'n testament sal steeds nie geldig wees nie.

2 14 Waar 'n testateur 'n testament verly het voor sy egskeiding of nietigverklaring van sy huwelik, en hy sterf binne drie maande daarna sonder om sy testament te verander, moet aan die testament uitvoering gegee word asof die voormalige gade oorlede was op die datum van ontbinding van die huwelik tensy 'n teenstrydige bedoeling uit die testament blyk

Die regskommissie was nie ten gunste van 'n algemene reël dat die testateur se testament herroep moet word deur 'n verandering van sy omstandighede nie (*Verslag* par 3 66). Die kommissie was egter wel ten gunste van 'n reël dat 'n egskeiding of nietigverklaring van die testateur se huwelik sy testamentêre bepalings beïnvloed (*Verslag* par 3 51 – 3 56). Die testament as geheel moet egter nie herroep word nie, maar die testament moet in werking tree soos dit in werking sou getree het as die gade vooroorlede was op die datum van egskeiding of nietigverklaring. Waar 'n teenstrydige bedoeling uit die testament blyk (maw waar dit duidelik blyk dat die testateur wel sy voormalige gade in sy testament wou bevoordeel het) moet egter aan die bedoeling van die testateur gevolg gegee word. Die regskommissie was ook van mening dat die egskeiding of nietigverklaring van die huwelik net die testamentêre bepalings moet beïnvloed indien die testateur binne drie maande na die ontbinding van die huwelik sterf aangesien dit die testateur genoeg tyd gee om sy testament te verander. Indien hy dit nie binne drie maande verander nie kan geredeneer word dat hy steeds sy voormalige gade wil bevoordeel (*Verslag* par 3 57 – 3 63).

Hierdie voorstel van die regskommissie is vervat in 'n nuwe artikel 2B van die hoofwet (ingevoeg deur a 4 van die wet).

2 15 Drie interpretasiereëls word geskep wat by die uitleg van 'n testament gebruik word, tensy 'n teenstrydige bedoeling uit die testament blyk

2 15 1 'n Aangenome kind moet beskou word as gebore uit sy aannemende ouers, en by die bepaling van sy verwantskap met die erflater of 'n ander persoon vir doeleindes van 'n testament, beskou word as die kind van sy aannemende ouers

'n Aangenome kind se testate erfregtelike posisie word deur artikel 20(1) en 20(2) van die Wet op Kindersorg 74 van 1983 geraak. Daar het heelwat onduidelikheid

en onsekerheid oor die implikasies van hierdie artikel vir die testate erfreg bestaan (sien *Verslag* par 6 8 – 6 14). Volgens die regskommissie bied 'n fiksie, soos vervat in artikel 20(2) (nl dat 'n aangenome kind vir alle doeleindes hoegenaamd regtens die wettige kind van die aannemende ouer is, asof hy gedurende die bestaan van 'n wettige huwelik uit daardie ouer gebore is) nie die korrekte oplossing vir die testate erfreg nie. Die regskommissie het voorgestel dat daar eerder 'n interpretasiereël ingevoer moet word wat ten doel het om die testateur se bedoeling te bepaal in gevalle waar daar twyfel bestaan. By die formulering van die interpretasiereël was die regskommissie se uitgangspunt dat die gemiddelde testateur nie sy natuurlike kinders bo sy aangenome kinders wil bevoordeel nie (*Verslag* par 6 17 – 6 18).

Artikel 2D(1)(a) van die hoofwet (ingevoeg deur a 4 van die wet) gee uitvoering aan bogenoemde voorstelle.

2 15 2 Die feit dat 'n persoon buite-egtelik is, moet buite rekening gelaat word by die bepaling van sy verwantskap met die testateur of 'n ander persoon

In die gemenereg is daar teen die verskillende klasse buite-egtelike kinders gediskrimineer ten aansien van sowel die intestate erfreg (Van der Merwe en Rowland 107 – 109) as testate erfreg (Voet 28 2 14; Van der Merwe en Rowland 242). Die Wet op Intestate Erfopvolging 81 van 1987 het hulle posisie verbeter wat die intestate erfreg betref, maar in die testate erfreg was die posisie van buite-egtelike kinders, in die besonder die posisie van die bloedskendige kinders, onseker (Van der Merwe en Rowland 242). Daar is ook teen speelkinders en owerspelige kinders gediskrimineer want waar 'n testateur die woorde "my kinders" in sy testament gebruik het, het ons howe beslis dat dit nie buite-egtelike kinders insluit nie (Corbett, Hahlo, Hofmeyr en Kahn 552 en gesag daar aangehaal).

Volgens die regskommissie is dit moreel onverdedigbaar om teen buite-egtelike kinders te diskrimineer; daarom is aanbeveel dat 'n uitlegreël deur wetgewing geskep moet word waarvolgens die woord "kinders" of soortgelyke woorde wat in die testament gebruik word, buite-egtelike kinders insluit, tensy die testateur se bedoeling tot die teendeel uit sy testament blyk (*Verslag* par 4 27, 4 29).

Hierdie voorstel is vervat in 'n nuwe artikel 2D(1)(b) van die hoofwet (ingevoeg deur a 4 van die wet).

2 15 3 Kinders wat na die testateur se dood gebore word, moet nie by 'n klasbemaking ingesluit word nie

In die verlede was die howe nie konsekwent in hulle beantwoording van die vraag of by 'n bemaking aan 'n klas persone (bv "my broer se kinders") net die lede van die klas mag erf wat by die testateur se dood lewe, en of lede van die klas wat na sy dood gebore word, ook mag erf nie (vgl oa *Wentzel v Brink's Executors* (1892) 9 SC 328; *Ex parte die Standard Bank of SA Ltd* 1966 4 SA 414 (N); *Reichenberg v Bader* 1977 2 SA 1045 (W)). Die appèlhof het ook nog nie nodig gehad om daaroor te beslis nie (vgl *Ex parte Burger* 1957 3 SA 644 (A)). Volgens Murray moes *post nati* nie ingesluit word by 'n klasbemaking nie

aangesien die gemiddelde testateur nie mense wil bevoordeel wat nie aan hom bekend was nie. Indien *post nati* ook onder die bevoordeeldes gereken moet word, sal dit boonop tot gevolg hê dat dit jare kan neem voordat die klas bevoordeeldes bepaalbaar sal wees (*Verslag* 5 39). Die regskommissie het sy aanbevelings in die verband aanvaar.

Die wet (a 4) voeg daarom 'n nuwe artikel 2D(1)(c) in die hoofwet in waarvolgens 'n voordeel wat toegeken is aan die kinders van 'n persoon, of die lede van 'n klas persone, in daardie kinders van die persoon of daardie lede van die klas persone vestig wat op die tydstip van die oorgang van die voordeel leef, of wat op daardie tydstip reeds verwek is en later lewend gebore word (die laaste deel van die bepaling is net 'n bevestiging van die *nasciturus*-fiksie).

Soos aangetoon is, geld al drie bogenoemde uitlegreëls net as 'n teenstrydige bedoeling nie uit die testament blyk nie. By die toepassing van die uitlegreëls in artikel 2D(1) beteken "testament" enige geskrif van 'n persoon waarvolgens hy na sy dood oor sy goed of 'n deel daarvan beskik (a 2D(2) van die hoofwet).

2 16 Daar word uitsonderings geskep op die reël dat die testamentskrywer, die amanuensis *en getuies tot 'n testament, asook hulle gades, nie ingevolge die betrokke testament mag erf nie*

Volgens die regskommissie moet die gemeenregtelike reël dat die skrywer van 'n testament, behalwe in twee uitsonderingsgevalle, nie ingevolge daardie testament mag erf nie, asook artikels 5 en 6 van die hoofwet, herroep word (*Verslag* par 4 38). (A 5 en 6 het bepaal dat die getuies tot 'n testament en die persoon wat namens die testateur onderteken het, asook hulle gades en regsverkrygendes (of hulle gades), onbevoeg was om 'n voordeel – wat ingesluit het die benoeming as eksekuteur, administrateur, trustee of voog – in daardie testament te neem.)

Aanvanklik het die Wetsontwerp tot Wysiging van die Erfreg (W8-92 (AS)) 'n artikel bevat wat gevolg gegee het aan hierdie voorstelle. Die gesamentlike Komitee oor Justisie het egter die artikel verwerp en 'n ander een voorgestel. Die resultaat is dat die wet (a 8) artikels 5 en 6 van die hoofwet herroep en 'n nuwe artikel 4A in die hoofwet voeg (a 7). In artikel 4A word as vertrekpunt aanvaar dat die persoon wat die testament in sy eie handskrif skryf, die getuies tot die testament en die persoon wat namens en in opdrag van die testateur onderteken, asook genoemde persone se gades, *nie* mag erf nie (a 4A(1)). In sekere uitsonderingsgevalle sal hulle egter wel mag erf: dit is naamlik die geval waar die hof oortuig is dat hulle nie die testateur bedrieg of onbehoorlik beïnvloed het by die verlyding van die testament nie (a 4A(2)(a)), of as hulle in elk geval intestaat sou geërf het. In laasgenoemde geval mag hulle nie meer as hulle intestate porsie erf nie (a 4A(2)(b)). Die getuie tot 'n testament en sy gade mag ook erf as daar nog twee ander bevoegde getuies is wat geen bevoordeling uit die testament ontvang nie (a 4A(2)(c)). Artikel 4A(3) stem ooreen met die ou artikel 6 ingevolge waarvan 'n aanstelling as 'n voog, eksekuteur of trustee ook as 'n voordeel beskou is.

Dit is interessant om daarop te let dat die begrip "regsverkrygende", wat in artikel 5 gebruik was, nie meer in artikel 4A(1) gebruik word nie. Dit is te verwelkom aangesien die begrip in elk geval oortollig was (sien Van Zyl 1988 *De Jure* 365).

2 17 Artikel 24 van Wet 32 van 1952 word herroep en vervang deur 'n bepaling wat voorsiening maak vir representasie van 'n vooroorlede afstammeling van die testateur, asook vir representasie van 'n afstammeling wat repudieer of onbevoeg is om te erf. Die bepaling maak ook voorsiening dat waar 'n afstammeling repudieer, die voordeel in sekere omstandighede in die langslewende gade van die testateur, en nie in die afstammeling se afstammelinge nie, sal vestig

Artikel 24 van Wet 32 van 1952 het baie kritiek uitgelok (sien Joubert 1954 *THRHR* 40 ev; Rogers 1953 *SALJ* 418; Corbett, Hahlo, Hofmeyr en Kahn 213 ev) en word nou op aanbeveling van die regskommissie deur die wet herroep (a 1) en vervang deur artikel 2C(1) en (2) en 2D van die hoofwet (ingevoeg deur a 4 van die wet).

Artikel 2C(2) vervang in wese artikel 24 en toon daarom die meeste raakpunte met artikel 24. Dit verskil egter ook in vele opsigte daarvan. 'n Eerste verskil is dat die statutêre substitusie nou nie meer beperk word tot kinders van die testateur nie, maar uitgebrei word na alle afstammelinge van die testateur omdat dit meer in ooreenstemming met die posisie in die intestate erfreg en die gemenereg is (*Verslag* par 5 8, 5 18). Net soos in artikel 24 word hier ook nie onderskei tussen die aanstelling van erfgename in die algemeen en aanstelling met verwysing na naam en getal nie. Die regskommissie wou nie voorstel dat 'n onderskeid, soos in die gemenereg, gemaak moet word tussen klas- en ander bemakings nie omdat dit die reg onnodig sou kompliseer (*Verslag* par 5 19 – 5 20).

'n Tweede verskil is dat enige afstammeling kan representeer; dit hoef nie meer 'n "wettige" afstammeling te wees nie. Die wysiging is in ooreenstemming met die regskommissie se voorstel dat buite-egtelike kinders van hulle ouers moet kan erf (*Verslag* par 5 31).

'n Derde verskil is dat artikel 2C(2) nie net op die bepalings van 'n testament betrekking het nie maar op enige geskrif waarvolgens 'n persoon na sy dood oor sy goed of 'n deel daarvan beskik (a 2C(2) saamgelees met a 2D van die hoofwet). Die regskommissie was van mening dat bevoordelings wat 'n persoon bedoel het na sy dood in werking moet tree, dieselfde hanteer behoort te word ongeag of die bevoordeling in 'n testament voorkom al dan nie en dat die woord "bemaking" in artikel 24 dienooreenkomstig deur "voordeel" in die nuwe artikel vervang moet word (*Verslag* par 5 11, 5 27).

'n Vierde verskil is dat artikel 2C(2) nie net vir die vooroorlye van die testateur se afstammeling voorsiening maak nie, maar ook vir die geval waar die afstammeling onbevoeg is om te erf of repudieer (*Verslag* par 5 56). (Indien hy repudieer, moet die bepalings van artikel 2C(1) egter eers in ag geneem word.)

In ooreenstemming met 'n verdere voorstel van die regskommissie word die Afrikaanse begrip "staaksgewyse" in artikel 2C(2) gebruik in plaas van die Latynse term *per stirpes* wat in artikel 24 gebruik was (*Verslag* par 5 33). Net soos by artikel 24 geld die bepalings van artikel 2C(2) net as 'n teenstrydige bedoeling nie uit die testament blyk nie.

Soos aangetoon is, maak artikel 2C(2) ook voorsiening vir statutêre substitusie in die geval waar die afstammeling van die testateur sy voordeel repudieer. Indien die afstammeling wat repudieer (uitgesonderd 'n minderjarige of geestesonbevoegde afstammeling) egter saam met die oorlewende gade van die testateur op 'n voordeel ingevolge 'n testament geregtig was, vestig sodanige voordeel

in die oorlewende gade en nie in die afstammeling se afstammelinge nie (a 2C(1) van die hoofwet; die artikel stem ooreen met die reëling wat getref word in die intestate erfreg – *Verslag* par 5 55). Artikel 2C(1) bevat nie 'n soortgelyke voorbehoudsbepaling as artikel 2C(2) dat 'n teenstrydige bedoeling in die testament die werking van die artikel kan uitskakel nie (vir kritiek hierop, sien Sonnekus 1992 *TSAR* 173). Indien die afstammeling nie binne die trefwydte van artikel 2C(1) val nie, (maw as hy minderjarig of geestesongesteld is of nie saam met die langslewende gade op 'n voordeel in die testament geregtig is nie) erf sy afstammelinge weer eens ingevolge artikel 2C(2).

Dit is nie duidelik wat die uitdrukking "saam met die oorlewende gade van die erflater op 'n voordeel ingevolge 'n testament geregtig is" in artikel 2C(1) presies beteken nie. Dit is byvoorbeeld onseker of dit voldoende sal wees dat die afstammeling en die oorlewende gade saam in een testament bevoordeel word, en of vereis sal word dat hulle saam op dieselfde voordeel geregtig moet wees, soos wat gewoonlik by gemeenregtelike aanwas die geval is (sien hieroor Sonnekus 1992 *TSAR* 171 ev).

2 18 Artikel 1(4)(c) van die Wet op Intestate Erfopvolging 81 van 1987 word herroep en vervang deur 'n bepaling wat tot gevolg het dat representasie in die intestate erfreg nie net plaasvind by die vooroorlye van 'n intestate erfgenaam nie, maar ook wanneer 'n intestate erfgenaam sy voordeel repudieer of onbevoeg is om te erf; verder word voorsiening gemaak dat indien 'n afstammeling repudieer die voordeel in sekere omstandighede in die langslewende gade van die erflater sal vestig

Ingevolge artikel 1(4)(c) van die Wet op Intestate Erfopvolging 81 van 1987 word 'n persoon wat van sy reg om te erf afstand gedoen het, of onbevoeg was om te erf, geag vooroorlede te wees. Enige persoon wat geregtig sou wees om te erf deur hom te representeer, word ook geag vooroorlede te wees. Die regskommissie het hierdie bepaling op twee gronde gekritiseer: eerstens dat dit onregverdig is om die "misdaad van die vaders aan die kinders te besoek" en tweedens dat dit onlogies is om verskillende reëls neer te lê vir die geval van vooroorlye aan die een kant en repudiasie of onbevoegdheid om te erf aan die ander kant (*Verslag* par 5 47).

In ooreenstemming met die voorstelle van die regskommissie skrap die wet (a 14) artikel 1(4)(c) en voeg twee nuwe subartikels, (6) en (7), in artikel 1 van die Wet op Intestate Erfopvolging in. Hiervolgens kan 'n onbevoegde intestate erfgenaam van die oorledene gerepresenteer word deur sy afstammelinge want die voordeel wat hy sou geërf het, vererf asof hy onmiddellik voor die oorledene as 'n bevoegde erfgenaam gesterf het. Verder, as 'n intestate erfgenaam van die oorledene afstand doen van sy reg om te erf, vestig die voordeel in die oorlewende gade mits die intestate erfgenaam 'n meerderjarige, geestesbevoegde afstammeling van die oorledene is wat saam met die oorlewende gade op 'n voordeel uit die intestate boedel geregtig is. So nie, vererf die voordeel wat hy sou geërf het asof hy onmiddellik voor die oorledene gesterf het, en kan hy gevolglik weer eens deur sy afstammelinge gerepresenteer word.

Hierdie artikels beliggaam die gevestigde praktyk dat begunstigdes ten gunste van die langslewende gade mag afstand doen, soos die regskommissie aanbeveel het (*Verslag* par 5 48). Net soos in die testate erfreg, sal 'n minderjarige of

geestesongestelde afstammeling egter nie ten gunste van die langslewende gade mag repudieer nie (*Verslag* par 5 50).

(Let daarop dat die woord "erflater" in die laaste sin van a 1(7) deur "oorledene" vervang moet word – sien a 32 van die Algemene Regswysigingswetsontwerp W150B – 92.)

3 Slot

Die regskommissie word gelukgewens met hulle navorsing en verslag. Weliswaar is nie al sy voorstelle in die wet geïmplementeer nie. Soos in par 2 16 hierbo aangetoon is, is die voorstel oor die bevoegdheid om te erf van die persone wat by die verlyding van die testament betrokke is, in gewysigde vorm geïmplementeer. Voorts is 'n voorstel oor die bevoegdheid om te erf van 'n persoon wat die erflater of sy naasbestaandes se dood veroorsaak het, of die testateur se testament verberg of vernietig het, glad nie in die wet opgeneem nie (*Verslag* par 4 23, 4 49). Sommige van die voorstelle wat wel in die wet beliggaam is, is vatbaar vir kritiek. (Sien bv Schoeman 1991 *De Jure* 216 se kritiek op die feit dat slegs die ontbinding van die testateur se huwelik, en nie ook huweliksluiting nie, 'n effek het op die wyse waarop uitvoering aan 'n testament gegee word; en vgl Sonnekus 1992 *TSAR* 171 173 se kritiek op die formulering van die nuwe artikel 2C wat voorsiening maak vir statutêre substitusie.) Hierdie paar punte van kritiek doen egter nie afbreuk aan die feit dat die regskommissie hom goed van sy taak gekwyt het nie. Die wet word uiteraard verwelkom. Alhoewel dit waarskynlik nie al die probleme of onsekerhede wat in die erfreg bestaan het uit die weg ruim nie, word seer sekerlik die meeste van die ernstige probleme opgelos en op baie terreine van die erfreg regsekerheid gebring.

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SOME PROBLEMS CONCERNING IMPLIED (TACIT) PROVISIONS OF CONTRACTS

1 Introduction

In *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA 459 (C) the court, with respect, correctly held that the principles relating to the grant or refusal of an order of specific performance applied, *mutatis mutandis*, to an application for an interdict restraining one to whom goods had been pledged *in securitatem debiti* from alienating the goods without the consent of the pledgor (464C); that

> "the grant or refusal of an interdict is a matter within the discretion of the Court hearing the application and depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect" (per Cooper J 464F – G);

and that there is no rule in South African law that an order of specific performance will not be granted where the applicant could be compensated adequately by an award of damages (464G – H).

It has recently been asked whether the rules on orders of specific performance should not be re-examined by the Appellate Division (Van Deventer "The right of unilateral stoppage in construction projects and its consequences revisited – or how a South African Court took a wrong turning in a French tunnel and how a Frenchman provided light at the end of the tunnel" 1991 *SALJ* 403 – 405). That question is beyond the scope of this note, the purpose of which is to examine three other matters relevant to what is said in the opinion.

2 Does "necessary" in the test for implied provisions in a contract mean "necessary" as presently understood?

When he formulated the hypothetical bystander test in *Reigate v Union Manufacturing Co* 1918 1 KB 592 605, Scrutton LJ began by saying:

> "A term can only be implied [the LT report cited by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) at 533B has "You must only imply a term"] if it is necessary in the business sense to give efficacy to the contract;"

and continued the sentence with the well-known reference to the hypothetical bystander. It is important to note that what is "necessary in the business sense to give efficacy to [a] contract" is not a requirement additional to passing the hypothetical bystander test: to pass the hypothetical bystander test the requirement of being "necessary . . . to give efficacy" must be met.

The language used by Scrutton LJ gives rise to a linguistic difficulty in that to say that a provision is "necessary" suggests to a modern reader that the provision so described is one without which the contract cannot exist. This is not what Scrutton LJ meant (see the discussion in my *The principles of the law of contract* (1989) 271 – 282 280 – 282 (*Contract*)). One may say with confidence that Cooper J, who constituted the court in the *Candid Electronics* case *supra*, would agree with the example concerning leases in *Contract* 280 – 281 (see his *The South African law of landlord and tenant* (1973) 319 – 321).

The hypothetical bystander test is firmly established in our law (see the authorities cited in *Contract* 271 fn 104); so there is no question of doing without it. That being so, there would seem to be two ways of dealing with the problem. The first is to omit the words which do not add to the value of the test and are likely to be misunderstood. This is the solution I prefer (*Contract* 271) and have preferred since 1967 (it appeared in the first edition of *Contract* in that year at 108); but the suggestion has not as yet, so far as I am aware, been adopted by any court. The second way of dealing with the problem is for courts which quote the words "necessary in the business sense to give efficacy to the contract" to explain what they understand them to mean. The words are reproduced without explanation in the *Candid Electronics* case *supra* 463A in a quotation from *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 533B and, since the list in *Contract* 271 fn 104 was compiled, in *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 1 SA 822 (A) 827G and *Marais v Van Niekerk* 1991 3 SA 724 (E) 728I, also quoting the *Alfred McAlpine* case. At the risk of being accused of repeating myself, I should like to re-iterate the plea I made in 1985 *THRHR* 232 that any court, whether the Appellate Division or any other, which considers that the words "necessary in a business sense to give efficacy to the contract" indicate a requirement additional to the hypothetical bystander test should spell out precisely what the words mean, that is, precisely what the requirement is.

3 The status of an implied provision

In the *Candid Electronics* case *supra* 463D Cooper J referred with approval to the statement of Ogilvie Thompson AJ in *Mercantile Bank of India Ltd v Davis* 1947 2 SA 723 (C) 736-737 that

> "[i]n the absence of an express agreement for *parate* execution, a pledgee is not under our law entitled to sell the pledged property without prior recourse to the court",

and held that for this and another reason that

> "the tacit term alleged by the respondent is no answer to the relief claimed by the applicant" (463D – E).

The use of the words "implied" and "tacit" will be discussed in the next section. Here it is necessary only to note that by "the tacit term" the court intended to refer to one which was alleged to be in the minds of the parties but was not expressed (see the passage from the *Alfred McAlpine* case *supra* 462I – J). It should be noted, however, that both in the *Mercantile Bank of India* case and in *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 which it followed, there was written agreement on the point; thus neither court considered, nor needed to consider, what the position would be if the agreement was either oral or implied.

The controversy concerning *parate* execution was concerned with the validity or otherwise of an agreement that such might take place, not with the form of the agreement (see the authorities cited in Scott and Scott *Wille's law of mortgage and pledge in South Africa* (1987) 120 – 124). (In modern law an agreement allowing *parate* execution is valid if the goods pledged are movable; it is not valid if the property is immovable (*ibid*). In both the *Mercantile Bank of India* and *Candid Electronics* case the goods were movable.) One needs to distinguish between, on the one hand, a (possible) requirement that agreement be in writing and, on the other hand, a (possible) requirement that it be express because express agreements may be either written or oral. Ulpian in *D* 13 7 4 does not require writing and Kotzé JP said in *Osry*'s case *supra* 541:

> "A pressing creditor, who for instance obtains from his debtor the right to take a horse or cow from his field in order to sell it to the best advantage in settlement of the debt due, and to hand over any balance of the proceeds to the debtor, is in no different position from one who has stipulated for parate execution, and yet he is at full liberty to sell the horse or cow and give legal title to the purchaser."

Clearly a contract to remove a horse or cow and to sell it is not required to be in writing and "stipulations" need not necessarily be so either; the learned Judge President presumably did not think that an agreement of *parate* execution had to be in writing. Hence it appears that an agreement for *parate* execution can be oral and can be implied because, once a provision which does not need to be in writing has met the requirements for recognition and has been found to be implied, it has the same status as an express provision of the contract in question. It is based on the agreement of the parties. It is not provided by the law in the absence of agreement by the parties (for authorities on the propositions in last three sentences see *Contract* 270 – 292).

4 Terminology: "implied", "tacit"

How should one best describe the process of recognising a provision in a contract which the parties had in mind but did not express? In the *Candid Electronics* case *supra* 463B – D the court, following Corbett AJA in the *Alfred*

McAlpine case *supra* 532H, twice referred to "implying" a "tacit" term. With respect, this expression is an acceptable though not the most suitable one if, and only if, the terms "implied" and "tacit" are regarded as synonymous or virtually synonymous. Most non-legal and some legal authorities do so regard them (see *Contract* 257 fn 10 11). However, if with Rumpff ACJ and Corbett AJA in the *Alfred McAlpine* case *supra* 526A – E 532F – G one adopts Salmond and Williams's (*op cit*) proposal and uses the word "tacit" to describe a term which the parties had in mind but did not express and the word "implied" to describe a term which the law provides and imposes in the absence of agreement by the parties, it is not correct to say that a "tacit" term is "implied" because the processes by which the two classes of terms become part of the contract are very different (*Contract* 285 – 295).

Another term was used in the *Alfred McAlpine* case *supra* 532H, quoted in the *Candid Electronics* case *supra* 462I, where it was said by Corbett AJA that the court may "import" a "tacit" term into a contract. With respect, as "importing" refers to something brought in from outside, this is not a good way of describing the recognition by the court of a term that the parties themselves had in mind but did not express, particularly as the phrase is followed immediately by an acknowledgement that a court

> "cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so".

As Henochsberg AJ said in *Graham v McGee* 1949 4 SA 770 (D) 777:

> "[W]hen a court makes such an implication it does not impose a term *ab extra*, it merely remedies an omission. It does what the parties would have done themselves had they thought of the matter."

As long as courts use the words "implied" and "tacit", which are virtually synonymous (see above), to indicate two quite different categories of contractual provisions, difficulties and confusion are likely to result. A provision which the parties have in mind but do not express, may be the same in content as the one that would be supplied by law in the absence of agreement by the parties – as Corbett AJA pointed out in the *Alfred McAlpine* case *supra* 535F – G (see also *Contract* 285) – but it still behoves the courts to be careful of their terminology. Thus one may be permitted to wonder whether Corbett AJA in the *Alfred McAlpine* case *supra* 534G – H should have drawn attention to what was "clearly contemplated by the parties" when he was giving grounds for describing a provision as "implied in the contract", "implied" in the terminology which the learned Judge was using, meaning supplied by law in the absence of agreement by the parties. One may also be permitted to wonder whether, if the words are given the meanings assigned to them (532F – G), readers will not have difficulty with the following passage (535F – G), emphasis added:

> "I consider that all the requirements for the *importation* of a *tacit* term are also satisfied. I am convinced that such an obligation must necessarily be *implied* in order to give business efficacy to the contract and that the bystander test would have elicited a unanimous and affirmative response from the contracting parties."

As the court in the *Alfred McAlpine* case *supra* 526A – E 532D – F was influenced by Salmond and Williams's choice of terminology in their work on English law, *The principles of the law of contracts* (2ed (1945)), it is pertinent to note that the most important expositors of the English and American law of contract do not adopt the word "tacit" to describe a category of contracts or of provisions of contracts (see *Halsbury's Laws of England* vol 9 (1974);

Chitty on contracts (1989); *Cheshire, Fifoot and Furmston's law of contract* (1986) by Furmston; Treitel *The law of contract* (1987); *Williston on contracts* (1957); *Corbin on contracts* (1963); *Restatement, second, contracts* (1981); *American Jurisprudence* vol 17 *Contracts*; Calamari and Perillo *The law of contracts* 1977).

It is also pertinent to note that, when used to refer to a provision which the parties had in mind but did not express, each of the words "implied" and "tacit" has in its favour Appellate Division authority in unanimous decisions taken subsequent to that in the *Alfred McAlpine* case *supra*: "implied" in *Wedge Transport (Pty) Ltd v Cape Divisional Council* 1981 4 SA 513 (A) 535B – H, and "tacit" in *Delfs v Kuehne and Nagel (Pty) Ltd* 1990 1 SA 822 (A) 827H ff.

The lack of a suitable verb to use in connection with the word "tacit" (if this term is used) when describing the recognition of a provision which the parties had in mind, and the availability of "is implied" when "implied" is used, together with the fact that the word "implied" is used by numerous authorities both in South Africa and elsewhere in the English-speaking world, are additional factors in favour of continuing to use "implied" to refer to provisions which the parties had in mind but did not express. Further, the virtual synonymity of "implied" and "tacit" is a strong argument for choosing a completely different word, such as "residual", to describe provisions added by the law in the absence of agreement between the parties (see *Contract* 255 – 258 269 – 295).

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DIE TENIETGAAN VAN VERBINTENISSE IN DIE INHEEMSE KONTRAKTEREG VAN DIE BAKWENA BA MOGOPA VAN HEBRON*

1 Inleiding

'n Kontrak by die Bakwena ba Mogopa van Hebron kan beskryf word as 'n afspraak waaruit daar verbintenisse voortvloei. 'n Kontrak staan as *tumalano* bekend en 'n verbintenis as *tlamo*. Vir elkeen van hierdie begrippe bestaan daar dus 'n afsonderlike woord en is dit daarom duidelik dat daar nie na 'n kontrak en verbintenis verwys kan word asof dit dieselfde begrip is nie. 'n Kontrak is slegs die bron waaruit 'n verbintenis ontstaan, en indien die verbintenis beëindig word, gaan die kontrak ook tot niet.

'n Blote afspraak, dit wil sê sonder dat een van die partye ingevolge daardie afspraak presteer het, gee nie aanleiding tot enige regsgevolge nie (*contra* Prinsloo en Vorster "Elements of a contract" in Centre for Indigenous Law se

* Hierdie aantekening is gebaseer op 'n deel van die navorsingsresultate wat in die outeur se LLD-proefskrif Unisa 1992 vervat is. Die gegewens wat volg, is tydens veldnavorsing in 1991 deur ondervraging van 'n paneel van deskundige informante van die Bakwena ba Mogopa van Hebron in die Odi I distrik van Bophuthatswana verkry.

Indigenous contract in Bophuthatswana (1990) 10). Derhalwe sal die een party nie die ander kan dwing om te presteer of prestasie te ontvang nie. Daar ontstaan dus geen kontraktuele gebondenheid op grond van 'n afspraak alleen nie. Hierdie regsreël word verklaar aan die hand van 'n regspreuk *lentswe la maabane ga le tlhabe kgomo* (gister se woord slag nie 'n bees nie). Die partye kan in enige stadium nadat 'n afspraak aangegaan is, maar voordat enige prestasie daarkragtens gelewer is, van standpunt verander. Die beginsel word soos volg uitgedruk: *Motlhalefi o fetola mogopolo wa gagwe* ('n wyse man verander van besluit). Hieruit blyk dat slegs reële kontrakte bekend is, dit wil sê kontrakte wat bestaan uit 'n afspraak plus prestasie of gedeeltelike prestasie.

'n Verbintenis word beskou as 'n subjektiewe verhouding tussen die skuldeiser en die skuldenaar met die klem op die partye as mense, en nie op die objek van die verbintenis, naamlik die prestasie nie. Dit verklaar waarom 'n dispuut in 'n hof dikwels van sekondêre belang is en die verhouding tussen die partye as mense die hoogste prioriteit geniet. Alhoewel 'n verbintenis bestaande uit regte en verpligtinge van tydelike aard is en bestem is om deur voldoening uitgewis te word, is die partye op grond van hulle onderlinge menseverhoudinge aan daardie verbintenis gebonde.

'n Behoorlike begrip van hierdie konkrete aard van 'n kontrak en 'n verbintenis is noodsaaklik om die tenietgaan van verbintenisse te verstaan. Daar is opvallende ooreenkomste met die wyses waarop verbintenisse in die Westerse regstelsels tenietgaan maar ook duidelike verskille.

2 Verjaring

In die Westerse regstelsels het tydsverloop 'n invloed op kontrakte. Volgens De Wet en Yeats (*Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 255) handel verjaring oor die verkryging van regte of die bevryding van skulde na verloop van 'n sekere tyd. Daarom word tussen verkrygende en bevrydende verjaring onderskei. Verkrygende verjaring hou in dat sekere regte na verloop van tyd verkry kan word. Bevrydende verjaring handel daarenteen oor die uitwissing van 'n skuld na die verloop van 'n bepaalde tyd.

In wat hierop volg word aandag aan bevrydende verjaring gegee aangesien 'n kontrak tenietgaan wanneer skulde uitgewis word. 'n Skuldenaar kan dus na verloop van tyd die bestaan van 'n skuld ontken of, anders gestel, indien hy vir 'n skuld aangespreek word en die bepaalde tydperk reeds verstryk het, kan die skuldenaar regtens weier om daardie skuld te betaal aangesien dit deur tydsverloop verval het.

'n Toonaangewende saak oor verjaring in die inheemse reg is *Lequoa v Sipamla* 1944 NAC (C & D) 85. Hierin wys die voormalige Naturelle Appèlhof daarop dat die inheemse reg nie verjaring van 'n skuld ken wat erken of deur 'n hofbevel bevestig is nie. Die hof vervolg:

> "But where a debt, claim, or liability is open to denial, or dispute, or is a matter where time is important in fixing an event, eg a seduction, or the whereabouts of an individual, eg a catch in an adultery case, delay in instituting action by report, demand or summons is regarded in Native Law as prejudicing the defence if the delay is unreasonable" (85–86).

Bekker (*Seymour's customary law in Southern Africa* (1989) 65) skryf ook dat verjaring in die inheemse reg onbekend is en dat die vertraging om 'n aksie aanhangig te maak nie die reg om die aksie in te stel, wegneem nie. Volgens hom

moet die skuld egter "wakker gehou word" deurdat die skuldeiser die skuldenaar van tyd tot tyd daaraan moet herinner. Enigeen teenwoordig kan dan waarneem dat die skuldenaar nie sy aanspreeklikheid ontken nie.

Ten aansien van die Batswana van Botswana meld Schapera (*A handbook of Tswana law and custom* (1970) 286–287) die volgende:

> "It may be noted here that there is no law of prescription among the Tswana. *Molato ga obole, go bola nama*, goes the saying: 'a wrong does not go bad, it is meat that goes bad'."

Dit is ook die bevinding van Prinsloo en Vorster 20 vir die Batswana van Bophuthatswana.

By die Bakwena ba Mogopa van Hebron is verjaring insgelyks onbekend en geld die bekende regspreuk *molato ga o bole, go bola nama* (skuld word nie vrot nie, vleis word vrot) ook by hulle. 'n Prestasie hoef nie aan 'n tydperk gekoppel te wees om enige betekenis te hê nie. Tyd kan ook nie in die plek van die waarheid staan nie. Solank as wat daar 'n skuld bestaan, is daar 'n verpligting wat nagekom moet word en juis daarin is die regsekerheid geleë. 'n Uitstaande skuld bied ook nie veel ruimte vir manipulasie deur die skuldeiser nie want 'n skuld hoef nooit onmiddellik betaal te word nie, selfs al is daar 'n spesifieke dag vir prestasie bepaal. Ten einde die bewys van die skuld na 'n lang tyd te vergemaklik, is dit ook nodig dat die skuldeiser die skuldenaar van tyd tot tyd daaraan moet herinner om sodoende die skuld "wakker te hou".

3 Skuldvergelyking

Wanneer twee persone ingevolge die Westerse regstelsels 'n bedrag geld skuld, kan hulle hierdie skulde teenoor mekaar opweeg. Indien die bedrae ewe groot is, word die skulde uitgewis en indien een bedrag groter as die ander is, word die kleiner bedrag uitgewis en die groter bedrag in verhouding verminder (*SA Metropolitan Life Assurance Co Ltd v Ferreira* 1962 4 SA 213 (O)).

Skuldvergelyking, bekend as *tekatekanyo ya disuga*, is egter nie by die Bakwena ba Mogopa 'n wyse waarvolgens verbintenisse beëindig kan word nie. Elke skuldooreenkoms bring 'n afsonderlike verbintenis met sy eie regte en verpligtinge tussen bepaalde persone mee en daar moet gevolglik aan elkeen afsonderlik voldoen word.

Prinsloo en Vorster 19 vermeld ook dat skuldvergelyking nie in Bophuthatswana voorkom nie:

> "All the experts maintained that set-off is not recognised in Tswana law. A debtor's obligation under one contract can therefore not be terminated by an equal obligation of the creditor in terms of another contract. Equal debts between the parties but under different contracts are therefore not extinguished by way of set-off."

Coetzee en andere (*Privaatreg van ses Tswanastamme in die Republiek van Bophuthatswana* (1985) 146) beweer egter dat skuldvergelyking wel in Bophuthatswana voorkom en noem as voorbeeld die geval waar die *bogadi* vir 'n dogter van iemand anders ontvang is en die ontvanger 'n deel daarvan vir onderhoud en huweliksuitgawes terughou. Hierdie gebruik is glad nie aan die Bakwena ba Mogopa van Hebron bekend nie. Indien dit volgens hulle moontlik was, sal die ontvanger van die *bogadi* eers al die *bogadi* aan die reghebbende moet lewer alvorens hy aanspraak sal kan maak op enige vorm van vergoeding. Skuldverpligtinge word ook aangegaan om sosiale verhoudinge te bestendig en optredes soos in die voorbeeld van Coetzee genoem, sal negatief en verwarrend daarop inwerk.

4 Voldoening

Skrywers oor die inheemse reg laat hulle nie spesifiek oor hierdie regshandeling uit nie. Ten aansien van die Batswana van Bophuthatswana skryf Prinsloo en Vorster 18 slegs die volgende:

> "Contractual obligations are terminated by rendering performance, by entering into a new agreement and by supervening impossibility of performance. As soon as a debtor has performed properly he has fulfilled his obligation."

Voldoening is by die Bakwena ba Mogopa van Hebron die algemeenste wyse waarop verbintenisse ten einde loop en vind plaas wanneer die kontraktante hulle onderskeie verpligtinge ingevolge die ooreenkoms nakom. Anders as wat in die Westerse regstelsels moontlik is, kan voldoening nie geskied deur 'n derde wat nie 'n party tot die ooreenkoms is nie. Die skuldeiser kan dus behoorlike prestasie wat 'n derde aanbied, weier, sonder om in *mora creditoris* te verval. Voldoening deur 'n derde sal alleen moontlik wees indien die oorspronklike verbintenis tussen die skuldeiser en skuldenaar tot niet gemaak word en 'n nuwe verbintenis tussen die skuldeiser en die derde gevestig word. In so 'n geval is daar dan nie meer sprake van voldoening deur 'n derde nie. 'n Derde kan nie betrokke raak in 'n verbintenis wat tussen twee partye bestaan nie. Benewens die subjektiwiteit van 'n kontraktuele verhouding sou dit te veel ruimte vir oneerlikheid laat en geen bydrae tot regsekerheid lewer nie.

Voldoening moet aan die skuldeiser self geskied en nie aan sy gevolmagtigde of skuldeiser nie. Die partye kan ook nie ooreenkom dat betaling aan 'n derde mag geskied nie omdat so 'n derde op geen wyse deel uitmaak van die regsband wat tussen die skuldeiser en skuldenaar bestaan nie.

Die skuldenaar kan ook nie iets anders in die plek van die verskuldigde prestasie lewer sonder dat die oorspronklike verbintenis tot niet gemaak is en 'n nuwe verbintenis in die plek daarvan tot stand gekom het nie. Die werklik verskuldigde prestasie moet dus gelewer word.

Die skuldenaar moet algehele voldoening aanbied tensy hy van nuuts af met die skuldeiser ooreenkom om stuksgewys te presteer. Die skuldenaar moet prestasie lewer op die plek waartoe die partye ooreengekom het. Indien die skuldenaar op 'n ander plek prestasie aanbied, hoef die skuldeiser dit nie te aanvaar nie.

5 Kwytskelding

Kwytskelding in die Westerse regstelsels is algemeen bekend as 'n ooreenkoms tussen skuldeiser en skuldenaar waarkragtens die skuldenaar deur die skuldeiser van sy verpligtinge ingevolge die verbintenis onthef word. Dit is vanselfsprekend dat wilsooreenstemming tussen die partye nodig is. 'n Enkele aanbod van die skuldeiser om die skuldenaar kwyt te skeld, kan dus in enige stadium, totdat die skuldenaar daartoe ingestem het, herroep word (De Wet en Yeats 238 – 239).

Die Engelse reg het "consideration" vereis vir 'n kwytskelding maar in die Suid-Afrikaanse reg is die blote skenkingsbedoeling voldoende. 'n Gratis kwytskelding *ex liberalitate* moet egter voldoen aan die formaliteite wat vir skenkings gestel word (*Coronelis Curator v Coronelis Estate* 1941 AD 323).

In die beskikbare literatuur oor die inheemse reg maak slegs Prinsloo en Vorster 19 melding van kwytskelding. Ten aansien van die Batswana van Bophuthatswana skryf hulle soos volg (*ibid*):

> "A creditor may release his debtor from performing. The following example was put to the experts: Group A, who is poor, borrowed a large basket (*seroto*) of corn from

> group B, who is wealthy. The latter decide to forego their obligatory right and inform group A accordingly. The experts maintained that group B would have to notify group A of the release and that group A would have to accept the offer of release in order to terminate the obligation. The obligation is not automatically terminated by an offer of release, acceptance is necessary."

Indien 'n mens van die standpunt uitgaan dat kwytskelding in die inheemse reg 'n kontrak tussen die skuldeiser en die skuldenaar is, ontstaan die vraag of daar in die lig van die reële aard van die inheemse kontrak nie ook een of ander vorm van prestasie moet wees om die kontrak tot stand te bring nie. Volgens die Bakwena ba Mogopa van Hebron aan wie kwytskelding bekend is as *golola*, is die blote aanbod en aanname soos in bogenoemde voorbeeld nie voldoende vir kwytskelding nie. Daar sal boonop een of ander vorm van prestasie aan die kant van B moet wees. Die vraag is of ons dan nog met kwytskelding te doen het aangesien kwytskelding plaasvind wanneer partye ooreenkom dat die skuldenaar nie hoef te presteer nie.

6 Novasie

Volgens De Wet en Yeats 239 is novasie of skuldvernuwing

> "die delging van 'n ou skuld deur die skepping van 'n nuwe skuld in die plek van die oue. Dit kan gebeur deur die skepping van 'n nuwe skuld tussen dieselfde partye, novasie in engere sin, of deur die vervanging van een van die partye deur 'n ander, delegasie".

Volgens gemelde skrywers vind novasie plaas deur ooreenkoms tussen die betrokke partye, gemaak met die bedoeling om deur die skepping van die nuwe skuld die oue te vervang.

Alhoewel die Bakwena ba Mogopa van mening is dat novasie bekend is in die sin van 'n ou skuld wat deur 'n nuwe gedelg word, is dit egter twyfelagtig of dit novasie in die Westerse sin van die woord kan wees. Die volgende voorbeeld van "novasie" is gegee: A en B kom ooreen dat A 'n koei aan B sal lewer in ruil vir 'n os wat A van B ontvang het. In 'n latere stadium gaan A en B 'n nuwe afspraak aan ingevolge waarvan A vyf bokke in die plek van die koei aan B kan lewer. Alvorens 'n nuwe kontrak tussen A en B tot stand kan kom, moet die prestasie ten aansien van die eerste verbintenis eers teruggegee word en van nuuts af deur albei partye presteer word. Sodoende word nie alleen die ou verbintenis tussen die partye deur 'n nuwe verbintenis opgehef en vervang nie, maar ook die kontrak as bron van die ou verbintenis tot niet gemaak en deur 'n nuwe kontrak vervang. Aangesien 'n kontrak alleen tot stand kom deur ooreenkoms plus prestasie, kan die partye later weier om voort te gaan met die "nuwe kontrak" en bestaan daar dan geen wyse waarop hulle daaraan gebonde gehou kan word nie.

Prinsloo en Vorster 19 skryf dat ook novasie aan die Batswana van Bophuthatswana bekend is. Benewens bovermelde kommentaar kan daar egter nie met die volgende stelling van gemelde skrywers saamgestem word nie:

> "In the case of novation liability is based on the performance of the creditor in terms of the original agreement and the stipulated counter performance of the debtor in terms of the new agreement."

By novasie kom daar juis 'n nuwe kontrak tot stand waaruit daar nuwe verbintenisse voortvloei. Daarbenewens het die Bakwena ba Mogopa van Hebron dit vreemd gevind dat aanspreeklikheid vir die partye uit twee verskillende kontrakte voortvloei.

7 Skikking

Skikking soos in die Westerse regstelsels bekend is, is 'n kontrak waardeur die partye 'n geskil tussen hulle oplos (vgl De Wet en Yeats 242).

Ten aansien van die Batswana van Bophuthatswana meld Prinsloo en Vorster 19:

> "The change of the original agreement can also be the result of a dispute between the parties. In the above example [sien die voorbeeld hierbo by kwytskelding] it was, for instance, required that group A should return the corn within two months but group A failed to do so. To be reasonable the parties compromise and determine that instead of returning the corn group A will weed group B's gardens."

Die voorbeeld skep die indruk dat die skrywers skikking in die oog het ofskoon hulle nie die term eksplisiet gebruik nie. Dit kan egter nie as 'n voorbeeld van skikking gesien word nie omdat daar nooit 'n dispuut tussen A en B was oor die bestaan van 'n geldige skuld nie.

Dit is belangrik om skikking van novasie te onderskei. Novasie verskil van skikking in die opsig dat by novasie die partye dit eens is oor die bestaan van 'n geldige skuld terwyl daar by skikking juis 'n geskil is oor die bestaan daarvan al dan nie. De Wet en Yeats 242 stel dit soos volg:

> "Vir die geldigheid van die skikking is dit nodig dat daar tussen partye 'n geskil moes bestaan het, maar nie noodwendig 'n regsgeding nie . . . Die doel van 'n skikking is juis om sekerheid te bring waar daar voorheen onsekerheid bestaan het."

Indien A dus beweer dat B R200 ingevolge 'n weddenskapskontrak aan hom verskuldig is terwyl B dit ontken, en A later inwillig om R100 in die plek van die R200 te neem, vind daar 'n skikking tussen A en B plaas. Die Bakwena ba Mogopa van Hebron het met laasgenoemde voorbeeld saamgestem en verduidelik dat *gophumula diatla*, letterlik vertaal, beteken "om hande af te vee". Volgens hulle is die skuld deur die skikking uitgewis en het uit die skikking self weer 'n nuwe verbintenis ontstaan. Aangesien die prestasie ten aansien van die oorspronklike verbintenis egter eers teruggegee moet word en 'n ander kontrak gesluit moet word alvorens 'n nuwe verbintenis kan ontstaan, is dit twyfelagtig of 'n skikking in die Westerse sin van die woord wel by die Bakwena ba Mogopa van Hebron moontlik is.

8 Skuldvermenging

Skuldvermenging soos die Westerse regstelsels dit ken, vind plaas wanneer iemand die hoedanigheid van skuldeiser en skuldenaar in sy eie persoon verenig. Met ander woorde, waar een persoon 'n skuldenaar was en die ander 'n skuldeiser, vestig albei hierdie hoedanighede in een persoon (De Wet en Yeats 255). Deurdat die hoedanighede van skuldeiser en skuldenaar in een persoon vestig en 'n persoon nie sy eie skuldeiser of skuldenaar kan wees nie, word die verbintenis beëindig.

'n Verskynsel wat ooreenkoms toon met bogenoemde beskrywing van skuldvermenging staan as *kopanyo disuga* (ontmoeting van skulde) bekend. *Kopanyo* is afgelei van die werkwoord *kopana* (om bymekaar uit te kom). Die volgende voorbeeld van *kopanyo disuga* is deur die Bakwena ba Mogopa van Hebron verskaf: A skuld R200 aan B. B kom te sterwe en laat R300 aan A na. Alhoewel volgens die Westerse siening van skuldvermenging die hoedanighede van skuldeiser en skuldenaar na B se dood in bogenoemde voorbeeld in A verenig is ten opsigte van dieselfde verbintenis, het die Bakwena ba Mogopa van Hebron

die regsposisie anders verklaar. Volgens hulle het daar wel 'n vorm van "ontmoeting" tussen die regte en verpligtinge van A en B plaasgevind maar geensins 'n vermenging nie. A sal eers fisies die R200 aan B se boedel moet betaal alvorens hy op die R300 aanspraak kan maak.

Ten aansien van die Batswana van Bophuthatswana skryf Prinsloo en Vorster 19:

> "An obligation can also be terminated by way of merger. The following example was put to the experts: Group A has borrowed a pack-ox (*pelesa*) from group B. The latter is so taken with the animal that it offers group B five sheep for it. Group B accepts the offer and the sheep are delivered while group A keeps the ox as its own. The experts maintained that group B could not demand that the original contract of loan be honoured by group A after group B had accepted the sheep."

Die Bakwena ba Mogopa van Hebron het hierdie voorbeeld aanneemlik gevind alhoewel hulle daarop gewys het dat die leenkontrak tussen A en B eers beëindig moet word. A moet dus eers die os aan B terugbesorg het voordat 'n koopkontrak gesluit kan word. Hierdie siening illustreer die standpunt dat daar nie meer as een verbintenis uit dieselfde kontrak kan voortvloei sonder om eers die oorspronklike kontrak as regsfeit tot niet te maak nie.

9 Samevatting

Voldoening is 'n bekende wyse waarvolgens verbintenisse in die inheemse kontraktereg van die Bakwena ba Mogopa van Hebron tot niet kan gaan. Wanneer 'n verbintenis beëindig word, gaan ook die kontrak tot niet waaruit die verbintenis voortgevloei het. Gevolglik is dit nie moontlik om die regte en verpligtinge wat 'n bepaalde verbintenis meebring, te verander sonder om ook die afspraak waaruit die verbintenisse ontstaan het, tot niet te maak en van nuuts af 'n kontrak te sluit nie. Om hierdie rede is skuldvergelyking nie moontlik nie en ontstaan die vraag of kwytskelding, novasie en skikking nie ook om dieselfde rede onbestaanbaar is nie. Verjaring is onbekend omdat tydsverloop 'n party nie van sy skulde kan bevry nie.

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IS LYFSTRAF OP PAD UIT?

Die juridiese geoorloofdheid van lyfstraf is in 'n onlangse appèl van drie sake, naamlik *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 2 SA 702 (ZS), uitvoerig bespreek. Hierdie beslissing, asook twee ander waarna verwys sal word, maak die onderwerp van hierdie aantekening uit.

Die meerderjarige appellant N in *S v Ncube supra* is deur die verhoorhof tot ses jaar gevangenisstraf en ses houe gevonnis vir die verkragting van 'n minderjarige. Die ander twee appellante het in hul onderskeie strafsake ooreenstemmende vonnisse van lyfstraf opgeloop en aangesien slegs die appèlle ten opsigte

van die lyfstraf (en nie ook die skuldigbevindinge nie) toegestaan is, is die drie appèlle tegelyk aangehoor.

Meer in die besonder is die hof gevra om te besin oor die bewering dat die oplegging van lyfstraf vir 'n volwasse manlike oortreder 'n onmenslike of vernederende straf is, en bygevolg strydig met artikel 15(1) van die Verklaring van Regte soos vervat in die Zimbabwiese grondwet (703F – G). Artikel 15(1) bepaal:

> "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

Appèlregter Gubbay bespreek etlike konvensies wat in Zimbabwe oor die afgelope jare ontwikkel het wat die oplegging en uitvoer van lyfstraf aansienlik ingeperk en in ooreenstemming met die gebruike in verligte regstelsels gebring het (705J – 707A). Genoemde konvensies handel egter bloot oor praktiese aspekte, byvoorbeeld dat lyfstraf nie opgelê behoort te word as dit duidelik is dat vorige houe nie 'n rehabiliterende uitwerking op die beskuldigde gehad het nie, of dat dit ongewens is om lyfstraf aan 'n lang gevangeskap te koppel. Die hof spreek dan (707B) sy teleurstelling uit dat weinig beslissings afkeur aangaande die aard van hierdie tipe straf uitgespreek het. In *R v Tanbiga* 1965 1 SA 257 (SR) 258E beskryf regter Young lyfstraf as "a severe and degrading punishment for an adult" terwyl regter Gubbay dit in 'n ander vroeër saak (*S v Ndhlovu* 1981 ZLR 600 602A) as "an inhumane, humiliating and degrading mode of punishment" beskou.

In Suid-Afrika, waar nóg die beginsel, nóg die oplegging van lyfstraf aan toetsing deur die howe beregbaar is, is daar oor die afgelope 32 jaar skerp kritiek vanuit regskringe geopper teen die klakkelose en selfs onbesonne wyse waarop lyfstraf as 'n aanvaarde korrektiewe middel aangewend word (707F – 710A).

Die hof (714I – 715B) wys daarop dat in die tersaaklike gedeeltes van artikel 15(1) (aangehaal *supra*), die selfstandige naamwoorde "punishment" en "treatment" beide deur die twee byvoeglike naamwoorde "inhuman" en "degrading" gekwalifiseer word; voorts volg uit die gebruik van "or" en nie "and" nie tussen die twee frases dat 'n disjunktiewe uitleg gebruik moet word. Dit kom daarop neer dat die oogmerk van hierdie artikel is om sowel onmenslike straf en onmenslike behandeling as vernederende straf en vernederende behandeling te voorkom. Die volle regbank het ingestem dat die lyfstraf soos opgelê op die drie volwasse appellante strydig met die bepalings van die Verklaring van Regte is en die straf gevolglik tersyde gestel (sien ook 721H – 722D).

Die kwessie van lyfstraf op minderjariges was ter sprake in *S v F* 1989 1 SA 460 (ZH) en ook daar dui die hof aan dat dit in sekere omstandighede onkonstitusioneel kan wees (465A – B). In 'n opvolgende saak, *S v A Juvenile* 1990 4 SA 151 (ZS), is die Zimbabwiese Hooggeregshof uitdruklik gevra om te beslis of 'n vonnis van lyfstraf wat vir 'n minderjarige opgelê is, straks strydig met artikel 15(1) is. In hierdie beslissing word Tshuma se pleidooi ("Spare the rod and spoil the child: is juvenile whipping constitutional?" 1987 *Zimbabwean LR* 214) in behandeling geneem. Die toepassing van hierdie straf aan 'n minderjarige word beheer deur artikel 330 van die Zimbabwiese Criminal Procedure and Evidence Act (ch 59) wat soos volg bepaal:

> "(1) As often as any male person who has not attained the age of 19 years is convicted of any offence, the court before which he is convicted may –
>
> (a) in lieu of any other punishment; or
>
> (b) if such person has been sentenced to pay a fine or to undergo a period of imprisonment and the operation of the whole of such sentence has been suspended, in addition to such fine or imprisonment;

and as well as in the case of a first conviction as of any subsequent conviction, sentence such person to receive in private a moderate correction of whipping, not exceeding ten cuts.

(2) A moderate correction in terms of ss (1) shall be administered by such person and in such place and with such instrument as the court may appoint.

(3) The parent or guardian of a person sentenced to receive a moderate correction shall have the right to be present."

Hierdie artikel kom wesenlik ooreen met artikel 294(1) en (3) van die Suid-Afrikaanse Strafproseswet 51 van 1977, behalwe dat die ouderdomsgrens in laasgenoemde 21 jaar is.

By monde van hoofregter Dumbutshena in die *Juvenile*-beslissing is die enigste feitelike verskille tussen lyfstraf soos toegepas op meerderjariges en minderjariges dat die rottang in laasgenoemde geval kleiner is en dat die minderjarige se ouer of voog die keuse het om by die strafoplegging teenwoordig te wees (156A – B). Die hof bevind, na oorweging van verskillende betoë, dat die oplegging van lyfstraf aan 'n minderjarige 'n onmenslike en vernederende straf of behandeling is wat as sodanig in stryd is met die verbod van artikel 15(1) en onderskryf die bevinding in *S v Ncube supra* 162H – J.

Die minderheidsuitspraak in die *Juvenile*-beslissing weerspieël egter die gevoel van meeste mense. Appèlregter McNally, met instemming van appèlregter Manyarara, laat hom soos volg uit:

> "I do not agree that because this Court has ruled adult strokes to be unconstitutional it must follow that juvenile cuts are unconstitutional. Nor, progressing down the scale, does it follow that corporal punishment in schools is unconstitutional, or that smacking a naughty child is *ipso facto* a violation of that child's fundamental human rights" (170C; sien ook 174B – E 175E – F).

Na die beslissing van *S v A Juvenile supra* wat op 29 Junie 1989 gelewer is, is die Zimbabwiese grondwet in 1990 gewysig deur die Constitution Amendment (No 11) – wet 30 van 1990. Hierdie wysiging volg die algemene bevinding in *S v Ncube supra* maar gee tog gevolg aan die minderheidsuitspraak in *S v A Juvenile* vir sover dit matige lyfstraf vir 'n persoon jonger as agtien jaar betref. Die nuut toegevoegde artikel 15(3) lui soos volg:

> "No moderate corporal punishment inflicted –
>
> (a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian; or
>
> (b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law;
>
> shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading."

In die derde beslissing, *Ex parte Attorney-general, Namibia: In re Corporal Punishment by Organs of State* 1991 3 SA 76 (NmSC), is die hof gevra om oor die grondwetlikheid van staatsopgelegde lyfstraf in Namibië te besluit en te besin oor aspekte soos die straf as sodanig, persone aan wie dit opgelê mag word, vir watter oortredings en of die prosedure by die toepassing juis is.

Artikel 8 van die Namibiese grondwet is getitel "Respect for human dignity" en artikel 8(2) bepaal soos volg:

> "(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty respect for human dignity shall be guaranteed.
>
> (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

Behalwe vir die toevoeging van "cruel" (wat as 'n aktiewe vorm van die begrip "inhuman" geïnterpreteer kan word), stem artikel 8(2)(b) ooreen met artikel 15(1) van die Zimbabwiese grondwet.

Waarnemende appèlregter Mahomed bevind dat lyfstraf in die gestelde omstandighede "inhuman or degrading" is (90A) en stel die beslissing van die hof soos volg:

> "The infliction of all corporal punishment (in consequence of an order from a judicial or quasi-judicial authority) both in respect of adults as well as juveniles, constitutes degrading and inhuman punishment within the meaning of art 8(2)(b) of the Namibian Constitution" (93D – E).

Hoewel die begrippe in die eerste geval in teenstelling geplaas (naamlik "inhuman OR degrading") en in die tweede saamgevoeg word ("inhuman AND degrading"), is hierdie verskil in woordgebruik nie van kritiese belang vir die onderhawige bespreking nie. Die hof bevind voorts dat enige lyfstraf wat by 'n regeringskool aan 'n skolier toegedien word, in stryd met die Namibiese grondwet is (95A).

Appèlregter Holmes dui in *S v Sparks* 1972 3 SA (A) 396 aan dat straf eerstens die belange van die veroordeelde en die staat in ag moet neem, tweedens by die oortreding aangepas moet wees en derdens 'n mate van medelye moet toon (401H). In *S v Ncube* (*supra* 706 708D – 709A 722B – E), *S v A Juvenile* (*supra* 152B – E 156G – 157A 164C – D 165I – J 169B) asook in *Ex parte A-G, Namibia* (*supra* 87D – H 89G – J 90H – 91A) word die vernaamste redes bespreek waarom lyfstraf nie 'n geskikte vonnis is nie. Uit hierdie besprekings kan 'n mens die volgende punte haal en op die drie belanghebbendes by lyfstraf van toepassing maak: die veroordeelde, vonnisvoltrekker en gemeenskap. Ten aansien van die veroordeelde is lyfstraf onaanvaarbaar omdat:

(a) geen oorweging aan die rasionele oordeel tot hervorming van die veroordeelde self gegee word nie;

(b) die fisiese aanval waarin die straf gestalte vind, 'n onoorbrugbare afstand tussen veroordeelde en voltrekker skep; en

(c) dit nie opgelê moet word waar dit duidelik blyk dat die lyfstraf geen korrektiewe of afskrikwaarde het nie.

Vir die voltrekker is so 'n straf onaanvaarbaar omdat:

(a) dit ook vir hom vernederend is; en,

(b) ten spyte van maatreëls en moontlik ingeboude meganismes om wanpraktyke te voorkom, lyfstraf steeds vir misbruik vatbaar is.

Vir die gemeenskap is lyfstraf onaanvaarbaar omdat:

(a) vergelding asook rehabilitasie op 'n sinvoller en beskaafder wyse bereik moet word;

(b) lyfstraf net so barbaars is as die misdryf wat daarmee bekamp word; en

(c) lyfstraf niks anders as geïnstitusionaliseerde wreedheid is nie.

Vervolgens is dit nodig om op die Suid-Afrikaanse situasie te let. In al drie bovermelde beslissings word naamlik uitvoerig verwys na Suid-Afrikaanse regspraak, artikels en wetgewing waarin lyfstraf aanwending vind, maar ook na spesifieke gevalle waar dit reeds bevraagteken is (vgl *S v Ncube supra* 707F – 710A; *S v A Juvenile supra* 157B – H 165D – 169G *passim*; en *Ex parte A – G, Namibia supra* 78G – 84I 87I – J 89F – J). Wat hou die toekoms in?

Die Suid-Afrikaanse Regskommissie se interimverslag oor *Groeps- en menseregte* (Projek 58, Werkstuk 25, 1991) bepaal soos volg:

> "4(b) Niemand mag aan psigiese of liggaamlike marteling, aanranding of onmenslike of vernederende behandeling onderwerp word nie" (par 7.119 307).

In die besprekings van die kommissie oor hierdie onderwerp is daar onder meer gelet op artikel 5 van die Universele Verklaring van Menseregte wat bepaal dat "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment *or punishment*" (par 7.112 304; ons beklemtoning) maar nêrens in die verslag word oorweeg of die begrip "or punishment" in die kommissie se voorgestelde artikel 4(b) opgeneem moet word nie.

Ons doen aan die hand dat die term "behandeling" wat die kommissie gebruik, wyd genoeg is om benewens marteling en aanranding (wat wel afsonderlik in a 4(b) opgeneem is), ook straf in te sluit. Dit sou nietemin raadsaam wees om, in ooreenstemming met internasionale gebruik, die uitdrukking "of straf" by die voorgestelde artikel 4(b) in te voeg selfs al sou geredeneer kon word dat dit toutologies is. Op hierdie punt is artikel 2(6) van die ANC se *Bill of Rights for a New South Africa* (1990) bevredigender: "No-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."

Uit bostaande kan afgelei word dat lyfstraf ook in Suid-Afrika onkonstitusioneel verklaar sal kan word indien 'n verklaring van menseregte aanvaar word. Daar is egter 'n geval waar lyfstraf deur howe opgelê mag word en waaroor moontlik opnuut besin sal moet word, naamlik lyfstraf deur kapteinshowe. Dit is 'n tradisionele straf (Schapera *A handbook of Tswana law and custom* (1955) 49). Ingevolge artikel 20(2) van die Swart Administrasie Wet 38 van 1927 mag dit egter net opgelê word "in die geval van ongetroude manspersone onder die oënskynlike ouderdom van dertig jaar". Hierdie bepaling het al in die howe ter sprake gekom in verband met die vraag of lyfstraf binne die gegewe perke opgelê is (vgl bv *S v Seatholo* 1978 4 SA 368 (T); *S v Molubi* 1988 2 SA 576 (BGD); *S v Madihlaba* 1990 1 SA 76 (T)). Uiteraard is nie oorweeg of dié straf onkonstitusioneel is nie. Op die oog af behoort dit ook onkonstitusioneel verklaar te word. Daar is egter ander oorwegings wat hier 'n rol kan speel. Alhoewel lyfstraf bots met internasionaal erkende menseregte, bestaan daar in baie Afrika-lande en elders tradisionele howe wat lyfstraf mag oplê (sien oa a 17 van die Botswana Customary Courts Act Cap 04:05).

In dié verband is die volgende pertinente vrae oor inboorlingreg in Australië gevra:

> "Where conflicts occur, should the values of Aboriginal society be overridden on the basis that they are unacceptable to the wider Australian, or even the international community? Should recognition only be accorded those Aboriginal laws which mainstream Western culture finds acceptable? Or should Aboriginal societies be left to develop their own values?" (McRae *et al Aboriginal legal issues* (1991) 225.)

Die Australian Law Reform Commission het aanbeveel dat ieder geval op eie meriete behandel word (vgl ALRC Report 31 (1986) hfst 10 vir 'n volledige bespreking). Die houding van die Australiese regskommissie weerspieël 'n mate van verdraagsaamheid ten opsigte van die toepassing van inheemse regsreëls al sou dit bots met universele norme. Onses insiens behoort die saak egter met omsigtigheid hanteer te word. Persone wat aan die jurisdiksie van kapteinshowe onderworpe is, is nie noodwendig net daarom ook vir lyfstraf te vinde nie. Lyfstraf is in alle omstandighede wreed en vernederend en kan nie goedgemaak word met die stelling dat dit vir swartmense aanvaarbaar is nie.

Feit is dat ook 'n meerderheid blankes waarskynlik nog die een of ander vorm van lyfstraf goedpraat – ons eie onderwysowerhede maak per slot van sake nog daarvoor voorsiening. As lyfstraf dan op grond van die gemeenskapsopvatting voorlopig (tot 'n menseregtehandves ingestel word) behoue moet bly, kan dit intussen ten minste ook in kapteinshowe beperk word tot 'n matige lyfstraf van sê nie meer nie as ses houe met 'n ligte rottang op seuns onder 18 jaar.

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VOLTOOIINGSAANSPREEKLIKHEID, VERKRAGTING EN VIGS: 'N RIGTINGWYSER VAN DIE NATUUR?

1 Inleiding

Dit is algemeen bekend dat VIGS 'n dodelike en ongeneeslike siektetoestand is. Anders as ander groot epidemies, soos tifus, cholera en griep wat deur die uitoefening van lewensnoodsaaklike funksies soos asemhaling en voeding versprei word, word VIGS oorgedra deur menslike handelinge waaroor die mens beheer het en nie lewensnoodsaaklik is nie (De Jager "VIGS: Die rol van die strafreg" 1991 *TSAR* 215). Dit kan onder andere oorgedra word deur homo- of heteroseksuele geslagsomgang en van moeder tot kind (Van Wyk "VIGS en die reg: 'n verkenning" 1988 *THRHR* 319).

In geval van 'n enkele onbeskermde daad van geslagsomgang word die risiko dat die gesonde deelnemer die siekte sal opdoen op hoogstens 1% geskat. By geslagsomgang *per anum* is die risiko egter hoër (De Jager 215). Wat egter duidelik blyk, is dat die gewone voortplantingshandeling vir 'n medemens noodlottige gevolge kan hê. Deur 'n enkele handeling van geslagsomgang (*per vaginam* of *per anum*) kan 'n kettingreaksie aan die gang gesit word wat jare daarna die dood van 'n medemens kan veroorsaak (Schlehofer "Risikovorsatz und zeitliche Reichweite der Zurechnung beim ungeschützen Geschlechtsverkehr des HIV – Infizierten" 1989 *NJW* 2017). In hierdie kort aantekening word dié problematiek teen die agtergrond van die empiriese en morele regverdigbaarheid van voltooiingsaanspreeklikheid aan die orde gestel.

2 Voltooiingsaanspreeklikheid

Volgens Von Hippel is die oorsprong van die strafreg te vinde in die vaderlike *jus vitae necisque* van primitiewe gemeenskappe (*Deutsches Strafrecht* 1 (1925) 55). In dieselfde trant wys Makarewicz daarop dat die strafreg aanvanklik suiwer op mag gebaseer was (*Einführung in die Philosophie des Strafrechts* (1967) 137 ev). Die strafreg was in 'n vroeëre stadium gerig op die bestraffing van uiterlikwaarneembare skade of besering of doodsveroorsaking (Wilda *Das Strafrecht der Germanen* (1960) 147; Labuschagne "Die eindbestemming van die dekonkretiseringsproses in die strafreg" 1990 *THRHR* 99). Afwesigheid van

skuld, ontoerekeningsvatbaarheid asook hedendaagse regverdigingsgronde, soos noodweer, het in beide die oud-Germaanse en oud-Romeinse reg nie strafregtelike aanspreeklikheid opgehef nie (Von Hippel 46–47; Wilda 147; Rein *Das Kriminalrecht der Römer* (1962) 158; Binavince "The ethical foundation of criminal liability" 1964 *Fordham LR* 4–9). Volgens Von Schwerin het pogingsmisdade eers in die 14de en 15de eeu in die hedendaagse Duitsland ontwikkel (*Grundzüge der deutschen Rechtsgeschichte* (1950) 211). Glazebrook wys daarop dat pogingsmisdade eers in die tweede helfte van die 17de eeu in Engeland "with clarity at work" was ("Should we have a law of attempted crime?" 1969 *LQR* 29). Daar is derhalwe duidelik 'n proses van dekonkretisering in die strafreg werksaam (Labuschagne 1990 *THRHR* 99–101).

Tot op hede bestaan (uiterlik-waarneembare) voltooiingsaanspreeklikheid, ook ten aansien van verkragting, egter steeds voort. In 'n vroeëre fase van die ontwikkeling van ons reg het die vrou se voortplantingsvermoë aan óf haar vader (of voog) óf haar man behoort. Geslagsomgang met haar, hétsy vrywillig, hétsy wilstrydend, was 'n skending van haar vader of haar man se regte (Rein 830–842). Die klem op die vroulike voortplantingsvermoë bestaan tot vandag toe, hoewel afgewater, voort. In Suid-Afrika en Engeland is penetrasie van die *labia* of *vulva* voldoende om verkragting daar te stel (*R v Botha* 1916 TPD 365 366; *R v V* 1960 1 SA 117 (T) 117–118; *S v Molete* 1969 2 PH H213 (Botswana); a 7(2) van die Engelse Sexual Offences (Amendment) Act 1976 gelees met *R v Lines* (1844) 1 Car and Kir 393, 174 ER 861). In Duitsland daarenteen word blykbaar vereis dat die vroulike *vagina* deur die manlike geslagsorgaan binnegedring word (a 177 *StGB* gelees met RG, JW 30, 1916; BGH, NJW 59, 1091). In 'n ander bydrae het ek dié toedrag van sake gekritiseer en aanbeveel dat die Kanadese benadering gevolg moet word. Artikel 246(1) van die Kanadese strafkode skep naamlik 'n misdaad seksuele aanranding ("sexual assault"). Seksuele aanranding is bloot 'n aanranding van 'n seksuele aard (*R v Chase* (1987) 37 CCC (3d) 97 103). Die seksuele selfbestemmingsreg van die mens staan in die Kanadese reg voorop en die vraag of een of ander vorm van penetrasie plaasgevind het, het nie primêre betekenis nie (Labuschagne "Die penetrasievereiste by verkragting heroorweeg" 1991 *SALJ* 154–157). Interessant is dat die oordrag van VIGS nie slegs deur vaginale penetrasie nie maar ook deur anale penetrasie kan geskied. Waar daar die geringste moontlikheid is dat VIGS gedurende 'n seksmisdaad oorgedra kon gewees het, behoort die beweerde dader myns insiens verpligte VIGS-toetse te ondergaan. Dit is tans die beleid in die Amerikaanse staat Kalifornië (MacDonald "AIDS, rape, and the Fourth Amendment. Schemes for mandatory AIDS testing of sex offenders" 1990 *Vanderbilt LR* 1607; Moody "AIDS and rape: the constitutional dimensions of mandatory testing of sex offenders" 1990 *Cornell LR* 238).

3 Doodsveroorsaking deur geslagsomgang

A het geslagsomgang (*per anum* of *per vaginam*) met B sonder sy/haar toestemming. A, 'n VIGS-lyer, het die opset om B met VIGS te besmet en sodoende sy of haar dood te veroorsaak. A is ook bewus van die konkreet-reële moontlikheid dat sy daad 'n kettingreaksie kan veroorsaak as gevolg waarvan dekades daarna nog mense kan sterf en hy wil dit ook (sien ook Van Wyk 1988 *THRHR* 330–331; Van Wyk "Die juridiese implikasies van VIGS" 1991 *Stell LR* 37; Sorgdrager "VIGS: 'n juridiese seekat" 1988 *De Rebus* 792). Indien A nie die opset het om B te dood nie sou hy nogtans aan strafbare manslag skuldig bevind

kon word. Daar is verskeie probleme ten aansien van gevolgsaanspreeklikheid as verskyningsvorm van voltooiingsaanspreeklikheid wat in dié verband na vore tree.

3 1 Verjaring

Aangesien moord 'n halsmisdaad is, is vervolgingsverjaring nie ter sake nie. Strafbare manslag verjaar egter na 20 jaar (a 18 van die Strafproseswet 51 van 1977; Labuschagne "Die effek van tydsverloop op strafregtelike aanspreeklikheid" 1987 *THRHR* 211). Daar kan gevolglik nie onbeperk gewag word totdat al die moontlike slagoffers oorlede is nie. Nietemin moet toegegee word dat dit baie onwaarskynlik is dat dié problematiek werklik in die praktyk ter sprake sal kom, veral ook in die lig van die feit dat die dader self 'n VIGS-lyer is en as gevolg daarvan kan sterf.

3 2 Tydstip van bestraffing

'n Duitse hof het beslis dat 'n VIGS-lyer wat sonder 'n beskermingsmiddel met 'n persoon wat onkundig van sy toestand is homoseksuele geslagsomgang het, strafbaar is weens gevaarlike liggaamskending ("gefährliche Körperverletzung") (LG Nürnberg-Fürth, Urt v 16/11/87, NJW 1988, 2311). In 'n ander saak is beslis dat uit die blote feit dat 'n VIGS-lyer onbeskermde geslagsomgang met 'n ander het, nie afgelei kan word dat hy die opset gehad het om haar te besmet en te dood nie (LG München 1, Beschl v 2/3/1987, NJW 1987, 1495; sien ook AG Kempen, Urt v 1/7/1988, NJW 1988, 2313). Dit is duidelik dat daar, soos ook blyk uit ander gewysdes, nie eenstemmigheid in dié verband in die Duitse reg bestaan nie (Schlehofer 2017). Sover my kennis strek, was daar nog nie Suid-Afrikaanse sake hieroor nie.

Die sleutelvraag is: op welke tydstip moet A gestraf word vir die uit sy geslagsdaad voortvloeiende moord of strafbare manslag? Daar kan seer sekerlik nie gewag word totdat al die moontlike slagoffers gesterf het nie! Aan die ander kant sou dit onregverdig wees om hom elke keer as 'n verdere persoon sterf opnuut aan te kla. Dit sou die effek hê dat hy vir 'n onbepaalde tydperk 'n verhoorafwagtende sou wees. Dit blyk derhalwe dat A gestraf sal moet word voordat al die moontlike gevolge ingetree het.

4 Konklusie

Uit bogaande bespreking blyk dat voltooiingsaanspreeklikheid nóg billik nóg prakties uitvoerbaar is. Deur die VIGS-verskynsel het die natuur 'n vraagteken agter voltooiingsaanspreeklikheid, meer besonder in die vorm van gevolgsaanspreeklikheid, geplaas. Dit bevestig die konklusie wat ek, vanuit 'n sterk morele oogpunt gesien, ten aansien van voltooiingsaanspreeklikheid by 'n ander geleentheid bereik het ("Die uitskakeling van toeval by strafregtelike aanspreeklikheid" 1985 *De Jure* 158 – 160).

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VONNISSE

STRENGE AANSPREEKLIKHEID IN DIE STRAFREG

Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council 1992 2 SASV 183 (N)

1 Inleiding

Dit is 'n kenmerk van 'n beskaafde strafregstelsel dat niemand aan 'n misdaad skuldig bevind kan word nie tensy daar bewys word dat hy met skuld opgetree het. Soos bekend, aanvaar sowel die Anglo-Amerikaanse as die Suid-Afrikaanse strafreg egter die beginsel van sogenaamde "strenge aanspreeklikheid", wat inhou dat indien die wetgewer 'n misdaad skep maar in die definisie van die misdaad oor die skuldvereiste swyg, dit 'n hof vrystaan om die wet so te interpreteer dat die wetgewer bedoel het om 'n misdaad te skep ten opsigte waarvan die skuldvereiste nie geld nie. (Die uitdrukkings "strenge" en "absolute" aanspreeklikheid beteken dieselfde.)

Dit is eweneens bekend dat die beginsel waarvolgens dit 'n hof vrystaan om te beslis dat skuld nie 'n vereiste by sekere wetteregtelike misdade is nie, skerp gekritiseer is. Al die besonderhede van die kritiek sal nie hier uiteengesit word nie. Een van die belangrikste punte van kritiek teen die beginsel was gemik op die manier waarop die howe dit toegepas het, en meer in die besonder die siening dat die howe te maklik bevind het dat die wetgewer bedoel het om strenge aanspreeklikheid te skep. Die maatstawwe wat die howe aanwend om vas te stel of die wetgewer bedoel het om strenge aanspreeklikheid te vestig, is tereg deur die kritici as vaag en spekulatief beskryf. Selfs 'n appèlregter het hierdie maatstawwe al as "ambivalent" beskryf (Holmes AR in *S v Qumbella* 1966 4 SA 356 (A) 364). Daar is tereg aangevoer dat om 'n skuldlose dader te straf, futiel is omdat dit geen afskrikkende effek kan hê nie: 'n volgende skuldlose oortreder kan nie daardeur afgeskrik word nie juis omdat hy geen skuld ten aansien van die betrokke misdryf het nie. In die *Verslag van die Kommissie van Ondersoek na die Strafregstelsel van die Republiek van Suid-Afrika* RP 78/1976 (die "Viljoenkommissieverslag") is 'n wet wat strenge aanspreeklikheid skep as "'n penologiese onding" beskryf (5 1 2 88); verder is verklaar dat die kommissie "onboetvaardig en onversetlik [is] in sy houding dat misdrywe van absolute aanspreeklikheid nie geregverdig kan word in die strafreg nie" (5 1 2 82).

Al die kritiek teen die beginsel van strenge aanspreeklikheid het daartoe gelei dat daar die afgelope stuk of twee dekades aansienlik minder uitsprake was waarin bevind is dat 'n wet strenge aanspreeklikheid geskep het. Sedert 1970 is daar, sover my kennis strek, net omtrent vier of vyf gerapporteerde beslissings

waarin beslis is dat geen skuld vir 'n wetteregtelike misdaad vereis word nie. Hierdie beslissings is *S v Makwasi* 1970 2 SA 128 (T), *Ismail v Durban Corporation* 1971 2 SA 606 (N) 610, *S v Williamson* 1972 2 SA 140 (N) 145, *S v Di Stefano* 1977 1 SA 770 (K) en *S v Ohlenschlager* 1992 1 SASV 695 (T) 709. Die beslissing in *S v Williamson*, waarin beslis is dat geen skuld by die misdaad "dronkbestuur" vereis word nie, is klaarblyklik verkeerd en deur die appèlhof in *S v Fouché* 1974 1 SA 96 (A) 101 – 102 omvergewerp. In *S v Ohlenschlager* het net een van die twee regters wat die appèl aangehoor het (Stegmann R), beslis dat strenge aanspreeklikheid geskep is; die ander regter (Botha R) het uitdruklik die teenoorgestelde beslis. Die oorblywende beslissings is vatbaar vir kritiek: die howe kon in hierdie sake beslis het dat skuld in die vorm van nalatigheid deur die wetgewer vereis word. Teenoor hierdie enkele beslissings waarin beslis is dat skuldlose aanspreeklikheid geskep is, is daar natuurlik 'n oorweldigende aantal beslissings waarin beslis is dat skuld wel vereis word.

2 Die uitspraak

Dit is teen hierdie agtergrond dat vervolgens gelet word op die onlangse uitspraak in *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council*. Hier was die hof geroepe om te beslis of 'n misdaad geskep in 'n sekere munisipale bywet, skuldlose aanspreeklikheid daarstel. Die relevante gedeeltes van die bywet wat deur die Durbanse munisipaliteit uitgevaardig is ingevolge 'n magtiging verleen deur 'n Natalse ordonnansie, lui soos volg:

> "No person who carries on any business involving the manufacture, preparation . . . or distribution of food shall in connection with such business . . . cause or permit any article of food or drink which is not clean, wholesome, sound and free from any foreign object . . . or contamination to be . . . sold or exposed for sale or introduced into the city for purposes of sale."

(Sien a 18(c) gelees met a 9 van die "Food By-laws of the City of Durban" gepubliseer in die *Natalse Provinsiale Koerant* onder Kennisgewing 627 van 1950. Die bywet is uitgevaardig kragtens magtiging verleen deur a 197(1)(f) van Ord 21 van 1942 (N).)

Die onderneming wat hom in hierdie saak in die beskuldigdebank bevind het, het koeldranke, waaronder "Sparletta Cream Soda", vervaardig. Op 'n dag het iemand 'n bottel van hierdie koeldrank gekoop en, nadat hy dit oopgemaak het, 'n by in die koeldrank ontdek. Die by in die koeldrankbottel het daartoe gelei dat die Durbanse stadsraad die vervaardiger van die koeldrank in 'n landdroshof van oortreding van die bogemelde bepaling in die bywet aangekla het. Die vervaardiger is deur die landdros skuldig bevind aan die oortreding en met R1 000 beboet. Hy het na die Natalse Provinsiale Afdeling geappelleer. Die hof van appèl, bestaande uit drie regters, wys in 'n eenparige uitspraak by monde van regter-president Howard die appèl van die hand.

Die belang van die uitspraak is dat die hof sy afwysing van die appèl grond op 'n bevinding dat die misdaad geskep in die onderhawige artikel van die bywet 'n sogenaamde strenge-aanspreeklikheid-misdaad is. Die beskuldigde onderneming het in appèl aangevoer dat skuld 'n element is van die misdaad wat hom ten laste gelê is, dat die toepaslike skuldvorm by hierdie misdaad nalatigheid is en dat daar geen nalatigheid aan sy kant was nie. Die hof aanvaar nie hierdie argument nie. Die hof benadruk dat die doel van die bepaling baie duidelik is, naamlik die beskerming van die gemeenskap se gesondheid, en dat

> "[i]t is difficult to see how a by-law prohibiting the introduction or sale of contaminated food could be satisfactorily enforced without imposing strict liability" (185c).

Die hof grond sy bevinding verder op die feit dat die betrokke bepaling nie tot die publiek in die algemeen gerig is nie, maar tot slegs 'n beperkte klas regsubjekte, te wete mense of ondernemings wat 'n sekere bedryf beoefen. Hierdie oorweging vergemaklik volgens die hof 'n afleiding van strenge aanspreeklikheid.

3 Kritiek teen uitspraak

Die hof se gevolgtrekking dat die bepaling waaronder die beskuldigde aangekla is geen skuld vereis nie, kan nie ondersteun word nie. Na my mening het 'n mens nie hier te doen met 'n strenge-aanspreeklikheid-misdaad nie maar met 'n misdaad ten opsigte waarvan skuld in die vorm van nalatigheid vereis word.

Die vreemdste aspek van die uitspraak is die feit dat die hof nooit eers oorweeg of nalatigheid 'n vereiste vir die misdaad is nie. Die hof beperk hom tot die vraag of opset 'n vereiste vir die misdaad is. Laasgenoemde vraag beantwoord die hof tereg ontkennend. Dit is moeilik om die afleiding te vermy dat die hof onder die indruk verkeer dat "strenge aanspreeklikheid" slegs "opsetlose aanspreeklikheid" beteken. "Strenge aanspreeklikheid" beteken tog "*skuldlose* aanspreeklikheid", en "skuld" verwys na sowel opset as nalatigheid. Dit gebeur trouens gereeld dat 'n hof 'n betoog deur die staat dat 'n wetteregtelike misdaad strenge aanspreeklikheid geskep het, verwerp op grond van 'n bevinding dat die wetgewer by implikasie skuld in die vorm van nalatigheid vereis.

Die moontlikheid van skuld in die vorm van nalatigheid by wetteregtelike misdade is vroeër nie altyd deur die howe besef nie. Sedert die middel van die sestigerjare het die moontlikheid van nalatigheid as versweë skuldvorm al meer veld gewen, danksy die appèlhofbeslissings in *S v Arenstein* 1964 1 SA 361 (A), *S v Jassat* 1965 3 SA 423 (A) en *S v Qumbella* 1964 4 SA 356 (A). (Sien ook die aanvaarding van nalatigheid as skuldvorm in *S v Sayed* 1981 1 SA 982 (K) 988, *S v Evans* 1982 4 SA 346 (K) en *S v Barketts Transport (Pty) Ltd* 1986 1 SA 706 (K) 711 – 712.) Deur te bevind dat nalatigheid vereis word, vermy die hof die onbevredigende uiterste van strenge aanspreeklikheid, terwyl dit tegelykertyd die belange van die openbare welsyn dien deur 'n objektiewe sorgvuldigheidsplig te vereis. Sodoende word 'n bevredigende kompromie bewerkstellig (sien bv die bespreking in *S v Pretorius* 1964 1 SA 735 (K) 740 en *S v Marangwe* 1967 1 SA 607 (T) 608).

Dit lyk egter nie of die hof in die beslissing onder bespreking hoegenaamd van die pasgenoemde oorwegings bewus is nie. Dit is moontlik dat die hof, soos ons howe voor die middel van die sestigerjare, *mens rea* eenvoudig aan opset gelyk stel. Hierdie vermoede word versterk deur die hof se beroep op die Engelse reg. Daar kan naamlik nie met sekerheid aanvaar word dat nalatigheid in die Engelse reg hoegenaamd saam met opset as 'n vorm van *mens rea* beskou word nie. In die Engelse reg beteken *mens rea* "the mental state (subjective element) required for the particular crime in question" (Glanville Williams *Textbook of criminal law* (1983) 71). Nalatigheid is iets anders as "a mental state" of "subjective element". In Cross, Jones en Card *Introduction to criminal law* (1988 deur Richard Card) 93 word gesê dat

> "negligence cannot strictly be described as species of mens rea, despite the fact that they have on occasion been so described by judges".

Vir woorde met dieselfde strekking sien ook Allen *Textbook on criminal law* (1991) 41, waar die skrywer verder verklaar:

> "Offences which require mens rea are generally regarded as being more serious than those which may be committed negligently or for which liability is strict."

Daar is nog 'n verdere rede vir die gevolgtrekking dat die hof in hierdie saak verkeerdelik dink dat skuldlose aanspreeklikheid slegs uitgesluit kan word deur 'n bevinding dat opset vir 'n skuldigbevinding vereis word. Dit is naamlik dat die hof by meer as een geleentheid feitlik in soveel woorde erken dat daar nalatigheid aan die kant van die beskuldigde was. Die hof verklaar byvoorbeeld soos volg (187d):

> "According to the evidence *it should not have escaped detection* if the persons employed by the appellant to carry out the final visual inspection after the filling and capping process had kept a proper lookout."

Kort daarna verklaar die hof weer soos volg (187e – f):

> "However, there are *occasional lapses*, due either to *shortcomings in the measures* taken by the appellant or *negligence of its servants*, and the consequences of such lapses are potentially so disastrous that it is not unreasonable to demand absolute compliance" (kursivering telkens my eie).

Na my mening is dit heeltemal moontlik om die bepaling wat die hof *in casu* moes interpreteer, soos volg uit te lê: 'n Vervaardiger van kos of drank moet 'n hoë mate van sorgsaamheid aan die dag lê deur toe te sien dat sy dienaars nie besoedelde kos of drank vervaardig of aan die publiek verskaf nie. Die oplegging van die sorgvuldigheidsplig beteken dat daar *nalatigheid* aan die kant van die vervaardiger moet wees voordat hy skuldig bevind kan word. Daar is dus nie sprake van strenge aanspreeklikheid nie.

Die hof kom in hierdie saak tot dieselfde gevolgtrekking as die Natalse hof vroeër in *Ismail v Durban Corporation* 1971 2 SA 606 (N). In laasgenoemde saak moes die hof dieselfde bepaling uitlê en word beslis dat dit skuldlose aanspreeklikheid skep. In die *Verslag oor die ondersoek na die toepassing van mens rea by statutêre misdrywe* (projek 29 September 1982) van die Suid-Afrikaanse Regskommissie is die meriete van laasgenoemde beslissing onder die vergrootglas geplaas en word tot die gevolgtrekking gekom dat die beslissing vatbaar is vir kritiek, en wel op wesenlik dieselfde gronde as dié hierbo genoem teen die onderhawige 1992-uitspraak van die Natalse hof.

In die bywet wat die hof geroepe is om te vertolk, verskyn onder meer die woorde "cause" en "permit". Daar is al meermale beslis dat die gebruik van hierdie woorde opset of nalatigheid aan die kant van die beskuldigde impliseer (sien *R v Webb* 1911 TPD 280 282; *R v Joao* 1959 1 SA 563 (O) 566; *S v Mathebula* 1972 1 SA 495 (T) 497; *S v Kritzinger* 1973 1 SA 596 (K) 598 599). Die volgende *dictum* in die *Webb*-saak *supra* 282 is meermale in latere sake gevolg, naamlik "it seems to me that a person can only be said to permit an act if he either knows of it or ought to have known of it". In *Kritzinger* se saak *supra* 598E word verklaar:

> "In die geval van 'n beskuldigde wat daarvan beskuldig word dat hy 'n handeling 'permit' (toegelaat) het, moet bewys word dat hy kennis . . . van die handeling gedra het . . ."

Later, verwysende na die vertolking van dieselfde woord, voeg die hof by dat

> "dit . . . voldoende [is] as daar bewys word dat die beskuldigde behoort te geweet het maar inderdaad nie geweet het nie, omrede hy sy oë toegemaak het vir dit wat ooglopend was, of sy dienaar toegelaat het om iets te doen onder omstandighede waar 'n oortreding waarskynlik sou plaasvind . . ."

In die 1992-uitspraak tans onder bespreking neem die hof die bogemelde vertolking van die woorde "cause" en "permit" nie in ag nie.

4 Slot: Skuldig op grond van nalatigheid

Ofskoon die hof na my mening dwaal deur te beslis dat die bepaling in die bywet strenge aanspreeklikheid skep, is ek nietemin tevrede dat die hof se uiteindelike gevolgtrekking dat die beskuldigde wel aan oortreding van die bywet skuldig bevind moet word, korrek is. Die grond vir die skuldigbevinding is na my mening egter nie te vinde in enige strenge aanspreeklikheid wat die bywet sou skep nie, maar in die oorweging dat skuld in die vorm van nalatigheid vir 'n skuldigbevinding vereis word en dat die beskuldigde in hierdie saak *inderdaad nalatig was*. Soos hierbo aangetoon is, maak die hof in sy uitspraak self stellings waaruit afgelei kan word dat hy van mening is dat die beskuldigde nalatig was. Afgesien hiervan, is daar ook ander gedeeltes van die uitspraak wat aanduidings van die beskuldigde se nalatigheid gee. Dit blyk naamlik dat, ofskoon die appellant tydens die verhoor gepoog het om aan te toon dat hy voorsorgmaatreëls teen moontlike besoedeling getref het, hy geen verduideliking kon gee oor hoe die by in die koeldrankbottel beland het nie. Die hof beslis uitdruklik dat die beskuldigde se dienaars die vreemde voorwerp *moes* gesien het as hulle maar net hulle take – insluitende 'n visuele inspeksie van hulle produk – enigsins behoorlik uitgevoer het (187d).

Dit is jammer dat die hof in hierdie saak die moontlikheid van nalatigheid as skuldvorm oor die hoof gesien het. Gevolglik is 'n uitspraak gelewer wat moeilik versoenbaar is met die algemene strekking van die regspraak aangaande hierdie onderwerp die afgelope stuk of twee dekades.

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THE NATURE OF THE RIGHT TO PHASED DEVELOPMENT IN TERMS OF THE SECTIONAL TITLES ACT 66 of 1971

Erlax Properties (Pty) Ltd v Registrar of Deeds 1992 1 SA 879 (A)

1 Introduction

In terms of the old Sectional Titles Act 66 of 1971 the development of sectional title schemes in phases was problematic. The nature of the right to extend a sectional title scheme was never precisely determined, nor was the procedure and the position of both purchasers and developer properly regulated (Van der Merwe "Nuwe gesigspunte oor die ontwikkeling van 'n deeltitelskema in fases" 1987 *TRW* 43 – 54 46). Even though the Sectional Titles Act 95 of 1986 (s 25) now provides for the development of a sectional title scheme in phases, not all the problems have been solved, since many phased developments were carried out in terms of the 1971 act and it is still applicable to those developments. The decision in *Erlax Properties (Pty) Ltd v Registrar of Deeds* does nothing to dispel the uncertainty, because it was held that the right to extend a sectional title scheme was a personal servitude and, therefore, inalienable. This meant

that the developer Erlax could not sell its unit and simultaneously transfer its right to extend the sectional title scheme, without losing the right to develop that second phase.

2 Facts

The appellant, Erlax Properties (Pty) Ltd, was the developer of a sectional title scheme on erf 1514 in Berea, Johannesburg in terms of the (now repealed and replaced) Sectional Titles Act 66 of 1971. Erlax had envisaged that the development of the scheme should proceed in two phases, the first phase comprising eight units while the second phase, to be undertaken in the future, would add a further fourteen units.

On 10 September 1985 the scheme was registered in the Deeds Registry, Johannesburg. This entailed the registration of the sectional plan and the opening of the sectional title register in terms of section 8(1) as well as the closing of certain entries (in this case erf 1514) in the land register in terms of section 8(2)(a). Simultaneously, the Registrar of Deeds issued to Erlax a certificate of registered sectional title in respect of each of the eight units in terms of section 8(2)(d). After the sectional title register had been opened, Erlax sold and transferred to purchasers, by means of endorsements on the sectional title deeds in terms of section 11(1)(a), all the units in the scheme except unit 7, of which it remained the registered owner. Erlax had to remain owner of a unit so that in terms of section 8A(1) it would be entitled to develop the scheme in phases (see further Van der Merwe *Sakereg* (1989) 444).

On the date of registration of the sectional plan, Erlax, in terms of section 5(3)(d) caused the sectional plan to be endorsed with certain conditions of title relating to the extension. These conditions were also referred to in the certificates of registered sectional title. It was necessary to do this to allow Erlax to develop the second phase of the scheme in terms of section 18(1), which provides that

> "where a building . . . is to be extended in such a manner that an existing section is to be added to or that the building may be further divided into more sections, the developer or, if the developer has ceased to have any share in the common property, the body corporate, with the consent in writing of all the owners of sections and all holders of sectional mortgage bonds, and other registered real rights, shall . . . prepare a scheme".

This section was originally not intended to make provision for phased development, but because problems were experienced as a result of the fact that the act (s 5(1)) provided that it was not possible to open a sectional title register before the buildings in the scheme were suitable for occupation (see further Van der Merwe 1987 *TRW* 46) the Chief Registrar of Deeds in 1975 issued a circular making possible phased development in terms of section 18. This circular, in a schedule, contained the conditions (for model conditions see Van der Merwe and Butler *Sectional titles, share blocks and time-sharing* (1985) 204) in terms of which the developer, at the sale of first phase units, could reserve for himself, on the registration of the sectional plan, the right to develop further phases. Consequently, the most common conditions of sectional title registered were those which granted a developer the right to erect further buildings on the land without the existing sectional owners acquiring any right in respect of the sections in the new buildings (Schoeman *Silberberg & Schoeman: Law of property* (1983) 367). The Registrar of Deeds himself regarded these conditions as registrable;

this means that upon registration the developer acquires a real right to proceed with the development for his own account (Cowen "The scope of the Sectional Titles Act with special reference to group and cluster housing" 1974 *Planning and Building Developments* Supplement 44).

The conditions which Erlax caused to be endorsed on the sectional plan were identical to the model conditions set out by the Chief Registrar of Deeds in his 1975 circular. The salient features of these conditions are that (882H – 883D):

(1) No person whose consent is required in terms of section 18 of the act shall withhold that written consent to the developer as owner of unit number 7 to prepare and submit a scheme to the local authority for approval, to erect additional buildings on the land in terms of and indicated on the sketch plan, and to apply for the registration of the sectional plan provided the additional buildings harmonise with the existing buildings. The additional building is restricted to fourteen units.

(2) All persons having an interest in the sections and common property must allow the developer to exercise his positive right to proceed with the development in the manner envisaged; no persons may interfere with or obstruct the developer from erecting the additional buildings; and no person shall have any right of access to that portion of the land until the buildings are completed and the sectional plan registered.

(3) No persons mentioned in paragraph 2 shall have any right to or in any unit comprised in the said additional buildings, of which the developer shall be the sole owner, and the certificate of registered sectional title shall be issued to and in the name of the developer who will be entitled to dispose of or otherwise deal with the units for his own and exclusive benefit and account.

(4) The owners shall not be entitled to refuse to acknowledge and accept that upon registration of the sectional plan their participation quotas will be reviewed and adjusted.

After completion of the first phase, Erlax decided to dispose of its ownership of unit number 7 as well as its rights as developer to extend the scheme. In order to do this, it required the developer's right of extension to be effected to it by registration in the Deeds Office. It was, therefore, necessary for Erlax to be entitled to a certificate of registration of a real right in terms of section 64(1) of the Deeds Registries Act 47 of 1937. The attitude of the Registrar of Deeds in Johannesburg was that Erlax was not entitled to a certificate without the authority of an order of court (884B). Erlax applied for a declaratory order in the court *a quo* (*Erlax Properties (Pty) Ltd v Registrar of Deeds* 1990 3 SA 262 (W)). It was turned down by Goldblatt AJ, who examined the issue from the point of view of an interpretation of section 64(1) of the Deeds Registries Act 47 of 1937. This section provides that

> "any person who . . . has transferred land subject to the reservation of any real right in his favour may . . . obtain a certificate of registration of that real right . . ."

Goldblatt AJ held that

> "the right to extend the building was not . . . reserved by the developer in transferring the land but was a right which it had subject to and by virtue of s 18 . . . and which it did not lose when it transferred any of the sections sold. No rights were reserved by the applicant when the sections were transferred but positive rights were obtained, ie the right to demand that the owner of the section grant his consent . . . to the extension of the building. Whilst this positive right may be a real right . . . it was not a reservation of a right but the creation of a new right" (266F – I).

Even though Goldblatt AJ's point of departure was to distinguish between the "reservation" and the "creation" of a right, he did not deny that the construction of the right to extend the scheme as a real right was impossible (266H).

The construction of this right determines the angle of Joubert JA's approach in the appeal decision. He held that the right of extension is a real right and that Erlax was, therefore, entitled to obtain a certificate of registered real right under section 64(1) of the Deeds Registries Act 47 of 1937 (885F). In a separate judgment, and without giving reasons, Grosskopf JA agreed with the construction as a real right (893B). As to the type of real right, Joubert JA held that it is in the nature of a personal servitude (887E) and, therefore, inalienable. Erlax, could, for this reason, not transfer its right of extension.

3 Right of extension as a real right

By classifying the right to extend the scheme to include the additional fourteen units as a real right capable of registration, Joubert JA indicated that the test to determine whether a right is real is twofold, namely that the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors-in-title, and that the right or condition must be such that registration of it results in a "subtraction from the *dominium*" of the land against which it is registered (885A – C). Joubert JA showed that there had been compliance with these two requirements since the intention of Erlax in creating and imposing the conditions as burdening the initial eight units was to bind its owners and successors-in-title from time to time (885C – D). There was also compliance with the second requirement since

> "the registration of the right to extend the scheme to include fourteen additional units resulted from the diminution of the ownership of each of the initial eight units in regard to their undivided shares in the common property in accordance with their respective participation quotas as provided for in condition 4 of the registered conditions of sectional title. In other words, condition 4 constituted a burden on the common ownership of the initial eight units" (885E).

There is consensus among the authors that this right of extension constitutes a limited real right. Schoeman (366 – 367) states that this right, included in the category of so-called "conditions of sectional title" is a real right because it "satisfies the general requirements of a real right". Cowen (44) refers to the original authority on the issue, namely *Ex parte Geldenhuys* 1926 OPD 155, to classify this right as real. He selects the first two of the Chief Registrar's conditions (which are the same as the first two in the Erlax case) and states that

> "the provisions in question constitute a substantial subtraction from the rights of the unit owners and their successors-in-title as co-owners of the common property (including the land) to prevent the erection of the additional buildings on the common property and also restrict the rights of ownership of each unit owner and his successors-in-title by taking away the rights which they enjoy, as owners in terms of the Act, to withhold written consent to specified extensions of the scheme".

The view of Van der Merwe and Butler (204 – 205) is that these rights clearly qualify as real rights. They also apply the "subtraction from the *dominium*" test and state the chief reason in wider terms than Cowen, namely that, since undeveloped land which forms part of the common property is reserved by these conditions for future development, these conditions do burden the common ownership of all the sectional owners of the land, excepting the developer. In addition, these authors echo Cowen's view when they state that the restriction of the sectional owner's right to withhold consent to future extensions also diminishes his ownership.

The right in question is a right which a developer reserves to himself to extend a scheme. He does this in respect of every unit he sells off except the one which, in terms of the act, he is obliged to retain for himself. Its content is threefold, namely that owners are limited in exercising rights which they enjoy as owners – they may not withhold their written consent; they must allow the building to proceed in terms of the sketch plan; and they must abide by the fact that their participation quotas may be reduced in future, which implies that the value of the share in the common property will be decreased. These all clearly constitute a "subtraction from the *dominium*" of all the owners of units in the sectional title scheme.

4 Classification as a servitude

Once the right to extend a sectional title scheme has been categorised as a limited real right, the next step is to determine the nature of that right. There are two possible approaches: the first is the traditional one where new developments are placed in existing categories of limited real rights; the second provides for other categories of limited real rights to be created to accommodate new developments. Joubert JA's approach, the traditional approach, was to classify this right as a servitude, either praedial or personal (885H).

4 1 Praedial servitude

Joubert JA considered whether the right in question is a praedial servitude. He rejected this classification because no reference is made to a dominant tenement in the conditions of sectional title (885I – J) and because the real right to extend the scheme does not confer any economic benefit or advantage on any unit as a dominant tenement (886C).

Joubert JA is correct in stating that this right is not a praedial servitude, the reason being that

> "no reference to a dominant tenement was either expressly or impliedly made in the conditions of sectional title" (885I).

This fact, it would seem, did not preclude him in *Malan v Ardconnel Investments (Pty) Ltd* 1988 2 SA 12 (A) from deciding that a township condition of title was a praedial servitude (37H) even though there was no mention of the dominant erf in the title deed. Normally, in the case of a praedial servitude, the servitude is noted in the title deed of the servient tenement in favour of a specific dominant tenement. In the case of (township) conditions of title there is no indication in the title deed of the servient tenement as to the dominant tenement (Deeds Registries Act 47 of 1937 s 65 (1). See also Joubert "Beperkende bepalings in die titelaktes van grond" 1960 *THRHR* 176; Van Wyk *Restrictive conditions as urban land-use planning instruments* (LLD thesis Unisa 1990) 149). In the same way as a (township) condition of title is a limited real right other than a praedial servitude (*idem* 144 – 151), the right to extend a sectional title scheme could also be a limited real right other than a praedial servitude.

Two issues should be distinguished in respect of this argument about the requirement of a servient and a dominant tenement: first of all, it is an absolute requirement for a praedial servitude that there be two pieces of land (Van der Merwe *Sakereg* 460); and secondly a praedial servitude is noted in the title deed of at least the servient tenement in favour of a specific dominant tenement.

Joubert JA concentrated on the latter issue. Perhaps the better argument is that the right is clearly constituted to benefit the developer only and is not in favour of a dominant tenement over a servient tenement.

Schoeman (366 – 367) states that these conditions for phased developments may be construed as reciprocal praedial servitudes where they are for the benefit of the sectional owners as owners. Should one accept that each of the sections is a dominant tenement and the common property the servient tenement, the issue of reciprocity, reminiscent of mutual and reciprocal conditions of title in townships, is introduced. The creation of reciprocal rights was introduced in terms of (township) conditions of title. These conditions were always incorrectly classified as praedial or personal servitudes. In the case of a praedial servitude the right attaches to a person as owner of a dominant tenement (Van der Merwe *Sakereg* 459 – 460) and praedial servitudes traditionally never allowed for reciprocity (Van Wyk 148). Reciprocity is one of the factors which results in the classification of conditions of title as limited real rights *sui generis* and not as praedial servitudes. This issue would, therefore, also classify these sectional title conditions as limited real rights other than praedial servitudes.

Joubert JA's second reason for denying the right to extend the sectional title scheme the classification as a praedial servitude was that the *utilitas* requirement has not been met. He stated that this right does not confer any economic benefit or advantage on any unit as a dominant tenement (886C). The *utilitas* requirement has as its content that the usefulness and enjoyment of the dominant tenement is increased. In this case the usefulness and enjoyment of no dominant tenement is increased but rather the right accruing to the developer. It is he who acquires an economic advantage.

This right to extend the sectional title scheme can exist only until the extension is completed. Its duration is, therefore, limited in time, in contrast with a praedial servitude which should, in principle, have a permanent application – the *perpetua causa* requirement (see further Van der Merwe *Sakereg* 471). This is a further reason why the right of extension cannot be classified as a praedial servitude.

4 2 Personal servitude

Having rejected the classification as a praedial servitude Joubert JA then considered – and accepted – the construction of the right as a personal servitude (86G – 887F). He based his arguments on the content of the conditions of sectional title. Condition 2 refers to the obligation of

> "all persons having an interest in the sections and common property to allow the developer to exercise *his* positive right to proceed with the development . . ."

Condition 3 indicates that the owners of the initial eight units would *qua* owners have no right to or in any unit comprised in the scheme of the additional fourteen units. This right would belong solely to Erlax "for his own and exclusive benefit and account". Thirdly, the real right to extend the scheme was inseparably attached to Erlax *qua* developer of the scheme. These arguments all indicate that the right is in favour of Erlax (as developer) personally.

A personal servitude is inseparably attached to the person of the beneficiary. It cannot be transmitted or alienated and it comes to an end on the death of the beneficiary (Van der Merwe *Sakereg* 506). Joubert JA's finding that the right to develop the scheme in phases is a personal servitude, led him to conclude

that it is not transferable. Grosskopf JA (893B – C) agreed in a separate judgment and without giving reasons. Erlax could therefore not transfer the right. Should, however, this right be found to be something other than a personal servitude, then the issue of transferability becomes especially relevant because it would allow Erlax to transfer either unit no 7 and/or the right of extension.

Van der Merwe and Butler (203 fn 39 205 fn 45) as well as Cowen (47) reject the classification as a personal servitude because, according to them, a developer may transfer its interest in the development to a successor-in-title who would acquire the right to proceed with the development and it would presumably survive his death (see further Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 344 – 346 esp fn 7). The reason is to be found in the definition (s 1) of "developer" which provides that

> "'developer' means a person who is the registered owner of land which is situated within the area of jurisdiction of a local authority and on which is situated or to be erected a building or buildings which he has divided or proposes to divide into two or more sections in terms of a scheme, or his successor-in-title, and for the purposes of s 18, includes the body corporate . . ."

An interpretation of this provision leads to the conclusion that the right can be transferred to both a successor-in-title and the body corporate. Furthermore section 26(3) of the act provides that

> "when a developer has in one transaction alienated the whole of his interest in the land and the building or buildings comprised in a scheme or a share in the whole of such interest to another person, the registrar shall register the transaction by endorsing the fact of such alienation and the full name of the successor-in-title on the developer's sectional title deeds".

Instead of finding that it is a personal servitude and therefore not transferable, these authors argue that the right is transferable to indicate that the right in question is not a personal servitude.

Besides this argument, there are other reasons for denying that the right to extend a sectional title scheme is a personal servitude. The background, nature, purpose and field of application of personal servitudes differ so much from these rights of extension that the latter can hardly be classified as personal servitudes.

Roman law knew only a *numerus clausus* of personal servitudes, namely usufruct, use and occupation. Van der Merwe (*Sakereg* 506 – 507) states that although South African law recognises no *numerus clausus*, only three groups of servitudes besides these accepted in Roman law are permitted. One of these groups has as its content some divergent personal servitudes such as the entitlement to trade on land, the entitlement to cut down trees and remove wood, and so on. The other two groups consist of the so-called *servitutes irregulares* and conditions of title in new townships. The latter have already been found not to constitute servitudes. This view indicates how limited the field of application and the content of personal servitudes really are. The right of a developer to extend a sectional title scheme does not fit in here.

The chief characteristic of a personal servitude lies in its purpose, which is the use and enjoyment of the property of another. The purpose of the right to extend a sectional title scheme is to enable a developer to build a sectional title scheme in phases. This purpose does not correspond to the traditional purpose of personal servitudes and there is little room to extend personal servitudes to include the right to develop a sectional title scheme in phases. The latter

right should be recognised as such and not be forced into an existing mould into which it does not fit comfortably. Instead of extending personal servitudes, the approach should be to classify as personal servitudes only those which really fit the description. All others should be classified apart from servitudes and be recognised as such.

4 3 Conclusion

The approach of Joubert JA to classify the right to extend a sectional title scheme as a personal servitude is questionable; not all new limited real rights should be forced into the servitude mould.

This was originally the position with mineral rights. These were initially classified as quasi-servitudes (*Coronation Collieries v Malan* 1911 TPD 577) before they were recognised as limited real rights *sui generis* (*Ex parte Pierce* 1950 3 SA 628 (O)).

Conditions of title imposed in pursuance of township establishment are still classified as servitudes, either personal or praedial, the most recent decisions of the Appellate Division on the nature of these conditions having also been handed down by Joubert JA. These are *Malan v Ardconnel Investments (Pty) Ltd* 1988 2 SA 12 (A) and *Provisional Trustees Alan Doggett Family Trust v Karakondis* 1992 1 SA 33 (A). In both these cases (albeit *obiter* in the latter case) a condition of title imposed in pursuance of township establishment legislation is classified as a servitude. These conditions are not servitudes in the traditional sense of the word because they differ in many respects. In particular, the manner in which they are created and terminated, as well as their purpose and nature, all indicate that they should rather be classified as limited real rights *sui generis* (see further Van Wyk 152).

The same trend may now be seen in respect of the right of a developer to develop a sectional title scheme in phases. This right cannot be classified as either a praedial or a personal servitude but should rather be seen as some new type of limited real right.

Perhaps the most acceptable approach is that of Van der Merwe and Butler (204) who liken this right to conditions of title in townships whereby purchasers of erven in the township consent to limitations on the way an erf may be developed. Accordingly, it constitutes a limited real right.

5 Provisions of old act deemed to be provisions of new act

In his judgment Grosskopf JA examined the second part of the declaratory order sought by the appellant, namely whether the rights reserved to the applicant in terms of section 18(1) of the Sectional Titles Act 66 of 1971 and the sectional title conditions registered in accordance with section 5(3)(d)(i) of that act to extend the sectional title scheme are, by reason of the transitional provisions (s 60(9) of the Sectional Titles Act 95 of 1986), deemed to have been reserved to the applicant in terms of section 25(1) of the latter act.

Section 25 of the 1986 act clearly makes provision for phased development, and a right reserved in terms of this section in respect of which a certificate of real right has been issued, is for all purposes deemed to be a right to urban immovable property which may be mortgaged and transferred (see further Van der Merwe *Sakereg* 444). More important, perhaps, is the fact that the right

may be exercised by a developer or his successor-in-title even though he has no other interest in the common property (890B; see further Van der Merwe *Sakereg* 444). In terms of section 25, therefore, Erlax would be able to transfer its right to a successor-in-title.

Grosskopf JA showed that there are vast differences between the old section 18(1) and the new section 25. Among these he noted that section 18(1) of the old act allowed the developer himself a limited right of extension without the consent of all the owners of sections and holders of mortgage bonds. He was not entitled to alienate his right of extension otherwise than by alienating the whole of his interest in the scheme and this right then passed on to the developer. The new act permits the developer to reserve a right of extension wider in ambit and without the consent of a section owner. This right may also be alienated. Besides these basic differences in nature, different procedures are laid down for the creation and exercise of the rights. The respective provisions can, therefore, not be regarded as corresponding (891J) and Erlax cannot rely on the provisions of the new act.

6 Conclusion

The most important flaw in the decision is that the right to develop a sectional title scheme in phases is seen as a round peg which neatly fits into the round personal servitude hole. Unfortunately this right is not a round peg but a square one.

The approach should be to identify the type of right which is involved, then to determine whether or not it fits into an existing category and, if it does not, to provide it with a new classification. This would eliminate the type of hardship suffered by Erlax in this case.

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THE END OF THE COMMON-LAW SPECIAL NOTARIAL BOND*

Cooper v Die Meester 1992 3 SA 60 (A)

The Appellate Division found that section 102 of the Insolvency Act confers no statutory preference on the special notarial bond as against concurrent creditors in respect of the free residue of the estate of the insolvent debtor; that sections 96 – 102 inclusive, contain an exhaustive list of statutory preferent claims to the free residue; and that a preference on the strength of the common law is incompatible with the wording used in the sections mentioned. In finding this

* See also 1992 *THRHR* 682 ff for a discussion of this case (editor).

the Appellate Division not only reversed a decision of the Orange Free State Division, but also abolished the common law as it was applied on this point.

The intention is to look into some aspects of this decision.

Terminology

The term *special notarial bond*, unless otherwise indicated, will be used to refer to the notarial bond hypothecating specified movables which are not in the control of the creditor/bondholder at the time of the sequestration of the estate of the debtor, and which notarial bond does not fall within the provisions of section 1 of the Notarial Bonds (Natal) Act 18 of 1932; the term *general notarial bond* refers to a similar bond, the only difference being that the movables of the debtor are hypothecated generally. The term *security* will be used either to refer to real security or to some form of preference conferred on the creditor in case of insolvency.

General remarks

1 A valuable form of security has been destroyed at a time when economically speaking, there is a greater need than perhaps ever before for movables to be rendered capable of serving as security without control by the creditor of the movables in question being essential for the effectiveness of the security in case of insolvency.

2 This decision does not contribute towards uniformity in the law obtaining in South Africa: the incongruity between the law obtaining in Natal and the other provinces has been accentuated – Natal still has the statutory special notarial bond mentioned above, which provides virtually the same security as a pledge (Van der Walt "Aspekte van die reg insake notariële verbande" 1983 *THRHR* 332 – 333).

3 The practice of disguising this form of security as a transaction of sale will in many instances be promoted by the loss of this type of notarial bond, since the only way in which specific movables can now be used as security is by way of pledge. In order to obviate the disadvantage to the debtor of having to give up the natural possession/control of the movable in case of pledge, the parties very often simulate a sale to enable them to effect a delivery by way of *constitutum possessorium* (which is not sufficient in case of pledge), as happened in *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) *inter alia*.

4 Although the general notarial bond which is still available provides security to the creditor equal to that provided by the former special notarial bond, it is nevertheless submitted that the creditworthiness of the debtor is adversely affected by the loss of the special notarial bond: a debtor with a number of pieces of expensive equipment could, by way of various special notarial bonds, obtain finance without hypothecating the same equipment twice. It seems logical that if the same creditors were approached (before this decision) and each was offered a general notarial bond over the same movables as security, the debtor would not have been able to obtain the same total amount of credit.

5 This decision detrimentally affects bondholders under existing special notarial bonds:

(a) Where the agreement between the bondholder and debtor provides for delivery to the creditor/bondholder of the bonded movables. Because special

notarial bondholders now enjoy no preference (to the free residue) as against the concurrent creditors as was hitherto accepted in the case of insolvency of the debtor, such bondholders will be well advised to claim specific performance of their notarial bond agreement if at all possible, in order to attain a position very similar to that of a pledgee (cf Van der Walt 1983 *THRHR* 335).

This decision will, moreover, affect the exercise of the discretion whether or not to grant specific performance in such instances: the special notarial bondholder has been deprived of the alternative remedy of applying for a sequestration or liquidation order if the circumstances warrant it, instead of claiming specific performance; the sequestration or liquidation of the debtor is no longer equally effective to terminate the creditor's risk in respect of the security, because in the event of insolvency he will be a mere concurrent creditor to the free residue, even with regard to the proceeds of the movables – subject to his special notarial bond which fall within the free residue. In *Barclays Bank v Natal Fire Extinguishers* 1982 4 SA 650 (D) 655H–658B, for instance, various factors which would influence the court in the exercise of its discretion for or against specific performance of such an agreement were discussed. The fact that the holder of a notarial bond could always resort to an application for a sequestration or liquidation order against the debtor as an alternative effective remedy to terminate his risk or to realise the property, was mentioned as such a factor.

(b) Where the agreement between the bondholder and the debtor does not provide for delivery to the creditor of the bonded movables (Van der Walt 1983 *THRHR loc cit*). The creditor/special notarial bondholder will not be able to claim delivery of the bonded articles (specific performance of the agreement) and will, moreover, be left in the cold in the event of the insolvency of the debtor. (The notarial bondholder may have been satisfied to rely on his common-law preference as against concurrent creditors in case of insolvency, when the (special notarial) agreement with the debtor was concluded.)

6 This decision affects the contents of various provisions of the Deeds Registries Act 47 of 1937. Section 102 of this act describes a notarial bond as "a bond . . . hypothecating movable property *specially or generally*" (my italics). It is doubtful whether the legislature had in mind only the statutory "Natal bond" (as aptly named by Sacks "Notarial bonds in South African law" 1982 *SALJ* 609; the Notarial Bonds (Natal) Act) as a possible special notarial hypothecation. The effect of section 81(b) of the same act, which provides that the hypothecation of a lease or sub-lease which is not immovable property, can be effected only by way of a notarial bond, will be that such hypothecation will be possible only by way of general notarial bond, unless the notarial bond falls within the provisions of the Notarial Bonds (Natal) Act.

7 The distinction between the general and special notarial bond with regard to the preference to the free residue in case of insolvency, being based solely on the type of description of the movables, whether general or specified, is hard to understand – if not illogical – even if ascribed to the legislature: a general clause within a special notarial bond would probably confer a preference as against concurrent creditors in respect of the movables generally bonded, while there will be no preference for the bondholder in respect of those movables specially bonded in the same deed (or will our courts find that a general clause in a special notarial bond is not a general mortgage bond within the meaning of section 102?). In *Adolph Mosenthal & Co v The Master and Feinberg's*

Trustees 1930 CPD 155, the court held that a general clause in a special notarial bond was not excluded by section 87 of the Insolvency Act 32 of 1916; in *Reeskens v Registrar of Deeds* 1964 4 SA 369 (N) 372E – F it was decided (under the present Insolvency Act 24 of 1936) that the same deed could incorporate both a general and a special notarial bond.

8 Prior to the present decision there was, moreover, no difference in respect of the economic and legal value of a general and a special notarial bond: the *qui prior est in tempore, potior est in iure* yardstick determined the order of preference of all these notarial bonds equally (De la Rey *Mars: The law of insolvency in South Africa* (1988) 384 par 19.16; Wunsh "What rights of preference are enjoyed by a special notarial bond?" 1960 *THRHR* 113; Sacks 1982 *SALJ* 611 – 612).

Analysis of the decision

9 The drastic change to the common law brought about by this decision, was not warranted in view of the following:

(a) The uncertainty as to the meaning of "general bond" in section 102 of the Insolvency Act 24 of 1936. Mars and Hockly *The law of insolvency* (1924) 218 – 220 (referred to as *Mars* (1924)), treated both types of notarial bonds, special and general, under the same heading, namely "(C) General bonds without delivery". Wunsh cautiously points to this possibility but concludes that, considering section 88, section 102 can nevertheless not be said to contain language clear enough to convey an intention to change the common law (1960 *THRHR* 115 fn 18 and the authority cited there).

The Insolvency Act 24 of 1936 as amended is markedly poor in clear references to notarial bonds (special or general) which do not constitute security in terms of the act. There is an indirect reference (by way of exclusion) to the special notarial bond in the definition of a "special mortgage" in section 2. The general bond of section 86 appears to be the general mortgage of old which purported to bind all the property (movable and immovable) of the debtor (cf Coaker and Zeffertt *Wille and Millin's mercantile law of South Africa* (1984) 389). This section again only indirectly refers to the general notarial bond.

Section 88 ("A mortgage bond . . . whether special or general . . .") implies that all bonds can be classified into "special" or "general" bonds. Since the act describes what it intends by a "special mortgage bond", one may infer that all bonds which are not "special mortgage bonds" are "general mortgage bonds"; the only bonds which could be "general mortgage bonds" are therefore the various notarial bonds (other than the "Natal bonds" which are "special mortgages" in terms of section 2). Although this definition of "special mortgage" was only added by the amendment (Act 16 of 1943) of Act 24 of 1936, this interpretation is, it is submitted, supported by the meaning of "special mortgage" which could in turn be deduced from the definition of "free residue" (in which the notarial bonds under discussion were excluded from the term "special mortgage": see s 3(b) Act 29 of 1926; cf Wunsh 1960 *THRHR* 114).

Note further that section 81(a) and (b) of the Deeds Registries Act 47 of 1937 distinguishes between the terms "mortgage bond", which is used for a registered bond on immovable property, and a "notarial bond", which refers to a registered bond on movable property. Section 102 of the Insolvency Act uses

the term "mortgage bond", which is apparently a reference to a bond on immovable property, since a general mortgage bond in this sense is legally impossible (s 86 of the Insolvency Act 24 of 1936 and s 53 of the Deeds Registries Act 47 of 1937); in the light of section 88 as discussed above, this would appear to be a problem of incorrect terminology (*Mars* (1988) 383). To this however, add the reference in the section (102) to "claims . . . *secured* by a general mortgage bond" (my italics) and the problem ceases to be merely one of terminology. If one should accept, as the judge did in the present case (81D – E), that "claims . . . secured" refers to claims for which there is security (real) in terms of section 2 of the Insolvency Act, then section 102 does not refer to the general notarial bond (which does not provide "security" in terms of the act).

(b) Sections 96 – 103 do not contain an exhaustive list of preferences to the free residue of an insolvent estate (82G – H). The order of preference to the free residue was regulated by the earlier 1916 Insolvency Act (s 82 – 85) in essentially the same language as in the present Insolvency Act 24 of 1936, and the common-law preference enjoyed by these notarial bonds was recognised in addition to the statutory preferences after the enactment of the 1916 Act.

Section 82 of Act 32 of 1916 read: "*In priority to all other claims* or charges . . . there shall be paid out of the free residue . . ." (my italics), while the subsequent sections which dealt with the claims following in order of priority, each began with "Thereafter . . .". Section 96(1) of Act 24 of 1936 reads: "Any free residue . . . *shall be applied in the first place* . . ." (my italics), while sections 96(2), 97(1), 98(1) and 99 – 102, which deal with the order of priority accorded the different types of costs, all start with "Thereafter . . .".

It is submitted that the words in section 103, namely "after making provision for the expenditure mentioned in sections ninety-six to one hundred and two inclusive . . ." are not sufficient in the circumstances to convey an intention on the part of the legislature (in 1936) to change the law as applied by the courts and accepted by authors and jurists alike after the 1916 Insolvency Act.

Textbooks (*Mars* (1924) 218 – 220) and case law on this topic (*Adolph Mosenthal and Co v The Master and Feinberg's Trustees loc cit*), dating from the period after the passing of the 1916 act, show that the common-law preference of the different notarial bonds as against concurrent creditors was recognised in our law notwithstanding this enactment. Cases decided (on the basis of the common law) prior to the passing of the 1916 act, such as *Hare v Heath's Trustee* 3 SC 32, *Meyer v Botha and Hergenröder* (1882) 1 SAR 47 and *Francis v Savage and Hill* (1882) 1 SAR 33, remained applicable. The legislature, being aware of the law, would clearly have indicated its intention to abolish all common-law preferences with the enactment of the sections in question in the 1936 act and would not have used almost the same language as it had used in the 1916 act.

(c) It is, moreover, doubtful whether the legislature could have intended by the enactment of section 102 of the Insolvency Act, to provide the general notarial bondholder with a possible preference in respect of the proceeds of unencumbered immovable property which falls within the free residue (Scott and Scott *Wille's law of mortgage and pledge in South Africa* (1987) 68; Sacks 1982 *SALJ* 611; without directly stating it, the court seems to have accepted this possibility in the case under discussion). Notwithstanding this apparent effect of section 102, *De Wet and Yeats* (De Wet en Van Wyk *De Wet en Yeats*: *Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 364 and fn 153) adhere to the position at common law, namely that the notarial bondholder is not entitled

to a preference in respect of the proceeds of immovables which might fall into the free residue. In the light of section 86, "No general mortgage bond . . . shall confer any preference in respect of immovable property . . .", this is, it is submitted, the correct approach.

Conclusion

10 The factors mentioned above no doubt resulted in our courts and authors generally accepting either that the term "general mortgage bond" in section 102 of the Insolvency Act 24 of 1936 refers to general and special notarial bonds (Wunsh 1960 *THRHR* 114 and fn 16), or that section 102 at least does not exclude the common-law preference to the free residue of the special notarial bondholder as against the concurrent creditors (*Vrede Koöp Landboumaatskappy Bpk v Uys* 1964 2 SA 283 (O) 286C – D; the statements by and the authorities cited in this regard by the following authors *inter alia* also bear evidence of this: *De Wet and Yeats* 364 and fn 152; Gibson and Comrie *South African mercantile and company law* (1988) 625; *Mars* (1988) 384 par 19.16 and fn 204; Joubert and Scott 17 *LAWSA* 355 par 472 and fn 8; *Wille Mortgage* 68 and fn 217).

11 This decision is therefore incorrect in that it denies the special notarial bond its common-law preference to the free residue as against concurrent creditors: the main reasons are that the meaning of "general mortgage bond" in section 102 of the Insolvency Act is not clear (par 9(a) above), and that sections 96 – 103 cannot be said to contain an exhaustive list of (statutory) preferences to the free residue of an insolvent estate, since the relevant sections have been drafted by the legislature in substantially the same language as the earlier 1916 Insolvency Act (par 9(b) above).

12 Owing to the operation of *stare decisis* and the costs involved in taking the risk of another Appellate Division decision, the only feasible solution is for the legislature to restore the special notarial bond as a form of security. Unfortunately, however, this procedure will not assist those bondholders who are immediately adversely affected by this decision. It is hoped, further, that the legislature will look seriously into suggestions which have been made as long ago as 1982 by Sacks (1982 *SALJ* 605) with regard to the desirability of supportive measures to increase the usefulness of this type of security.

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POLIGAMIE, BUITE-EGTELIKHEID EN INTESTATE ERFREG

Dhansay v Davids 1991 4 SA 200 (K)

1 Inleiding

Die vraag of kinders uit 'n Moslemhuwelik vir doeleindes van die intestate erfreg as buite- of binne-egtelik beskou moet word, het in hierdie saak ter sprake

gekom. Die stand van die erkenning van poligamie en die rol van die internasionale privaatreg kom ook na vore.

2 Feite

Omar Dhansay (O) sterf op 16 November 1964 in Indië en sy broer Ebrahim Dhansay (E) op 3 Mei 1977 in Kaapstad. O sterf intestaat en laat drie kinders (XYZ) gebore uit 'n Moslemhuwelik (in Indië gesluit) na. XYZ is in Indië gebore en het hulle hele lewe daar gewoon. E het ook 'n Moslemhuwelik met F (sewende applikant) gesluit. Ses kinders (eerste ses applikante) is uit die huwelik tussen E en F gebore. In E se testament laat hy al sy onroerende eiendom (in aangeduide aandele) aan sy kinders na onderworpe aan 'n vruggebruik ten gunste van F (201B – D).

O en E was die geregistreerde eienaars in onverdeelde aandele van 'n stuk grond in Athlone, Kaapstad (201E – F). Die eerste respondent is die aangewese eksekuteur van O se boedel, en die tweede respondent 'n oom aan moederskant van die eerste ses applikante en testamentêre eksekuteur van E se boedel. (Die ander respondente is die Meester en die Registrateur van Aktes. Die vyfde respondent is 'n maatskappy wat 'n kontrak met O se eksekuteur aangegaan het oor die verkoop van O se onverdeelde aandeel in die grond: 201F.)

3 Betoë en bevinding

Applikante voer aan dat O se onverdeelde aandeel op grond van die intestate erfreg aan E vererf het aangesien XYZ (O se kinders) kragtens die Suid-Afrikaanse intestate reg buite-egtelik is en gevolglik nie van O kon erf nie. Volgens dié benadering sou die applikante dus op beide E en O se aandele geregtig wees (201G 202B – C). Die reg ten opsigte van onroerende eiendom word ooreenkomstig die *lex loci rei sitae* bepaal (202B, E). Die eerste, tweede en vyfde respondente voer aan dat XYZ die werklike erfgename van die halwe aandeel in die onroerende eiendom in Suid-Afrika is omdat O se huwelik wel geldig in Indië is (volgens die reg van die plek waar dit gesluit is: 201H 202D). Applikante beweer dat O ten tyde van sy dood in Suid-Afrika gedomisilieer was. Daarteenoor beweer van die respondente (een, twee en vyf) dat sy domisilie in Indië was (201I).

Die applikant wou verhoed dat eiendomsoordrag aan die vyfde respondent geskied en het 'n bevel *nisi* bekom (201J – 202A). Die hooggeregshof is versoek om te bepaal of die *lex loci rei sitae* die intestate erfreg met betrekking tot onroerende goed reël en of kinders wat wel binne-egtelik ooreenkomstig die regstelsel van die land waar hulle gebore en sedertdien gedomisilieer is (hoewel buite-egtelik volgens die *lex loci rei sitae*), nie onroerende eiendom in Suid-Afrika kan erf nie (202E).

Die hof bevind dat die *lex loci rei sitae* die status van XYZ (O se kinders) bepaal en dat hulle vanweë hulle buite-egtelike status nie sou kon erf nie, dat E die regmatige erfopvolger van O was en dat die eerste ses applikante wel die onroerende eiendom erf onderworpe aan die vruggebruik van E se vrou (203I).

4 Regsposisie

Die saak bring 'n paar vrae na vore, naamlik die invloed op die intestate erfreg van (a) binne- en buite-egtelikheid; (b) die nie-erkenning van poligamiese huwelike

en die voorstelle van die Suid-Afrikaanse Regskommissie (*Huwelike en gebruiklike verbindings van swart persone* Projek 51 (1986) 213) met betrekking tot die erkenning daarvan in die geval van gebruiklike verbindings; en (c) artikel 1 van die Wysigingswet op die Bewysreg 45 van 1988.

4 1 Binne- en buite-egtelikheid

Voor die inwerkingtreding van die Wet op Intestate Erfopvolging 81 van 1987 (hierna die 1987-wet) was buite-egtelike kinders nie bevoeg om intestaat van hulle vader te erf nie – hulle kon wel van die moeder erf op grond van die reël *een moeder maakt geen bastaard* (Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 107 – 108). Dié reël het as gevolg van die invloed van die kerk in die Middeleeue ontstaan (sien Du Plessis "Regshistoriese grondslae van die Wet op Intestate Erfopvolging 81 van 1987" 1990 *De Jure* 244 – 245). (Indien die erflater sy buite-egtelike kinders testamentêr wou bevoordeel, moes hulle by name genoem word (Van der Merwe en Rowland 223). Dié posisie word deur a 2D(1)(b) van die Wysigingswet tot die Wysiging van die Erfreg 43 van 1992 reggestel (sien ook Sonnekus "Voorgestelde statutêre wysiging van die erfreg" 1992 *TSAR* 172 – 173).)

Die 1987-wet is egter nie op die feitestel van toepassing nie aangesien dit eers na O en E se dood in werking getree het (202G). Sou die wet van toepassing gewees het, sou O se kinders wel die wettige erfgename gewees het – ook volgens die *lex loci rei sitae*. O en E se vrouens sou egter steeds nie in die erfenis kon deel nie vanweë die potensiële poligamiese aard van hulle huwelike.

Dieselfde problematiek kom in die selfregerende gebiede voor. Kragtens artikel 30 gelees met bylae 1 van die Grondwet van die Selfregerende Gebiede 21 van 1971 is item 23 wat betrekking het op erfregtelike kwessies aan die selfregerende gebiede oorgedra. Die 1987-wet is gevolglik nie op hierdie gebiede van toepassing nie en die voor-1987-reëlings met betrekking tot buite-egtelike kinders is dus steeds van toepassing. Selfs al sou die hof sy diskresie uitoefen (sien par 4 4 hieronder) om Westerse reg toe te pas, sou buite-egtelike kinders steeds nie kon erf nie. Poligame huwelike word ook hier vir doeleindes van die Westerse reg nie as wettige huwelike beskou nie. Erfopvolging kragtens die gewoontereg (hoewel onderworpe aan 'n aantal spesifieke statutêre voorskrifte) word wel erken (GK R200 in *SK* 10601 van 1987-02-06 – vgl Olivier, Olivier en Olivier *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 435 – 518; Bekker *Seymour's customary law* (1989) 273 – 331).

4 2 Nie-erkenning van poligamie

In Suid-Afrika word huwelike wat potensieel poligamies is as teen die staatsgedragslyn en die reëls van natuurlike geregtigheid beskou en gevolglik nie erken nie (*Seedat's Executors v The Master (Natal)* 1917 AD 302 307 – 309). Dié sogenaamde *repugnancy clause* is in Afrika ingevoer nadat sendelinge met die tradisionele Afrikahuwelik kennis gemaak het. Aangesien hulle nie die aard van hierdie huwelik verstaan het nie en dit onder andere as 'n vorm van "slawerny" aangesien het, is die huwelike veroordeel en as teen die staatsgedragslyn beskou (Allott *New essays in African law* (1970) 165 – 166; Du Plessis *Afrika en Rome: regsgeskiedenis by die kruispad* (1991) 11). Die *repugnancy clause* is ook op Moslemhuwelike van toepassing gemaak (die *Seedat's*-saak 306 ev). Kinders gebore uit poligame huwelike is gevolglik as buite-egtelik beskou (SA Regskommissie 213).

Vir doeleindes van die erfreg reël die internasionale privaatreg dat 'n betrokke regstelsel bepaal word na aanleiding van die vraag of roerende dan wel onroerende eiendom ter sprake is. In die geval van roerende eiendom word die toepaslike regstelsel bepaal deur die regstelsel van die plek van domisilie van die erflater ten tyde van sy dood (*lex ultimi domicilii*). Die *lex loci rei sitae* reël die erfopvolging met betrekking tot onroerende eiendom (vgl Corbett, Hahlo en Hofmeyer *The law of succession in South Africa* (1980) 636 – 637; Forsyth en Bennett *Private international law* (1981) 304 – 305). Die geldigheid van 'n huwelik word bepaal volgens die *lex loci celebrationis* behalwe as dit as teen die openbare beleid beskou word (Forsyth en Bennet 239).

Indien O se *lex ultimi domicilii* (Indië) dus gevolg sou gewees het, sou die Islamitiese erfreg van toepassing gewees het en sou sowel XYZ as die vrou van O volgens dié regstelsel verskillende breukdele ontvang het (vgl Omar *The Islamic law of succession* (1988) 31 ev).

Volgens die *lex loci rei sitae* (Suid-Afrika) word Moslemhuwelike nie erken nie (vgl Forsyth en Bennett 242 se kritiek in hierdie verband). Sou E nie 'n testament nagelaat het nie, sou ook sy kinders en vrou nie bevoeg gewees het om sy intestate erfgename te wees nie – die voor-1987-erfregreëls (vgl Van der Merwe en Rowland 45 – 89) sou dan van toepassing gewees het.

Die Suid-Afrikaanse Regskommissie (213 215 – 216) het in sy ondersoek na swart gewoonteregtelike huwelike aanbeveel dat poligamie (net mbt die gebruiklike verbinding) erken word en dat alle kinders gebore uit sodanige huwelike as binne-egtelik beskou moet word. Dié erkenning sal egter ook na Moslemhuwelike uitgebrei moet word. Die uitwerking van sodanige erkenning sou, as dit op die feitestel in die *Dhansay*-saak toegepas word, meebring dat sowel die vrouens as die kinders geregtig sou wees om te erf.

Die 1987-wet maak egter nie vir poligamie voorsiening nie. Hoewel kinders uit so 'n huwelik wel intestaat kragtens die 1987-wet mag erf, geld die verbodsbepaling met betrekking tot vrouens (weens die nie-erkenning van die Islamitiese huwelik in Suid-Afrika). Volgens die Islamreg word 'n kwart van die boedel aan die vrou afgestaan. As daar meerdere vrouens is, word die kwart onder hulle verdeel (Omar 41). In Bophuthatswana is die Bophuthatswana Succession Act 23 van 1982 aanvaar ten einde intestate erfopvolging te reël waar daar meerdere vroue (sivielregtelik of gewoonteregtelik) nagelaat word – die wet los egter nie alle probleme op nie (vgl Maithufi "Widows of civil and customary marriages in Bophuthatswana – competing heirs" 1990 *De Jure* 326 – 333). Ook dié wet bevat geen bepalings met betrekking tot Moslemhuwelike nie. Indien poligame huwelike in Suid-Afrika erken sou word, sou die 1987-wet ook gewysig moet word.

4 3 Wysigingswet op die Bewysreg 45 van 1988

Die hof het in die *Dhansay*-saak bevind dat die *lex loci rei sitae* – in besonder die Westerse Suid-Afrikaanse – toepassing moet vind (203H – I). In Suid-Afrika behoort daar egter erkenning aan meerdere regstelsels gegee te word. O het geen testament gemaak nie en 'n Moslemhuwelik gesluit. Sy boedel sou op die oog af volgens Islamreg moet vererf. In die *Seedat's*-saak het die oorledene 'n testament nagelaat waarin hy bepaal het dat die Islamerfreg van toepassing moet wees en die hof het die *lex ultimi domicilii* toegepas (306 314). Seedat het twee Moslemhuwelike in Indië gesluit. Hy en sy erfgename (sommige is in Indië

gebore) was tydens verlyding van die testament en sy dood in Natal gedomisilieer. E het egter nie in sy testament so 'n bepaling ingesluit nie maar het wel ook 'n Moslemhuwelik gesluit. Daar sou beweer kon word dat aangesien sy testament volgens Westerse reg opgestel is, dié regstelsel toepassing vind.

Dit blyk nie uit die uitspraak of artikel 1 van die Wysigingswet op die Bewysreg 45 van 1988 deur enige van die partye in ag geneem is nie. Dié artikel bepaal dat die hof kennis mag neem van vreemde reg indien dit nie teen die staatsgedragslyn of die reëls van natuurlike geregtigheid is nie en dit geredelik en met voldoende sekerheid vasstelbaar is. (Vreemde reg kan kragtens a 1(2) bewys word.) Die hof mag ook nie bevind dat *lobola* of *bogadi* of dergelike gebruike daarmee in stryd is nie (a 1(1)).

Die hof sou dus voorlopig kon bevind dat hy van die gewoontereg (in dié geval Islamreg) kennis mag neem, en, analoog aan die voorbehoudsbepaling (met betrekking tot *lobola*), dat ook Moslemhuwelike vir doeleindes van hierdie artikel nie as teen die staatsgedragslyn beskou mag word nie.

Na voorlegging van al die getuienis sou die hof op grond van *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1947 AD 388 397 finaal kon besluit watter regstelsel (in dié geval Westerse of Islamreg) hy in die gegewe geval wil toepas:

> "[T]he dominant consideration is his own reasoned view as to the best system of law to apply in order to reach a just decision between the parties" (401).

Op grond van billikheid sou die hof sowel Westerse reg (tav E se helfte van die grond) as Islamreg (tav O se helfte) kon toepas (vgl *Umvovu v Umvovu* 1953 1 SA 195 (A)). Indien die hof so sou bevind het, sou die vyfde respondent wel die koopkontrak vir O se helfte kon afdwing en die opbrengs volgens Islamreg (roerende bates vererf volgens die *lex ultimi domicilii*) onder andere onder XYZ verdeel word. E se helfte sou dan testamentêr onder sy vrou en kinders vererf.

Daar sou ook geargumenteer kon word dat die hof die billikste beslissing in die gegewe geval gegee het deur die Westerse reg ten aansien van sowel O as E se boedels toe te pas aangesien O en sy kinders in elk geval in Indië woonagtig was en geen voordeel uit die grond getrek het nie.

5 Gevolgtrekking

Die *Dhansay*-saak is op sigself nie 'n opspraakwekkende beslissing nie maar illustreer weer eens die problematiek wat oor die nie-erkenning van poligamiese huwelike en die afdwinging van aanwysingsnorme kan ontstaan. Alhoewel die regskommissie aanbeveel het dat wat swart huwelike betref, daar aan poligamie erkenning verleen moet word, is die erfregtelike posisie van die kinders gebore uit sodanige huwelike in verhouding met daaropvolgende Westerse huwelike nie uitgeklaar nie. Geen sodanige aanbeveling word uitdruklik ten aansien van Moslemhuwelike gemaak nie.

Na inwerkingtreding van die 1987-wet is die intestate problematiek met betrekking tot buite-egtelike kinders (buite die selfregerende gebiede) opgeklaar en sou hulle kon erf. Selfs al sou poligame huwelike dus nie erken word nie, sou die kinders uit sodanige huwelike ten minste kon erf. Die vrouens uit sodanige huwelike word egter steeds nie beskerm nie. In die ontwikkeling van 'n nuwe regsbestel sal dié benadelende situasie reggestel moet word.

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DAMAGES FOR LOSS OF EARNING CAPACITY – NEW HOPE FOR THE ILLEGAL EARNER

Lebona v President Versekeringsmaatskappy Bpk 1991 3 SA 395 (W); Dhlamini v Multilaterale Motorvoertuigongelukkefonds 1992 1 SA 802 (T); Nkwenteni v Allianz Insurance Co Ltd 1992 2 SA 713 (Ck)

Nearly twenty years ago the Appellate Division ruled that it was against public policy to compensate for loss of income derived from an activity forbidden by statute (*Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A), hereinafter referred to as the *Protea Assurance* case). As a result, any hawker or taxi-driver who operated without a licence would have been unable to recover in delict for loss of income. Public policy was also said to demand that the dependants of such a person be denied an action for loss of support (*Booysen v Shield Insurance Co Ltd* 1980 3 SA 1211 (SE)). The question arose before the Appellate Division again in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) (the *Santam* case), but the precedents set by the *Protea Assurance* and *Booysen* cases were not upset.

Recent state initiatives to deregulate the economy with a view to encouraging small business, appear to have brought in their wake a softening of public policy toward the statutory transgressions of those in the informal sector. A new judicial tolerance of the illegal earner is apparent from the three recent cases which form the subject of this note.

In the *Lebona* case, in which the breadwinner hawked without a licence, and the *Dhlamini* case, in which the breadwinner drove a taxi without a licence, the illegality of the breadwinner's occupation was found to be no bar to compensation. In the *Nkwenteni* case, on the other hand, the absence of a licence to operate a taxi was deemed fatal to plaintiff's claim. In this case, the authority of the *Santam* case weighed heavily.

The question that arises is how the courts in the *Lebona* and *Dhlamini* cases saw their way clear to awarding compensation within the constraint of the Appellate Division precedent, while in the *Nkwenteni* case, it was relied upon to justify the failure of plaintiff's claim. It will be argued that the *Lebona* and *Dhlamini* decisions are perfectly consistent with the *Santam* judgment but that in the *Nkwenteni* case this authority was incorrectly applied.

It is necessary therefore briefly to consider the judgment of Joubert JA in the *Santam* case. The insurance company appealed against an award for loss of support made in favour of the respondent widow. The nub of Santam's defence was that the deceased had, at all relevant times before his death, and in contravention of Ordinance 15 of 1953, carried on a panelbeating business in a residential area without licence to do so. Such an activity, it was argued, was *contra bonos mores* and any claim for loss of support out of income which had been earned in such a way, was unenforceable.

After considering the relevant ordinance, Joubert JA found that carrying on the business of panelbeater without licence in a residential area amounted not

merely to a colourless statutory contravention, but was punishable as a crime (850B – C). He went on:

> "Dit is verder duidelik dat baie belangrike oorwegings van publieke belang met betrekking tot gesondheid, veiligheid, brandgevaar en die woongeriewe van die omgewing 'n belangrike rol speel by die uitreiking van 'n lisensie aan 'n duikklopper. Dit volg dan dat waar die besigheid van duikklopwerk sonder lisensie plaasvind die gevolge van so 'n besigheid nie regsgeldig is nie en dat die inkomste wat daardeur verkry word nie-regmatige inkomste is volgens die beslissing van hierdie Hof in *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) *per* RUMPFF AR op 917:
>
> 'Na my mening het die wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder lisensie nie. Om dit wel te doen is nie alleen strafbaar nie, maar, weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie.
>
> Na my mening was die inkomste van die eerste appellante dus nie-regmatige inkomste'" (850C – E).

It is important to appreciate the context of the latter passage which Joubert JA quoted from the *Protea Assurance* case. This case was an appeal against the refusal by the court *a quo* of a claim for loss of earnings brought by a person who had earned a living by hawking fruit without a licence. Rumpff JA, having reached the above quoted conclusion that the appellant's income was unlawful, dismissed the appeal without further ado.

When Joubert JA made the above reference to the *Protea Assurance* case, he had already found that the deceased's activities were illegal. It was thus open to him, at this stage in his judgment, to dismiss the plaintiff's claim for loss of support. Before doing so, however, he proceeded to examine the picture drawn in evidence of the deceased's activities.

They were, it turned out, conducted under extremely crude conditions, in what was essentially a corrugated iron shed which had been constructed from the remains of a burnt down garage. Since it was clear that, among other defects, the deceased's premises were not sufficiently fire resistant, Joubert JA concluded:

> "In die onderhawige geval is die posisie dan dat die oorledene te alle relevante tye voor sy dood die besigheid van duikklopwerk sonder lisensie . . . *beoefen het onder omstandighede waar hy nie 'n lisensie sou bekom het nie* [851B – C, writer's italics] . . . Dit is na my mening onteenseglik so dat die berekening van die *quantum* van [die respondent se] skadevergoeding noodwendig gebaseer moet word op die nie-regmatige inkomste wat die oorledene as broodwenner uit die onwettige beoefening van sy ongelisensieerde besigheid van duikklopwerk verdien het" (851E – F).

That Joubert JA considered the circumstances under which the deceased traded, is significant. In concluding that the deceased *would not* have been granted a licence the judge found, in effect, that he did not, at the time of his death, have the *capacity* legally to conduct his panelbeating business. The door was left open, in other words, to award compensation on the basis of past earnings where it appears that the breadwinner could legally have conducted the business in which he was engaged.

The courts in the *Lebona* and *Dhlamini* cases took advantage of this gap, and gave practical effect to the distinction between loss of earning capacity on the one hand, and loss of earnings on the other.

In the *Lebona* case, the deceased had practised as a hawker despite having been refused a licence to do so by the Lekoa Town Council. He died in 1986. His widow's claim for loss of support was heard in 1990. Much of Flemming

DJP's judgment is dedicated to describing how the political climate had changed in the interim; how, in 1986, it was all but impossible to obtain such a licence since certain health regulations made it incumbent upon prospective hawkers to secure a building on business premises in order to store their wares; and how, in 1989, when it became state policy to stimulate small business, licences became obtainable despite non-fulfilment of that requirement (403I – 404G).

Bearing in mind that the health regulations were a barely disguised ploy to thwart applicants for a hawker's licence, Flemming J opined that, even in 1986, there was a good chance that the deceased could successfully have brought on review the refusal of his application, and would probably, in the end, have been granted a licence (404G – I).

Predictably, the defendant insurance company relied upon the *Protea Assurance* and *Santam* cases, but they were given short shrift by Flemming J:

> "Indien ek wel genoodsaak is om iets daaromtrent te sê, beklemtoon ek dat die beslissing in hierdie geval nie gegrond is op die enkele feit dat die oorledene die eiseres 'onderhou (het) uit sy nie-regmatige inkomste' nie (te 85D in die *Ferguson*-saak) . . . en berus nie (vergelyk die kopskrif in die *Dhlamini* [*v Protea Assurance*]-saak) 'op grond van gederfde inkomste' terwyl oorledene nie 'n lisensie gehad het nie maar sy vermoë en plig om te verdien ongeag of hy op grond van 'n lisensie of daarsonder die bepaalde tipe bedrywigheid beoefen het of 'n ander" (405D – F).

The plaintiff in the *Dhlamini* case claimed damages for loss of support arising from the death of her husband who had operated a taxi without the relevant permit. De Villiers J found that the deceased would have earned the same amount had he worked legally, and, in all probability, would have obtained the necessary licence had he applied (806F):

> "Die feit dat die oorledene vanaf 1986 tot sy dood in Mei 1988 onwettige huurmotorwerk verrig het, kan wel in ag geneem word as 'n aanduiding van die oorledene se verdienvermoë".

In line with the *Santam* decision then, the courts in the *Lebona* and *Dhlamini* cases considered whether the deceased had the capacity legally to carry on his business, and, finding that he did, awarded compensation to his widow for the loss of his support. Actual earnings were relevant only in so far as they helped in determining *quantum*.

It remains to consider how the *Santam* judgment was relied upon to justify denying Nkwenteni, an unlicensed taxi driver, his claim for loss of earning capacity. (The decision in the *Nkwenteni* case is *obiter* because it was found that the plaintiff's injuries had not in fact impaired his capacity to earn.) Claassen AJ began his judgment by reporting:

> "At the close of the hearing, it was common cause that for plaintiff to be entitled compensation *of any amount whatsoever*, he had to have proved that at the time of the collision, he was operating legally under a valid Road Transportation Permit . . . Those concessions were made in the light of the decision in *Santam Insurance Ltd v Ferguson* 1985 (4) SA 843 (A) and the cases referred to therein" (716B – C).

The judge went on to explain:

> "The basis of these decisions is that if the only measure of income earned by a plaintiff is derived from an illegal activity, then there is nothing to go on to establish his loss of future earning capacity" (716D).

This, it is submitted, is not the basis of these decisions. Not to put too fine a point on it, the basis of the *Santam* decision is that if the income is derived from an illegal activity *and* the breadwinner is found to have lacked the capacity

legally to pursue that activity, then, in absence of other evidence of the breadwinner's earning capacity, the court has nothing to go on to establish his or her loss.

It emerges from the *Nkwenteni* judgment (716G – H 718A) that during the period between the collision and the trial, the plaintiff had applied for and had in fact been granted the required permit. He may well, in other words, have been eligible for a licence at the time of the collision. But, while paying lip service to the concept of lost earning capacity, the court, in effect, treated plaintiff's action as a claim for loss of actual earnings.

Once loss of capacity to earn is recognised as the loss to be compensated (see Neethling, Potgieter and Visser *Deliktereg* (1992) 238 – 239) then it is open even to a breadwinner whose trade was doomed to offend statute, to recover damages. A person who derives income from an activity which is intrinsically illegal, does not necessarily lack the capacity to earn a living in another, legal way. Naturally, it would be up to the plaintiff to prove that capacity, as well as its market value. But if, in spite of such proof, compensation were denied to an illegal earner or to his or her dependants, it would be difficult to escape the conclusion that the South African law of delict, as did its Roman-law counterpart, sometimes assumes a penal role.

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ASPEKTE VAN DIE DELIKSELEMENTE NALATIGHEID, FEITELIKE EN JURIDIESE KOUSALITEIT (INSLUITEND DIE SOGENAAMDE EIERSKEDELGEVALLE)

Smit v Abrahams 1992 3 SA 158 (K)

Die voertuig waarmee die eiser (respondent) 'n marskramersbedryf beoefen het, is in 'n botsing met die verweerder (appellant) se voertuig onherstelbaar beskadig. Die eiser was 30% en die verweerder 70% nalatig. Die eiser slaag met sy eis om skadevergoeding vir die markwaarde van die voertuig. Omdat die voertuig noodsaaklik was vir die beoefening van sy bedryf en hy dit weens finansiële onvermoëndheid ("impecuniosity") nie kon vervang nie, eis die eiser voorts die bedrag wat hy moes betaal het om 'n plaasvervangende voertuig te huur. Hierteenoor voer die verweerder aan dat laasgenoemde eis nie verhaalbaar is nie omdat die skade deur die eiser se eie geldelike onvermoëndheid veroorsaak is. In die hof *a quo* word hierdie verweer van die hand gewys en die appèl teen die beslissing misluk. Die eiser slaag gevolglik ook met sy eis om die huurgeld van die plaasvervangende voertuig.

Enkele aspekte van waarnemende regter Farlam se uitspraak verg kommentaar.

1 Ten eerste oorweeg die regter of die eiser se skade deur die verweerder *veroorsaak* is (161C ev). Vir doeleindes hiervan onderskei hy met verwysing na *Minister*

of Police v Skosana 1977 1 SA 31 (A) 34 – 35 en *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914 tussen feitelike en juridiese kousaliteit ("remoteness of damage"). Wat juridiese kousaliteit betref, beklemtoon hy tereg dat dit nie hier in werklikheid oor *kousaliteit* gaan nie, maar oor aanspreeklikheidsbegrensing of toerekenbaarheid van skade, dit wil sê die vraag vir welke skadelike gevolge wat feitelik deur die dader se onregmatige, skuldige handeling veroorsaak is, hy aanspreeklik gestel moet word – met ander woorde welke gevolge hom *toegereken* moet word (sien hieroor Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 9 ev (waarna die hof oa verwys: 162G – H); Neethling, Potgieter en Visser *Deliktereg* (1992) 159 ev). Hy stel dit soos volg (162E):

> "The use of the expression 'legal causation' to describe the concept underlying the second enquiry, namely the enquiry as to the remoteness of damage, may be a convenient label, but it must not be allowed to distract one's attention from the important consideration that the second enquiry does not really raise a question of causation but relates to the fixing of the outward limit of legal liability."

2 Volgens regter Farlam moet feitelike kousaliteit aan die hand van die "but for"-oftewel *conditio sine qua non*-toets vasgestel word. Sy gevolgtrekking is dat sowel die verweerder se nalatige optrede as die eiser se onvermoëndheid feitelik tot die skade ten aansien van die besteding van die huurgeld bygedra het (163A – B). Alhoewel hierdie gevolgtrekking instemming verdien, kan die gebruik van die sogenaamde *conditio sine qua non*-"toets" nie goedgepraat word nie. Daar is al by herhaling aangetoon dat hierdie "toets" in werklikheid geen kousaliteitstoets is nie maar hoogstens 'n *ex post facto* wyse om 'n vooraf-bepaalde kousale verband uit te druk (sien oa Neethling, Potgieter en Visser 164 – 166 en die bronne daar aangehaal; sien ook *idem* 162 – 164 vir ander ernstige en grondige punte van kritiek). In die jongste uitgawe van sy gesaghebbende werk *Strafreg* (1992) skaar Snyman (81 – 82) hom ook nou by hierdie kritiek. Die vertroue word daarom opnuut uitgespreek dat die appèlhof by die eersvolgende geleentheid die vermelde kritiek in behandeling sal neem ten einde sy betwisbare houding ten opsigte van *conditio sine qua non* te heroorweeg (sien ook Visser "*Conditio sine qua non*" 1989 *THRHR* 568; Potgieter "Feitelike en juridiese kousaliteit" 1990 *THRHR* 269).

3 Omdat regter Farlam juridiese kousaliteit as delikselement aanvaar, meen hy dat die sogenaamde konkrete benadering tot nalatigheid ("doctrine of 'relative negligence'") (waarvolgens by beantwoording van die vraag of die dader nalatig opgetree het, gekyk word of 'n *spesifieke* gevolg of gevolge redelikerwys voorsienbaar was), nie deel van ons reg uitmaak nie indien dié benadering die vraag na juridiese kousaliteit sou misken (163C – D):

> "It is clear from the decision in *Skosana's* case to the effect that two enquiries must be held (one on factual causation and the other on remoteness) that the view espoused by some writers (eg Boberg *The Law of Delict* 386 *et seq*) that it must be shown that defendant was negligent as regards a particular item of damage (the doctrine of 'relative negligence') – with the result that no enquiry into remoteness is necessary – is not part of our law."

Hierdie standpunt verdien instemming met dien verstande dat dit nie as 'n verwerping van die konkrete benadering vertolk word nie. Die konkrete benadering word teenoor die abstrakte benadering gestel waarvolgens daar by nalatigheid (redelike voorsienbaarheid en voorkombaarheid van skade: *Kruger v Coetzee* 1966 2 SA 428 (A) 430) weer gekyk word of die benadeling van andere *in die algemeen* (en nie die spesifieke gevolg nie) redelikerwys voorsienbaar was. Alhoewel daar gesag vir beide benaderings in die regspraak te vinde is (sien Neethling,

Potgieter en Visser 130 – 131), is die konkrete benadering na ons mening te verkies: die vraag of die redelike man anders as die dader in die betrokke geval sou opgetree het om benadeling te voorkom, kan naamlik slegs sinvol beantwoord word met verwysing na die nadelige gevolg of gevolge wat inderdaad redelikerwys voorsienbaar was (Boberg 276 – 277; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 143; Visser "Denkmodelle oor deliktuele aanspreeklikheid" 1977 *De Jure* 382 ev). 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.

Dit is egter belangrik om daarop te let dat by sowel die abstrakte as konkrete benadering tot nalatigheid 'n ondersoek na juridiese kousaliteit noodsaaklik kan wees (soos wat regter Farlam dan ook, minstens met betrekking tot laasgenoemde, te kenne gee: 163C – D). Die wesenlike verskil tussen die vraag na nalatigheid (juridiese verwytbaarheid van die dader) aan die een kant, en juridiese kousaliteit (aanspreeklikheidsbegrensing of toerekenbaarheid van skade) aan die ander kant, moet nie uit die oog verloor word nie. Dit is onlogies om, nadat eenmaal bevind is dat die dader nalatig was (omdat hy in die lig van die voorsienbaarheid van óf spesifieke gevolge, óf skade in die algemeen, anders moes opgetree het), met verwysing na *verdere* ("remote") gevolge *weer* te vra of die dader anders moes opgetree het. Daar is immers by die ondersoek na nalatigheid reeds besluit dat hy anders moes opgetree het. By verdere gevolge gaan dit dus nie meer om die dader se verwytbaarheid (skuld) nie (dit staan in hierdie stadium reeds vas), maar of hy vir die verdere gevolge van sy verwytbare optrede aanspreeklik gehou moet word (sien verder Neethling, Potgieter en Visser 183 – 184; Van Rensburg 28 – 29; Hart en Honoré *Causation in the law* (1959) 239 – 240).

4 Die regter verwys in die verbygaan tereg daarop dat die appèlhof "has left open the question as to what is or are the correct test or tests to be applied" met betrekking tot juridiese kousaliteit (164C; sien ook 165I). Die appèlhof staan in die jongste tyd inderdaad 'n soepel benadering voor waarvolgens vir die bepaling van juridiese kousaliteit nie net 'n enkele maatstaf geld wat vir alle feitelike omstandighede deug nie. Die kernvraag is of daar 'n genoegsaam noue verband tussen die dader se handeling en die gevolg bestaan dat die gevolg die dader met inagneming van beleidsoorwegings op grond van redelikheid, billikheid en regverdigheid toegereken kan word. Die bestaande juridiese kousaliteitsmaatstawwe kan wel 'n subsidiêre rol speel by bepaling van juridiese kousaliteit aan die hand van die elastiese benadering (sien *S v Mokgethi* 1990 1 SA 32 (A) 40 – 41; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700 – 701; Neethling, Potgieter en Visser 191 – 193).

5 Volgens die regter (163D ev) word daar nietemin veral twee toetse ter bepaling van juridiese kousaliteit aangewend, naamlik die "direct consequences"-en redelike voorsienbaarheidstoets (sien in die algemeen oor hierdie twee toetse Neethling, Potgieter en Visser 174 – 176 en 185 – 187). Die regter vind dit onnodig om te beslis of die "direct consequences"-toets deel van ons reg is omdat, *in casu*, die onvermoëndheid van die verweerder in elk geval redelikerwys voorsienbaar was (165A – 166A; sien par 6 hieronder). Indien "direct consequences" egter wel deel van ons reg is, is hy (164E, I) *obiter* van mening dat "it will operate as an extension to, and not a substitute for, the test of reasonable foreseeability". Hy verklaar naamlik, soos hy Van der Walt "Delict" 8 *LA WSA* par 53 vertolk,

dat 'n verweerder aanspreeklik is vir al die redelikerwys voorsienbare gevolge van sy optrede *plus* die direkte gevolge daarvan, al was laasgenoemde nie op sigself redelikerwys voorsienbaar nie (164E – F). Dit is na ons mening egter onseker of Van der Walt die vermelde twee toetse deurgaans as 'n absolute reël op hierdie "gekombineerde" wyse wil akkommodeer. Dit kom voor of hy eerder aan die hand van 'n soepel benadering van geval tot geval sou wou bepaal of "direkte" gevolge 'n dader toegereken moet word. Van der Walt verwys in hierdie verband trouens net na die gebied van *persoonlike beserings* waar die dader aanspreeklik gehou word selfs vir gevolge wat syns insiens nie redelikerwys voorsienbaar was nie, soos by die sogenaamde eierskedelgevalle (sien hieroor die bespreking later par 7; *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (W) 516 – 517; *Potgieter v Rondalia Assurance Corporation of SA Ltd* 1970 1 SA 705 (N) 713 – 714; *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K) 342; sien ook Neethling, Potgieter en Visser 176 190). Onses insiens is hierdie voorbeeld gepas aangesien 'n mens by persoonlike beserings met die beskerming van die mens se hoogste goed, sy fisies-psigiese integriteit, te make het (vgl Neethling *Persoonlikheidsreg* (1991) 27).

Ons wil nietemin beklemtoon dat die regter se gekombineerde "direct consequences"- en redelike voorsienbaarheidsbenadering nie as die enigste benadering tot juridiese kousaliteit gesien moet word nie. Die appèlhof het dit immers, soos hierbo (par 4) gestel is, duidelik gemaak dat 'n soepel benadering geld sodat juridiese kousaliteit met inagneming van beleidsoorwegings op grond van redelikheid, billikheid en regverdigheid bepaal moet word; en dat by hierdie bepaling alle bestaande juridiese kousaliteitsmaatstawwe (dus ook byvoorbeeld die adekwate veroorsakingsmaatstaf: Neethling, Potgieter en Visser 172 – 173) 'n rol kan speel.

6 Die regter bevind, onses insiens tereg, in elk geval wat Suid-Afrika betref, dat die onvermoëndheid van 'n eiser wat as gevolg van 'n motorongeluk benadeel word, redelikerwys voorsienbaar is. Hy verduidelik dit soos volg (165H – I):

> "Mr *Van der Hoven* [vir die appellant/verweerder] argued that it was not reasonably foreseeable that respondent [eiser] would be in such straitened financial circumstances that he would not be able to afford to buy a replacement vehicle and would have to hire one. I am not sure that that proposition is correct but it is not necessary to consider it. The correct inquiry is: was there a 'reasonable possibility' . . . that the financial circumstances of the owner of the vehicle with which appellant collided would be such that he could not afford to buy a replacement vehicle? I am satisfied that the answer to that question must be in the affirmative. It is notorious that there are extremes of wealth and poverty in this country and that many people are impecunious."

Hierdie bevinding sluit aan by sy interpretasie van die Engelse saak *Owners of Dredger Liesbosch v Owners of Steamship Edison* (*The Edison*) 1933 AC 449 (HL), 1933 All ER 144. Na 'n deurvorste bespreking van die saak verklaar die regter naamlik (170F – G):

> "In my view, the true *ratio* of *The Edison* is that a person who negligently brings about physical damage to the property of another who is prevented by his straitened financial circumstances from purchasing a substitute is not liable to compensate him for the pecuniary loss he has suffered as a result of the combined operation of the wrongdoer's negligent conduct and his impecuniosity where such pecuniary loss is not reasonably foreseeable: where it is reasonably foreseeable, a wrongdoer is liable to compensate his victim for such loss."

In die lig hiervan kom regter Farlam tot die slotsom, wat volle steun verdien, dat dit onnodig is om uit te maak of die *Edison*-saak deur ons howe nagevolg behoort te word of nie. Hy stel dit treffend (180C – E):

> "[I]t is clear that it is not open to a Court in this country to 'sink' *The Edison*: the most we can do is to tow it out of our territorial waters so that it will no longer be

a menace to local shipping. I have endeavoured, however, to show that its true *ratio* has been misunderstood and that, properly explained, it should not serve 'to foul meritorious claimants'. Whether it be towed away or explained away I am satisfied that it is not our law that reasonably foreseeable loss caused by the combined operation of the impecuniosity of the plaintiff and the culpable conduct of the defendant cannot be recovered in delict."

7 Ten slotte gee regter Farlam (171 ev) indringend aandag aan die reël "a wrongdoer takes his victim as he finds him" wat hy kortweg beskryf as die "*talem qualem*"-reël (*talem qualem*: "net soos hy is") en wat veelal op die gebied van persoonlike beserings as die sogenaamde eierskedelgevalle geklassifiseer word (Neethling, Potgieter en Visser 189 – 191; Van der Walt *Delict: principles and cases* (1979) 99 – 100).

Eerstens is van belang dat die *talem qualem*-reël nie (meer) tot persoonlike beserings ("eierskedels") beperk word nie maar ook tot ander gevalle (soos die finansiële onvermoëndheid van die eiser *in casu*) uitgebrei kan word. Hierdie siening verdien instemming aangesien dit strook met die vermelde soepel benadering tot juridiese kousaliteit (sien par 4 hierbo).

Voorts moet die feit dat die regter (179E – 180B) redelike voorsienbaarheid as grondslag vir die *talem qualem*-reël beskou, vlugtig onder die vergrootglas kom. Alhoewel die gesag waarop die regter hom beroep (*ibid*) 'n mate van steun vir sy standpunt bied, is dit nietemin vatbaar van kritiek. Van der Walt (*Delict* 100) se benadering in hierdie verband is te verkies: volgens hom is benadeling in die sogenaamde eierskedelgevalle gewoonlik nie redelikerwys voorsienbaar nie; gevolglik sal dit ongewens wees om die voorsienbaarheidsmaatstaf so te rek en as 't ware te oorspan dat aanspreeklikheid by die eierskedelgevalle daarvolgens verklaar word. Daarom doen hy aan die hand dat die eierskedelgevalle eerder volgens die "direct consequences"-reël hanteer word. Nietemin is ons nie met hierdie benadering getroud nie. Daar moet steeds vir die moontlikheid voorsiening gemaak word dat 'n gevolg, selfs al was dit 'n "direct consequence", in 'n gegewe geval so uitsonderlik kan wees dat 'n mens die verweerder nie daarvoor aanspreeklik wil stel nie. In so 'n geval sou op grond van oorwegings van billikheid, regverdigheid en redelikheid (sien weer par 4 hierbo) die adekwate veroorsakingsteorie (Neethling, Potgieter en Visser 172 – 173) moontlik die geskikste raamwerk bied waarbinne die gevolgtrekking gestel kan word: 'n mens sou dan kon sê dat die dader nie vir die gevolg aanspreeklik gehou behoort te word nie omdat dit volgens menslike ervaring só buitengewoon is dat dit die dader nie toegereken behoort te word nie (vgl *idem* 191).

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BOEKE

PRINCIPLES OF CRIMINAL LAW

deur J BURCHELL en J MILTON

Juta Kaapstad Wetton Johannesburg 1991; xlvii en 669 bl

Prys R98,45

Met elke verskyning van 'n nuwe handboek of proefskrif oor die Suid-Afrikaanse strafreg word 'n mens weer bewus van die uiteenlopende persoonlikhede van die twee "ouers" waaruit die "jongeling" voortgespruit het. Alhoewel die materiële strafreg histories Romeins-Hollands is, het eeue van Britse regslui en hofprosedure sy merk gelaat, veral wat die benadering van die vakgebied betref. Hierdie erfenis blyk duidelik uit die verskillende handboeke oor die Suid-Afrikaanse strafreg. So het die pionierswerk van Gardiner en Lansdown 'n sterk kasuïstiese benadering gehad en het die outeurs slegs algemene beginsels probeer formuleer insoverre dit met die regspraak versoen kon word (myns insiens 'n tipies Britse benadering). In skrille kontras hiermee het die werk van De Wet en Swanepoel die howe soms byna met minagting behandel en die algemene beginsels van die Kontinentale reg herbevestig (alhoewel dit meer die klassieke strafregsdogmatiek van die Duitser Von Liszt as Romeins-Hollandse reg was). Burchell en Hunt het 'n sintese tussen hierdie twee benaderings probeer bewerkstellig maar is duidelik nog meer aan Gardiner en Lansdown se kant van die veld. Snyman het die meer onlangse Duitse reg bestudeer en probeer nog steeds om die praktyk te oorreed om jongere ontwikkelings aldaar, soos die leerstukke van finale handeling en die normatiewe skuldbegrip, te aanvaar. Hierdie "Schulenstreit" is voortgesit in regstydskrifte en doktorale proefskrifte, met geen duidelike oorwinnaar nog in sig nie. Du Plessis het byvoorbeeld 'n hewige teësin in die ivoortoringbenadering van die Duitse dogmatici en beweer dat selfs die Duitse praktyk hom nie steur aan die "Professorenrecht" van die dogmatici nie. Badenhorst wys ook op die twee uiteenlopende denkrigtings vanuit die Duitse en Britse reg, wat hy onderskeidelik as die "aksiomaties-geslote" en die "problematies-ope" benaderings bestempel en waarvan hy eersgenoemde verkies.

Die werk onder bespreking (ek sal voortaan daarna verwys as Burchell en Milton), toon groot ooreenkoms met dié van Burchell en Hunt (dele van die teks stem byna ooreen) en sou dus aan die kant van die problematies-ope kategoriseer moet word. Dit is egter interessant dat die jongere werk duidelik 'n baie beter begrip van die Duitse strafregsdogmatiek toon en deeglik daarvan gebruik maak by die bespreking van algemene beginsels. Die enigste Duitse werk wat ek egter in die bronnelys kon opspoor, was Von Feuerbach se "Lehrbuch des peinlichen Rechtes" van 1801; ek lei dus af dat die outeurs se Duitse inspirasie meesal van Fletcher se "Rethinking criminal law" afkomstig was. Burchell en Milton is duidelik gemik op dieselfde mark as dié wat Snyman reeds baie suksesvol gedurende die afgelope paar jaar aangespreek het, naamlik as voorgeskrewe boek vir strafregstudente. Burchell en Milton maak gebruik van die navorsing van Burchell, Hunt en Milton se meer uitgebreide werke oor die strafreg en probeer dit in eenvoudige taal en teen 'n billike prys in die studentemark vestig. 'n Mens vrees dat dit dalk die einde van die meer uitgebreide werk kan beteken, aangesien 'n student wat later gaan praktiseer miskien huiwerig kan wees om die addisionele belegging in strafregboeke te maak nadat hy Burchell en Milton reeds tydens sy studies aangekoop het.

Die outeurs slaag myns insiens grotendeels in die strewe wat in die voorwoord uitgespreek word:

> "[W]e have taken pains to explain the origins of concepts and ideas and to describe theories and principles in what we hope is clear and simple language. Wherever possible we have avoided jargon, legalese and Latin (and where not possible we have translated 'lawyerspeak' into ordinary English)."

Ek het dit persoonlik fassinerend gevind om vas te stel wat die oorsprong van uitdrukkings soos "tronk" (21) en "steal" (485) was. Dit toon myns insiens ook 'n liefde vir en goeie agtergrond van die vakgebied. Ongelukkig het die drang om alles te probeer verduidelik gelei tot baie lang definisies ('n mens kan hier eerder van "omskrywings" praat) van kernbegrippe soos "criminal law", "crime" en "punishment" in hoofstuk 1. Miskien sou 'n kernagtiger definisie gevolg deur 'n verduideliking 'n gebruikersvriendeliker toegang tot die boek verleen het.

Van toegang gepraat, die kleurvolle omslag van die boek trek onmiddellik aandag. Dit bestaan uit 'n legkaart met sowel plaaslike as oorsese kunswerke waarvan die een stuk nog kortkom. Gelukkig word die simboliek daarvan in die voorwoord verduidelik:

> "[T]he interlocking nature of the principles of the criminal law is a central theme of the work. The puzzle is not yet complete and some of the pieces may ultimately require judicial or legislative modification, or even replacement."

Persoonlik het die omslag my met 'n effense neerslagtigheid gelaat by die aanskoue van soveel moord, teregstelling, brandstigting en revolusie. Die uitdrukkings van wanhoop en verslaenheid op die meeste karakters se gesigte het hiertoe bygedra; trouens, die enigste karakter wat naastenby gelukkig gelyk het, was die vermoorde Marat in sy bad. Die simboliek is egter wél waar in die sin dat die nuwe Suid-Afrika waarskynlik sy stempel op die strafreg sal afdruk saam met dié van die twee ouer stelsels. Dit sal waarskynlik geskied as gevolg van 'n nuwe grondwet met 'n handves van menseregte ('n moontlikheid wat die outeurs in gedagte hou) asook weens die insette wat Swart gedagtepatrone en waardestelsels vir die eerste keer op strafregwetgewing sal hê.

Ander fisiese interessanthede in verband met die werk is die voorkoms van klein asteriske by sekere hofbeslissings wat in voetnote aangehaal word. In die voorwoord word beloof dat dit die skakeling sal wees tussen die huidige werk en 'n susterwerk aangaande "cases, statutes and materials" wat later sal verskyn. Aangesien Juta ook die pionier in Suid-Afrika is om die hofverslae en statute elektronies aan te bied, kan 'n mens seker begin vergesigte sien waar die regsgeleerde die hofverslae, die statute en relevante akademiese werke op sy rekenaar beskikbaar sal hê. Hierop sal hy dan nie net blitsig sekere regsbegrippe kan opspoor nie maar ook die relevante hipertekskoppelings tussen aldrie bronne hierbo genoem kan opvolg.

'n Boekbespreking soos die huidige laat eintlik nie ruimte om op die detail van die bespreking van die algemene beginsels of die spesifieke misdade in te gaan nie. Ek sou nietemin die volgende opmerkings oor die algemene beginsels wou maak. Die eerste kenmerk is dat die werk op datum is. Vir die resensent was dit byvoorbeeld aangenaam om reeds 'n verwysing na sy werk "Sentencing" aan te tref wat maar 'n jaar voor die werk onder bespreking verskyn het. Soos reeds hierbo genoem, stem die werk in talle opsigte ooreen met die uitvoeriger werke van Burchell, Hunt en Milton, maar die taal is vereenvoudig en die inhoud aansienlik verkort. Hierdie kombinasie kan egter daartoe lei dat die inhoud soms kripties word, 'n probleem wat ek ook met die werk van Snyman het; die rede is waarskynlik dat daar gepoog is om 'n uitgebreide vakgebied (soos die strafreg) binne slapbandformaat te hou. 'n Ander interessante punt van vergelyking met Snyman is dat die huidige werk hom nie te ver op die gebied van Duitse strafregsdogmatiek wil waag nie, maar doodgelukkig is met die huidige stand van sake in die Suid-Afrikaanse strafregspraktyk. Dit is 'n aanvaarbare standpunt maar dan sou 'n mens tog verwag dat beslissings uitvoeriger in die voetnote aangehaal word, soos wat Snyman (die meer "akademiese" werk) wél doen. Nogtans, soos reeds hierbo genoem is, het die skrywers kennis geneem van die Duitse strafregsdogmatiek en dit ook in hul besprekings van die algemene beginsels gebruik. 'n Goeie voorbeeld hiervan is hulle kernagtige bespreking van "justification and excuse" (146–148).

By die spesifieke misdade is die werk ook goed op datum en is daar byvoorbeeld besprekings van sowel die nuwe Wet op Padverkeer as die nuwe bedeling by die doodstraf, beide synde redelik onlangse statutêre skeppings. Een van die beste, oorspronklike bydraes wat Burchell en Milton met hierdie werk lewer, is myns insiens hul herbesinning oor die regsgoed onderliggend aan die verskillende groepe misdade. Vir die eerste keer word die regsgoed van padverkeers- en dwelmmisdade byvoorbeeld vir my bevredigend ingedeel by die "Collective welfare" van die gemeenskap. Alhoewel beknop, het ek die outeurs se bespreking van die kwessie of slegs liggaamlike sake gesteel kan word (491 – 492) akkuraat en op die man af gevind. Aan die ander kant betreur ek die feit dat sekere definisies van misdade wat sedert die eerste verskyning van Hunt se werk aan gegronde kritiek onderwerp is, byvoorbeeld die oorbeknopte definisie van diefstal, nog steeds *verbatim* oorgeneem word. Hunt het in 'n voetnoot ook verwys na die definisies van ander skrywers, soos Gardiner en Lansdown en De Wet en Swanepoel, wat 'n baie nuttige perspektief op die betrokke skrywers se siening van die misdaad verleen het. In die huidige werk is hierdie praktyk gestaak waarskynlik weens ruimteoorwegings.

Om dan op te som, Burchell en Milton se werk is ietwat van 'n paradoks. Dit is 'n werk wat gegrond is op die Britse kasuïstiese benadering – beskryf as "problematiesope" deur Badenhorst – wat stewig op die praktyk geskoei behoort te word. Nogtans haal die meer "akademiese" werk van Snyman, met sy klem op die Duitse strafregsdogmatiek en die "aksiomaties-geslote" benadering, baie meer beslissings in sy voetnote aan. Aan die ander kant behoort die eenvoudige taal en sorgvuldige verduideliking van begrippe deur Burchell en Milton 'n verbruikersvriendeliker aanspraak op 'n regstudent te maak as sommige van die Duitse dogmatiek wat hy in Snyman sal moet baasraak. Die twee werke kompeteer onteenseglik vir die studentemark – welke een behoort deur die strafregdosent voorgeskryf te word? Persoonlik glo ek dat dit afhang van die siening wat 'n mens van akademiese opleiding het. Indien dit die funksie van 'n universiteit is om regstudente realisties vir die praktyk voor te berei, is Burchell en Milton nader aan die situasie wat hom elke dag in die Suid-Afrikaanse strafhowe voordoen. Indien dit die funksie van 'n universiteit is om studente te leer om prinsipieël te besin oor die beginsels van die strafreg (omdat dit hul laaste kans is voordat die praktyk hulle opslurp), dan sit Snyman se werk nader aan die akademiese vure van Europa. Die leser kan hieruit seker reeds aflei dat ek nie namens hom gaan kies nie! Nietemin moet die voorbeeld van die verskyning van die destydse werk van De Wet en Swanepoel steeds by die besluit in gedagte gehou word. Hier het 'n akademiese werk soveel regstudente permanent beïnvloed dat die akademie van een geslag die praktyk van die volgende geslag geword het.

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VONNISBUNDEL OOR DIE VENNOOTSKAPSREG, MAATSKAPPYEREG EN INSOLVENSIEREG/ CASE BOOK ON THE LAW OF PARTNERSHIP, COMPANY LAW AND INSOLVENCY LAW

deur ANNELI LOUBSER

Juta Kaapstad Wetton Johannesburg 1992; 251 bl

Prys R49,50 (sagteband)

Die *Vonnisbundel oor die vennootskapsreg, maatskappyereg en insolvensiereg/Case book on the law of partnership, company law and insolvency law* (die *Vonnisbundel*) is 'n

versameling uitsprake wat relevant is vir voorgraadse studente in die vennootskapsreg, maatskappyereg en insolvensiereg.

Vonnisbundels is noodsaaklike euwels. Die kritiek teen die gebruik daarvan is oorbekend. Akademici en puriste voer aan dat dit studente verhoed om te leer hoe om uitsprake in hofbundels na te speur en te ontleed. Aan die ander kant is dit nie realisties om te verwag dat akademiese instellings vandag oor regsversamelings moet beskik wat aan alle regstudente billike toegang tot die oorspronklike bronne kan bied nie. Met die uitbreiding van afstandsonderrig bevind baie studente hulleself ook nie in 'n posisie waar hulle gemaklike toegang tot biblioteekmateriaal het nie. Bykomend vind voorgraadse studente wat wel toegang tot gerapporteerde beslissings in die kommersiële reg het, dit besonder moeilik om sonder verdere leiding deur die ingewikkelde feitestelle en uitsprake te worstel.

Uit die beplanning van die bundel is dit duidelik dat die samesteller bewus was van die voor- en nadele van vonnisbundels. Kort, ongekompliseerde uitsprake word byvoorbeeld in hul geheel in die *Vonnisbundel* weergegee om studente vertroud te maak met die uitleg van 'n gerapporteerde uitspraak. Hierdie vollengte uitsprake bevat selfs die kopstuk en vlugnotas asook die argumentshoofde van die advokate. Langer uitsprake word daarenteen op die meer tradisionele wyse deur middel van relevante uittreksels gereproduseer. Elke uitspraak word ingelei deur 'n bondige opsomming van die algemene regsreëls op die terrein ten einde die uitspraak binne konteks te plaas. Uitsprake in gedinge waar ingewikkelde feite betrokke was, bevat bykomend 'n kort opsomming van die tersaaklike feite in beide amptelike tale.

Die *Vonnisbundel* wek die indruk dat die samesteller gepoog het om dit prysgewys so toeganklik as moontlik vir studente te maak. Dit blyk uit die tipe papier wat gebruik is, die sagteband waarin die bundel verskyn en die feit dat die bundel slegs 251 bladsye beslaan. Dit is waarskynlik die streng beperking op die omvang van die publikasie wat die samesteller se keuse van uitsprake aan bande gelê het. Die *Vonnisbundel* bevat naamlik slegs 45 uitsprake – agt ten aansien van vennootskapsreg, agtien ten aansien van maatskappyereg en negentien ten aansien van insolvensiereg. Al 45 uitsprake is beslissings van die Suid-Afrikaanse regbank en belig aspekte van die grondbeginsels in die onderskeie vakgebiede.

Ongeag sy beperkte omvang, is die *Vonnisbundel* klaarblyklik 'n handige hulpmiddel wat op 'n besondere wyse die behoeftes van sekere voorgraadse studente sal bevredig. Juis daarom verstout ek my om enkele aanbevelings rakende 'n volgende uitgawe van die bundel te maak.

Dit sal waardevol wees om 'n volgende uitgawe uit te brei deur uitsprake rakende beslote korporasies en bedryfstrusts in te sluit. In die *Vonnisbundel* word die vennootskapsreg en die maatskappyereg saam met die insolvensiereg gegroepeer. Gewoonlik word die vennootskapsreg en maatskappyereg egter in 'n voorgraadse kurrikulum behandel binne die breër raamwerk van die ondernemingsreg. Die afwesigheid van uitsprake wat handel oor veral bedryfstrusts en beslote korporasies is dus 'n leemte. Die databasis van die Sentrum vir Ondernemingsreg toon aan dat daar minstens al elf gerapporteerde uitsprake is wat direk op beslote korporasies betrekking het. Ten minste een van die aantal uitsprake oor die likwidasie van beslote korporasies sal byvoorbeeld kan kwalifiseer om in so 'n bundel opgeneem te word.

'n Vonnisbundel verskaf ongelukkig by uitstek 'n geleentheid aan die drukkersduiwel om te baljaar. 'n Opvolgende uitgawe van die *Vonnisbundel* sal daarom baat by noukeuriger proeflesing. Lastighede soos die "Company Law, and Insolvency Law" op die titelblad, die laaste paragraaf in die eerste opsomming op bladsy 3 wat weggeval het, "getuienisdat" (26) en "copartner" (42) kan in die toekoms met vrug vermy word.

Nieteenstaande bogenoemde is die *Vonnisbundel* reeds 'n waardevolle hulpmiddel vir voorgraadse studente in die kommersiële reg en sal dit na verwagting allerweë deur die studentekorps verwelkom word.

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Sentrum vir Ondernemingsreg
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LEVERING KRACHTENS GELDIGE TITEL
enige grepen uit de geschiedenis van de vereisten voor eigendomsoverdracht

deur JH DONDORP en EJH SCHRAGE met medewerking van JJ HALLEBREEK en T WALLINGA

Vrije Universiteit Uitgeverij Amsterdam 1991; Juridische Reeks 12; 121 bl

Prys HFL 24,50

In die Nederlandse tradisie van regsonderwys word die Europese regsgeskiedenis aan die hand van die geskiedenis van die Nederlandse privaatreg onderrig; hierdie boekie is een van die talle regshistoriese monografieë oor aspekte van die privaatreg wat die afgelope jare in Nederland as hulpmiddel by regsonderwys gepubliseer is. In die tradisie van die regshistoriese metode word die probleemveld, naamlik die vereistes by eiendomsoordrag, behandel met verwysing na die Romeinse reg, die Glossatore, die Postglossatore, die Humaniste en die Europese kodifikasies. In aansluiting by die kodifikasiegeskiedenis word 'n laaste hoofstuk aan 'n kort regsvergelykende oorsig (Nederlandse *Nieuw BW*, Duitse *BGB*, Franse *CC* en die Engelse reg) gewy. In die konteks van Europa 1992 en die implikasies daarvan vir die Europese handelsverkeer verkry die bestudering van die Europese *ius commune* 'n heel nuwe, praktiese betekenis – vandaar die belangstelling in die Engelse reg.

Die boekie is vir studente bedoel, en is daarom in eenvoudige en maklik verstaanbare Nederlands geskryf. Die probleem word helder en duidelik uiteengesit, en die historiese ontwikkeling word onderhoudend en verstaanbaar verduidelik, ook vir diegene vir wie die oorspronklike bronne ontoeganklik sou wees. Aangehaalde gemeenregtelike tekste word in Nederlandse vertaling weergegee, met die oorspronklike in 'n voetnoot. Die enkele aanhalings uit Duitse en Franse bronne word andersom hanteer, met die oorspronklike in die teks en 'n Nederlandse vertaling in die voetnoot. Verwysings is tot die noodsaaklike beperk. 'n Lys van werke vir verdere studie, 'n personeregister en 'n teksregister is ingesluit.

Ten spyte van verskille wat deur die kodifikasies meegebring is, is die probleem van eiendomsoordrag natuurlik vir die Suid-Afrikaanse reg ook van groot belang. In 'n tyd waarin regsontwikkeling, regshervorming en die moontlikheid van kodifikasie toenemend op die agenda verskyn, lewer hierdie boekie 'n uiters leersame en interessante moontlikheid om die historiese en regsvergelykende agtergrond van die Suid-Afrikaanse reg op 'n eenvoudige en pynlose manier te bestudeer. Dit word by almal aanbeveel wat in die historiese agtergrond en verdere ontwikkeling van die eiendomsreg belangstel. Dosente kan die boekie gerus oorweeg vir gebruik deur studente, veral op nagraadse vlak.

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SOUTH AFRICAN BUSINESS ENTITIES.
A PRACTICAL GUIDE

by JL VAN DORSTEN

Second edition; Obiter Publishers CC Sandton 1991; xxxvii and 519 pp

Price R82,50 (soft cover)

The aim of this book, as stated in the preface, is to "provide an introduction and a practical guide to the business entities which are used most frequently in South Africa".

After giving a few definitions, the author devotes the balance of the first chapter to a compact comparison of various aspects relating to each of the different business entities. This will undoubtedly serve as a useful checklist of aspects to be considered when selecting an appropriate business form. While it is understandable that such a comparison cannot be very detailed, the inclusion of cross-references would have been useful (eg at 14 where mention is made of "certain professional partnerships" who may have more than twenty members, and at 16 where it is said that members of a close corporation may "in certain circumstances" become liable for debts of the corporation). Unfortunately the tax rates for companies and individuals are stated incorrectly in this section (9 10). They are, however, reflected correctly in later chapters.

Chapters 2 to 6 are devoted to close corporations, companies, partnerships, business trusts and sole proprietorships respectively. Each chapter gives a comprehensive exposition of the business entity concerned as well as very valuable practical information not usually found in textbooks (eg, where to buy the forms needed to form a close corporation, where to buy revenue stamps, the cost of forming each of the entities, the listing requirements of the JSE, a list summarising the duties of a company, lists of the retention periods of documents and suggested contents of a trust deed).

The chapter on companies contains the vast majority of the 331 quotations from decided cases. According to the preface, it was hoped that these extracts would illustrate the law in practice. I can find nothing wrong with this approach in principle. However, readers who lack a legal background may experience difficulty with this method of learning about practice. Very often the law could have been stated much more clearly, and briefly, in the author's own very readable language. For example, there are six extracts on the separate legal existence of companies (76 – 77), three on the court's discretion to reinstate a director who has been disqualified (219) and eight on the statutory derivative action (188 – 193), resulting in an unavoidable degree of overlapping. Some of the quotations merely repeat what the author has already explained quite clearly (eg, the extract at 209 from *Boyd v CIR* 1951 3 SA 525 (A) 534 explaining that shareholders are only entitled to a dividend once it has been declared). In a few instances the author neglected to include extracts conflicting with those provided by him. For example, there is a difference of opinion between *Pressma Services (Pty) Ltd v Schuttler* 1990 2 SA 411 (C) on the one hand, and *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) and *Ex parte De Villiers NO: In re MSL Publications (Pty) Ltd (in Liquidation)* 1990 4 SA 59 (W) on the other, on whether the sanctioning of a section 311 compromise deprives creditors, who had ceded their claims to the offeror, of the right to institute proceedings in terms of section 424 of the Companies Act 61 of 1973. The author, however, includes a quotation only from the *Pressma Services* case on this particular issue (245).

Chapter 7 deals with taxation and the following chapter with RSC levies and business licences, adding to the value of this publication as these topics are not usually discussed in textbooks on corporate law. Chapter 9 is devoted to a discussion of a few general topics, such as the phrase "carrying on business", the voidable transfer of a business under the Insolvency Act 24 of 1936, goodwill and an employer's liability for the delicts of his employee. Chapter 10 contains addresses of business-related government officials and business organisations.

References to authority are given in footnotes at the end of each paragraph rather than at the end of each page. In paragraphs spanning more than one page, as is often the case in the chapter on companies, this practice is inconvenient. On the positive side, the full reference (and not merely a "see note n *supra*") is given each time a case is referred to. The reader saves a lot of time and frustration by not having to page back to the first place where a particular reference has been given. References to sections of an act of parliament are sometimes given in brackets in the text – a somewhat unorthodox but nevertheless very sensible practice. However, this is not done consistently and sometimes such references are contained in footnotes (see eg 53).

Although the holding/subsidiary relationship is described (87 – 89), a short discussion of circumstances in which using a group should be considered, would have been valuable. Practical considerations, and perhaps a few examples, could also have been included in the discussion of compromises and arrangements (273 ff). The extracts concentrate on compromises between an insolvent company and its creditors and very little attention is given to compromises between a company and its members. A short discussion of the general principles of agency would also have been appropriate.

Van Dorsten's *South African business entities. A practical guide* undoubtedly succeeds in its aim, which is to provide the reader with easy access to information not usually found in a single book.

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CASE BOOK ON THE LAW OF PERSONS AND FAMILY LAW/ VONNISBUNDEL OOR DIE PERSONE- EN FAMILIEREG

deur DSP CRONJÉ en J HEATON

Butterworths Durban 1990; 531 bl

Prys R74,80 (sagteband)

Die bundel bestaan uit 531 bladsye afgesien van die inhoudsopgaaf, bronnelys en sakeregister. Hiervan vorm 165 bladsye die personereggedeelte. Anders gestel: 51 sake word in die personereg- en 101 sake in die familieregdeel bespreek. Soos die naam aandui, is die bundel 'n vonnisbundel en nie 'n bronnebundel nie en gevolglik word weinig wetgewing aangehaal.

Elke saak bevat 'n kort opsomming van die feite in beide Afrikaans en Engels, waarop 'n *verbatim* uittreksel uit die hofsaak volg. In die meeste gevalle word dan 'n aantekening ook in Afrikaans en Engels voorsien waarin die skrywers die saak toelig en soms kritiek opper. Ander toepaslike primêre en sekondêre bronne word ook normaalweg vermeld. Die feit dat die bundel in beide amptelike landstale geskryf is, maak dit vir sowel Afrikaans- as Engelssprekende studente toeganklik.

Die tegniese versorging is goed en die taalgebruik van die skrywers maak die lees van die bundel 'n aangename ondervinding.

Punte van kritiek wat ek wil meld, is die volgende:

(a) Die inhoudsopgaaf is in wye, algemene terme. 'n Meer gedetailleerde opgaaf sou die bundel meer gebruikersvriendelik gemaak het.

(b) 'n Punt van kritiek teen enige vonnisbundel is sekerlik die feit dat sommige sake weggelaat kon gewees het terwyl ander weer ontbreek. Dit is egter ook waar dat hoe meer sake 'n bundel bevat, hoe bruikbaarder dit is. Daar moet nietemin gewaak word teen die neiging om sake wat dieselfde beginsel neerlê, bloot volledigheidshalwe op te neem. Sake wat myns insiens byvoorbeeld weggelaat kon gewees het, is *Kruger v Fourie* 1969 4 SA 469 (O) (203); *De Greeff v De Greeff* 1982 1 SA 882 (O) (205); *Bing and Lauer v Van der Heever* 1922 TPD 279 (300) (die aantekening by hierdie saak kon goed by *Excell v Douglas* 1924 CPD 472 (303) gebruik gewees het); *Ex parte Nathan Woolf* 1944 OPD (325) (die aantekening hiervan kon goed by *Ex parte Dunn* 1989 2 SA 429 (NK) (328) gebruik gewees het). Ek sou ook graag sake wou sien wat nie aangehaal word nie. Voorbeelde hiervan is *Amra v Amra* 1971 4 SA 409 (D) en *Osman v Osman* 1983

2 SA 706 (D) by onveranderlike gevolge van die huwelik in die plek van *Wassenaar v Jameson* 1969 2 SA 349 (W) (232); en *Barnett v Rudman* 1934 AD 203 by die huwelik binne gemeenskap van goed in die plek van *Van Wyk v Groch* 1968 3 SA 240 (OK) (259).

(c) Die aantekening by *Chamani v Chamani* 1979 4 SA 804 (W) (247) wek ongelukkig 'n verkeerde indruk omdat die siening van Sinclair waarna verwys word, myns insiens wel in *Carstens v Carstens* 1985 2 SA 351 (SOK) 334C – D en moontlik ook in *Nilsson v Nilsson* 1984 2 SA 294 (K) 297 – 298 nagevolg word.

(d) In die aantekening by *Nel v Nel* 1977 3 SA 288 (O) (452) maak die skrywers die stelling dat *Porthino v Porthino* 1981 2 SA 595 (T) (453) gesag vir die standpunt bied dat nominale onderhoud by egskeiding nie toegeken mag word nie. Hierdie standpunt is myns insiens nie geregverdig nie. (Vgl ook die onlangse beslissing van *Qoza v Qoza* 1989 4 SA 838 (Ck), veral 842C – D.)

(e) *Bam v Bhabha* 1947 4 SA 798 (A) (500) kon weggelaat gewees het. Die betrokke opskrif, "Status van kinders gebore uit 'n putatiewe huwelik", is ook misleidend aangesien die hof nie hieroor beslis het nie. Soos die skrywers tereg opmerk, "is hierdie beslissing dus van geen hulp by beantwoording van die vraag of die kinders wat uit 'n putatiewe huwelik gebore word binne-egtelik is of nie". Of die nakoming van die formaliteitsvereistes vir huweliksluiting 'n vereiste vir 'n putatiewe huwelik is, word ook nie in hierdie saak beslis nie en gevolglik is die volgende opmerking van die skrywers te eensydig:

> "Deesdae vereis die howe egter nie vir die totstandkoming van 'n putatiewe huwelik dat al die formaliteitsvereistes streng nagekom moes gewees het nie. Daar word net vereis dat daar darem een of ander vorm van huwelikseremonie moes plaasgevind het. Sien ook *Moola v Aulsebrook* [147]."

Geen melding word in hierdie verband gemaak van 'n teenoorgestelde standpunt soos onder andere dié in *Ngubane v Ngubane* 1983 2 SA 770 (T) (wat wel as saak [148] verskyn) nie. Met die jongste beslissing in *Solomons v Abrams* 1991 4 SA 437 (W) word die kritiek nog feller.

Nieteenstaande die paar punte van kritiek, is die bundel 'n welkome toevoeging tot die regsliteratuur op hierdie gebied en die skrywers en uitgewer moet van harte daarmee gelukgewens word. Aangesien nuwe sake met reëlmaat (veral op die gebied van die familiereg) in die hofverslae opgeneem word, word die skrywers alle sterkte met die bywerk van die bundel toegewens.

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I think the extent and manner of the influence will come as a surprise to some lawyers, because the historical background is not generally known. *South African criminal law and procedure*, better known by the name of its authors, Gardiner and Lansdown, was virtually the medium through which the principles of the Penal Code infiltrated into our common law, but it is no longer current legal literature. Subsequent authors either ignored the Code and Gardiner and Lansdown, or were more cautious about accepting them as correctly reflecting South African criminal law. The author explains all this, and more, clearly and analytically.

It had to be explained that English law and even customary law played a role in the making and interpretation of the Code. It had to be explained how judges blithely applied the Code outside Transkei. It was quite an achievement for the author to gather up these threads.

It is gratifying that the author has chosen this topic. African law and justice, whether in the form of codes, statutes, customary law or administration of justice, have so far been ignored or mentioned only in passing. This book brings into prominence criminal justice as applied in an African area for almost a century. It is, after all, part and parcel of South African legal history. It moreover enables the reader to gain a better understanding of South African criminal law.

The book is divided into eleven chapters, focusing on general principles and specific crimes on which the Code had an impact. The final chapter consists of an overview and some concluding remarks.

As far as history goes, it is a pity, though, that the author did not say anything about the history of the 1983 Code. It is not clear why it was necessary to enact an entirely new Code. Who drafted it? Was it merely a consolidation measure or is it now a Code with a different character? It is also to be regretted that the wording of repealed sections of the 1886 Code, such as section 119, are not printed in the Appendix. It would have been most valuable from an historical point of view.

The book is well researched, clearly written and has a good bibliography. It is efficiently produced, but a little more care might have gone into the final editing. There are some printing errors, for example on 45, 51, 54, 64 and 156.

This is a book that approaches an aspect of South African law from a different angle. It is well worth reading and should serve as an excellent aid to the study of criminal law in this country.

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Policy considerations in the law of delict*

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OPSOMMING

Beleidsoorwegings in die deliktereg

Beleidsoorwegings speel 'n belangrike rol in die Suid-Afrikaanse deliktereg, veral omdat feitlik alle onlangse ontwikkelings op hierdie gebied van die reg deur hulle beïnvloed of bepaal is. Beleidsoorwegings kan gedefinieer word as substantiewe etiese of doelgerigte regverdigings vir beslissings in problematiese sake waar die gevestigde vaste regsreëls en -standaarde nie op sigself 'n oplossing bied nie. Die rol en aard van sodanige oorwegings hou verband met fundamentele regsfilosofiese probleme oor byvoorbeeld die wese van die reg en die behoorlike funksie van die regter in dispuutbeslegting. 'n Ondersoek na die gebruik van beleidsoorwegings in verskeie spesifieke gevalle met klem op die tipe sake en die oorwegings waarop spesifiek staatgemaak is, vorm die basis vir 'n ontleding van Suid-Afrikaanse opvattings oor die aard van beleidsoorwegings, hul behoorlike aanwending en die rol van die regter in die verband. Ten slotte word sekere voorstelle gemaak ten einde 'n realistiese en gewenste benadering tot die rol van beleid in die Suid-Afrikaanse deliktereg te bevorder.

1 INTRODUCTION

The importance of policy considerations for the South African law of delict is obvious from the number of recently reported cases expressly acknowledging that the decision was determined or influenced by such considerations.[1] More significant, however, is the fact that policy considerations played a decisive role in the vast majority of new developments, expansions or adaptations to the settled body of delict law over the last two or three decades. The following are examples of areas in which policy dictated or guided such developments:

(a) The expansion of Aquilian liability for omissions,[2] for pure economic loss,[3]

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* This article is an expanded version of my inaugural lecture delivered at the University of South Africa, Pretoria on 1992-09-10.

1 See eg *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W); *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A); *Administrator, Natal v Edouard* 1990 3 SA 581 (A).

2 See eg *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 1 SA 899 (NC); *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd supra;* cf also *Kadir v Minister of Law and Order* 1992 3 SA 737 (C).

3 See eg *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (C); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd supra; Kadir v Minister of Law and Order supra.*

more specifically for pure economic loss caused by negligent misrepresentation,[4] and for unlawful competition;[5]

(b) the recognition that all legal, as opposed to natural, persons are also bearers of personality rights in the form of the right to *fama* or good name, and that infringement of such a right calculated to cause financial prejudice will entitle such a legal *persona* to sue for defamation with the *actio iniuriarum*;[6]

(c) the recognition of strict liability of the press for defamation;[7]

(d) the recent formulation by the Appellate Division of an expressly policy-based criterion for legal causation or remoteness of damage;[8] and

(e) the recognition of the role of policy in cases of concurrence of delictual and contractual claims for damages.[9]

Recent cases therefore amply substantiate the statement that policy considerations play a crucial role in the development and adaptation of the existing body of settled law. This is especially true of the South African common law; the law of delict, probably more so than any other area of private law, consists primarily of common-law rules, standards and doctrines. For this reason, and because I cannot, within the context of this contribution, do justice to the complexity of the issues involved, I shall not consider the application and interpretation of statutory enactments in what follows.

If one accepts the basic fact that law is a social institution, it follows that the law must remain in step with changed circumstances, values and perceptions in the society which it serves in order to retain its validity, legitimacy and effectiveness. Recognition of this truism determines the importance of developing and adapting the law in accordance with these dictates. As Innes CJ said in 1908:[10]

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions."

More recently, Corbett CJ[11] emphasised the importance of the "process of developing the common law and adjusting it to the ever-changing needs of

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4 See eg *Administrateur, Natal v Trust Bank van Afrika Bpk supra; Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A); *International Shipping Co (Pty) Ltd v Bentley supra; Bayer South Africa (Pty) Ltd v Viljoen* 1990 2 SA 647 (A). Recently, delictual liability for negligent misrepresentation inducing a contract was also recognised by the Appellate Division in *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A), confirming the earlier provincial division decision in *Kern Trust (Edms) Bpk v Hurter* 1981 3 SA 607 (C).

5 See eg *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T); *Schultz v Butt* 1986 3 SA 667 (A); *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W).

6 *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A); *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra.*

7 *SAUK v O'Malley* 1977 3 SA 394 (A); *Pakendorf v De Flamingh* 1982 3 SA 146 (A).

8 *S v Mokgethi* 1990 1 SA 32 (A); *International Shipping Co (Pty) Ltd v Bentley supra.*

9 *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra;* cf also *Otto v Santam Versekering Bpk* 1992 3 SA 615 (O).

10 In *Blower v Van Noorden* 1909 TS 890 905.

11 "The role of policy in the evolution of our common law" 1987 *SALJ* 54. These sentiments enjoy widespread support and recognition in South African legal literature: see in general eg Dugard *Human rights and the South African legal order* (1987) 367; Boberg

society''. The role that policy plays in such development, extension and adaptation of the law, justifies and requires a study and evaluation of, and a debate on the nature and role of policy considerations. It will become clear in what follows that the use of policy considerations in law is inextricably interwoven with fundamental questions of legal science and philosophy. It would be a vain hope that any one, relatively short investigation such as this could possibly adequately explore or even merely state all the ramifications of the subject. I shall therefore limit myself to an examination of the use of policy considerations in a few prototype cases in the law of delict, against the background of a broad outline of the most important underlying jurisprudential issues. This is then used as a basis for some preliminary conclusions on the nature and utilisation of policy considerations in this branch of the law, and the role of the judge in this regard.

2 DEFINITION

The first logical step in such an endeavour is to furnish an accurate and comprehensive description or definition of the concept of ''legal policy''. Lawyers will have an intuitive understanding of its basic meaning, but many will be hard-pressed to give an exact definition. One seeks in vain for such a definition in case law, and the *Concise Oxford Dictionary* defines ''policy'' simply as ''course of action adopted by government, party etc''. This is not very helpful, beyond linking policy to a planned course of conduct. The dearth of authoritative expositions on the exact meaning of policy or legal policy can perhaps be explained by the following remark of Hoexter,[12] writing on judicial policy in South Africa: ''Policy is a very slippery concept indeed: its meaning can shift depending on the context in which it is used.'' Like Hoexter, I too will accept as a starting point in defining legal policy the exposition of Bell,[13] who describes policy arguments as

> ''substantive justifications to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of a dispute''.

He contrasts these justifications with authoritative reasons for a decision, which are the clear legal rules and principles established by statute or precedent, and emphasises that policy considerations refer to *values* and that the argument (when utilising policy considerations) focuses on the balancing of competing values. Policy considerations can, in his view, be ethical – conforming to an ethical standard such as fairness or justice – or goal-based – advancing some social goal. The latter indicate the desirability of an outcome in the public or general interest, and may be described as goals of collective welfare,

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The law of delict I: Aquilian liability (1989 reprint) 211 214; Corder and Davis ''Law and social practice: an introduction'' in Corder (ed) *Essays on law and social practice in South Africa* (1988) 1 – 26 7 – 15; De Vos and Van Loggerenberg ''The activism of the judge in South Africa'' 1991 *TSAR* 594; Van der Walt *Delict: principles and cases* (1979) 2 – 3; Lubbe ''Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg'' 1991 *TSAR* 13 – 18; Mayer Maly ''The *boni mores* in historical perspective'' 1987 *THRHR* 61; cf also Herdegen ''The activist judge in a 'positivistic' environment – European experiences'' 1990 *Stell LR* 336.

12 ''Judicial policy in South Africa'' 1986 *SALJ* 436.

13 *Policy arguments in judicial decisions* (1983) 22 – 23.

such as effective loss spreading or free economic competition. Bell stresses that ethical reasons may be consequentialist in nature, referring to a desirable ethical outcome.[14] This exposition accords in broad outline with the distinction drawn by Atiyah and Summers[15] between formal and substantive reasons for decisions. The latter, which they divide into rightness reasons and goal reasons, correspond to the two types of policy considerations identified.

From the foregoing we can adopt the following working definition, which also accords with the general view in South Africa:[16] Policy considerations are substantive reasons for judgments reflecting values accepted by society. They consist in moral or ethical values, valuable in themselves, or in desirable goals of collective societal welfare, but there is no reason why these two types of policy consideration cannot overlap. A decision determined by such considerations – a policy decision – comprises a balancing of the various values, and is thus a value judgment by the decision-maker.

3 PHILOSOPHICAL BACKGROUND

3 1 General

Whereas there is general agreement about this descriptive definition of policy considerations, any closer analysis of their fundamental nature, role or utilisation inevitably raises contentious issues. The statement that these considerations come into play when existing legal rules do not provide a clear answer, the so-called hard cases, raises two such questions, namely:

(a) Are policy considerations therefore not legal rules; and

(b) does this mean that the judge is going beyond the application of the law when he utilises such considerations and that he is in fact then making law?

How do the answers to these questions accord with what I shall call the traditional view that we teach our students, namely that the law consists of a body of rules regulating human conduct; that these legal rules are to be found in the authoritative sources of law consisting of legislation, the rules of common law, custom (in exceptional cases) and precedents; and that the function of the judge

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14 *Idem* 23; cf also Hoexter 1986 *SALJ* 441 – 442.

15 *Form and substance in Anglo-American law* (1987) 5 – 11. Cf also Cockrell "Substance and form in the South African law of contract" 1992 *SALJ* 41 – 43.

16 This is apparent from the type of policy consideration utilised by our courts when making policy decisions. A few prototype decisions and the considerations relied on in such decisions are discussed in detail *infra*. The numerous judicial affirmations of the nature of policy decisions as value judgments balancing competing interests also confirm the statement: cf eg the *dicta* in *Hawker v Life Offices Association of SA* 1987 3 SA 777 (C) 781; *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd supra* 498; *Indac Electronics v Volkskas Bank Ltd supra* 797; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra* 588. Finally, the statement is confirmed by definitions or descriptions of policy considerations and policy decisions adopted by various academic commentators: cf eg Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis Unisa 1991) 418 – 420; Hoexter 1986 *SALJ* 441 – 442; Corbett 1987 *SALJ* 54 59 and esp 62; Burchell "The policy limits for recovery of pure economic loss" 1981 *SALJ* 3; Du Plessis and Davis "Restraint of trade and public policy" 1984 *SALJ* 89; Lubbe and Murray *Farlam and Hathaway: Contract – cases, materials and commentary* (1988) 241; Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 13 – 17; Cockrell 1992 *SALJ* 40 – 45.

is to apply and not to make the law – *ius dicere non facere* – because that is the prerogative of parliament as supreme legislator!

The traditional view is determined by the acceptance of two closely associated main premises:[17] a basically positivist view of the law and a Westminster-type parliamentary and democratic political system. In describing these premises, I am using broad generalisations and extreme formulations not intended to convey any one coherent view or philosophy, but merely to isolate the main features of the stated premises that have a bearing on the present problem. As far as positivism is concerned, these features are: (i) the strict distinction between legal rules and other norms regulating human conduct; (ii) the source-based requirements for the validity of legal rules; (iii) the rational approach inherent in the idea that legal rules are created by human conduct; (iv) the idea that the application of legal rules is a rational activity involving deductive reasoning; (v) the idea that the judge therefore does not play a creative role when applying legal rules; and (vi) the somewhat paradoxical admission that legal rules are not exhaustive; that where a case arises which is not covered by existing rules, there is a gap in the law to be filled by judicial law-making; and that in such hard cases the judge is free to rely on non- or extra-legal materials such as morality or expediency. The implications of a parliamentary democratic political system for the present problem lie mainly in its insistence on the separation of the powers of adjudication and legislation in order to guarantee or protect democracy. Only the *elected* lawmaker, parliament, can legislate and not the *appointed* judge, since the former is accountable to the community and therefore subject to democratic rule, but not the latter.

The implications of such an approach for an analysis of the role and nature of policy considerations are obvious. Such considerations are characteristically not source-validated legal rules and therefore comprise non-legal materials. The basic function of the judge is to interpret law, not to create it, and therefore judicial law-making in policy decisions is strictly confined to hard cases and gaps in the law. Even in those cases, the tendency is to deny the creative activity of the judge. This is evidenced by a reluctance to formulate expressly the considerations actually influencing decisions. Judges sometimes even refuse to make certain types of policy decision because they feel that adapting the law in accordance with the relevant policy considerations is a task best left to parliament.

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17 For this exposition of the traditional view, I relied mainly on the following sources: Van der Merwe "Hans Kelsen – legal positivism's supreme champion" in Corder (ed) *Essays* 93 – 120; Blackman "Professor HLA Hart and the separation of law and morals" in Corder (ed) *Essays* 145 – 179; Herdegen 1990 *Stell LR* 336 – 347; Atiyah and Summers ch 1 4 7 8 9; Dworkin *Taking rights seriously* (1987 impression) ch 1 – 4 and appendix; Lloyd and Freeman *Lloyd's introduction to jurisprudence* (1985) ch 4 5 6 and 12; Van Eikema Hommes *De elementaire grondbegrippen der rechtswetenschap* (1983) ch 1 2 4 7 10 14 15; Beyleveld and Brownsword *Law as a moral judgement* (1986) ch 1 4 6 9; Hart *The concept of law (1961)* ch 2 – 6, *Essays on Bentham* (1982), *Essays in jurisprudence and philosophy* (1983); MacCormick *HLA Hart* (1981), *Legal reasoning and legal theory* (1978), "Principles of law" 1974 *The Juridical R* 217 – 226; Raz *The authority of law* (1979), "Legal principles and the limits of law" 1972 *Yale LJ* 823; Simmonds "Between positivism and idealism" 1991 *Cam LJ* 308 – 329; Bell "The judge as bureaucrat" in Eekelaar and Bell (eds) *Oxford essays in jurisprudence* (1987) 33 *et seq*; Hahlo and Kahn *The South African legal system and its background* (1973) ch 9; Jaffe *English and American judges as lawmakers* (1969) ch 1 2; Dyzenhaus *Hard cases in wicked legal systems. South African law in the perspective of legal philosophy* (1991) ch 1 9.

Opposition to this view of policy considerations and the function of the judge is not united in any one particular philosophy or vision. Adherents of divergent philosophical schools of thought, including certain forms of positivism, criticise different aspects for different reasons. For the present purpose, a broad general statement of the main objections raised, once again stated in extreme form for the reasons I mentioned earlier, will suffice.[18]

The notion that law is a body of rules strictly distinguished from other norms by means of some source-based test, has been severely challenged through the ages. The first exponents of this challenge are variants of natural-law schools of thought, who maintain that law also consists of immanent principles of a moral nature which are valid irrespective of source-based positing. Some radical views deny the notion that law can be described as a rational system, or be distinguished from other norms. Some see law as merely an instrument of repression in the hands of the politically powerful in society. All deny the notion that law is a closed and determinable system of rules or other standards, and thus also deny the idea that policy considerations are by their nature extra-legal materials.

A second line of reasoning focuses on the function of judges and their law-making activity. This view denies the notion that legal adjudication consists of an objective, rational application of rules, and stresses the creative activity of the judge inherent in the interpretation of legal rules and standards, even of the most particular prescriptive statutory enactment. Some adherents of this view further stress the decisive importance of the judge's personal, subjective views and the irrational nature of the process of inevitable judicial law-making inherent in adjudicating. Others maintain that judicial law-making is contained within strict legal boundaries excluding the idiosyncracies of an individual judge by requiring that judicial law-making meet various objective requirements or standards. They all unite in acknowledging the inevitability and desirability of active judical law-making, *inter alia* by utilising policy considerations as defined above in adjudicating.

Finally, variations of or deviations from the parliamentary democracy-type political system also derogate from the traditional ideal of the non-legislative function of the judge. American-style democracy, incorporating judicial review of legislation as an integral part of the checks and balances preserving democracy, promotes general acceptance of judicial law-making. The emergence of the communitarian, essentially paternalistic welfare state stresses the importance of the law serving the community's needs, if necessary by greater state

18 This exposition is based mainly on the following sources in addition to some of those mentioned in fn 17: Strydom "The legal theory of Lon L. Fuller" in Corder (ed) *Essays* 123 – 142; Mureinik "Dworkin and apartheid" in Corder (ed) *Essays* 181 – 214; Dyzenhaus ch 1 10; Finnis *Natural law and natural rights* (1980), "The critical legal studies movement" in Eekelaar and Bell (eds) *Oxford essays* 145; Lloyd and Freeman ch 3 6 7 8; Van Dunné *De dialektiek van rechtsvinding en rechtsvorming. Opstellen over rechtsvinding en privaatrecht* (1984) ch 1 2 3 5; Jaffe ch 1 2; Denning *The discipline of law* (1979); Wolfe *The rise of modern judicial review* (1986) ch 3 4 9 10 11, *Judicial activism. Bulwark of freedom or precarious security* (1991); Carty (ed) *Post-modern law. Enlightenment, revolution and the death of man* (1990); McWhinney *Supreme courts and judicial law-making: constitutional tribunals and constitutional review* (1986) ch 5 11 12; Duxbury "The birth of legal realism and the myth of Justice Holmes" 1991 *Anglo-American LR* 81 – 100; Yablon "Justifying the judge's hunch: an essay on discretion" 1990 *Hastings LJ* 231 – 279; Posner *The problems of jurisprudence* (1991).

intervention at the cost of the individualistic democratic ideal. This erodes the idea of parliament as supreme legislator in favour of active judicial lawmaking to serve immediate societal needs.

These approaches in opposition to the traditional view encourage a denial of the idea that policy considerations are necessarily extra- or non-legal materials. They also propagate acceptance of the inevitability and desirability of active judicial involvement in law-making, *inter alia* by utilising policy considerations, even if they fall outside the body of readily ascertainable and established legal materials.

3 2 Particular insights facilitating analysis of policy considerations

The general views and arguments set out above include several particular insights that I regard as particularly helpful to the analysis of policy considerations that is to be undertaken. The views of Dworkin on the nature of the process of adjudication and of the materials utilised in this process,[19] are illuminating. He asserts that when deciding individual cases, judges can and do determine the correct answer only in the light of the existing concrete and abstract rights of the parties. Judges have no discretion when deciding cases – the materials they can legitimately rely on when adjudicating are restricted to legal rules, characterised by the fact that, if valid, they are applicable in an all-or-nothing fashion and must be followed, and other standards logically distinguishable from rules. These standards he calls principles and they conform in broad terms to the first type of policy considerations identified earlier. Principles are standards which do not necessarily advance a desirable economic, political or social goal, but serve some dimension of morality such as justice or fairness. They can be of a consequentialist nature, but will always feature in arguments about individual rights. Unlike rules, they need not be followed, and when adjudicating, judges have to exercise judgment in choosing between competing principles in accordance with their relative weight. The important point is that, when deciding cases, judges can (and actually do) rely only on valid legal rules and principles that form part of the body of law. Apart from rules and principles, Dworkin also distinguishes a further type of standard, namely policies, which are simply arguments about some desirable social goal. They correspond to the second type of policy consideration defined earlier. In Dworkin's view, policies should not influence a judge's decision if his role is properly described. Actual law-making or amendment, in which policies may play a part, is the task of the legislator.

These insights offer some relief for the dilemma of retroactive legislation implicit in the recognition of judicial law-making. As Dworkin himself affirms, there is less resistance to the creative activity of judges when applying the law – they are merely utilising principles contained in the legal system. Moreover, Dworkin is no doubt correct in his assertion that the legal system consists of far more than merely rules. It also comprises principles and other standards

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19 In this regard, see Dworkin ch 1 – 4 and appendix; Dyzenhaus ch 1 10; Mureinik in Corder (ed) *Essays* 181 – 206; Bell 14 – 17 24 – 30 and ch 8; Atiyah and Summers 257 – 266. Dworkin's views have been applied in a South African context especially with regard to the function of judges (see eg Hoexter 1986 *SALJ* 439; Wacks "Judges and injustice" 1984 *SALJ* 266). Their relevance for private law has been explored or alluded to by Du Plessis and Davis 1984 *SALJ* 90 – 91; Lubbe and Murray 241; Lubbe 1991 *TSAR* 13 – 15, 1990 *Stell LR* 13 – 17.

not always contained in the form of legal rules. Many other philosophers, such as Van Eikema Hommes[20] acknowledge that such underlying standards, many or all of which can be described as principles in the Dworkinian sense, form part of every legal system, whether as the underlying basis of, or derived from, valid legal rules. This provides a better explanation of the theory that policy considerations are used to fill gaps in the law. Very often the idea of such gaps merely implies that settled legal rules applicable to the situation in hand do not exist, but that other legal materials, consisting of principles and other standards, should be used to decide the case. These materials are equally part of the law but involve a greater degree of choice, whether categorised as judgment or discretion. However, even if one accepts all of the above, as I do, and even if one also acknowledges Dworkin's basic premise on the nature of adjudication, it seems to me that the process of finding the right answer in a particular case, of discovering and weighing the relevant principles, implies such a measure of choice or discretion in its ordinary sense, that for present purposes judicial choice or discretion and judgment in the Dworkinian sense can be equated. Furthermore, the acknowledgement that principles are as much part of the law as rules, raises the question whether the first type of policy consideration identified, which encompasses principles in the Dworkinian sense, can properly be classified as policy considerations at all. To my mind, such a classification is justified by the fact that principles consist of substantive justifications, or underlying values, and that their application requires, as Dworkin admits, a balancing of competing values and thus comprises a value judgment. Finally, considerations pertaining to a desirable social goal – that is the second type of policy consideration I defined earlier – do feature so often in judicial decisions that they have to be specifically provided for in a definition of policy arguments even if, as Dworkin insists, they are used as arguments to determine individual rights.

A further important insight concerning the use of policy considerations is gleaned from the views of Hart, McCormick and Raz about legal standards operating as rules.[21] Hart points out that legal rules are often formulated in such a way that they are open-textured or open-ended, that is not identifiable with only one specific meaning. This will imply that, even when applying a rule, a judge may be constrained to make use of considerations other than the rule itself, including policy considerations. Although the paradigm of a legal rule is precise and specific as to its area of application, many legal rules are so generally stated (that is open-textured) that in form they approximate Dworkin's principles, or the first type of policy consideration defined. Raz therefore avers that the difference between rule and principle is one of degree only. The general requirements for delictual liability certainly figure as examples of open-ended rules. This means that there is little difference between the activities of a judge applying this kind of rule or applying the first type of policy consideration or principles. This certainly facilitates an acceptance of the creativity inherent in

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20 355–356. Cf also eg MacCormick (1978) 244–252, 1974 *Juridical R* 219–226; Lloyd and Freeman 64–65 411–413; Van Dunné 105–113; Herdegen 1990 *Stell LR* 341; Simmonds 1991 *Cam LJ* 314–323.

21 Hart (1961) 120–132; MacCormick (1978) 244–252, 1974 *Juridical R* 219–226; Raz 1972 *Yale LJ* 823 834–851; cf also Atiyah and Summers 70–95; Lloyd and Freeman 411–413; Finnis in Eekelaar and Bell (eds) *Oxford essays* 147; Simmonds 1991 *Cam LJ* 314–315; Nienaber "United States supreme court appointments: implications for a future constitution in South Africa" 1991 *Consultus* 21–22.

the judicial function. Furthermore, open-ended rules are often specifically formulated expressly to include policy considerations in their application. A South African example is the *boni-mores* criterion for wrongfulness, which will be discussed presently. The existence of such rules forces one to adopt a realistic approach to judicial law-making.

Finally, one cannot deny the self-evident truth in the oft-repeated assertion, acknowledged by leading positivists such as Kelsen,[22] that the activity of a judge can never be purely mechanical. The judge as a mere "bouche de la loi" has not seriously been put forward since Montesquieu, except perhaps in Weber's bureaucratic vision of the law.[23] Even when applying the clearest, most specific and prescriptive rule, there is a creative and personal element in judging, albeit only in the understanding of language. Some legal realists have expanded this truism into an acceptance of the total unpredictability of law, the law applied in a specific case being a necessary consequence of the personal convictions and personality of the judge over which he has no control. The whole process of judging is thus described as the operation of an irrational hunch afterwards rationalised by manipulating the legal materials.[24] This extreme view amounts to a total negation of all attempts at rational activity which I cannot accept. Nearer the truth to my mind is the approach of the Dutch jurist Van Dunné.[25] Following Scholtens, he maintains that adjudication is a dynamic, dialectic process giving substance to legal rules. He stresses the interaction between the general, objective rational meaning of legal rules and standards, and the subjective, creative and intuitive translation of these to specific, case oriented results. In this process the judicial hunch or legal sense ("regsgevoel"), which to my mind can be partially ascribed to actual experience of applying the law and ingrained knowledge of legal rules and standards, is important. This view stresses the active law-making role inherent in all adjudication without reducing it to the absurdity of pure determinism. It also justifies and provides a model for adjudication in cases where policy considerations play a role.

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22 *Pure theory of law* (1967) 233 – 255; Van der Merwe in Corder (ed) *Essays* 113 – 114; Lloyd and Freeman 328 – 396. Cf also the views of the positivists referred to in fn 17.

23 For Weber's views, see Bell in Eekelaar and Bell (eds) *Oxford essays* 33; Lloyd and Freeman 554 – 557. As to the general statement, see Herdegen 1990 *Stell LR* 336; Van Dunné 172; Dugard 367; De Vos and Van Loggerenberg 1991 *TSAR* 595; cf also the views of the writers referred to in fn 18.

24 This view was to a lesser or greater extent accepted by the so-called American instrumentalists and realists, such as Holmes, Pound, Frank, Cardozo etc. As to those views in general, see Lloyd and Freeman 548 – 583 679 – 716; Atiyah and Summers 251 – 257; Dworkin 3. Cf also Yablon 1990 *Hastings LJ* 231; Duxbury 1991 *Anglo-American LR* 81; Nienaber 1991 *Consultus* 21. For the adoption of this view by European writers such as Salleiles, Gény and Ehrlich, see Van Dunné 181 – 182 186 – 187. The view has also been echoed in South Africa – cf eg Boberg 146 214, who describes policy decisions as "a judicial gut-reaction" and "an intuitive opinion . . . justified by invoking the legal convictions of the community as interpreted by itself"; De Vos and Van Loggerenberg 1991 *TSAR* 594; Dugard 369 – 370.

25 18 – 30 76 – 92 114 – 120 166 – 170 172 – 178 181 – 192. The pragmatic approach of Posner is in many respects very similar to that of Van Dunné: see in general *The problems of jurisprudence*; cf also Levison "Strolling down the path of the law (and toward critical legal studies?): the jurisprudence of Richard Posner" 1991 *Col LR* 1221; Brown "Posner, prisoners, and pragmatism" 1992 *Tul LR* 1117. The symbiosis between legal rules and social considerations is emphasised by Simmonds 1991 *Cam LJ* 314 – 315, also converging with the central tenet of Van Dunné's approach. For a similar view to Van Dunné's on the importance of the judicial hunch, see Yablon 1990 *Hastings LJ* 231 *et seq*, esp 279.

4 ANALYSIS OF DELICT CASES INFLUENCED BY POLICY CONSIDERATIONS

Against this background we may now proceed to an examination of some of the cases in the South African law of delict which have been determined by policy considerations. The focus is on the different types of case in which judges feel justified or constrained to rely on such considerations in reaching a decision, and on the actual considerations relied on in those cases.

4 1 Open-ended standards

In the first place, policy considerations feature in delict cases where the applicable legal rule is so formulated that it expressly or by implication incorporates considerations of policy in its application. Such rules are examples of so-called open-ended standards. The currently accepted criteria for the determination of wrongfulness and of legal causation or remoteness of damage (both general requirements for delictual liability) are examples of such open-ended standards. The legal criterion for determining whether a particular infringement of individual interests is wrongful or contrary to law, is the objective reasonableness of the conduct in the light of the *boni mores*, which are consistently defined as the legal convictions prevailing in the community.[26] Policy considerations play a decisive role in determining the legal convictions of the community. The application of this criterion consists in a weighing up and balancing of the conflicting interests of the parties concerned in the light of the interests of the community. The determination of wrongfulness thus entails a policy decision.[27] Nevertheless, policy does not play an active role in every decision in which delictual wrongfulness is in issue. The reason is that in practice, in the most prevalent factual instances of wrongful conduct, specific guidelines or doctrines which operate as subrules have crystallised, determining conclusively that wrongfulness is either present or absent. Examples are the doctrine that wrongfulness consists in the infringement of a "subjective" right, and the established categories of grounds of justification. In cases falling under these crystallised categories, there is no need to utilise the general criterion, and thus policy, to determine the presence or absence of wrongfulness.[28] However, cases not precisely subsumed under such categories, have to be dealt with by actually applying the open-ended *boni-mores* norm, which necessarily involves a policy decision.

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26 *Marais v Richard* 1981 1 SA 1157 (A) 1168; *Administrateur, Natal v Trust Bank van Afrika Bpk supra* 833 – 834; *Minister van Polisie v Ewels supra* 597; *Schultz v Butt supra* 679; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* 498; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd supra* 797; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra* 588; Neethling, Potgieter and Visser *Deliktereg* (1992) 33 – 34; Boberg 33; Van der Walt 22.

27 *Administrateur, Natal v Trust Bank van Afrika Bpk supra* 832 – 833; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd supra* 913 – 914; *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd supra* 797; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* 500 503 – 504; cf also *Kadir v Minister of Law and Order supra* 740; Boberg 33 35 – 37 40; Van der Walt 21 22 26; Pretorius *Aanspreeklikheid van maatskappy-ouditeure teenoor derdes op grond van wanvoorstelling in die finansiële state* (1985) 241 305.

28 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 383; Boberg 267; Neethling, Potgieter and Visser 29 – 40 41 – 42; Van Aswegen 139 – 142 420; Lubbe 1990 *Stell LR* 11. In these cases the open-ended norm has, in Hart's terminology, acquired a "core of settled meaning" (cf text *supra* at fn 21 and authorities cited in fn 21).

The decision in *Hawker v Life Offices Association of South Africa* illustrates such an application of the open-ended *boni-mores* norm. There it had to be determined whether the registration of an S reference against the name of a member of the insurance industry, which meant that he was placed on a black-list of his profession, was a wrongful interference with the right of such a member to exercise his chosen calling. Howie J stressed the importance of social policy in determining wrongfulness in general, referring in this regard to the morals of the market place or business ethics.[29] In deciding the case in hand, he specifically considered that, on the one hand, public interest required that dishonesty should be discouraged in an industry based on good faith, but that, on the other hand, public interest also required that people should be at liberty to pursue their chosen calling. He also considered the disproportion between the claimant's transgression and the sanction of an S reference.[30] These considerations are all based on immanent legal principles like the protection of good faith and the protection of the liberty of the individual. In addition to the aforegoing, the judge also considered the goal-based consideration of the social undesirability to the community of trained personnel being lost to the industry.[31]

The general open-ended criterion of wrongfulness sometimes also has to be used in conjunction with the crystallised categories in borderline cases requiring further refinement. Such instances arise, for example, where it has to be determined whether the apparently lawful exercise of a right which infringes another's interests, is in fact wrongful. This often happens in actions instituted by neighbouring owners of land. In *Regal v African Superslate*[32] it had to be decided whether a landowner's failure to remove slate waste which had washed down to a neighbour's land and caused damage there, was wrongful. Without referring expressly to policy, Steyn CJ determined the question of wrongfulness with reference *inter alia* to the common-law principle that what is done on one's own land with the exclusive purpose of prejudicing another (*animo vicino nocendi*) will not be tolerated by the law.[33] He thus utilised malice as a factor pointing to the social or moral censure of conduct. He further explicitly invoked the principle of fairness ("billikheid"),[34] an ethical or moral consideration, and also stressed the importance of costs in determining the reasonable practicability of conduct preventing harm,[35] which in turn is an economic consequence pertaining to a goal of collective welfare.

Further cases offering illustrations of the actual application of the open-ended *boni-mores* standard, are all instances of an expansion of delictual liability to situations to which the rules encompassing the requirements for delictual liability had not previously been applied. Because the central characteristic of these cases is an expansion of all the rules regulating liability to novel situations and not merely the application of open-ended norms, I shall deal with them separately.

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29 *Supra* 781.
30 790.
31 *Ibid.*
32 1963 1 SA 102 (A).
33 107 – 108.
34 108 – 109.
35 112.

A further illustration of an open-ended standard specifically incorporating policy considerations, is to be found in the recent formulation by the Appellate Division in *S v Mokgethi*[36] and *International Shipping Co (Pty) Ltd v Bentley* of the criterion for legal causation. Legal causation, to be distinguished from mere factual causation, is used to determine whether a wrongdoer should be held liable to compensate all the harmful consequences of his wrongful conduct – in other words whether the harmful consequences should be imputed to him. It is perhaps more familiar under the head of remoteness of damage, and is essentially a device limiting potentially excessive liability. In the *Mokgethi* case it was decided that a flexible criterion, determined by policy considerations, should be used to ensure that, in the light of reasonableness, fairness and justice, a sufficiently close connection exists between a wrongdoer's conduct and its harmful consequences for which compensation is sought, to justify the imposition of liability. Previously propagated or accepted criteria for determining this issue, such as the absence of a *novus actus interveniens*, direct consequences, reasonable foreseeability, *et cetera*, can be used as aids in the application of this criterion.[37]

Legal causation is therefore overtly recognised as a policy decision and the criterion for its determination is openly stated in terms of policy considerations. This is the ultimate open-ended norm, although guidelines similar to those alluded to in connection with wrongfulness will no doubt develop in time.

In the *Mokgethi* case the judge did not identify policy considerations influencing his decision beyond specifically stressing considerations of fairness, reasonableness and justice. In the *Bentley* case, Corbett CJ accepted the test formulated above and with approval quoted Fleming, who, emphasising that the question of legal causation entails a value judgment based on policy, names the opposing considerations of full reparation of an innocent victim's loss versus the excessive burden on human activity caused by imposing liability for all the consequences of his wrongful conduct on a wrongdoer.[38] The judge then proceeded to name the factors tending to separate cause and effect – and thus the factors relevant to the underlying policy considerations – *inter alia*, the long passage of time between cause and effect; the negligent conduct of the victim's own employees and the foreseeability of such conduct; and fraud by a third party contributing to the loss.[39] The second and third of these obviously pertain to the principle that no man is liable for loss not caused by his conduct.

4 2 Extension of area of application of existing legal rules

In the second place, policy plays a role in the extension of established rules or standards to factual situations to which they were not previously applied. The extension is necessitated either by new situations arising as a result of changed circumstances or progress in technology or science, or because of changed perceptions as to the propriety of applying the rule to situations hitherto not covered by it. The first example of this type of case has to do with the extension of delictual liability to novel situations and involves the application of the open-ended *boni-mores* norm, as explained earlier. In these cases, delictual liability

36 1990 1 SA 32 (A).
37 40–41.
38 *Supra* 700.
39 702–704.

for omissions, for the causing of pure economic loss in some form and for certain instances of unlawful competition, is extended to a form of conduct or a type of loss not previously recognised as founding such liability. Although *all* the requirements for delictual liability have to be considered in cases of extended liability (including specifically the requirement of legal causation, also determined by an open-ended norm), the emphasis in these cases falls mainly on the open-ended *boni-mores* standard for determining wrongfulness. This can perhaps be ascribed partly to the fact that wrongfulness is often seen as a policy device limiting liability. I shall return to this observation presently.

It was generally accepted for a long time that delictual liability for omissions could exist only where the omission was preceded by certain types of positive act or prior conduct. However, in *Minister van Polisie v Ewels* it was decided that not only the recognised instances of prior conduct could render conduct delictually wrongful, and that it should be determined in the circumstances of each case whether an omission should be regarded as unlawful in the light of the *boni mores*. The accepted categories of prior conduct could be used as guidelines or indications of wrongfulness.[40] A recent example of recognition in principle of an extension of liability for an omission beyond these guidelines in accordance with the *Ewels* approach, is to be found in *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd*. The case turned on whether a failure to take reasonable precautionary measures against theft by a security firm contracted by X to guard its premises, could be delictually wrongful to Y, whose car was stolen while lawfully present on X's property. Stressing that a decision "extending the ambit of delictual liability" is by its nature a policy decision and emphasising the close connection between *boni mores*, public policy and the community's perceptions of concepts such as justice, equity, good faith and reasonableness, Van Zyl J decided the question of wrongfulness in the affirmative, expressly relying on policy.[41] The judge did not specifically identify other policy considerations influencing his decision other than the mentioned concepts of fairness, equity and so forth. However, his decision was based mainly on the reliance by the plaintiff on protection by the security firm as a factor indicating wrongfulness.[42] To my mind, this is an application of the principle of protection of reasonable reliance, which is immanent in our law.

Delictual liability was also recently extended in principle to negligent misrepresentation and to conduct causing pure economic loss. Previously, liability was limited to fraudulent misrepresentation and, beyond the historically recognised cases of economic loss, to injury or damage to the person or property of the plaintiff. The *locus classicus* for this development was the case of *Administrateur, Natal v Trust Bank van Afrika Bpk* in which it was stressed by Rumpff CJ that, when deciding whether to extend Aquilian liability, regard should be had to all the requirements for liability, including fault and causation. This is necessary to counter the main policy reason militating against such expansions, namely the fear of "too heavy and unpredictable a burden on enterprise".[43]

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40 *Supra* 597.
41 *Supra* 527 – 529.
42 530. Similarly, in *Kadir v Minister of Law and Order supra*, the so-called "principle of public expectation" was used as a determinant of the existence of a legal duty, and thus of wrongfulness, on the part of the police in the circumstances of the case (740).
43 *Supra* 832 – 833.

He further alluded to the role of policy in deciding the issue of wrongfulness, which comprises a value judgment. With reference to Fleming and Millner, the judge confirmed that in case of negligent misrepresentation causing pure economic loss, wrongfulness consists in the breach of a legal duty. The existence of such a duty is determined with reference to policy considerations. Such considerations do not require the imposition of a legal duty to furnish correct information when the information is given casually or in a social context, but do require such a duty when the advice is given in a business situation or in the course of business activities.[44] Since the main difference between these two instances is the likelihood of reliance on the advice given in the second, this can be interpreted to refer to the principle of protection of reasonable reliance.

Following the *Trust Bank* case, the extension of Aquilian liability to conduct causing pure economic loss was developed further in several other cases.[45] The main arguments for and against the recognition of liability in these specific instances centred around the issue of wrongfulness, decided with reference to the existence of a legal duty in accordance with the *boni mores*. In this regard, two factors in particular emerged as decisive. On the one hand, militating against such extension is the policy consideration of a fear of overwhelming potential liability – that is, liability for a potentially unlimited sum to a large and indeterminate class of plaintiffs. This factor encompasses two aspects based on different policy considerations: an administrative or constitutional objection to an unlimited number of cases swamping the courts and impairing the administration of justice; and moral, practical and social objections to saddling the wrongdoer with an impossible burden.[46] Operating in favour of the extension of liability, on the other hand, is a factor which the courts call reasonable foreseeability, but which in the cases actually boils down to subjective foresight or knowledge on the part of the wrongdoer of the fact that his conduct would cause loss to the plaintiff. Knowledge of the identity of the plaintiff(s) and of the loss or damage which will be caused, thus justifies the imposition of liability. Policy considerations underlie this factor as well: the moral dimension of imposing liability for knowingly causing loss, as well as the absence of the main objections to indeterminate liability. Foreseen loss to an identified victim can never be indefinite.

In a recent decision of the Appellate Division dealing with liability for pure economic loss, *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*, the extension of the liability of collecting banks for conduct causing loss to the true owners or drawers of cheques was recognised in principle. The case was decided on exception, and therefore the only issue was whether the bank's conduct could be wrongful, that is whether a legal duty could possibly rest on the bank. Vivier

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44 834.

45 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd supra*; *Fransch-hoekse Wynkelder (Ko-op) Bpk v SAR & H* 1981 3 SA 36 (C); *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra*; *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA supra*; *Arthur E Abrahams and Gross v Cohen supra*; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd supra*; *Kadir v Minister of Law and Order supra*.

46 See in this regard Pretorius 269; Hutchison, Van Heerden, Visser and Van der Merwe *Wille's principles of South African law* (1992) 649.

JA nevertheless stressed the importance of the fact that the other requirements for liability, such as negligence, should be met in reaching a final decision on the extension of liability.[47] Regarding wrongfulness, the judge took care specifically to spell out the factors indicative of the policy considerations imposing a legal duty in the circumstances.[48] He stressed the absence of the possibility of limitless liability which is dealt with above. Further, he emphasised the need of protection on the part of the drawer of the cheque and the special position in this regard of the collecting banker, who professes special skill and knowledge by virtue of his calling and whose exclusive knowledge enables only him to act in protection of the drawer. These considerations to my mind indicate the principle of protection of reasonable reliance. The judge proceeded to point out the favourable economic position of the bank *vis-à-vis* the plaintiff: the bank can claim reimbursement from its client and is in a position to insure against the loss. This is one of the few direct allusions in our law to a policy consideration not often acknowledged as influencing a decision, namely the possibility of effective loss-spreading, which is geared towards protection of the economic interests of society as a whole. Finally, he considered and dismissed the main policy-based objections to the extension of the liability of bankers, namely that it would conflict directly with the policy of parliament as reflected in legislation and that it would work undue hardship on existing banking procedures. He concluded by stressing that in a decision on exception, the factors listed merely indicated a balance in favour of a finding of wrongfulness and that he had not engaged in an actual balancing process of all the factors considered.

The extension of liability for unlawful competition beyond the instances falling under such recognised categories as passing-off, injurious falsehood, *et cetera*, was considered in *Shultz v Butt*. Nicholas AJA once again emphasised the role of the policy-based requirement of wrongfulness. The *boni-mores* criterion for wrongfulness was held not only to encompass considerations of fairness and honesty in competition, but also to include questions of public policy such as the importance of a free market and of competition in our economic system.[49] In the event, moral and ethical objections, based on the community's sense of fairness and honesty, to the pirating of the mould of a fibreglass hull developed by a rival, and the selling of casts made from such a hull, overrode the social desirability of free business competition and such conduct was branded wrongful.

The acknowledgment by the Appellate Division that certain personality rights be extended to legal, as opposed to natural persons, furnishes an example of the expansion of a rule to a novel situation where the application of an open-ended norm is not directly concerned. In *Dhlomo v Natal Newspapers (Pty) Ltd* the long-standing recognition of a personality right to *fama* or good name of a trading corporation, was extended to a non-trading corporation, which could consequently sue for defamation with the *actio iniuriarum*, provided that the defamation was "calculated to cause financial prejudice".[50] The court left open the possibility that certain corporations, such as political bodies, could be denied this right "on the ground of considerations of public or legal

47 *Supra* 798.
48 798 – 801.
49 *Supra* 679.
50 *Supra* 952.

policy''.[51] In *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* the Appellate Division had to decide this question in relation to a political body. In his judgment, Grosskopf JA stated that the answer to the question involved the weighing up of two different and competing values that our law seeks to protect, namely freedom of speech *versus* the safeguarding of reputations against unjustified attack.[52] He proceeded to evaluate carefully all the concomitant factors supporting one of the two values mentioned, such as the need to foster free political debate and the protection of this idea which is inherent in the existing law of defamation. He concluded that the law of defamation as it stands provides a wide scope for freedom of political expression and allowed the extension.[53]

4 3 Alteration of existing legal rules

The third type of case in which policy considerations are invoked by the courts, is in a sense the opposite of the previous type. In these cases, the application of existing rules is not merely extended, but existing rules are altered to accommodate novel factual situations, arising in the ways explained earlier, because such rules are inappropriate to changed circumstances or perceptions. Examples of this type of case are not numerous, perhaps because in these cases judges cannot link their law-making activity when applying policy to open-ended norms providing express justification for the use of policy. Here, the invocation of policy rests solely on the obvious dissonance between the law as applied hitherto and present circumstances and attitudes. Only very glaring disjunctions between law and social reality will be addressed by judges in this manner. One example is the recognition of strict liability of the press for defamation, where the ordinary Roman-Dutch law requirement of intent for *iniuria* has been forsaken. In *SA UK v O'Malley* the Appellate Division gave *obiter* recognition to this exception, stating as its reason the difficulty of protecting the innocent individual should it be required that intent on the part of the powerful mass media be proved.[54] In *Pakendorf v De Flamingh* this reasoning was accepted as the basis for a decision expressly recognising strict liability of the press for defamation.[55] In neither of these cases was policy expressly invoked, but the justification of the decisions makes clear the policy-based nature of the considerations influencing the decision. In the *Pakendorf* case the judge also quoted, without expressly signifying agreement, Burchell's view that the economic consequence of loss-spreading supported the decision, the press being better able to bear the loss and to distribute it among the community than the individual.[56]

4 4 Conflicting rules or consequences

The fourth and final type of case in which the decision is based on policy, concerns instances in which the settled rules applicable to a specific set of facts apparently conflict or give rise to contradictory consequences. This happens first of all where, in accordance with the ordinary requirements for delictual

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51 954.
52 *Supra* 585.
53 585 *et seq.*
54 *Supra* 407.
55 *Supra* 157.
56 *Ibid.*

liability, more than one person has a claim for the same loss. Examples are *Smit v Saipem*[57] where both the owner of and the holder of a real right to a thing, have a claim for damage to the object; and *Van Gool v Guardian National Insurance Co Ltd*[58] where both parent and child may have a claim for compensation of loss suffered as a result of injury to the child – the father for increased maintenance. Where such claims for dual compensation have arisen, the cases have been solved by direct reliance on the *ne-bis-in-idem* principle, which is based on a policy of not over-compensating. However, no reference has been made to policy in these cases.[59]

Secondly, examples of conflict cases occur where there is concurrence of a delictual claim for damages with a claim for damages based on another ground, such as breach of contract. There the requirements for liability for both grounds of actions are met, and the decision as to which claim should be allowed, preferred or prescribed by the law, has quite frankly been acknowledged to be one of policy.[60] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*, such a situation arose and the Appellate Division based its decision prescribing the use of the contractual claim in cases of a possible concurrence between a contractual and a delictual claim for damages for pure economic loss on policy considerations.[61] The court in fact held that these considerations negated the existence of a delictual legal duty, and therefore of delictual wrongfulness, in the circumstances.[62] Its decision was therefore actually based on the absence of one of the requirements for delictual liability, and therefore also amounted to a denial of a concurrence of claims in the circumstances. Although the determination of wrongfulness in cases of pure economic loss is also a policy decision based on policy considerations, as Grosskopf AJA correctly pointed out in the *Lillicrap* case,[63] the policy considerations he in fact relied on are not relevant to the determination of delictual wrongfulness, as I shall attempt to show presently. They relate to a different policy decision, namely which of the competing sets of rules should be allowed or preferred. The policy considerations influencing the court's decision in the *Lillicrap* case were all based on

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57 1974 4 SA 918 (A).

58 1992 1 SA 191 (W). Cf however *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A), which seems to imply that in such a case the father can claim only for patrimonial loss consisting of hospital and medical costs *already incurred*, whereas the claim for future patrimonial loss is that of the minor. If this interpretation is correct, there will be no overlap between the claims of the father and the minor.

59 As regards reliance on the *ne-bis-in-idem* principle, ie the principle that one should not be obliged to compensate the same loss twice, see eg *Smit v Saipem supra* 932; *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 1 SA 996 (T) 999; *Lean v Van der Mescht* 1972 2 SA 100 (O) 111; *Vaal Transport Corporation v Van Wyk Venter* 1974 3 SA 518 (T) 518.

60 Van Aswegen 99–103 416 418–445; Midgley "The nature of the inquiry into concurrence of actions" 1990 *SALJ* 627; Hosten "*Concursus actionum* of keuse van aksies" 1960 *THRHR* 257; Lubbe and Murray 11. Cf also *Otto v Santam Versekering Bpk supra* 624. In this case, however, the plaintiff's concurring claims were against *two different defendants*, albeit both for the same loss. The position therefore differs from other cases of concurrence of claims for the same loss against the same defendant but based on different grounds of action.

61 *Supra* 500.

62 505.

63 498.

the existence of a contract between the parties.[64] The court held that the existence of adequate and satisfactory contractual remedies obviated the need to rely on the protection of the law of delict, and that the parties should be free to regulate their relationship as they see fit and to accept that the contract regulated their entire relationship. These considerations all reflect the principles of freedom of contract and of party or individual autonomy, policies deemed by the judge to override the application of delictual rules, norms and standards in a contractual setting.

5 NATURE AND ROLE OF POLICY CONSIDERATIONS

On the basis of this brief discussion of prototype cases, some conclusions may be drawn reflecting the current views on the nature and applicability of policy considerations in the South African law of delict, the role of the judge in this regard and the manner in which such considerations are employed.

5 1 Nature

As regards the nature of policy considerations, the types of case identified show that policy considerations are regarded as peripheral materials, to be utilised in the interstices where settled legal rules and standards do not provide a clear answer. This is confirmed by express judicial pronouncements linking policy considerations to novel situations or *res nova*, for example in the *Lillicrap* case and the *Compass Motors* case.[65] This has in certain instances led to acceptance of the view that policy considerations fill "gaps" in the law and are consequently not part of the legal materials. Hahlo and Kahn[66] allude to courts "bereft of binding legislation, precedent and modern custom" filling gaps in the law "by judicial law-making", and this view has received express judicial acceptance.[67] However, at least not all policy considerations referred to in the cases are regarded as extra-legal materials. Even those expressly referring to "gaps" in the law, stress the close identification of the materials used to fill the gaps with the common-law precepts of natural law, equity and reasonableness.[68] This is

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64 500 – 501.

65 *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* 503 – 504; *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd supra* 527. Cf also further references to policy decisions operating in novel situations in Neethling, Potgieter and Visser 36 fn 22; Van der Walt 3; cf also Lubbe 1990 *Stell LR* 12. Other commentators stress that such considerations apply when settled legal rules are unclear or conflict: cf Du Plessis and Davis 1984 *SALJ* 91; Lubbe 1991 *TSAR* 14. All of these descriptions fall under the "hard cases" identified by Bell 24 – 30, ie all the instances where settled rules do not provide clear answers. This can be because the rules are open-ended norms (cf Lubbe 1990 *Stell LR* 17; Corbett 1987 *SALJ* 56; Du Plessis and Davis 1984 *SALJ* 91) or because their application to a particular instance is unclear (Du Plessis and Davis 1984 *SALJ* 91) or because applicable rules conflict (Lubbe 1991 *TSAR* 14). All of these may be described as novel situations in a wide sense.

66 304. The linking of policy decisions to "gaps" in the law is also found in Motala "Independence of the judiciary, prospects and limitations of judicial review in terms of the United States model in a new South African order: towards an alternative judicial structure" 1991 *CILSA* 293; Mayer-Maly 1987 *THRHR* 61 62; cf also Corbett 1987 *SALJ* 67; Herdegen 1990 *Stell LR* 337.

67 *Van Erk v Holmer* 1992 2 SA 636 (W) 643 – 644 648.

68 Hahlo and Kahn 304; *Van Erk v Holmer supra* 643 – 644 648; Van Zyl "The significance of the concepts 'justice' and 'equity' in law and legal thought" 1988 *SALJ* 284 – 289.

surely compatible with the view that many of the principles and values comprising policy considerations are immanent in or at least underlying the settled legal materials. Specific references to policy considerations as values and principles of our law, or which our law seeks to protect, such as in the *Argus* case,[69] strengthen this view. Similarly, the often invoked principles of fairness, honesty and justice are obviously given content and considered in the light of existing legal rules and standards. In *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd*[70] for example, the judge expressly stated that the policy decision he made was "not inconsistent with any fundamental principle of our law". The essentially legal nature of policy considerations is also apparent from the many express affirmations, for example in the *Ewels* case that the *boni mores* as measure of public policy refers to the legal convictions of the community[71] and from the affirmation in *Schultz v Butt* that these convictions should be sought in the "regsgevoel van die gemeenskap se regsbeleidmakers".[72]

5 2 Area of application

As regards the appropriate application of policy considerations, the classes of case identified clearly indicate that creative judicial use of such considerations is regarded as basically interstitial and evolutionary. Such use is permissible only where the settled legal materials are inadequate to reach a decision. The third type of case identified above, where settled legal rules are changed or adapted by utilising policy considerations, can also be described as interstitial in this sense. In such cases, glaring inconsistencies between the settled legal rules and standards, and present circumstances result in settled law being inadequate to reach a decision compatible with social reality. The interstitial nature of the use of policy considerations is confirmed by the fact that, even where open-ended standards expressly incorporate policy considerations, they are only in fact used to reach a decision in cases falling outside guidelines developed or categories crystallised from such standards.[73] These quidelines are followed or categories adopted in subsequent decisions partly because of the application of the precedent system in our law, but to my mind also because this minimises the legal uncertainty and retroactiveness inherent in judicial law-making on the basis of policy. Still, decisions based on policy always remain open to re-examination. It is often stressed in case law that categories established or guidelines developed in connection with open-ended norms are not a *numerus clausus* but

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69 *Supra* 585: "two different and competing values which the law seeks to protect . . . freedom of speech . . . and the safeguarding of reputations against unjustified attack." See also Lubbe 1990 *Stell LR* 14, 1991 *TSAR* 13; Stegmann "A point at which law and morality may part" 1991 *SALJ* 694.

70 *Supra* 917.

71 *Minister van Polisie v Ewels supra* 597; cf also *Hawker v Life Offices Association of South Africa supra* 780; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd supra* 384; Neethling, Potgieter and Visser 34 fn 18; Van der Walt 23 fn 9; Boberg 33 213 214; Corbett 1987 *SALJ* 62.

72 *Supra* 679. Cf also Neethling, Potgieter and Visser 37–38.

73 See fn 28 *supra*. This is eg well-illustrated by the number of factors identified in case law pointing to the existence of a legal duty, and thus to a finding of wrongfulness, in cases of liability for an *omissio* (Neethling, Potgieter and Visser 52–64) and for negligent misrepresentation (*idem* 300–301; cf also Pretorius 249–304).

can be added to and amended, as occurred in the *Ewels* and *Schultz* cases.[74] The essentially dynamic nature of policy decisions, ensuring flexibility for future development, is therefore recognised, also by frequent assertions of the variable nature of policy considerations, for example in the *Compass Motors* case.[75] Moreover, it has often been stressed, for example in the *Argus* case, that policy considerations differ from community to community.[76] In *Marais v Richard* the judge stated that the *boni mores* are to be determined with reference to the "regsoortuigings hier te lande en nie in Engeland nie".[77] This stresses the crucial role of policy in keeping the law in step with the community it serves.

5 3 Law-making function of judge

As regards the role of the judge in the use of policy considerations, the number of policy decisions and type of considerations utilised attest to the recognition of the need and inevitability of the law-making function of the judge. This is a logical consequence of the practical impossibility – caused by the sheer volume of legislation in modern, state interventionist societies – that the supreme legislator can adequately fill the need for adaptation of the law in keeping with developments in society. But there is also overwhelming authority for the statement that our judges do not regard themselves primarily as law-makers, but in fact attempt to adhere to the maxim of *ius dicere non facere*. The following *dictum* of Kriegler J illustrates this approach:[78]

> "Op die keper beskou, verhef die landdros sy sedenorme tot beginsels van openbare beleid en gebruik dit dan om nuwe reg daar te stel. Dit is nie vir hom of vir my beskore nie – ons funksie is om reg te spreek en nie om dit te skep nie."

This view is reinforced by several characteristics of the policy decisions discussed. The first is the interstitial nature of the instances where reliance on policy is justified. The second is the emphasis placed on the fact that when applying policy, the judge is not free to act according to his own insights, but has to interpret the views of the community. In the *Compass Motors* case the following exposition by Corbett CJ is quoted with approval:[79]

> "A community has certain common values and norms . . . It is these values and norms that the judge must apply when making his decision and that decision must accord with society's notions of what justice demands."

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74 *Ewels* iro omissions, *Schultz* iro unlawful competition. Cf also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra* 590, where reference was made to the possibility of the development of new grounds of justification in cases of defamation, with reference to the decision in *Zillie v Johnson* 1984 2 SA 186 (W). See further *Lubbe* 1990 *Stell LR* 12; Du Plessis and Davis 1984 *SALJ* 91.

75 *Supra* 528. See too *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (A) 265; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891; Corbett 1987 *SALJ* 55 64; Lubbe 1990 *Stell LR* 11; Pretorius 250; Boberg 211; Lubbe and Murray 241.

76 *Supra* 593 – 595. See also *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* 505; *Marais v Richard supra* 1168; Corbett 1987 *SALJ* 63.

77 *Supra* 1168. This was affirmed in *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (A) 772. Cf also Corbett 1987 *SALJ* 63.

78 In *S v Matsemela* 1988 2 SA 254 (T) 257. Cf also De Vos and Van Loggerenberg 1991 *TSAR* 594 595; Neethling, Potgieter and Visser 38; Herdegen 1990 *Stell LR* 338 350; Dugard 366 – 369; Du Plessis and Davis 1984 *SALJ* 89.

79 *Supra* 527 – 528. The quote is from Corbett 1987 *SALJ* 67, but cf also 59 62 64; Lubbe 1990 *Stell LR* 14; Herdegen 1990 *Stell LR* 341; Du Plessis and Davis 1984 *SALJ* 89.

There are also statements stressing the impropriety of allowing personal preferences and idiosyncracies to influence a decision, such as the statement in the *Argus* case that sometimes a judge will simply have to disregard his personal feelings.[80] The third is the factor discussed in connection with the nature of policy considerations, namely that judges feel constrained to reconcile and fit in the policy considerations they utilise and the conclusions they reach with established legal rules and immanent or underlying principles of law.

It therefore appears that, in their own view and according to the general conceptions in South Africa, the law-making function judges perform when utilising policy considerations differs, at least in scope, from that of the legislator and is also in its nature limited by the factors I have identified. This has as a consequence that policy decisions are often rather vague and unspecific, not pertinently indicating or fully discussing the actual policy considerations motivating the decision. Earlier cases dealing with the extension of liability for various forms of pure economic loss illustrate this tendency. In these decisions, the findings were overtly based on the apparently legal standard of foreseeability. It was expressly admitted in *Union Government v Ocean Accident and Guarantee Corporation Ltd*[81] that this was but a device designed

> "to avoid the impression of delivering an unreasoned moral judgment *ex cathedra* as to how the injurer should have behaved".

A further example of this tendency, to my mind, is the fact that the economic factor of insurance, reflecting the policy consideration of effective loss spreading, is seldom alluded to in cases, whereas it must surely underlie many policy decisions.[82] Fortunately, this tendency to gloss over or deny the policy considerations influencing a decision seems to be changing, as is apparent from the recent judgments of the Appellate Division in the *Indac Electronics* and *Argus* cases discussed earlier.

5 4 Manner of application

Finally, the manner in which policy considerations are utilised in some cases, raises a very important issue. In view of the fact that delictual liability is based on general requirements for liability, the extension of the area of application of these requirements to novel situations is inherent in the nature of the law of delict. Moreover, two of these requirements consist in open-ended standards, expressly incorporating policy considerations in their application. Consequently policy considerations often feature in different respects and in connection with different requirements in delict cases. In such cases, it is perhaps natural that a judge should take an overall view of the situation and consider all the policy

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80 *Supra* 591. Cf also *Kuhn v Karp* 1984 4 SA 825 (T) 840; Lubbe and Murray 240–241; Lubbe 1990 *Stell LR* 15; Pretorius 252; Hutchison, Van Heerden, Visser and Van der Merwe 648.

81 1956 1 SA 577 (A) 585. Cf also *Kadir v Minister of Law and Order supra* 741.

82 An example that comes to mind is the recent case of *Van Gool v Guardian National Insurance Co Ltd supra*. There the court decided that a minor, who was being supported or maintained by his father, could nevertheless also personally claim for patrimonial loss suffered as a result of injuries to himself (in spite of the fact that his father also had a claim for the increase in his duty of support). The fact that loss by the minor would be covered by insurance must surely have influenced the court's decision, even though this factor was not alluded to in the judgment. In this regard, cf also Pretorius 302.

considerations together with a view to the final outcome of the case. In this way the different respects in which policy features, become somewhat blurred. Without advocating an unduly formalistic approach, I do believe that it is important to distinguish between the different respects or requirements in connection with which policy features in a given case. This is so especially because these requirements or respects have different functions in the overall determination of liability. These functions determine which considerations are relevant for that particular requirement or respect.

Two examples from the cases discussed are used to illustrate this point. In cases dealing with the extension of delictual liability, policy features *inter alia* in connection with the requirements of wrongfulness and legal causation. The function of the former is to determine whether society requires that the law brand the type of conduct concerned as impermissible,[83] and the function of the latter is to determine whether it is reasonable and equitable that *liability* for a specific consequence of his conduct should be imposed on the wrongdoer or that liability should be limited.[84] In many cases the policy considerations used to determine wrongfulness pertain rather to the question whether *liability* for such conduct would be appropriate, than to the question whether such conduct should in principle be regarded as permissible. This is probably a result of the view expressed *inter alia* in *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA*,[85] namely that wrongfulness encompasses a policy decision by means of which the scope of delictual liability is judicially controlled. In fact, the scope of delictual liability is controlled by a proper application of all the requirements for delictual liability, including legal causation, as was correctly emphasised in the *Trust Bank* case.[86] The specific example I have in mind is the policy consideration of limitless or indefinite liability discussed earlier. One aspect of this consideration, namely that the administration of justice could be impaired if courts were flooded with claims, is relevant to the decision whether conduct causing indefinite liability should be regarded as impermissible (that is, wrongful) in principle. The second aspect, namely whether the wrongdoer should be saddled with unlimited liability, is properly relevant to the requirement of legal causation, the function of which is to limit liability and keep it within reasonable bounds, and this aspect should be considered in that context and not in regard to wrongfulness. The reason for this view is not a mere formalistic preference for the so-called elementological approach, but

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83 Hutchison, Van Heerden, Visser and Van der Merwe 648 ("whether society disapproves of the type of . . . conduct"); Boberg 33 ("society's prevailing ideas of . . . what conduct should be condemned . . ."); Neethling, Potgieter and Visser 31 ("regtens afkeurenswaardige wyse").

84 *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A) 833 ("whether the link between the act or omission is sufficiently close or direct for legal liability to ensue, or whether harm is, as it is said, too remote"); *International Shipping Co (Pty) Ltd v Bentley supra* 700; *S v Mokgethi supra* 39; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd supra* 914; Neethling, Potgieter and Visser 169; Van der Walt 94.

85 *Supra* 659. Cf also Boberg 147, who poses the question of wrongfulness as "whether the legal convictions of the community demand that [the conduct] be regarded as unlawful and *that the damage suffered be made good by [the defendant]*" (my italics). He is in fact paraphrasing the test in *Minister van Polisie v Ewels supra* 597. Further on, he continues, still with reference to the decision of wrongfulness, "social implications of holding the defendant *liable*" (my italics).

86 See text *supra* fn 43 and fn 43 for reference.

rather the desire not to denaturise the functions of the different delictual requirements. This does not mean that the final decision reached in a case where both requirements are considered is necessarily wrong, because in such a case the mixing of the two requirements normally does not affect the final outcome of the case. However, in many cases, both requirements are not considered, for example wrongfulness alone features in an application for an interdict. In such cases an incorrect utilisation of a particular policy consideration can result not only in an incorrect decision in the individual case, but in a general undermining of the proper function of a particular requirement. Because of the application of the precedent system, such incorrect utilisations of particular policy considerations in subsequent cases, and consequent undermining of the functions of the different requirements for delictual liability, are quite possible. Thus, for example, it would be patently wrong and contrary to the purpose and function of the law of delict if a potential victim should fail to obtain an interdict against someone on the verge of causing him massive economic loss *because* the same conduct would result in similar economic loss to an undetermined number of other people as well.

The second example of a similar improper utilisation of policy considerations is to be found in the *Lillicrap* case.[87] There, considerations relevant to a decision on the policy question whether a delictual claim for pure economic loss should be allowed in addition or as alternative to a claim for breach of contract between the parties to a contract, were utilised to determine another policy question, namely whether conduct causing pure economic loss was delictually wrongful. Once again, the final decision in that case is not the issue. The issue is the effect of the decision on other cases where the question of the delictual wrongfulness of pure economic loss, caused in the context of a contractual relationship without the possibility of concurrent contractual liability, has to be decided. This whole issue emphasises the importance of explicitly identifying and discussing the policy considerations influencing a decision, and utilising them in the correct context.

6 CONCLUSION

In conclusion, one should welcome the realistic admission of the need for judicial law-making, which is evidenced by the cases discussed, especially in adapting common-law principles to changing social circumstances. It is particularly important in South Africa, where fundamental political changes will necessarily bring about radical changes in the circumstances and perceptions of the community. Policy considerations offer a viable instrument for the adaptation of law in accordance with these demands. Of course, no magic formula or instant solution exists – the well-recognised difficulties inherent in the application of law in a plural society are acute in our country at present.[88] Moreover, some

87 See text *supra* fn 61–64 and fn 61 and 64 for reference.

88 These problems were directly addressed in a Zimbabwean case *Olsen v Standaloft* 1983 2 SA 668 (ZS), but have not yet explicitly been considered in our case law. See on this issue in general Lubbe and Murray 241; Motala 1991 *CILSA* 294–304; Hoexter 1986 *SALJ* 436 *et seq*; Corder (ed) *Essays* esp 1 8–14; Nienaber 1991 *Consultus* 19 *et seq*; Tiruchelvam and Coomaraswami (eds) *The role of the judiciary in plural societies* (1987) esp ch 1 5 6 7 9 10 11.

of the very real dangers inherent in judicial law-making are particularly relevant in our circumstances. Naturally any form of legislation by judges who are unelected and unfettered carries the risk of undue reliance on personal preference and partisanship, also in a party-political context.[89] There is also the objection that an elitist judiciary drawn from a small unrepresentive minority of society cannot interpret and serve the needs of the community.[90] Finally, judicial law-making renders the law uncertain, retroactive and expensive and this can in itself also be unjust.[91] Many of these objections will have to be addressed by radical measures[92] but in the meantime and for the future, an appropriate approach to the role, nature and utilisation of policy considerations can contribute to the search for solutions.

To my mind, a balance between the two competing ideals of legal certainty on the one hand and flexibility and justice in the individual case on the other,[93] can best be achieved in the following way. Policy considerations should be seen as an inherent part of legal materials, often reflecting fundamental principles immanent in the legal system. Judicial law-making via the utilisation of policy considerations in the decisions is necessary and desirable, but is basically interstitial. It occurs where a plain and clear valid legal rule cannot, by means of the conscious, rational use of ordinary logical and deductive reasoning, furnish an answer. Policy considerations are then used, implying inductive and intuitive reasoning. The judge is then performing his or her most openly acknowledged law-making function. However, because the judge is not the supreme legislator, and to minimise the most important objections to judicial law-making, he or she must perform this function with constraint and in a principled way.[94] Apart from the restraint inherent in the rule of law and the overriding legislative powers of parliament, judges themselves can and do contribute to the ideal of judicial restraint in the following ways. Policy decisions should fit in with existing legal rules, standards *and* underlying principles of law and

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89 In this regard, cf in general the current debate on activism v restraint in constitutional adjudication in the USA, summarised by Wolfe (1991). Cf also Jaffe ch 4; Wolfe (1986) ch 3 4 9 10 and conclusion; McWhinney ch 5 11 12; Corder "Lessons from (North) America (beware the 'legalisation of politics' and the 'political seduction of the law')" 1992 *SALJ* 204; Nienaber 1991 *Consultus* 19; Herdegen 1991 *Stell LR* 339; De Vos and Van Loggerenberg 1991 *TSAR* 592.

90 Motala 1991 *CILSA* 293 – 299; cf also Jaffe ch 2; Bell 254 – 264.

91 Atiyah and Summers 408 – 432 state these arguments well with reference to the contrast between formal and substantive legal reasoning.

92 Eg regarding the appointment of judges and the composition of the bench. In this regard, see eg Motala 1991 *CILSA* 299 – 314; Nienaber 1991 *Consultus* 23 – 25; Raz 1972 *Yale LJ* 858 fn 48.

93 Raz 1972 *Yale LJ* 850 – 851; Yablon 1990 *Hastings LJ* 244; Lubbe 1991 *TSAR* 15 – 16; cf Posner 156 – 157. The idea of balancing competing visions of law is also expressed by Atiyah and Summers 411 – 432 iro the substantive and formal views of law.

94 Cf eg Posner 206 – 208 who advocates "principled" law-making by the incorporation of policy decisions or value judgments in an internally consistent manner which enjoys public approbation, and above all, *candidly*, ie by stating reasons for the decision (see Brown 1992 *Tul LR* 1156 – 1157 1165). Jaffe 37 – 49 stresses the importance of the judge rationalising, ie giving reasons for, his decision, basing it upon existing principles, honestly consulting his conscience and explicitly striving to represent generally accepted views. Bell 17 – 20 226 – 246, propagating the interstitial legislator model for the judicial function, stresses the restraints under which the judge operates, ie consistency with the established legal rules. The importance of specifying the considerations determining a policy decision, is also stressed by Lubbe 1990 *Stell LR* 15.

justice. Judges should explicitly identify and discuss the policy considerations underlying their decisions and they should consciously strive not to succumb to personal, partisan or idiosyncratic preferences. Judges should apply the generally accepted legal views of the community unless such views conflict with immanent principles of justice. However, the reference to the generally accepted views of the community, does not simply imply a type of majority view based on a simple opinion poll.[95] It presupposes a reflection of inherent values accepted in the community and apparent *inter alia* from the accepted legal standards and institutions of the community. In the determination of such values the judge will, however, have to rely on his or her own honestly held beliefs and opinions,[96] thus incorporating his or her intuition and legal feeling ("regsgevoel").

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95 Expounded by Bell 10–14 184–203 as the consensus model of the judicial function.
96 Corbett 1987 *SALJ* 68. Cf also text *supra* fn 25.

Hooftrekke van 'n nuwe Kredietwet

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SUMMARY

A new Credit Act in outline

The Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980 have caused serious problems during the last few years, particularly as regards the interpretation, application and reconciliation of the two acts. The South African Law Commission has instructed a research committee to draft new credit legislation for the country. This article deals with the main features of the committee's proposals and recommendations to the Law Commission. The committee has recommended one single Credit Act for South Africa. The proposed act deals with a variety of matters relating to the financial and contractual aspects of moneylending, hire-purchase and leasing contracts as well as the contract *locatio conductio operis*.

1 INLEIDING

Verbruikerskrediet word in Suid-Afrika deur 'n hele aantal statutêre maatreëls gereël. Afbetalingskoopkontrakte van grond word hoofsaaklik deur die Wet op Vervreemding van Grond[1] gereguleer, huur- en koopkontrakte van sekere verbruikersgoedere oor 'n termyn val binne die kader van sowel die Wet op Kredietooreenkomste[2] as die Woekerwet,[3] terwyl laasgenoemde ook die lewering van dienste en geldleningskontrakte reël. 'n Ander vorm van verbruikerskrediet, bêrekoop, word beheer deur regulasies[4] wat kragtens die Wet op Prysbeheer[5] uitgevaardig is. Hierdie wetgewing is dus óf van betreklik onlangse oorsprong óf is[6] in die afgelope dekade of wat ingrypend gewysig. Verbruikerskrediet is egter een van die mees dinamiese gebiede van die reg vanweë die wisselwerking en kumulatiewe effek van verskeie faktore: die mens se natuurlike drang om sy medemens se welvaart te ewenaar deur noodsaaklikhede en luukshede aan te skaf, die industriële wêreld se vermoë om

1 68 van 1981.
2 75 van 1980.
3 73 van 1968.
4 GK R 1234 in *SK* 7068 van 1980-06-13 soos gewysig deur GK R 1814 in *SK* 7200 van 1980-08-29.
5 25 van 1964.
6 In die geval van die Woekerwet.

voortdurend aanloklike produkte op te lewer, sakelui se vernuftigheid om met nuwe kontraksvorme en kredietskemas na vore to kom en, les bes, die wêreldwye aanvaarding en aanvaarbaarheid van krediet as 'n normale verskynsel in die deursneehuishouding. Al hierdie faktore noodsaak voortdurende vernuwing van, en herbesinning oor, verbruikerskredietwetgewing.

In Suid-Afrika het veral die Woekerwet die afgelope klompie jare meer as die normale hoeveelheid probleme opgelewer. Daar was ontevredenheid oor die wet se toepassingsgebied, die wet het tot botsende interpretasies aanleiding gegee wat vervolgings bemoeilik het, die owerhede het nie oor genoegsame afdwingingsmasjinerie beskik nie ensovoorts. Die Registrateur van Finansiële Instellings wat tot onlangs gemoeid was met die administrasie van die Woekerwet, het gevolglik die Suid-Afrikaanse Regskommissie versoek om die Woekerwet te ondersoek. Die regskommissie het op sy beurt 'n navorsingskomitee opdrag gegee om die werk te onderneem. Na samesprekings is besluit om nie lapwerk te probeer doen nie maar om die ondersoek breër te rig. Die gevolg was dat die Woekerwet, die Wet op Kredietooreenkomste en die Bêrekoopregulasies almal onder the loep geneem is.

Die navorsingskomitee[7] het sy verslag in Maart 1991 gelewer. Daarna is sekere wysigings op versoek van die regskommissie se werkskomitee aangebring voordat die moeisame taak van die staat se vertalers kon begin om 'n verslag van bykans 600 bladsye (insluitend twee konsepwette) te vertaal. Die verslag is aan die begin van 1993 vir kommentaar gepubliseer.[8] Dit moet duidelik gestel word dat die verslag, eweas hierdie artikel, die standpunte van die navorsers weergee en nie noodwendig in alle opsigte dié van die regskommissie nie.

Die verslag en aanbevelings aan die regskommissie is die resultaat van sowel navorsing wat oor verskillende regstelsels onderneem is, as die verwerking en oorweging van empiriese data wat bekom is uit skriftelike voorleggings, mondelinge getuienis, vraelyste en eerstehandse ondersoeke in die praktyk. Die komitee het twee nuwe wette aanbeveel: 'n Kredietwet wat die Woekerwet en die Wet op Kredietooreenkomste moet vervang en 'n Wet op Bêrekope wat die huidige regulasies se plek behoort in te neem. Hierdie artikel is gemoeid met die voorgestelde Kredietwet en het ten doel om die voorstelle aan 'n wyer leserskring bekend te stel. Ons verwag nie dat almal daarmee gaan saamstem nie. Daarvoor is daar te veel botsende en onversoenbare standpunte op hierdie regsterrein. Die Millstein-kommissie[9] wat verbruikerskrediet in Amerika ondersoek het, het dieselfde frustrasie ervaar:

> "One of the most controversial areas in consumer credit is that of creditors' remedies. Any discussion of modification or abolition of some creditors' remedies and clauses included in most consumer credit contracts is accompanied almost axiomatically by impassioned argument in defense of the status quo or on behalf of change. Such discussions are usually permeated with a fervid intolerance for contrary opinion – an attitude common to consumer groups and creditors alike. Past attempts at modification, restriction, or abolition of certain creditors' remedies and certain clauses in consumer credit contracts have been subjected to criticism and dissatisfaction and to charges of 'too little too late', 'overly protective of the consumer', and 'paternalistic'."

7 Die komitee het bestaan uit JM Otto en NJ Grové, geadviseer deur FR Malan.
8 As werkstuk 46 van die regskommissie.
9 Millstein (voors) *Consumer credit in the United States. Report of the national commission on consumer finance* (1972) 23.

Feldman[10] het dit by geleentheid baie raak gestel: "These are issues on which it is possible for men of good faith to differ substantially."

2 PROBLEME MET HUIDIGE WETGEWING

Die omvang van hierdie bydrae laat nie toe dat alle probleme wat met die huidige Woekerwet en die Wet op Kredietooreenkomste ondervind word, en wat in die voorgestelde Kredietwet aangespreek word, uitgewys kan word nie. Net 'n paar knelpunte word gevolglik uitgelig:

- Die Woekerwet en die Wet op Kredietooreenkomste is veronderstel om, aanvullend tot mekaar, *basies*[11] dieselfde tipe transaksies te reël – die een die finansiële sy daarvan en die ander die kontraktuele aspekte. Met verloop van tyd het die *toepassingsgebiede* van die twee wette egter al hoe groter verskille begin toon. Definisies stem nie ooreen nie, vrystellings verskil radikaal van mekaar ensovoorts. Die gevolg is dat 'n tiental verskille[12] in die toepassingsgebiede van die wette uitgewys kan word wat uiteraard die toepassing van die wette en die opstel van kontrakte onmeetbaar bemoeilik. Konsolidasie en die versoening van bepalings het dus 'n hoë prioriteit geword.

- Die huidige wetgewing maak nie 'n onderskeid tussen finansiële huurkontrakte en bedryfshuurkontrakte nie.

- Daar word nie tans voldoende administratiewe magte aan owerheidsfunksionarisse of 'n minister gegee om oortreders vinnig en effektief hok te slaan nie.

- Die huidige wetgewing is duidelik aanvanklik geskryf met die oog op vastesomkrediet (byvoorbeeld die tradisionele huurkoopkontrak) en nie vir wentelkrediet nie (byvoorbeeld oortrokke tjekrekenings en kredietkaarte). Ofskoon die Woekerwet poog om laasgenoemde tipe krediet wel aan te spreek, geskied dit op 'n onbevredigende wyse. Aangeleenthede soos die berekening van gewone en moratore rente en die inhoud van rekeningstate verskaf veral probleme.

- Dit het vir geldskieters onmoontlik geword om op 'n winsgewende basis klein lenings toe te staan binne die koerse wat die Woekerwet toelaat. Dit is te wyte aan die feit dat die vastekostekomponent[13] van 'n klein lening wesenlik dieselfde is as dié by 'n groot lening sodat die *pro rata* wins (en gevolglik die winsgrens) by kleiner lenings baie laag is.

- Die huidige afkoelreg in artikel 13 van die Wet op Kredietooreenkomste waarvolgens 'n kredietopnemer in sekere omstandighede sy kontrak straffeloos binne vyf dae mag kanselleer, het weinig praktiese waarde. Dit is veral te wyte aan die feit dat die wet slegs op sekere goedere van toepassing is waar die behoefte aan die afkoelreg nie altyd bestaan nie vanweë die wyse waarop dit verkoop word.[14]

- Oor die jare heen het al hoe meer standaardbedinge in kredietooreenkomste ingesluip wat eensydig na die kredietgewer se belange omsien en benadelend

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10 *Consumer protection. Problems and prospects* (1976) 47.
11 Die grootste verskil is dat die Woekerwet ook geldleningskontrakte reël terwyl die Wet op Kredietooreenkomste niks daarmee te doen het nie.
12 Sien hieroor Otto *Credit law service* (1991) *Commentary* par 13.
13 Bv salarisse, kantoorhuur, rekenaars, administratiewe uitgawes, "papierwerk" ens.
14 So geld die huidige afkoelreg bv nie vir ensiklopedieë en opvoedkundige speletjies wat soms van deur tot deur verkoop word nie.

is vir die skuldenaar wat tradisioneel weinig van 'n bydrae by die opstel van die kontrak lewer.

● By tjekrekenings is daar groeiende ongeduld by sekere individue en belangegroepe in die samelewing dat sleutelinligting oor die skuldenaar se betaalverpligtinge en aanspreeklikheid soms op rekeningstate ontbreek. Die Woekerwet sanksioneer grootliks hierdie geheimsinnigheid.[15]

● Die beëindiging en rekeningkundige afhandeling van huurkontrakte van roerende goed skep baie probleme in die praktyk, onder andere vanweë die ingewikkelde bepalings van artikel 6 van die Woekerwet.

● Nie-betaling van die deposito en oorskryding van die betaaltermyn by afbetalingskontrakte van roerende goed het tot heelwat teoretiese en praktiese vrae aanleiding gegee, byvoorbeeld die invloed daarvan op die geldigheid van die kontrak, die tydstip vir betaling van die deposito, die invloed van uitstelle op die betaaltermyn ensovoorts.

● Waar finansieringskoste op 'n lening vooraf bereken is (byvoorbeeld by 'n huurkoopkontrak) bestaan daar onsekerheid hoe die rente by vervroegde betalings herbereken moet word. Daar rus tans ook geen verpligting op 'n skuldeiser om rentekortings toe te staan waar 'n skuldenaar by byvoorbeeld 'n huislening sy paaiemente gedeeltelik verhoog nie.

● Die inhoud en frekwensie van rekeningstate word tans onvoldoende gereël.

● Terugnameprosedures het in die praktyk, die wetgewing en die regspraak 'n rigting ingeslaan wat vir sowel die skuldeiser as die skuldenaar nadelig kan wees. Die Wet op Kredietooreenkomste[16] vereis van 'n skuldeiser om 'n skuldenaar 30 dae aan te maan voordat hy die goed mag terugneem. Gedurende hierdie tydperk kan hy (minstens volgens die praktyk in die Witwatersrand) niks doen om byvoorbeeld by wyse van tussentydse beslaglegging te verhoed dat die goedere misbruik word of in waarde afneem nie.[17] Na terugname moet hy die goed vir 'n verdere 30 dae hou om die skuldenaar 'n tweede geleentheid te bied om sy kontrakbreuk te herstel, tensy die skuldenaar self die kontrak kanselleer.[18] Laasgenoemde uitvlug het tot die praktyk van "vrywillige teruggawes" gelei wat soms allermins vrywillig is. Na terugname en waardasie[19] van die saak is die skuldeiser verplig om op die koper se bates beslag te lê om sy skuld gedelg te kry aangesien die bekende skuldhofprosedure van artikel 65A(1) van die Wet op Landdroshowe[20] taboe is by 'n afbetalingsverkooptransaksie.[21]

● Ten slotte kan gemeld word dat gewetenlose wyses van skuldinvordering, en die praktyk om administrasiegelde te hef vir sogenaamde kredietkwotasies of kredietondersoeke, tans ook nie gereël word nie.

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15 Daar moet in alle billikheid gesê word dat verskeie finansiële instellings in onlangse tye vrywillig al hoe meer inligting op state aan hulle kliënte verstrek.
16 A 11.
17 *First Consolidated Leasing and Finance Corp Ltd v NM Plant Hire (Pty) Ltd* 1988 4 SA 924 (W). *Contra* die Vrystaatse praktyk volgens *Santam Bank Bpk v Dempers* 1987 4 SA 639 (O).
18 A 12 van die Wet op Kredietooreenkomste.
19 Waardasie geskied kragtens a 16 van die Wet op Kredietooreenkomste. Getuienis is voor die komitee gelewer dat wanpraktyke by waardasies nie ongewoon is nie.
20 32 van 1944.
21 A 19 van die Wet op Kredietooreenkomste.

Daar kan vervolgens gekyk word na sekere van die voorstelle wat in die verslag gemaak is. Om sake eenvoudig te hou, sal na die voorgestelde wet as die Kredietwet verwys word en na sy klousules as artikels.

3 TOEPASSINGSGEBIED VAN DIE KREDIETWET

Die toepassingsgebied van verbruikerswetgewing is altyd 'n omstrede en tergende kwessie en dit het die navorsingskomitee dan ook heelwat kopkrap besorg. Ons kon egter met vrug uit die huidige wetgewing en die ervaring in ander wêrelddele put.

Die Kredietwet is van toepassing op *kredietkontrakte*. Daaronder word verstaan 'n geldleningskontrak,[22] 'n kredietkoopkontrak van 'n roerende liggaamlike saak,[23] 'n werkaannemingskontrak[24] en 'n huurkontrak van roerende liggaamlike sake. Wat huurkontrakte betref, is die wet hoofsaaklik van toepassing op finansiële huurkontrakte wat vir die eerste keer uitvoerig gedefinieer word.

Verskeie kontrakte en kategorieë kredietgewers is vrygestel van die wet se bepalings maar dit kom grootliks neer op 'n herverordening en konsolidasie van die huidige wetgewing en die regulasies daarkragtens. 'n Paar belangrike nuwighede is egter ingevoer en bestaande bepalings is gewysig. Die huidige Woekerwet en die Wet op Kredietooreenkomste geld byvoorbeeld tot op bedrae van R500 000. Na ons mening is dit 'n belaglik hoë perk indien in gedagte gehou word dat 'n mens hier met verbruikerswetgewing te doen het. So 'n hoë perk verleen beskerming aan skuldenaars wat beswaarlik langer as verbruikers beskou kan word. Verbruikerswetgewing behoort in beginsel net gerig te wees op persone wat werklik beskermingswaardig is. Daarom is voorgestel dat die Kredietwet tot op 'n perk van R200 000 geld.[25] Gegewe die inflasierealiteit en die feit dat ons voorstelle eers iewers in die toekoms, indien enigsins, geïmplementeer sal kan word, lyk dit na 'n realistiese syfer wat die koop van motors, behuisingslenings ensovoorts kan dek. Aan die ander kant is die wet nie van toepassing op geldleningskontrakte vir vastesomkrediet[26] wat nie R2 000[27] oorskry nie.[28] Dit beteken dat klein lenings gedereguleer word ten einde skuldenaars tot die formele geldmark toegang te bied. Die geldskieter kan gevolglik 'n hoër, meer winsgewende koers beding wat steeds drasties laer kan wees as die uitermate hoë koerse wat tans in die informele sektor vir dieselfde skuldenaars gevra word. Sulke klein lenings is egter steeds onderworpe aan artikel 11 van die wet wat 'n hof magtig om, met inagneming van sekere faktore, in te gryp indien die hof meen dat die rentekoers *buitensporig*[29] hoog is.

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22 Wat 'n wye betekenis het en oa kredietkaartskemas, egte geldlenings en die lewering van dienste insluit.

23 Wat die tradisionele huurkoopkontrak insluit. Die begrip *huurkoopkontrak* word weer ingevoer nadat dit in die Wet op Kredietooreenkomste gebuk moes gaan onder die breedsprakige naam *afbetalingsverkooptransaksie*.

24 Dit is 'n kontrak waarkragtens 'n liggaamlike saak gebou, vervaardig, herstel, verander, verbeter of in stand gehou word. Die definisie is op enkele wysigings na ontleen aan Van Jaarsveld en Oosthuizen *Suid-Afrikaanse handelsreg I* (1988) 851.

25 A 2(3)(b)(i).

26 Die wet sal dus steeds geld vir bv oortrokke tjekrekenings en kredietkaarttransaksies benede R2 000.

27 Dié bedrag hang saam met die jurisdiksie van die howe vir klein eise.

28 A 2(3)(c).

29 Die toets is dus nie of die koers bloot hoër as die statutêre koers is nie.

Die Kredietwet is ook nie van toepassing waar die kredietnemer 'n regspersoon is nie.[30] Ofskoon 'n mens kleiner regspersone kry wat seker op beskerming aanspraak kan maak, is 'n regspersoon in die normale geval allermins die deursneeverbruiker. Die alledaagse verbruiker is eenvoudig 'n minder gesofistikeerde wese as die regspersoon vir wie se organe of beamptes dit nie ongewoon is om regsadvies in te win, opgawes in te dien, rekeningkundige state te vertolk ensovoorts nie.[31]

Die Woekerwet geld tans vir alle tipe goedere terwyl die Wet op Kredietooreenkomste net geld vir spesifieke goedere wat deur die betrokke minister afgekondig is.[32] Dit is 'n onhoudbare situasie wat nie net tot interpretasieprobleme aanleiding gee nie, maar tot gevolg het dat die een wet op 'n bepaalde kontrak van toepassing is maar die ander een nie.[33] Die uitgangspunt met die Kredietwet is dat dit op alle goedere van toepassing is tensy die minister dit spesifiek *uitsluit*.[34]

4 VORM EN INHOUD VAN KONTRAKTE

Kredietooreenkomste is gewoonlik[35] omvangryke standaarddokumente wat die partye se regsposisie uitvoerig reël. Die ervaring wêreldwyd is dat sulke kontrakte ook berug eensydig opgestel word. Dit sien in besonderhede om na die *regte* van die kredietgewer en die *verpligtinge* van die kredietnemer. Die taak van verbruikerswetgewing is om hierdie wanbalans te herstel deur sekere bedinge en inligting in die skriftelike stuk te vereis.

Die Woekerwet en die Wet op Kredietooreenkomste bevat albei bepalings[36] wat die vorm en inhoud van kontrakte reël. Dit sluit betreklik logiese items in soos die name en adresse van die partye, 'n beskrywing van die saak, die finansieringskostekoers ensovoorts. Dit was gevolglik moontlik om meeste van hierdie bepalings te versoen, te konsolideer en te herverorden. Heelwat van die bestaande bepalings is egter uitgebrei. Dit sou die leser onnodig vermoei om al hierdie besonderhede weer te gee en net 'n paar nuwighede sal vermeld word.

Volgens die huidige wetgewing pleeg die partye 'n misdryf indien die ooreenkoms nie op skrif is en die nodige besonderhede bevat nie.[37] Geen

30 Net soos by kontrakte bo R200 000 en benede R2 000 geld sekere bepalings van die wet, waaronder die algemene verbod op buitensporige rente, steeds.

31 Behalwe vir enkele uitsonderings is regspersone uitgesluit van die beskerming van die Engelse en Australiese kredietwetgewing. Sien die definisies van *credit sale contract* en *loan contract* in a 5 van Nieu-Suid-Wallis se Credit Act 94 van 1984; die definisie van *individual* in a 189(1) van die Britse Consumer Credit Act 39 van 1974; Goode *Consumer credit law* (1989) 93; Guest en Lloyd *Encyclopedia of consumer credit law* (1975) 1 – 004. Al is 'n maatskappy ook hoe klein, die Engelse wet beskerm hom nie (Marshall *Scots mercantile law* (1983) 195). In Denemarke is na behoorlike oorweging tot die gevolgtrekking gekom dat dit prakties moeilik is om kriteria uit te werk wat bepaal wat "groot" en "klein" regspersone is (Madsen "The impact of consumer law on the law of contracts in Denmark" 1984 *Scandinavian Studies in Law* 91).

32 A 2(1) van die Wet op Kredietooreenkomste.

33 So is die Woekerwet van toepassing op die koop van 'n trekker op krediet maar die Wet op Kredietooreenkomste geld glad nie.

34 A 2(2).

35 Daar is uitsonderings soos die tot nog toe betreklik eenvoudige afspraak vir kredietfasiliteite op 'n tjekrekening.

36 Onderskeidelik a 3 en 5(1).

37 A 5(2) en 23 van die Wet op Kredietooreenkomste; a 3(6) van die Woekerwet.

privaatregtelike sanksie word egter aan so 'n versuim gekoppel nie.[38] Die Kredietwet behou die kriminele sanksie[39] maar sorg andersins dat dit vir 'n kredietgewer deeglik die moeite werd is om die wet te gehoorsaam. Tot tyd en wyl die kontrak op skrif gestel is, kan die kredietgewer naamlik nie finansieringskoste[40] verhaal nie.[41] In Suid-Afrika is, behalwe in 'n baie beperkte geval,[42] nie in die verlede met so 'n sanksie gewerk nie. In ander stelsels is dit egter nie 'n vreemde bepaling nie.[43] Indien die kontrak nie inhoudelik aan die vereistes van die Kredietwet voldoen nie, is dit nie *per se* nietig nie maar 'n hof kan dit nietig verklaar of regstelling gelas as weglating van 'n bepaling nadeel vir die kredietnemer inhou.[44]

Wat die *inhoud* van kontrakte betref, is daar veral ten opsigte van wentelkrediet aansienlike uitbreiding in die Kredietwet ten einde die skuldenaar behoorlik op hoogte te bring met die inhoud en gevolge van sy regsband.[45] Dit sluit breedvoerige inligting in oor die wyse waarop finansieringskoste bereken word, die *effektiewe* finansieringskostekoers, hoe transaksiegelde[46] bereken word ensovoorts.

Talle van die ingewikkelde bepalings in die Woekerwet wat op huurtransaksies betrekking het, is in 'n poging tot vereenvoudiging uit die Kredietwet weggelaat. In die plek daarvan vereis laasgenoemde[47] nou dat die partye self by wyse van ooreenkoms die verhouding tussen hulle moet reël. Hulle moet in die kontrak voorsiening maak vir aangeleenthede soos instandhouding van die huursaak, waardasie by beëindiging, wat met die huursaak by afloop van die kontrak gebeur, die finansiële verrekeningsproses by beëindiging ensovoorts.

Die Kredietwet vereis ook dat sekere sleutelbeskermingsmaatreëls[48] in die wet op die voorste bladsy van die kontrak onder die kredietnemer se aandag gebring word.[49] Die bewoording van hierdie kennisgewing is in eenvoudige taal voorgeskryf in bylae 2 tot die wet.[50] Hierdie is kennelik 'n poging om die verbruiker se onkunde oor sy eie beskerming te verlig.[51]

5 ONGELDIGE BEPALINGS

Net soos verbruikerswetgewing tradisioneel die minimum inhoud van kontrakte voorskryf, word sekere bepalings in kontrakte verbied. Dit word al baie jare

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38 A 5(2) van die Wet op Kredietooreenkomste; a 3(8) van die Woekerwet.
39 A 21(17).
40 Rente in leketaal. Die begrip omvat egter meer as rente.
41 A 21(2)(a).
42 A 2(9) van die Woekerwet.
43 Sien a 25 van Nieu-Seeland se Credit Contracts Act 27 van 1981; a 42 en 43 van Nieu-Suid-Wallis se Credit Act 94 van 1984.
44 A 21(3).
45 A 21(5).
46 Grootboekgelde in die ou dae.
47 A 21(6)(c) en 21(7).
48 Bv die afkoelreg van vyf dae en die skuldenaar se reg om sy skuld vroeër af te los.
49 A 21(7)(a).
50 Dit is 'n uitbreiding van a 5(1)(i) van die Wet op Kredietooreenkomste wat slegs tov die afkoelreg 'n kennisgewing vereis, en dan wel in dieselfde woorde as die artikel wat die afkoelreg verleen (a 13 van die Wet op Kredietooreenkomste). Dit lyk egter sinvoller om eenvoudige bewoording voor te skryf wat die wetgewende bepaling in alledaagse taal onder die skuldenaar se aandag bring.
51 Dieselfde word gedoen in bylae 2 van Nieu-Seeland se Credit Contracts Act 27 van 1981.

in Suid-Afrika gedoen.[52] Die huidige bepalings kon met vrug in die Kredietwet opgeneem word en sekere gebreke of swak bewoording is reggestel. 'n Paar nuwe verbiedinge is ook in die Kredietwet opgeneem waarvan twee hier uitgewys sal word.

Meneer AS van Straaten van die konsultasie-onderneming Konsultus het in mondelinge getuienis voor die navorsingskomitee daarop gewys dat jurisdiksiebedinge in kredietkontrakte eensydig bewoord is. Dikwels stem slegs die kredietnemer tot 'n bepaalde hof se jurisdiksie toe maar die kredietgewer verleen nie dieselfde toestemming nie. Ons stem met hom saam dat dit onbillik is, vandaar 'n nuwe bepaling in die Kredietwet.[53] Hierdie verbod lui dat 'n kontrak nie 'n bepaling mag bevat waarvolgens 'n kredietnemer toestem tot 'n hof se jurisdiksie nie, tensy dit terselfdertyd bepaal dat die kredietgewer ook toestem tot die betrokke hof se jurisdiksie.

'n Lid van die publiek wat 'n skriftelike voorlegging aan die regskommissie gemaak het, het ons aandag gevestig op sekere bedinge in kredietkontrakte wat volgens hom onbillik is. Een daarvan is 'n bepaling wat 'n sertifikaat van aanspreeklikheid (''certificate of indebtedness'') wat byvoorbeeld deur 'n bankbestuurder uitgereik word, verhef tot afdoende bewys (''conclusive evidence'') van die feite daarin vermeld. Ofskoon daar in die verlede onsekerheid was oor die geldigheid van sulke bepalings in kontrakte[54] het die volbankbeslissing in *Donelly v Barclays National Bank Ltd*[55] dit bo twyfel gestel dat so 'n beding geldig is. Ons het heelwat standaardkontrakte nagegaan wat in die praktyk gebruik word; en dit is duidelik dat die bewyswaarde wat aan sulke sertifikate geheg word, wissel van *prima facie* bewys tot afdoende bewys. Dit sou nie raadsaam wees om sulke bedinge heeltemal te verbied nie omdat dit bewys en getuienis in elke saak sou noodsaak – dit is nóg in die kredietgewer nóg in die kredietnemer se belang. 'n Sertifikaat wat as *prima facie* bewys dien, lyk eerder na die billike oplossing. In die (betreklik klein aantal) gevalle waar 'n skuldenaar die *prima facie* saak wil versteur, staan dit hom vry. Dit lyk egter onbillik dat 'n kredietnemer in die geval van 'n tipiese verbruikerskontrak gebonde moet wees aan 'n sertifikaat wat as finale en afdoende bewys dien tensy hy byvoorbeeld bedrog kan bewys. Gevolglik is 'n verbod in die Kredietwet opgeneem.[56] Dit lui dat 'n kontrak nie 'n bepaling mag bevat met die strekking dat 'n sertifikaat, verklaring of enige dokument waarin die kredietnemer se aanspreeklikheid uiteengesit word, as afdoende bewys sal dien van sy aanspreeklikheid nie. 'n Ooreenkoms dat so 'n sertifikaat *prima facie* bewys sal wees van die feite daarin vermeld, is egter in orde.[57]

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52 Bv a 6 van die Wet op Huurkoop 36 van 1942; a 6 van die Wet op Kredietooreenkomste 75 van 1980; a 7 van die Wet op die Verkoop van Grond op Afbetaling 72 van 1971; a 15 van die Wet op Vervreemding van Grond 68 van 1981; reg 4.2 van die Bêrekoopregulasies van 1980-06-13.

53 A 22(1)(u).

54 Sien *Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1989 3 SA 750 (T).

55 1990 1 SA 375 (W).

56 A 22(1)(n).

57 A 22(5).

6 DEPOSITO'S EN BETAALTERMYNE

Die Wet op Kredietooreenkomste[58] magtig die betrokke minister om minimum deposito's (die wet noem dit "aanvanklike betaling") en maksimum betaaltermyne by koop- en huurkontrakte voor te skryf. Hierdie is 'n magtigende bepaling wat heel kwistig aangewend word.[59] Die doel met sulke voorskrifte is enersyds om verbruikers te beskerm deur te verseker dat slegs diegene met 'n minimum betaalvermoë tot die kredietmark toetree, en dan ook nie sy krediet vir 'n onhebbelik lang tyd verbind nie. Andersyds word dié wetgewing gebruik om, afhangende van die ekonomiese prioriteite op 'n gegewe tydstip, óf die besteding op verbruikersgoedere te stimuleer óf die mark af te koel. Die materiële gevolge van nie-betaling van die deposito en oorskryding van die betaaltermyn was egter nog altyd 'n kwessie van groot omstredenheid en onsekerheid in ons reg.[60] In die Kredietwet word gepoog om hierdie stofskoppery tot ruste te bring.

Die eerste aangeleentheid wat aangespreek is, is die sanksie vir nie-betaling van die deposito. Behalwe om dit, soos in die huidige Wet,[61] tot 'n misdryf te verklaar,[62] moes die gevolge van nie-betaling van die deposito op die *geldigheid* van die kontrak behoorlik oorweeg word. Die sanksie wat geheg moet word aan nie-betaling van die deposito is 'n moeilike kwessie. Die Huurkoopwet het so 'n kontrak ongeldig verklaar.[63] Die Wet op Kredietooreenkomste bepaal dat so 'n kontrak nie *bindend* is nie.[64] Die skrywers was dit eens dat dit beteken dat die kontrak nietig is.[65] In *Nel v Santambank Bpk*[66] is egter beslis dat niebetaling van die deposito by kontraksluiting 'n *nudum pactum* tot stand bring. Word dit nog dieselfde dag betaal, verkry die kontrak regskrag; indien dit nie gebeur nie is "nietigheid"[67] die ooreenkoms se voorland. Dit is noodsaaklik dat daar geen twyfel oor hierdie aangeleentheid moet bestaan nie. Wetgewers in ander lande het van verskillende sanksies gebruik gemaak. Daaruit blyk telkens dat oortreding van hierdie bepalings met groot erns bejeën word. In Nederland

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58 A 3(1).

59 Tussen 1981-02-27 en 1992-03-27 is voorskrifte in hierdie verband by 17 geleenthede afgekondig (sien Otto *Credit law service* par 24 vn 4). Die jongste regulasies is afgekondig by R 956 in *SK* 13887 van 1992-03-27.

60 Dié onderwerp is volledig elders behandel, insluitend die voorstelle vervat in die Kredietwet. In die huidige bydrae sal dit net kortliks behandel word. Sien vir 'n volledige bespreking Otto "Regspolitieke oorwegings by die voorskryf van deposito's en betaaltermyne vir kredietooreenkomste" 1990 *TSAR* 559; "Deposito's en betaaltermyne by kredietooreenkomste: probleme in die positiewe reg en die praktyk" 1991 *TSAR* 389; "Deposito's en betaaltermyne by kredietooreenkomste: aanbevelings vir regswysigings" 1991 *TSAR* 611 en 1992 *TSAR* 28.

61 A 6(6)(b) en 23 van die Wet op Kredietooreenkomste.

62 A 23(17) van die Kredietwet. Volgens die nuwe bepaling is dit egter net die kredietgewer en diegene wat namens hom optree wat die misdryf pleeg. Die kredietnemer begaan nie 'n oortreding nie. Die filosofie hieragter is dat die kredietverskaffer, en nie die verbruiker nie, noulettend na betaling van 'n deposito behoort om te sien.

63 A 7(1) Wet 36 van 1942.

64 A 6(5).

65 De Jager *Kredietooreenkomste en finansieringskoste* (1981) 63; Diemont en Aronstam *The law of credit agreements and hire-purchase in South Africa* (1982) 117; Flemming *Kredittransaksies* (1982) 118 179; Otto "Entering into a credit agreement" 1980 *BML* 36 vn 11. Sien vir 'n volledige bespreking van die kwessie Otto 1991 *TSAR* 390 ev.

66 1986 2 SA 28 (O).

67 32D.

het nie-betaling van die deposito tot gevolg dat die eiendomsvoorbehoud by 'n afbetalingskontrak verval met die gevolg dat eiendomsreg onmiddellik op die koper oorgaan.[68] Dit is ook die effek van die Malawiese wet.[69] In Nieu-Seeland het nie-betaling van die deposito of oorskryding van die betaaltermyn tot gevolg dat die kontrak nietig ("void") is.[70] Wat die Suid-Afrikaanse reg betref, beveel ons in die Kredietwet aan dat so 'n kontrak met *onafdwingbaarheid* getref word. Dit pas goed by bekende reëls van die kontraktereg in. Die kontrak is dus geldig maar geeneen kan prestasie vorder alvorens die deposito betaal is nie. Dit sou nie gepas wees om, soos in ander lande, aan die eiendomsvoorbehoud te torring nie omdat die Kredietwet ook van toepassing is op gewone kredietkope en huurkontrakte en nie net op huurkoopkontrakte nie.

Dit gebeur dikwels in die praktyk dat 'n deposito na kontraksluiting betaal word, of in paaiemente afbetaal word totdat dit die vereiste bedrag bereik. Dit is uiters onbillik teenoor 'n skuldenaar om die kontrak dan steeds as onafdwingbaar te beskou. Voor betaling van die deposito dra albei partye in elk geval die risiko en nadelige gevolge van onafdwingbaarheid, en pleeg die kredietgewer volgens artikel 23(17) van die Kredietwet boonop 'n misdryf. Nadat die deposito egter wel betaal is, is daar geen rede waarom die kontrak nie voortaan sy normale gang kan gaan nie. Gevolglik bepaal die Kredietwet kort en kragtig:

> "'n Kontrak wat ooreenkomstig subartikel (1) onafdwingbaar is, verkry volle werking sodra die voorgeskrewe deposito betaal is."[71]

So 'n situasie lyk regswetenskaplik meer aanvaarbaar as dat die kontrak *nietig* is vir 'n sekere tyd en daarna regskrag verwerf.[72] Die nuwe bepaling is andersins in ooreenstemming met artikel 7(1)(a) van die ou Huurkoopwet[73] en artikel 6(5) van die huidige Wet op Kredietooreenkomste sedert die wysiging van die omskrywing van "aanvanklike betaling" in die Wet op Kredietooreenkomste deur Wet 53 van 1987. Albei hierdie wette het, heel prakties, voorsiening gemaak vir die latere betaling van die deposito al het dit beteken dat die kontrak intussen mank was. Die voorgestelde Kredietwet verander net die sanksie uitdruklik na tussentydse onafdwingbaarheid.

Tot tyd en wyl die deposito betaal is, is die kontrak dan onafdwingbaar. Om enige dispute oor die partye se regsposisie in dié verband uit die weg te ruim, word uitdruklik bepaal dat enigeen wat reeds presteer het, sy prestasie kan terugeis tensy die kontrak deur latere betaling van die deposito volle werking verkry het.[74] In beginsel moet die deposito dus by lewering van die goedere betaal word,[75] maar betaling in 'n latere stadium kan die tussentydse onafdwingbaarheid van die kontrak regstel. Natuurlik word die kredietgewer nie verskoon van die misdryf wat hy gepleeg het deur te versuim om die deposito by lewering van die goedere in ontvangs te neem nie.

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68 A 41 van die Wet op het Afbetalingsstelsel 1961. Sien De Vries-Hess *Wet op het Afbetalingsstelsel 1961* (1979) 26.
69 Hire-Purchase Act Cap 48:05 a 24(3).
70 The Hire-Purchase and Credit Sales Stabilisation Regulations (1957) reg 10.
71 A 23(2).
72 Lg reëling van 'n nietige kontrak wat later lewe bekom, is deur De Wet "Law of purchase and sale" 1965 *Annual Survey of SA Law* 129 'n "legal monstrosity" genoem.
73 Soos toegepas in *Croxon's Garage (Pty) Ltd v Olivier* 1971 4 SA 85 (T).
74 A 23(16) van die Kredietwet.
75 A 23(3).

Daar is nog enkele ander wysigings rakende deposito's maar daar kan met bogenoemde volstaan word.

Wat betaaltermyne betref, bevat die Kredietwet belangrike nuwe bepalings. Die Wet op Kredietooreenkomste spel dit nie duidelik uit wat die sanksie is indien die voorgeskrewe betaalperiode oorskry word nie.[76] Die navorsingskomitee het die verskillende sanksies vir 'n ontoelaatbare lang betaaltermyn behoorlik oorweeg en het aanbeveel dat die *kredietnemer* die kontrak mag beëindig indien die wet verontagsaam word. Met ander woorde, die kontrak is na keuse van die kredietnemer *vernietigbaar* volgens artikel 23(11). Nietigheid of selfs onafdwingbaarheid van die kontrak lyk hier 'n bietjie kras. Betaling van die deposito is 'n eenmalige gebeurtenis wat by kontraksluiting plaasvind. Veranderings aan die betaalperiode kan egter lank na kontraksluiting nog gebeur[77] en verkeerde berekenings of 'n fout in hierdie verband (of selfs 'n fout of regsdwaling by kontraksluiting) behoort nie die kredietnemer vir die duur van die kontrak te benadeel deurdat sy kontrak nietig of onafdwingbaar is nie. Aan die ander kant loop die kredietgewer volgens die voorgestelde artikel 23(11) die risiko van 'n vernietigbare kontrak en behoort hy dus sorgsaam op te tree.

Artikel 23(12) voer 'n billikheidsreëling in. Dit bepaal dat die kredietnemer nie meer die kontrak mag beëindig indien albei partye ten volle presteer het nie.

Artikel 23(13) van die Kredietwet is nuut. Dit is enersyds 'n billikheidsreëling en los andersyds onsekerhede op wat in die praktyk bestaan het. Dié bepaling laat 'n oorskryding van die betaaltermyn in twee gevalle toe:

(a) Waar die oorskryding die gevolg is van 'n *uitstel* wat die kredietgewer gedurende die bestaan van die kontrak verleen aan 'n kredietnemer wat agterstallig met sy betaling geraak het.

(b) Waar die finansieringskostekoers later verhoog word. In so 'n geval mag die partye ooreenkom om die termyn te verleng[78] mits die verlenging(s) nie die voorgeskrewe termyn met meer as 15 persent oorskry nie.

7 TERUGNAMEPROSEDURES

Dit is geykte reg dat 'n skuldeiser nie 'n kontrak kan kanselleer bloot omdat die skuldenaar kontrakbreuk gepleeg het nie. Breedweg gesproke moet die kontrakbreuk wesenlik wees of die skuldeiser moet oor 'n bedonge terugtredingsreg ('n *lex commissoria*) beskik voordat hy kan terugtree.[79] Dit het gevolglik gebruiklik geword om in kredietooreenkomste 'n *lex commissoria* in te sluit wat terugtrede deur die skuldeiser magtig sou die skuldenaar op enige wyse kontrakbreuk pleeg. So 'n beding laat kansellasie toe ongeag die erns van die kontrakbreuk.[80] Ofskoon geldig, kan dit dus inherent onbillik wees. Wetgewers wêreldwyd het sulke bedinge aan bande gelê – nie deur dit te verbied nie maar deur te vereis dat die skuldenaar eers aangemaan moet word alvorens die beding

76 Sien Van Jaarsveld en Oosthuizen 403; Otto *Credit law service* par 25.
77 Bv waar die kredietgewer op 'n stadium uitstelle vir betaling verleen. Sien die bespreking van a 23(13) in die teks direk hierna.
78 Maw om vanweë die hoër rente 'n nuwe paaiementeskedule op te stel wat die skuldenaar 'n langer betaaltydperk bied en sy skielike verknorsing kan help verlig.
79 Sien Joubert *General principles of the law of contract* (1987) 236 ev.
80 Sien *Oatorian Properties (Pty) Ltd v Maroun* 1973 3 SA 777 (A) 785.

geïmplementeer kan word.[81] Dit was ook nog altyd die tradisie in Suid-Afrikaanse verbruikerswetgewing.[82] Tans vereis artikel 11 van die Wet op Kredietooreenkomste dat die kredietopnemer 30 dae skriftelik aangemaan moet word voordat die koop- of huurgoed teruggeneem mag word. Daar is geen rede waarom hierdie bepaling nie behou behoort te word nie. Die navorsingskomitee het egter aanbeveel dat dit enersyds uitgebrei moet word, en andersyds in belang van skuldeisers getemper behoort te word.

Wat uitbreiding betref, bepaal die Kredietwet dat 'n aanmaning nie net gestuur moet word alvorens teruggetree kan word nie maar ook voordat 'n vervroegingsbeding[83] of 'n straf- of verbeuringsbeding in werking gestel kan word.[84] Laasgenoemde tipe bedinge in 'n kontrak het verreikende gevolge vir 'n skuldenaar en dit lyk onses insiens billik[85] dat afdwinging daarvan vooraf-gegaan behoort te word deur 'n 30 dae-kennisgewing tot herstel van kontrakbreuk.[86]

Die skuldeiser se posisie word op drie wyses verlig. Indien hy die 30 dae-kennisgewing per geregistreerde pos gestuur het en dit word onafgehaal teruggestuur, of hy poog om dit persoonlik te oorhandig en die kredietnemer weier ontvangs daarvan, word dit geag dat hy behoorlik kennis gegee het.[87] Dit is 'n nuwe bepaling. Ten tweede word sy posisie versterk deurdat hy, hangende die afloop van die 30 dae, 'n tussentydse bewaarnemingsbevel kan kry indien daar 'n wesenlike moontlikheid bestaan dat die goedere verniel, beskadig, verbruik of vernietig sal word of verlore sal raak of vervreem sal word.[88] Daarmee word die beslissing in *First Consolidated Leasing and Finance Corp Ltd v NM Plant Hire (Pty) Ltd*[89] ongedaan gemaak. Derdens word die huidige reëling in artikel 12 van die Wet op Kredietooreenkomste verander waarvolgens die kredietgewer *na* terugname die goedere vir nog 30 dae moet hou sodat die skuldenaar 'n tweede geleentheid kry om die kontrakbreuk te herstel. 'n Tydperk van 60 dae[90] lyk onses insiens onnodig lank en die tweede tydperk[91] word in die Kredietwet na 14 dae verkort.[92]

Die navorsingskomitee het tydens die aanhoor van mondelinge getuienis klagtes ontvang oor die waardasie van huur- of koopgoedere wat teruggeneem

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81 Sien vir vbe hiervan a 26 van die Nieu-Seelandse Hire-Purchase Act 147 van 1971; a 76 87 en 88 van die Engelse Consumer Credit Act 39 van 1974; Leys en Northey *Commercial law in New Zealand* (1982) 605; Fontaine en Bourgoignie *Consumer legislation in Belgium and Luxemburg* (1982) 152; a 1576q van die Nederlandse *BW*.

82 Sien bv a 13 van die Wet op die Verkoop van Grond op Afbetaling 72 van 1971; a 19 van die Wet op Vervreemding van Grond 68 van 1981; a 12 van die Wet op Huurkoop 36 van 1942; a 11 van die Wet op Kredietooreenkomste 75 van 1980.

83 Dit is 'n beding wat 'n skuldeiser magtig om in geval van kontrakbreuk die hele uitstaande bedrag (al die paaiemente) in een aksie op te eis (sien hieroor Otto "Vervroegingsbedinge by verbruikerskontrakte" 1986 *De Jure* 33).

84 A 37(1).

85 Sien vir vergelykende wetgewing a 87 van die Engelse Consumer Credit Act 39 van 1974; a 19 van die Wet op Vervreemding van Grond 68 van 1981.

86 A 37(2).

87 A 37(5).

88 A 42(1).

89 Hierbo.

90 Die aanmaning vooraf plus die 30 dae na terugname.

91 Na terugname.

92 A 38(1).

is. Bewyse is voorgelê van onrealisties lae waardasies en onbillike pryse by herverkope wat natuurlik tot gevolg het dat die kredietopnemer steeds met 'n groot uitstaande skuld opgeskeep sit. Die Kredietwet bepaal nou dat die kredietgewer die kredietnemer skriftelik in kennis moet stel van die waarde wat op die goed geplaas is.[93] Hy moet hom verder meedeel dat hy geregtig is om binne sewe dae 'n kontantkoper voor te stel wat die goed teen minstens die waardasie mag koop.[94] Dit bied aan die kredietnemer die geleentheid om iemand te soek wat bereid is om meer te betaal as die bedrag van 'n potensieel lae waardasie.[95] Dié bepaling is volkome nuut.

8 ENKELE ANDER KONTRAKTUELE AANGELEENTHEDE

Soos reeds voorheen gesê is, is dit onmoontlik om binne die bestek van 'n tydskrifartikel al die bepalings van die nuwe Kredietwet te bespreek. Voordat oorgegaan word tot 'n behandeling van die belangrikste *finansiële* aspekte van die wet, kan daar net kortliks gewys word op enkele ander wysigings en invoerings op kontraktuele gebied:

(a) Die afkoelreg van vyf dae waarvolgens die kredietnemer die kontrak kan beëindig indien dit op inisiatief van die kredietgewer buite laasgenoemde se besigheidsperseel gesluit is,[96] word met sekere wysigings behou.[97] Die afkoelreg is egter nie van toepassing op geldleningskontrakte nie.

(b) Indien 'n kredietnemer meerdere skulde aan dieselfde kredietgewer verskuldig is, mag hy ondanks 'n teenstrydige bepaling in die kontrak sy betaling toewys aan die skuld van sy keuse.[98] Dit is 'n nuwe bepaling.

(c) Behalwe by geldleningskontrakte[99] mag niemand 'n wissel (behalwe 'n tjek) of promesse neem ter betaling van, of as sekuriteit vir, 'n skuld kragtens 'n kredietkontrak nie.[100] Tjeks mag wel aanvaar word. Indien die tjek egter vooruitgedateer is,[101] mag dit net geneem word indien dit gekruis en gemerk is "nie verhandelbaar" of indien dit woorde bevat wat oordrag verbied.[102]

(d) Alvorens iemand hom as borg of mede-skuldenaar verbind vir 'n skuld uit 'n kredietkontrak, moet die kredietgewer of diegene wat namens hom optree, 'n voorgeskrewe kennisgewing aan die persoon voorlees wat hom inlig waarvoor hy hom inlaat.[103]

(e) Indien 'n verskaffer of vervaardiger goed aan 'n kredietgewer lewer, verkoop of verhuur, wat dit dan weer aan 'n kredietnemer verkoop of verhuur,

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93 Waardasie moet geskied deur 'n "bevoegde en onbevooroordeelde persoon" wat deur die kredietgewer self aangewys is (a 40(1)).
94 A 40(4) en (7).
95 Onrealistiese waardasies is beslis nie uniek nie en kom in ander lande ook voor (sien die *Crowther*-verslag in Engeland: *Consumer credit. Report of the committee* Cmnd 4596 (1971) 294.
96 A 13 van die Wet op Kredietooreenkomste.
97 A 19 van die Kredietwet.
98 A 24.
99 Uitgesonderd 'n geldleningskontrak wat die lewering van dienste behels. In so 'n geval geld die verbod wel.
100 A 26(1).
101 Dit is 'n tjek gedateer en betaalbaar meer as sewe dae na uitgifte daarvan (a 26(4)).
102 A 26(2).
103 A 44 en bylae 3.

verkry die kredietnemer dieselfde regte (soos waarborge) teenoor die verskaffer of vervaardiger as wat die kredietgewer het. Dié regte bekom hy dus selfs al is daar geen kontraktuele band tussen hom en die vervaardiger of verskaffer nie.[104]

(f) Afstanddoening van verjaring word verbied[105] tensy dit betrekking het op 'n skuld wat reeds ontstaan het en die afstanddoening gerig is op 'n *bona fide* skikking.[106] 'n Standaardbeding in kredietkontrakte wat die Verjaringswet se werking uitsluit, is dus taboe.

(*Word vervolg*)

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104 A 45.

105 Hiermee word die beslissing in *Nedfin Bank Bpk v Meisenheimer* 1989 4 SA 701 (T) ongedaan gemaak wat kredietkontrakte betref (sien Hawthorne se oortuigende kritiek in haar bespreking van dié saak in 1991 *THRHR* 142).

106 A 51(3).

Let me say at once that down the years our Courts have never denied anybody the right to criticise a Judge by saying that he was mistaken and that his decision was erroneous. But that is certainly a far cry from permitting anybody to convert his right to criticise into a right to defame another person with impunity. Everyone is undoubtedly at liberty to criticise the conduct of Judges on the Bench in a fair and legitimate manner. *However, when the bounds of moderation and of fair and legitimate criticism are exceeded the Court has the power to interfere . . .*

Speaking for myself, a Judge does not fear criticism, nor does he resent it. No wrong is committed by any member of the public who freely exercises the ordinary right of criticising fairly and in good faith, whether in private or in public, any Judge who has acted in the execution of his duties.

By the same token, however, it is clear that, whenever such critics exercise their rights to freedom of speech, the criticism directed at Judges who performed their judicial duties should be shorn of imputing improper motives to the Judiciary, and such right to criticise should be exercised frankly, genuinely and without malice and should not endeavour to impair the course of justice (*per* Hattingh J in *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) 772).

Diskriminasieverbod en religieusgerigte onderwys – wat hou die toekoms in?*

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SUMMARY

Religious education and the prohibition of discrimination – what does the future hold?

The fundamental rights to freedom of association and freedom of religion are inherently contradictory to the prohibition of discrimination which is one of the primary stipulations of every human rights charter. It is therefore necessary to reconcile these apparently contradictory measures with reference to private-law relationships (*Drittwirkung*).

In the USA the prohibition of discrimination entails that the state should maintain religious neutrality to such an extent that religious education may not take place with any state support or financing. In the Netherlands and Germany religious education may receive state support on an equal basis, but no discrimination is allowed.

The relationship between the state and religious educational institutions in South Africa is analysed with reference to the South African government's proposed charter of fundamental rights and the ANC's proposed bill of rights. In terms of both these proposed charters freedom of religious education is possible, but in the case of the ANC's bill of rights it is not clear whether any state support and financing will be allowed such institutions. It is submitted that it is necessary to insert an express provision in the charter that religious education will receive state support on an equal basis on the condition that no discrimination or religious intolerance may be furthered.

The extent to which the prohibition of discrimination will be applicable to private-law relationships (*Drittwirkung*) should also be clearly stated in the charter and applied by a constitutional court.

1 DIE VOORGESTELDE MENSEREGTEHANDVES

Die Suid-Afrikaanse Regskommissie se werkstuk insake menseregte[1] en die interimverslag waarin aanbeveel word dat 'n menseregtehandves deel van enige nuwe konstitusionele bedeling in Suid-Afrika moet vorm,[2] is 'n langverwagte ontwikkeling wat uitgeloop het op die voorgestelde Handves van Fundamentele

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* Geldelike bystand van die Sentrum vir Navorsingsontwikkeling van die Raad vir Geesteswetenskaplike Navorsing, die Getrouheidsfonds vir Prokureurs en die Deutscher Akademischer Austauschdienst vir doeleindes van hierdie navorsing word hiermee erken. Menings en gevolgtrekkings in hierdie artikel vervat is dié van die skrywer en nie dié van genoemde instellings nie. Navorsing vir die artikel is op 1993-02-15 afgehandel.

1 *Werkstuk 25, Projek 58: Groeps- en menseregte* (1989).
2 Augustus 1991.

Regte wat gedurende Februarie 1993 deur die regering bekendgestel is. Die voorgestelde Bill of Rights van die ANC[3] is eweneens 'n positiewe ontwikkeling in hierdie verband. Die Republiek van Suid-Afrika is bykans die enigste land ter wêreld wat nie die Universele Verklaring van Menseregte van die Verenigde Nasies ingevolge die Verdrag van Rome[4] onderskryf nie en wat algemeen bekend staan as 'n land met 'n bedenklike menseregterekord.[5] Wat 'n mens se standpunt oor menseregte ook al is, is dit 'n onbetwisbare feit dat daar in die verlede deur 'n beduidende groep Suid-Afrikaners nie besondere erns met die beskerming van die regte en vryhede van die totale Suid-Afrikaanse bevolking gemaak is nie.[6]

Dat 'n menseregtehandves nie noodwendig 'n towerstaf is wat alle probleme in die Suid-Afrikaanse samelewing summier gaan oplos nie, staan vas.[7] Die belangrikste voordele daarvan is egter die feit dat dit 'n maatstaf vir die beoordeling van owerheidsoptrede daarstel en 'n gevoel vir die regte en vryhede van medeburgers (in veral privaatregtelike verhoudings) help bevorder.[8]

Een van die belangrikste bepalings van die Universal Declaration of Human Rights (UDHR)[9] is die diskriminasieverbod vervat in artikel 2:[10]

> "Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Die diskriminasieverbod moet in samehang met die ander verskanste regte geïnterpreteer word en, in die lig van bogemelde onderwerp, moet veral die samehang daarvan met die volgende regte beklemtoon word:

(a) die reg op vryheid van godsdiens en gewete soos omskryf in artikel 18 van die UDHR:[11]

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, *to manifest his religion or belief in teaching, practice, worship and observance.*"

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3 Vrygestel gedurende 1990; vgl ook die voorlopige hersiene weergawe hiervan (Februarie 1993) (red). Die ANC se eerste Bill of Rights is alreeds gedurende Desember 1943 vrygestel.

4 Aanvaar gedurende 1950.

5 Wellens "Apartheid, an international crime" in Heyde (red) *Begrensde vrijheid* (1989) 288-311.

6 Sien bv Dugard *Human rights and the South African legal order* (1978) 53 – 204; Mathews *Freedom, state security and the rule of law* (1986) 32 – 215.

7 Kruger *Die wordingsproses van 'n Suid-Afrikaanse menseregtebedeling* (1990) 1 – 2.

8 Du Plessis "Filosofiese perspektief op 'n menseregtehandves vir Suid-Afrika" in Van der Westhuizen en Viljoen (reds) *'n Menseregtehandves vir Suid-Afrika* (1988) 8 23; sien ook Kruger (1990) 1 – 2 en 360 – 369 in verband met die voordele van 'n menseregtehandves.

9 Die UDHR bevat slegs riglyne wat dan deur die state wat dit onderskryf, in hulle onderskeie grondwette of menseregte-aktes op 'n eiesoortige wyse opgeneem en geïmplementeer word. Tog is dit 'n belangrike bestanddeel van die volkeregtelike gewoontereg.

10 Dit word in die African Charter on Human and Peoples' Rights soos volg verwoord: "2. Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

11 A 8 van die African Charter lui: "Freedom of conscience, the profession and free practice of religion, shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

(b) die reg op vrye assosiasie soos omskryf in artikel 20:[12]

> "(1) Everyone has the right to freedom of peaceful assembly and association.
> (2) No one may be compelled to belong to an association."

Religieusgerigte onderwys en navorsing is dus wel enige persoon se reg,[13] maar dit moet in samehang met die diskriminasieverbod (wat onder meer diskriminasie op grond van geloof verbied) vertolk word. Hierdie samehang tussen die verskillende regte word nie in alle lande op dieselfde wyse hanteer nie. Alvorens daar na die moontlike vertolking van die verskillende bepalings in Suid-Afrika aandag geskenk word, word die hantering van die samehang tussen die verskillende verskanste regte in Nederland en die VSA, wat die aangeleentheid op totaal uiteenlopende wyses hanteer, ondersoek.

2 DIE NEDERLANDSE REGSPOSISIE

2 1 Algemene bepalings van die grondwet en NBW

Artikel 1 van die Grondwet voor het Koninkrijk der Nederlanden lui:

> "Allen die zich in Nederland bevinden, worden in gelijke gevallen gelijk behandeld. Discriminatie wegens godsdienst, levensovertuiging, politieke gezindheid, ras, geslacht of op welke grond dan ook, is niet toegestaan."

Hierteenoor bepaal artikel 6 in verband met godsdiensvryheid en meningsuiting:

> "(1) Ieder heeft het recht zijn godsdienst of levensovertuiging, individueel of in gemeenschap met anderen, vrij te belijden, behoudens ieders verantwoordelijkheid volgens de wet.
> (2) De wet kan ter zake van de uitoefening van dit recht buiten gebouwen en besloten plaatsen regels stellen ter bescherming van de gezondheid, in het belang van het verkeer en ter bestrijden of voorkoming van wanordelijkheden."

Die Nederlandse maatreël sluit dus (anders as in die geval van die UDHR) nie uitdruklik die reg in dat onderwys in ooreenstemming met die geloofsoortuiging van 'n individu of 'n groep beoefen mag word nie. Voorts mag die reg op godsdiensbeoefening en geloofsoortuiging in openbare belang deur wetgewing beperk word. Artikel 6(2) stel egter net die moontlikheid dat opelug godsdienstige byeenkomste in belang van gesondheid, die verkeer of openbare orde statutêr beperk mag word.[14]

Die reg op vrye assosiasie word ingevolge artikel 8 beskerm:

> "Het recht tot vereniging wordt erkend. Bij de wet kan dit recht worden beperkt in belang van de openbare orde."

Die reg op verenigingsvryheid is 'n beginsel wat alreeds sedert die negentiende eeu in die Nederlandse regspersonereg beklemtoon en toegepas word.[15] Hierdie

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12 A 10 van die African Charter lui: "10.1 Every individual shall have the right to free association provided that he abides by the law. 10.2 Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association."

13 A 18 UDHR: "to manifest his religion or belief in teaching, practice, worship and observance."

14 Vir 'n algemene uiteensetting van die wisselwerking tussen die diskriminasieverbod en vryheid van geloofsoortuiging, sien Vermeulen "De Goerees en de Kardinaal, oftewel: vrijheid van godsdienst versus discriminatieverbod" in Heyde (red) *Begrensde vrijheid* (1989) 258 – 278 en Van der Ploeg *Recht in het maatschappelijk middenveld* (1991) 19 – 20.

15 Van der Burg "Democratisering van gesubsidieerde instellingen" 1980 *WPNR* 361; Den Tonkelaar *Inleiding rechtspersonenrecht* (1988) 128 – 129; Asser-Van der Grinten *De rechtspersoon* 2/11 (1991) 205 241.

reg word in so 'n mate verskans dat daar geen diskriminasieverbod bestaan met betrekking tot die doelstellings en by die toelating van nuwe lede van vrywillige verenigings nie.[16] Die bestuur of ledevergadering van 'n vrywillige vereniging is gewoonlik bevoeg om ingevolge die voorskrifte van die statute of reëls van die vereniging te besluit of 'n persoon aan die vereistes vir lidmaatskap voldoen. Die statute of reëls mag vrylik onderskeidende (diskriminerende?) doelstellings (byvoorbeeld die bevordering van die belange van afgetrede, manlike spoorwegwerkers) of lidmaatskapsvereistes (byvoorbeeld slegs vroue, bejaardes of Moslems mag lede van 'n vereniging wees) stel, onderworpe aan die nakoming van redelikheid en billikheid (artikel 8 Boek 2 *Nieuw Burgerlijk Wetboek* (*NBW*)) en goeie trou (artikels 14 en 15 Boek 2 *NBW*).[17] Rassediskriminasie word gewoonlik as strydig met die beginsels van goeie trou bestempel.

2 2 Die regsposisie van Nederlandse skole en universiteite

Die regsreëls van toepassing op vrywillige verenigings as privaatregtelike regspersone is egter nie noodwendig op publiekregtelike regspersone van toepassing nie. Ingevolge die Nederlandse reg word universiteite as publiekregtelike regspersone geklassifiseer en word die regsposisie van universiteite aan die hand van publiekregtelike maatstawwe beoordeel.[18] Die samehang tussen vryheid van assosiasie en godsdiensoortuiging enersyds en die diskriminasieverbod andersyds word dus by universiteite synde openbare, staatsgesubsidieerde instellings op 'n ander wyse as by privaatregtelike regspersone hanteer.[19]

As uitgangspunt word gestel dat Nederlandse universiteite openbare instellings is wat uit staatsfondse gefinansier word en dat die diskriminasieverbod dus voorrang behoort te geniet bo die algemene beginsels van vryheid van assosiasie en geloofsoortuiging.[20] Dat die diskriminasieverbod egter nie onbegrens toegepas kan word nie, blyk uit die vanselfsprekende feit dat op grond van akademiese kwalifikasies en vermoëns toelatingsvereistes aan studente en aanstellingsvereistes aan dosente gestel word. Voorts het elke student en dosent aan 'n universiteit steeds die reg op vrye meningsuiting en die behoud en bevordering van sy eie geloofsoortuiging, welke regte in Nederland sonder skroom opgeëis en uitgeoefen word. Tog bestaan daar 'n verdraagsaamheid wat die vryheid van geloofsoortuiging en meningsuiting moontlik maak.[21]

Hierdie algemene beginsel van verdraagsaamheid maak dit dan ook moontlik dat religieusgerigte (ook uitsluitlik Christelike) primêre, sekondêre en tersiêre onderwys statutêr in Nederland erken en verskans word. Artikel 23 van die Grondwet skryf dan ook voor dat geloofsoortuiging in die openbare

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16 Pitlo-Löwensteyn *Het rechtspersonenrecht* 1A (1986) 122; Den Tonkelaar (1988) 130; Asser-Van der Grinten (1991) 240 – 241; sien hierteenoor die posisie in die Amerikaanse reg in par 3 2 hieronder.

17 Vir die toepassing van redelikheid, billikheid en goeie trou, sien veral Pitlo-Löwensteyn (1986) 108 – 109; Den Tonkelaar (1988) 60 – 61; Asser-Van der Grinten (1991) 42 – 44 105 – 117 234 – 235; insake die verbieding van organisasies met ongewenste doelstellings, vgl Pienaar "Die reg insake verbode organisasies" 1986 *SA Publiekreg* 81 – 87.

18 Van der Burg (1980) 361 – 362; Pitlo-Löwensteyn (1986) 25; Asser-Van der Grinten (1991) 44 165 – 166.

19 Van der Ploeg (1991) 24 – 25.

20 Vermeulen (1989) 267 – 271.

21 *Idem* 269.

onderwys eerbiedig moet word.[22] Ingevolge die Wet op het Wetenschappelijk Onderwijs van 1960 (soos gewysig)[23] word daar benewens openbare universiteitsinstellings ook vir besondere (Christelike) universiteite voorsiening gemaak,[24] by name die Vrije Universiteit te Amsterdam, die Katholieke Universiteit te Nijmegen en die Katholieke Hogeschool te Tilburg.[25] Artikel 16 bepaal:

> "1. De regering draagt, op de voet van het in deze afdeling bepaalde, zorg voor gelijkwaardige ontwikkelingsmogelijkheden voor de uit's rijks kas bekostigde universiteiten en hogenscholen.[26] Zij neemt hierbij, rekening houdend met het onderscheid tussen openbare en bijzondere instellingen, de vereiste van een redelijke taakverdeling tussen de instellingen in acht."

Die verskaffing van finansiering aan die besondere (Christelike) universiteite geskied net op voorwaarde dat die gemelde universiteite aan algemene administratiewe en akademiese vereistes en standaarde moet voldoen, byvoorbeeld die vasstelling en indeling van fakulteite en studierigtings (artikels 18 – 22); die toelatingsvereistes, kursusduur en eksaminering van doktorsgraadstudente (artikels 23 – 33); vereistes waaraan die teologiese fakulteite van die besondere universiteite moet voldoen (artikels 33*bis* en *ter*);[27] die bekendmaking van enige wysiging in die statute van die besondere universiteite aan die Minister van Onderwijs en Wetenschappen (wat slegs kennis neem van die wysiging en dit nie hoef goed te keur nie) (artikel 93(1)); verslaglewering aan die minister insake die organisasie, finansiering en stand van roerende en onroerende goed van die universiteit (artikel 93(2) – (4)); en die voorskrif dat die personeel van die besondere universiteite nie 'n gunstiger vergoedingspakket as die personeel van die openbare universiteite mag ontvang nie (artikel 94).

Daar word egter nêrens in die wet enige beperking op die eiesoortige, Christelike beleid of die reg op meningsuiting en geloofsoortuiging van personeel en studente van die besondere universiteite geplaas nie en die aanstelling van personeel, inhoud van leerstof en navorsing kan dus op 'n Christelike grondslag geskied sonder die gevaar dat dit as 'n diskriminerende praktyk ingevolge artikel 1 van die Nederlandse Grondwet getipeer kan word. Voorts hou die toepassing van die diskriminasieverbod in dat, sover dit prakties moontlik is en met inagneming van onderskeie behoeftes, gelyke hulp van staatsweë aan navolgers van verskillende geloofsuitgangspunte verleen word in die verskaffing van besondere onderwysgeleenthede.[28]

3 DIE AMERIKAANSE REG

Die Amerikaanse Bill of Rights neem die vorm aan van *amendments* tot die Constitution of the United States wat op 17 September 1787 aanvaar is – dit is dus een van die heel oudste menseregtehandveste wat nog steeds in gebruik

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22 A 23(3) lui: "Het openbaar onderwijs wordt, met eerbiediging van ieders godsdienst of levensovertuiging, bij de wet geregeld."
23 *Staatsblad* 559 van 1960; soos gewysig ingevolge *Staatsblad* 656 van 1975; sien *Staatsblad* 729 van 1975 vir die gewysigde teks.
24 A 3.
25 A 15.
26 Dit sluit ingevolge a 15 ook die besondere universiteite in.
27 Dit hou bloot administratiewe voorskrifte in en maak geensins inbreuk op die besondere universiteite se geloofsuitgangspunte soos in hulle beleid vervat nie.
28 Sien a 16.

is. Die *amendments* is nie almal gelyktydig aanvaar nie maar die eerste tien is op 25 September 1789 deur die Senaat goedgekeur en die ander met verloop van tyd daarna.

3 1 Diskriminasieverbod

Daar bestaan nie 'n uitdruklike en algemene diskriminasieverbod in die Bill of Rights nie, maar dit word afgelei uit verskeie *amendments*, soos deur die Amerikaanse Supreme Court geïnterpreteer.[29] Die *fourteenth amendment* lui:

> "1. All persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Die *fifteenth* en *nineteenth amendments* bepaal onderskeidelik dat stemreg nie op grond van ras of geslag weerhou mag word nie en dat die kongres gemagtig is om hierdie bepalings by wyse van wetgewing af te dwing. Die diskriminasieverbod is ook in verskeie Civil Rights Acts uiteengesit, byvoorbeeld die verbod op rassediskriminasie ingevolge die *thirteenth amendment* vind sy oorsprong in die Civil Rights Act van 1866,[30] terwyl die *equal protection*-bepaling ingevolge die *fourteenth amendment* uit die Civil Rights Act van 1871 ontstaan het.[31]

3 2 Godsdiens- en verenigingsvryheid

Die reg op verenigingsvryheid en godsdiensvryheid word albei in die *first amendment* vervat:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3 2 1 Verenigingsvryheid

Alhoewel die reg op verenigingsvryheid nie uitdruklik ingevolge die *first amendment* verskans word nie, word tans algemeen aanvaar dat die reg uit vryheid van spraak en vryheid van vergadering voortspruit.[32] Verenigingsvryheid impliseer egter nie sonder meer die reg om te diskrimineer nie.[33] In die regspraak word onderskei tussen *intimate association* en *expressive association*. In die geval van *intimate association* mag die lede van so 'n vereniging wel diskriminerende maatreëls toepas met betrekking tot die doelstellings van die vereniging en die toelatingsbeleid van nuwe lede, aangesien dit verband hou met

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29 Vir 'n verwysing na regspraak, sien Kimball "Protection of religious group members" 1982 *Washington and Lee LR* 555 vn 1 en 2; Hacker "Private club membership – where does privacy end and discrimination begin?" 1987 *St John's LR* 474 477 vn 12 en 13.

30 Gekodifiseer as 42 USC §1981 en §1982 van 1982.

31 42 USC §1985(c) van 1976. Dit word ook in privaatregtelike verhoudings afgedwing – sien par 4 4 hieronder.

32 *NAACP v Alabama ex rel Patterson* 357 US 449 (1958); *Roberts v United States Jaycees* 468 US 609 (1984).

33 Hacker 1987 *St John's LR* 474-501.

intimate human relationships en *personal liberty*.[34] Die volgende vereistes word gestel vir 'n vereniging wat diskriminerende maatreëls toepas ingevolge die reg op *intimate association*:

(a) 'n relatief klein groep;

(b) 'n hoë mate van eksklusiwiteit en selektiwiteit ten opsigte van die toelating van lede; en

(c) die uitsluiting van nie-lede van die aktiwiteite van die vereniging.[35]

Dit is duidelik dat universiteite nie aan hierdie vereistes voldoen nie.

Freedom of expressive association hou die volgende in:[36]

> "[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. . . . The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

Alhoewel religieusgerigte opvoedkundige inrigtings dus ingevolge die reg op *expressive association* toegelaat word, is dit 'n ewe sterk beginsel ingevolge die *first amendment* dat die staat volkome neutraal staan betreffende religieuse onderrig en dat geen staatsondersteuning (finansieel of andersins) derhalwe aan religieusgerigte opvoedkundige inrigtings verleen word nie.[37]

3 2 2 Godsdiensvryheid

Alhoewel enige vorm van staats- of staatsondersteunde godsdiens ingevolge die *first amendment* verbied word (die sogenaamde *establishment clause*),[38] verskaf die *free exercise clause* aan elkeen die individuele reg om godsdiens na eie keuse te beoefen.[39] Dit is egter opvallend dat die Amerikaanse konstitusionele wetgewing in verband met die reg op godsdiensvryheid geen voorsiening vir die reg op religieusgerigte onderwys maak nie (soos wel die geval ingevolge die UDHR is);[40] *staatsondersteunde* religieusgerigte onderwys word inteendeel ingevolge die toepassing van die *establishment clause* verbied.[41] Alhoewel dit heftig

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34 Shiffrin en Choper *The first amendment* (1991) 541.

35 *Roberts v United States Jaycees* 468 US 609 (1984) 619 – 620; Byrne "Infringement on the constitutional right to freedom of association" 1988 *Drake LJ* 161; Finlay "Prying open the clubhouse door" 1990 *Washington University LQ* 379.

36 *Roberts v United States Jaycees* 468 US 609 (1984) 615; sien ook Rotunda, Nowak en Young *Treatise on constitutional law* (1986) 201 – 203; Shiffrin en Choper (1991) 541 – 545.

37 Shiffrin en Choper (1991) 625; sien ook par 3 2 2 hieronder.

38 *Watson v Jones* 13 Wall 679 730; 20 LEd 666: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'" Sien ook Rotunda, Nowak en Young (1986) 344 – 375; Smith "Relations between church and state in the United States, with special attention to the schooling of children" 1987 *American Journal of Comparative Law* 1 – 24; Shiffrin en Choper (1991) 624 – 679; Leahy *The first amendment, 1791 – 1991* (1991) 45 – 69.

39 Rotunda, Nowak en Young (1986) 393 – 444; Shiffrin en Choper (1991) 681 – 715; Leahy (1991) 71 – 96.

40 Sien hierbo.

41 *Watson v Jones* 13 Wall 679 730; 20 LEd 666: "No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Sien ook *Lemon v Kurtzman* 403 US 602 (1971).

ontken word,[42] bestaan die mening dat die *establishment clause* so toegepas word dat in die geval van staatskole die owerheid nie neutraal teenoor die verskillende religieuse opvattings staan nie, maar dat nie-religieuse (en selfs anti-religieuse) onderrig toegelaat word terwyl enige vorm van religieuse onderrig verbied word.[43] Voorkeur word van staatsweë aan sekulêr-humanistiese opvoedkundige uitgangspunte verleen.[44] Voorbeelde van die verbod op enige vorm van religieuse onderrig in staatskole ingevolge die *establishment clause* is die volgende:[45]

(a) Die verbod op enige vorm van Skriflesing, gebed of selfs 'n stiltetyd vir "meditation" – *Engel v Vitale*[46] en *Abington School District v Schempp*.[47]

(b) Die verbod op enige vorm van godsdiensonderrig (insluitend vrywillige multi-religieuse onderrig) – *McCollum v Board of Education*.[48]

(c) Die verbod op die gebruik van skoolgeboue vir vrywillige godsdienstige byeenkomste na skoolure – *Bender v Williamsport Area School District*.[49]

(d) Die keuse van leerstof (die evolusieteorie word byvoorbeeld uit 'n Darwinistiese oogpunt aangebied sonder enige verwysing na ander standpunte) – *Epperson v Arkansas*.[50]

(e) Seksvoorligting word aangebied sonder inagneming van (verskillende) religieuse standpunte daaroor – *Board of Education v Pico*.[51]

Ingevolge die toepassing van die *free exercise clause* word privaatskole wel vrylik toegelaat om religieusgerigte onderrig te beoefen indien sodanige skole aan die staat se opvoedkundige standaarde voldoen;[52] dit bring egter mee dat sodanige skole geen staatsfinansiering mag ontvang nie.[53] Voorbeelde van weiering van staatsfondse is die volgende:

(a) *Grand Rapids School District v Ball*:[54] staatsgefinansierde remediërings- en verrykingskursusse in wiskunde en tale mag nie gratis by private kerkskole aangebied word nie.

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42 Sien bv Teitel "When separate is equal: why organized religious exercises, unlike chess, do not belong in the public schools" 1986 *Northwestern Univ LR* 182; Rotunda, Nowak en Young (1986) 340 – 344.

43 Sien bv Laycock "Equal access and moments of silence: the equal status of religious speech by private speakers" 1986 *Northwestern Univ LR* 1 – 67 se bespreking van *McCollum v Board of Education* 333 US 203 (1948); *Engel v Vitale* 370 US 421 (1962); *Abington School District v Schempp* 474 US 203 (1963); Smith (1987) 34.

44 Teitel (1986) 188 – 189.

45 Vir 'n vollediger uiteensetting, sien Van der Vyver *Die juridiese funksie van staat en kerk* (1972) 103 – 127; Laycock (1986) 1 – 67; Smith (1987) 27 – 37.

46 370 US 421 (1962).

47 474 US 203 (1963).

48 333 US 203 (1948).

49 106 SCt 1326 (1986).

50 393 US 97 (1968).

51 457 US 853 (1982); sien ook Bird "Freedom of religion and science instruction in public schools" 1978 *Yale LJ* 515 – 570; Dencer "The establishment clause, secondary religious effects, and humanistic education" 1982 *Yale LJ* 1196 – 1224.

52 *Wisconsin v Yoder* 406 US 205 (1972); Smith (1987) 25 – 27.

53 Rotunda, Nowak en Young (1986) 393 – 395; Smith (1987) 37 – 41; West "The case against a right to religion-based exemptions" 1990 *Notre Dame Journal of Law, Ethics and Public Policy* 591 – 638.

54 473 US 373 (1958).

(b) *Committee for Public Education v Nyquist:*[55] onderhouds- en verbeteringsuitgawes aan skoolgeboue van private kerkskole mag nie deur die owerheid gefinansier word nie.

(c) *Lemon v Kurtzman:*[56] geen salarissubsidies mag aan onderwysers by privaatskole verskaf word nie, ongeag of sodanige onderwysers slegs sekulêre vakke doseer al dan nie. In hierdie uitspraak is die volgende toets gebruik om te bepaal wanneer staatsfinansiering wel toelaatbaar sal wees: (i) die uitgawes moet uitsluitlik vir sekulêre doeleindes aangegaan word; (ii) dit moet primêr 'n sekulêre effek hê; en (iii) die owerheid moet nie enigsins in religieuse onderrigprogramme betrek word nie. Om laasgenoemde vereiste te bepaal, word op die volgende faktore gelet: (i) die karakter en aard van die religieuse inrigting; (ii) die aard van die steun wat van staatsweë verleen word; en (iii) die daaruit voortspruitende verbintenis en verhouding tussen die staat en die religieuse inrigting.

Die owerheid staan dus nie neutraal teenoor verskillende religieuse opvattings nie maar oefen 'n daadwerklike keuse uit ten gunste van nie-religieuse (sekulêr-humanistiese) onderrig teenoor religieuse onderrig.[57] Tog is daar enkele indirekte wyses waarop finansiële steun van owerheidsweë aan privaatskole verleen word (vir sekulêre doeleindes en in ooreenstemming met die vereistes soos uiteengesit in *Lemon v Kurtzman*):[58]

(a) *Everson v Board of Education:*[59] leerlinge van privaatskole (ook kerkskole) mag gratis van openbare vervoer na skole gebruik maak.

(b) *Board of Education v Allen:*[60] skoolboeke van sekulêre aard mag gratis aan leerlinge van privaatskole verskaf word.

(c) *Walz v Tax Commission:*[61] geen belasting is betaalbaar op wins, roerende of onroerende eiendom wat deur private kerkskole vir godsdienstige of opvoedkundige doeleindes gebruik word nie en skenkings aan sodanige skole is aftrekbaar vir belastingdoeleindes.

In die geval van tersiêre onderwysinstellings is die uitgangspunt hoofsaaklik dieselfde as in die geval van primêre en sekondêre onderrig, naamlik dat geen staatsondersteuning vir enige vorm van religieusgerigte onderrig verskaf mag word nie.[62] Daar is egter twee aspekte wat die posisie van tersiêre onderrig in die Verenigde State van ander onderrig onderskei:

(a) Universiteite in die VSA steun veel minder op owerheidsfinansiering as in die geval van primêre en sekondêre onderwysinstellings en dit is dus makliker vir universiteite om in die geval van religieuse onderrig finansiering vanuit die privaatsektor te bekom. Daar bestaan 'n tradisie van finansiële ondersteuning van universiteite deur die privaatsektor (wat in Suid-Afrika totaal ontbreek).

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55 413 US 756 (1973).
56 403 US 602 (1971).
57 Teitel (1986) 174–189.
58 403 US 602 (1971): sien (c) hierbo.
59 330 US 1 (1947).
60 392 US 236 (1968).
61 397 US 664 (1970); sien ook *Mueller v Allen* 463 US 388 (1983).
62 Rotunda, Nowak en Young (1986) 365–369.

(b) Die opvatting bestaan dat universiteitstudente nie so maklik "godsdienstig indoktrineerbaar" as skoolkinders is nie.[63]

Daar word dus in beginsel meer geredelik finansiële steun van owerheidsweë aan religieusgerigte universiteite verleen, maar nog steeds onderworpe aan die vereistes soos in *Lemon v Kurtzman* uiteengesit.[64] Enige staatsfinansiering aan religieusgerigte tersiêre onderwysinrigtings word net verleen met die oog op die bevordering van sekulêre oogmerke wat slegs 'n sekulêre effek sal hê sonder dat dit die owerheid by enige religieuse kwessies betrek. Ten einde te voorkom dat die staatsondersteuning die bevordering van religieuse oogmerke strydig met die *establishment clause* tot gevolg sal hê, word die volgende voorbehoude gestel:[65]

> "(i) [T]he institution's secular function must not be permeated with a religious atmosphere, and
> (ii) there must be assurances by the college and the government authority that the aid will not be used for religious teaching or other religious activities."[66]

In die Amerikaanse regspraak is alreeds by verskeie geleenthede bevestig dat staatsfinansiering aan religieusgerigte tersiêre inrigtings verleen mag word mits aan bogemelde vereistes voldoen word.[67]

4 DIE SUID-AFRIKAANSE REG

4 1 Diskriminasieverbod

Ingevolge die regering se voorgestelde Handves van Fundamentele Regte[68] lui die diskriminasieverbod soos vervat in artikel 6 soos volg:

> "(1) Alle persone is gelyk voor die reg en geregtig op gelyke beskerming deur die reg.
> (2) Niemand mag bevoordeel of benadeel word bloot op grond van ras, kleur, taal, geslag, geloof, etniese herkoms, sosiale stand, afkoms, politieke of ander opvattings, of gebreke of ander natuurlike eienskappe nie."

Die gelykluidende maatreël in die ANC se voorgestelde Bill of Rights bepaal:

> "1.1 All South Africans are born free and equal in dignity and rights.
> 1.2 No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth, or other status.
> 1.3 All men and women shall have equal protection under the law."

Die trefwydte van die diskriminasieverbod moet in samehang met die reg op verenigingsvryheid en geloofsvryheid bepaal word. Dit is voorts belangrik om

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63 *Tilton v Richardson* 403 US 672 (1971): "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The scepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations." Sien ook Leahy (1991) 55–56.

64 403 US 602 (1971); sien hierbo.

65 Rotunda, Nowak en Young (1986) 366.

66 Dit is te betwyfel of 'n universiteit soos die PU vir CHO, wat juis die beoefening van Christelike wetenskap (by die dosering van alle vakrigtings en navorsing) voorstaan, sal kan aantoon dat daar sekulêre akademiese aktiwiteite beoefen word wat nie religieusgerig is nie.

67 Sien bv *Tilton v Richardson* 403 US 672 (1971) en *Hunt v McNair* 413 US 734 (1973).

68 Gedateer Februarie 1993.

te oorweeg of die verbod net op publiekregtelike verhoudings (owerheid-onderdaan) of ook op privaatregtelike verhoudings (verhouding tussen regsubjekte onderling) van toepassing gemaak behoort te word.

4 2 Verenigingsvryheid

Vryheid van vereniging word reeds vir 'n geruime tyd deur die Suid-Afrikaanse howe erken. In *Morrison v Standard Building Society*[69] is beslis dat verenigings tot stand kom sonder uitdruklike owerheidstoestemming en dat die konstitusie van die vereniging deurslaggewend is om te bepaal of dit as regspersoon in die regsverkeer kan optree al dan nie.[70] Daar bestaan tans 'n groot mate van vryheid vir organisasies en verenigings om in hulle konstitusies of statute lidmaatskapsvereistes te stel sonder dat dit van staatsweë enigsins beheer word – dit word beskou as deel van die bestaande lede se kontrakteervryheid[71] en verenigingsvryheid.[72] Die enigste uitsondering op verenigingsvryheid is beperkings op politieke partye ingevolge die Wet op die Verbod op Politieke Inmenging 51 van 1968, soos gewysig deur die Wysigingswet op Staatskundige Aangeleenthede 104 van 1985,[73] en die verbod op "staatsgevaarlike organisasies" ingevolge artikel 4 van die Wet op Binnelandse Veiligheid 74 van 1982, wat weer deur die Wysigingswet op Binnelandse Veiligheid en Intimidasie 138 van 1991 gewysig is.[74]

Die bestaande reg tot vryheid van vereniging word in artikel 22 van die voorgestelde handves bevestig:

> "(1) Elke persoon het die reg op vryë assosiasie.
> (2) Geen persoon mag belet of verhinder word om met 'n ander persoon te assosieer nie.
> (3) Geen persoon mag verplig word om met 'n ander te assosieer nie."

Artikel 5.1 van die ANC se voorgestelde Bill of Rights bepaal:

> "There shall be freedom of association, including the right to form and join trade unions, religious, social and cultural bodies, and to form and participate in non-governmental organisations."

Die mate waarin die diskriminasieverbod die bestaande vryheid van vereniging sal beïnvloed, sal afhang van die strekwydte van die toepassing van die mensregtehandves. Indien dit slegs beskerming bied in die publiekregtelike owerheid-onderdaan-verhouding, behoort privaatregtelike verenigings steeds die vryheid te hê om selfs in stryd met die diskriminasieverbod lidmaatskapsmaatreëls met die oog op die selektiewe toelating van lede in hulle konstitusies op te neem (sien in hierdie verband artikel 2 van die voorgestelde handves). Selfs al word die handves ook op privaatregtelike verhoudings van toepassing gemaak,

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69 1932 AD 229 238 – 239.

70 Sien ook Pienaar *Die gemeenregtelike regspersoon in die SA privaatreg* (1982) 126 – 127 145 – 146; Pienaar "Die regsaard van verbode organisasies" 1986 *SA Publiekreg* 76 – 77.

71 Die reëls en konstitusie word as die kontrak tussen die lede aangemerk: *Turner v Jockey Club of SA* 1974 3 SA 633 (A) 645B – D; *Theron v Ring van Wellington, NG Sendingkerk* 1976 2 SA 1 (A) 23H – 26F.

72 *Committee of the Johannesburg Public Library v Spence* 1898 5 Off Rep 54; *Morrison v Standard Building Society* 1932 AD 229 237 – 238; *Marlin v Durban Turf Club* 1942 AD 112 122.

73 Sien ook Dugard (1978) 167 – 168.

74 Sien ook Pienaar (1986) 71 – 75; Sarkin-Hughes "Changes to the security laws in South Africa" 1991 *International Commission of Jurists* 61 – 64.

bly dit steeds 'n ope vraag of die werking van die handves so ver behoort te strek dat die (persoonlike) vryheid om lidmaatskapsvereistes te stel, totaal daardeur beperk word. Dié vraag word by paragraaf 4 4 hieronder vollediger bespreek.

Universiteite is egter nie privaatregtelike verenigings nie[75] maar wel statutêre regspersone van 'n openbare aard deurdat hulle grotendeels uit owerheidsfondse en skenkings deur die publiek gefinansier word.[76] Die vraag of religieusgerigte onderwys met die diskriminasieverbod versoenbaar is, hang dus nie primêr van privaatregtelike verenigingsvryheid af nie maar wel van die belange-afweging tussen die reg op geloofsvryheid en die diskriminasieverbod.

4 3 Geloofsvryheid

Ingevolge artikel 11 van die regering se voorgestelde handves word geloofsvryheid soos volg beskerm:

> "(1) Elke persoon het die reg om die godsdiens van sy keuse te bely en te beoefen.
>
> (2) Subartikel (1) belet nie die godsdienstige bediening van die Magte, die staatsdiens en ander staatsinrigtings, godsdienstige onderrig of godsdiensbeoefening in skole, en godsdienstige uitsendings deur 'n entiteit by of kragtens wet ingestel nie."

Die voorskrifte van artikel 14 van die voorgestelde handves bepaal voorts:

> "(2) Elke leerling wat 'n burger is, het die reg op religieusgerigte onderwys vir sover dit redelikerwys uitvoerbaar is.
>
> (4) Elke staatsondersteunde tersiêre onderwysinstelling het die reg om die voertaal en die religieuse en algemene karakter van die onderwysinstelling te bepaal."

Die reg op geloofsvryheid lui soos volg in die ANC se voorgestelde Bill of Rights:

> "5.2 There shall be freedom of worship and tolerance of all religions, and no State or official religion shall be established.
>
> 5.3 The institutions of religion shall be separate from the State, but nothing in this Constitution shall prevent them from co-operating with the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.
>
> 5.4 Places associated with religious observance shall be respected, and no-one shall be barred from entering them on grounds of race."

In die Bill of Rights word daar ook in verskeie artikels na 'n reg op onderwys verwys,[77] maar dit is slegs op primêre en sekondêre onderwys van toepassing. Dit sluit ook nie uitdruklik die reg op religieusgerigte onderwys in nie, soos wel ingevolge die UDHR[78] en die voorgestelde handves[79] die geval is. Dit blyk dus nie duidelik uit die ANC se Bill of Rights of religieusgerigte onderwys volgens dié organisasie eerstens toelaatbaar moet wees en tweedens van owerheidsweë ondersteun en gefinansier moet word nie.

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75 In Suid-Afrika word universiteite nie as publiekregtelike regspersone getipeer soos in die Nederlandse reg nie; sien par 2 2 hierbo.

76 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 388C; 1979 1 SA 441 (A) 450D.

77 A 5.8 (ivm taal van keuse); a 9.1 en 9.3 (reg van kinders op onderwys); en a 10 (reg op onderwys).

78 Sien hierbo 211.

79 A 14(2) en (4).

Nogtans bestaan daar myns insiens min twyfel dat religieusgerigte (en in die besonder Christelike) onderwys toelaatbaar sal wees in die lig van die feit dat (na bewering)[80] ongeveer 70% van die Suid-Afrikaanse bevolking Christene is.

Dit is egter wel belangrik om te bepaal in welke mate religieusgerigte onderwys van owerheidsweë ondersteun en gefinansier sal word in die lig van die diskriminasieverbod. Dit is duidelik dat die owerheid nie Christelike onderwys bo ander religieusgerigte onderwys behoort te bevoordeel nie, aangesien so 'n stap strydig met die gees van die menseregtehandves – in die besonder die diskriminasieverbod – sal wees. Andersyds behoort die owerheid myns insiens beslis nie op die weg van Amerikaanse neutraliteit te gaan nie. In die VSA word die neutraliteitsbeginsel op so 'n wyse toegepas dat nie-religieuse (en selfs antireligieuse)[81] onderrig ten koste van religieusgerigte onderwys bevoordeel word, wat ook maar 'n indirekte vorm van diskriminasie is.

Geloofsvryheid word ten beste met die diskriminasieverbod versoen indien daar gelyke geleenthede geskep word vir religieusgerigte onderwys sonder dat daar tussen die verskillende religieuse strominge[82] gediskrimineer word.[83] Dit behoort nie 'n onmoontlike taak te wees om onderwyssillabusse op te stel waarin daar gediversifiseerd voorsiening gemaak word vir verskillende religieuse standpunte en afsonderlike godsdiensopvoeding nie. Dit lê op die terrein van opvoedkundiges om vas te stel watter onderwysmodel met betrekking tot die aanbieding van religieusgerigte onderwys die voordeligste vir leerlinge en studente sal wees.[84] Daar behoort egter uitdruklik in die menseregtehandves voorsiening gemaak te word vir staatsondersteunde religieusgerigte onderwys sonder diskriminasie tussen die verskillende religieuse opvattings.

Hierdie beginsel behoort ook op tersiêre vlak te geld. Artikel 31 van die Private Wet op die Potchefstroomse Universiteit vir Christelike Hoër Onderwys 19 van 1950 bevat die sogenaamde gewetensklousule:

> "31. Handhawing van die Christelike karakter van die Universiteit sonder toepassing van 'n toets met betrekking tot lidmaatskap van 'n bepaalde kerk –
>
> 1. Die Raad moet by die benoeming van akademiese en nie-akademiese personeel sorg dra dat die Christelik-historiese karakter van die Universiteit gehandhaaf word: Met dien verstande dat geen toets met betrekking tot lidmaatskap van 'n bepaalde kerk toegepas word nie as voorwaarde om 'n akademiese of nie-akademiese personeellid aan die Universiteit te word of te bly, of om daarin 'n amp te beklee of besoldiging te ontvang of 'n voorreg uit te oefen.
>
> 2. Niemand word op grond van sy geloofsoortuiging verhinder om 'n student aan die Universiteit te word of te bly of 'n graad of diploma te verkry of te behou nie."

Dit is belangrik om op die volgende te let:

(a) Die gewetensklousule beperk nie die studente van die PU vir CHO tot 'n bepaalde religieuse opvatting nie en daar word nie op grond van die religieuse gerigtheid van 'n student enige onderskeid gemaak nie. Dit voldoen dus aan die voorskrifte van sowel die voorgestelde handves as Bill of Rights.

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80 Geen betroubare statistiek bestaan in hierdie verband nie. Dit is bv nie duidelik of persone wat as Christene getipeer word, belydend en/of meelewend is nie.

81 Sien par 3 2 2 hierbo.

82 In Suid-Afrika word in die besonder na Christelike, Moslem-, Hindoe-, Joodse, tradisionele inheemse en ateïstiese opvattings verwys.

83 Sien par 2 2 hierbo en veral a 23(3) van die Nederlandse Grondwet.

84 Sien in hierdie verband die insiggewende voorstelle van Van der Walt "Die probleem van religieuse/godsdienstige pluralisme en die moontlike hantering daarvan in die openbare onderwys" 1992 *Koers* 175 – 188.

(b) Die toepassing van die gewetensklousule op die aanstelling en aktiwiteite van doserende, navorsings- en administratiewe personeel is religieusgerig maar kerklik neutraal. Of sodanige onderskeid toelaatbaar behoort te wees, word in paragraaf 4 4 hieronder vollediger bespreek.[85] Die onsekerheid in verband met die toelaatbaarheid van hierdie bepaling word grootliks uit die weg geruim deur die voorskrifte van artikels 14(2) en 14(4) van die voorgestelde handves, terwyl die voorgestelde Bill of Rights nie uitdruklik vir staatsondersteunde religieusgerigte onderwys voorsiening maak nie.

(c) Selfs in die VSA, waar die neutraliteitsbeginsel sodanig skeefgetrek is dat dit diskriminasie teenoor religieusgerigte onderwys tot gevolg het, word tersiêre inrigtings nie totaal van alle owerheidsteun ontneem nie (in die beperkte mate waarin die owerheid wel by tersiêre onderwys betrokke is).[86]

(d) Die Nederlandse model, met openlike statutêre owerheidsteun aan religieusgerigte onderwysinstellings sonder om aan spesifieke godsdienstige strominge voorkeur te verleen, blyk egter die beste resultaat te verskaf in die afweging van die diskriminasieverbod teenoor die reg op geloofsvryheid.

4 4 Strekwydte van die diskriminasieverbod

Die primêre doel van 'n menseregtehandves is om die regte en belange van enkelinge en minderhede teen onregmatige en onbillike ingrype deur die staatsowerheid en meerderheidsgroepe te beskerm.[87] 'n Strydvraag in die meeste regstelsels is of menseregte net publiekregtelike werking (ten opsigte van die owerheid-onderdaan-verhouding) of ook privaatregtelike werking (ten opsigte van die verhouding tussen regsubjekte onderling) behoort te hê. Verbandhoudend met die onderwerp onder bespreking kom dit daarop neer dat vasgestel moet word of die diskriminasieverbod net toepassing vind wanneer die owerheid teenoor onderdane optree en of dit ook in die regsverhouding tussen regsubjekte onderling toegepas behoort te word. Dit is nie net van belang ten opsigte van die vraag of die owerheid religieusgerigte onderwys sal toelaat en ondersteun nie, maar ook of daar byvoorbeeld by die aanstelling van personeel (privaatregtelike dienskontrak) voorkeur verleen sal kan word aan persone met 'n bepaalde religieuse standpunt. Dit is insiggewend om kortliks vas te stel hoe hierdie aangeleentheid in ander regstelsels hanteer word. Hierdie wye vraagstuk word nie in die algemeen ondersoek nie maar slegs in verband met geloofsvryheid en verenigingsvryheid.

4 4 1 Die Amerikaanse reg

Die diskriminasieverbod word met betrekking tot geloofsvryheid en verenigingsvryheid ingevolge die *first amendment* slegs in die geval van heel uitsonderlike privaatregtelike verhoudings uitgesluit. Daar word onderskei tussen *freedom*

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85 Sien veral die toepassing van hierdie beginsel in die Nederlandse reg by par 4 4 2 hieronder.
86 Sien par 3 2 2 hierbo.
87 *Board of Education v Barnette* 319 US 624 (1943): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Sien ook Kruger (1990) 53 – 55; Leahy (1991) ix.

of intimate association en *freedom of expressive association*.[88] In die geval van *freedom of intimate association* is in *Roberts v United States Jaycees*[89] beslis:

> "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty."

Freedom of intimate association word egter net in 'n baie beperkte mate, in die geval van klein, selektiewe organisasies, erken.[90] Sodra enige openbare geriewe gebruik word, kan dié beginsel nie meer as uitsondering op die diskriminasieverbod aangevoer word nie.[91] In die geval van *freedom of expressive association* word die diskriminasieverbod ook uitgesluit indien persone verenig met die doel om aktiwiteite ingevolge die *first amendment* (geloofsvryheid, vryheid van spraak, vryheid van die pers) te beoefen. Dit vind egter ook net in beperkte omstandighede toepassing:[92]

> "The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."

Dit is dus duidelik dat die diskriminasieverbod slegs uitgesluit word in die geval van werklike (inter)persoonlike verhoudings. Waar die vereniging ten doel het "to foster business connections and professional advancements", is beslis dat die diskriminasieverbod wel toepassing vind.[93]

4 4 2 Die Nederlandse reg

Die diskriminasieverbod geld nie in die geval van lidmaatskapsvereistes wat deur privaatregtelike verenigings gestel word nie.[94] Die interne verhouding tussen die lede onderling en lede en bestuur is egter deurentyd onderworpe aan die vereistes van redelikheid en billikheid.[95] Voorts moet alle besluite deur die bestuur in belang van die goeie trou en openbare orde geneem en uitgevoer word.[96] Lidmaatskapsvereistes wat onderskeidend van aard is, word egter nie sonder meer as in stryd met die beginsels van goeie trou en die openbare belang vertolk nie, behalwe as die ongegronde weiering van lidmaatskap 'n persoon daarvan weerhou om 'n professie te beoefen.[97] Rassediskriminasie word gewoonlik as strydig met die openbare belang en goeie trou bestempel maar onderskeid op grond van geloofsoortuiging is nie noodwendig ontoelaatbaar nie.

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88 Hacker (1987) 475; Anoniem "State power and discrimination by private clubs: first amendment protection for nonexpressive associations" 1991 *Harvard LR* 1835 – 1838.
89 468 US 609 (1984) 617.
90 Sien par 3 2 hierbo; Rotunda, Nowak en Young (1986) 201; Shiffrin en Choper (1991) 541 – 543.
91 Hacker (1987) 481 – 483.
92 *Roberts v United States Jaycees* 468 US 609 (1984) 623.
93 *New York State Club Association v City of New York* 108 StC 2225 (1988).
94 Asser-Van der Grinten (1991) 240 – 241.
95 A 8 *NBW*.
96 A 14 en 15 *NBW*.
97 Dijk en Van der Pleeg *Van de vereniging en de stichting* (1982) 111; Pitlo-Löwensteyn (1986) 83 – 91 122; Asser-Van der Grinten (1991) 240.

Die uitsluiting van die diskriminasieverbod by privaatregtelike verenigings is ook in die Nederlandse reg nie absoluut nie. Daar bestaan in Nederland verskeie organisasies (privaatregtelike verenigings of stigtinge) wat hulle sonder winsbejag of eie voordeel spesifiek beywer vir maatskaplike dienslewering.[98] Verskeie van hierdie organisasies beoefen hulle aktiwiteite vanuit 'n bepaalde lewensbeskoulike visie (*particuliere organisaties*), wat onderskeidende maatreëls ten opsigte van die keuse van lede en bestuurders noodsaak.[99] Hierdie onderskeid is in die Nederlandse reg toelaatbaar. Indien sodanige organisasie egter staatsfinansiering of subsidiëring ontvang, word die diskriminasieverbod ingevolge artikel 1 van die Nederlandse Grondwet toegepas. Hoewel die lede en bestuurders dus nog op grond van hulle lewensbeskoulike uitgangspunt toegelaat mag word al dan nie, is diskriminasie in die konstitusie of reëls ten opsigte van die persone aan wie hulp, fondse of voordele gelewer word, ontoelaatbaar.[100]

Aangesien dit egter steeds 'n privaatregtelike vereniging of stigting is, behoort die toetsingskriterium nie (soos by publiekregtelike regspersone) die algemene of openbare belang te wees nie, maar wel redelikheid en billikheid.[101] In die voorgestelde Wet op Gelijke Behandeling is dit wel toelaatbaar dat privaatregtelike regspersone met 'n bepaalde lewensbeskoulike visie (*particuliere organisaties*) op grond van hulle grondslag onderskeide mag maak met betrekking tot lidmaatskapsvereistes, vakatures, aanstelling van werknemers, diensvoorwaardes en opleidingsmoontlikhede van werknemers, maar diskriminerende maatreëls by *dienslewering* word verbied (met die uitsondering van onderwysaangeleenthede).[102]

Vermeulen[103] dui aan dat die verband tussen die diskriminasieverbod en geloofsvryheid *horizontale werking* het, dit wil sê nie net by publiekregtelike verhoudings nie maar ook in die geval van privaatregtelike verhoudings toepassing vind en dat dit ingevolge die grondregtekatalogus van die Nederlandse Grondwet erken word. Meningsuiting ingevolge geloofsvryheid mag dus in Nederland nie van so 'n aard wees dat daar "horisontaal" teen medeburgers gediskrimineer word nie. Dit is egter belangrik dat die horisontale werking nie ten opsigte van alle grondregte in dieselfde mate geld nie; en die hof moet in hierdie verband 'n belangrike interpretasiefunksie vervul.[104] So is dit byvoorbeeld moontlik om religieusgerigte onderwys met staatsondersteuning in stand te hou.[105]

4 4 3 Die Duitse reg

Verenigingsvryheid word ingevolge §9(1) van die Grundgesetz en §1(1) van die Vereinsgesetz gewaarborg.[106] Daar bestaan in beginsel geen reg op toetrede tot 'n vereniging nie en lidmaatskapsvereistes kan vrylik in die konstitusie gestel

98 Van der Ploeg (1991) 1 – 3.
99 *Idem* 5 – 8.
100 *Idem* 19 – 22.
101 *Idem* 24 – 25.
102 *Idem* 19 – 20.
103 Heyde (1989) 263 – 267; sien ook Boesjes "De horizontale werking van grondrechten" 1973 *Nederlands Juristenblad* 905 – 916.
104 Boesjes (1973) 113 – 115.
105 Sien par 2 2 hierbo.
106 Soergel *Bürgerliches Gesetzbuch* (1987) Bd 1 190 – 191; sien ook Pienaar (1986) 87 – 92.

en deur die bestuur toegepas word.[107] Verenigingsvryheid is egter nie absoluut en verhewe bo enige owerheidsinmenging nie. Die bestuur moet in die toepassing van die lidmaatskapsvereistes (wat onderskeidend van aard mag wees) met die volgende bepalings rekening hou:

- §134 BGB: nietigheid van regshandelinge wat in stryd met ander wetgewing is;
- §138 BGB: nietigheid van regshandelinge wat teen die goeie sedes indruis;
- §242 BGB: die vereiste van goeie trou; en
- §826 BGB: indien 'n handeling van so 'n aard is dat dit teen die goeie sedes indruis en skade veroorsaak, kan skadevergoeding van die handelende persoon geëis word.[108]

Die optrede van die bestuur in die toepassing van die konstitusie en die voorskrifte van die konstitusie met betrekking tot lidmaatskapsvereistes mag derhalwe nie onredelik of teen die goeie trou of goeie sedes wees nie. Diskriminasie by die stel van lidmaatskapsvereistes is egter nie *per se* teen die goeie sedes of onbillik nie aangesien dit 'n manifestasie van verenigingsvryheid is. Dit kan egter in bepaalde omstandighede onredelik wees, soos wanneer 'n persoon nie 'n professie kan beoefen nie weens sy ongegronde nie-toelating tot 'n professionele vereniging, of wanneer *mala fides* by die neem van die bestuursbesluit 'n rol gespeel het. Die blote maak van 'n onderskeid is ook nie noodwendig diskriminerend van aard nie, soos blyk uit die feit dat religieusgerigte onderwys in Duitsland deur die owerheid gefinansier word.[109]

In die Duitse reg geld die diskriminasieverbod nie slegs in publiekregtelike verband nie, maar ook ten opsigte van privaatregtelike verhoudings (*Drittwirkung der Grundrechte*).[110] Die rede waarom *Drittwirkung* toenemend in die Duitse reg toepassing vind, is geleë in die feit dat fundamentele regte nie slegs meer ter beskerming van staatsburgers teen die owerheid aangewend word nie, maar 'n element van sosiale ordening verkry het wat ook in privaatregtelike verhoudings van belang is.[111] Die voorskrifte in die *BGB* wat redelikheid, billikheid en goeie trou ten opsigte van privaatregtelike verhoudings voorskryf, is voorbeelde van beperkings wat in belang van gemeenskapsordening op privaatregtelike verhoudings geplaas word.[112]

Die beginsel van *Drittwirkung* geld nie in dieselfde mate ten opsigte van die verskillende grondregte nie en kan ook in die geval van bepaalde grondregte glad nie toegepas word nie omdat daar nie 'n privaatregtelike verhouding bestaan

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107 Traub "Verbandsautonomie und Diskriminierung" 1985 *Wettbewerb in Recht und Praxis* 594; Soergel (1987) 359; Larenz *Allgemeiner Teil des deutschen Bürgerlichen Rechts* (1989) 171.

108 Schiedermair "Parteiausschluss und gerichtlicher Rechtsschutz" 1979 *Archiv der öffentlichen Rechts* 202; Traub (1985) 593.

109 Maunz "Schule und Religion in der Rechtsprechung des Bundesverfassungsgerichts" in Zeidler (Hrsg) *Festschrift Hans Joachim Faller* (1984) 175 – 185; Link "Staatliche Subventionierung konfessioneller Privatschulen" in Faller (Hrsg) *Verantwortlichkeit und Freiheit – Festschrift für Willi Geiger zum 80. Geburtstag* (1989) 600 – 619.

110 Grabitz (Hrsg) *Grundrechte in Europe und USA* (1986) BD 1 160 – 161 (sien veral vn 158 vir literatuurverwysings).

111 Grabitz (1986) 161: "Die Grundrechte stellen nicht mehr allein Abwehrrechte gegenüber staatlicher Machtentfaltung dar, sondern sind darüber hinaus Element der Gesamtordnung des Gemeinwesens und daher auch für die Gestaltung privater Rechtsverhältnisse massgeblich."

112 Schiedermair (1979) 219 – 220.

nie (byvoorbeeld in die geval van krygsdiensweiering ingevolge §4(3) *GG*). Die toepassing van die diskriminasieverbod by privaatregtelike verhoudings geskied nie altyd absoluut en eenvormig nie. Ingevolge §10(1) van die Parteiengesetz het die bestuur van 'n politieke party absolute seggenskap oor die toelating van nuwe lede en hoef daar geen redes vir die weiering van lidmaatskap verskaf te word nie.[113] Hierteenoor bepaal §26(2) en §27 van die Gesetz gegen Wettbewerbsbeschränkungen dat geen diskriminasie met betrekking tot lidmaatskapsvereistes wat monopolievormend van aard is, toelaatbaar is nie.[114]

4 5 Voorstelle met betrekking tot die privaatregtelike toepassing van menseregte in Suid-Afrika

Daar bestaan tans meningsverskil oor die vraag of menseregte ook privaatregtelike werking moet hê, en indien wel, in watter mate. Artikel 2(3) van die voorgestelde handves bepaal dat *Drittwirkung* wel toepassing vind in die opsig dat enige regte van 'n persoon wat deur die handves beskerm word nie sodanig uitgeoefen mag word dat dit op die beskermde regte van 'n ander persoon inbreuk maak nie. Dit los egter nie die probleem op wat ontstaan indien daar botsende aansprake bestaan nie (byvoorbeeld een persoon se reg op vrye assosiasie word aan bande gelê deur 'n ander persoon se reg dat daar nie op grond van lidmaatskapvereistes teen hom gediskrimineer mag word nie).[115] Verskeie juriste is ten gunste van die privaatregtelike toepassing van menseregte hoewel hulle nie duidelik uitspel wat die omvang van die beskerming ten opsigte van privaatregtelike verhoudings behoort te wees nie.[116] Daar is ook persone wat aanbeveel dat menseregte nie privaatregtelike werking behoort te hê nie.[117]

Dit is duidelik dat menseregte tans in die meeste regstelsels ook privaatregtelike werking het en dat dit verband hou met die feit dat regte en vryhede in belang van die algemene gemeenskapsordening ook in privaatregtelike verhoudings beskerm behoort te word.[118] Die volgende aspekte moet egter in gedagte gehou word:

(a) Uit die ontleding van die regsposisie in die VSA, Nederland en Duitsland is dit duidelik dat die privaatregtelike werking van menseregte nie absoluut is nie en van regsverhouding tot regsverhouding kan verskil. Die reg op verenigingsvryheid word byvoorbeeld verskillend toegepas in die geval van politieke partye, kerke en vakbonde. Dit gaan deurentyd oor die afweging van belange en onbuigsame maatstawwe het selde 'n regverdige uitslag tot gevolg.

(b) Daar is dikwels bykomende wetgewing wat reël in watter mate die toepassing van menseregte ook privaatregtelike werking het. Voorbeelde hiervan is die Nederlandse onderwyswetgewing en die Parteiengesetz en die Gesetz gegen Wettbewerbsbeschränkungen in Duitsland. In die gevalle waar die strekwydte

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113 Traub (1985) 592.
114 *Ibid.*
115 Sien ook Kruger (1990) 287 – 288.
116 Du Plessis "Filosofiese perspektief" 19; Rautenbach "Menseregte-aktes: 'n vergelykende oorsig" in Van der Westhuizen en Viljoen (reds) *'n Menseregtehandves vir Suid-Afrika* (1988) 35 42 vn 43.
117 Venter *Die publiekregtelike verhouding* (1985) 176 – 177; sien egter Kruger (1990) 285 – 291.
118 Sien veral Grabitz (1986) 161 ("Elemente der Gesamtrechtsordnung des Gemeinwesens").

van menseregte met betrekking tot privaatregtelike verhoudings nie statutêr vasgestel is nie, vervul 'n konstitusionele hof 'n baie belangrike funksie in die vasstelling van die omvang van menseregte.[119]

(c) In Nederland en Duitsland is vryheid van vereniging en geloofsvryheid beginsels wat dikwels voorkeur bo die diskriminasieverbod geniet, maar die diskriminasieverbod word wel in omskrewe gevalle privaatregtelik toegepas. In die VSA word vryheid van vereniging en geloofsvryheid egter sodanig deur die diskriminasieverbod beperk dat daar slegs in hoogs uitsonderlike gevalle van die diskriminasieverbod afgewyk word. Weens die inbreuk wat die Amerikaanse toepassing op persoonlike keuses en vryhede maak, is die wyse waarop die balans in Nederland en Duitsland gehandhaaf word bo die Amerikaanse stelsel te verkies. Ingevolge sowel die ANC se voorgestelde Bill of Rights as die regskommissie se voorgestelde handves word religieusgerigte keuses en onderskeide binne perke toegelaat, terwyl rassediskriminasie tereg verbied word.

(d) Dit sal vir regsekerheid bevorderlik wees indien die samehang tussen die vryheid van geloof en verenigingsvryheid enersyds en die diskriminasieverbod andersyds vroegtydig duidelik in 'n handves gereël word. Voorbeelde hiervan in die Nederlandse reg is die bepaling in artikel 23 van die Nederlandse Grondwet dat openbare onderwys geloofsoortuiging eerbiedig, die feit dat Christelike onderrig by openbare skole toelaatbaar is en die verskaffing van staatsfinansiering aan religieusgerigte privaatinstellings ingevolge die Wet op Wetenschappelijk Onderwys van 1975.

(e) In die Suid-Afrikaanse samelewing behoort daar met die behoefte aan die vrye uitoefening van keuses ten opsigte van geloofsuitlewing en verenigingsamestelling in privaatregtelike verhoudings rekening gehou te word. Dit is nie noodwendig diskriminerend van aard om op grond van godsdiens te onderskei nie. Dit is egter eweneens belangrik om in gedagte te hou dat diskriminasie in privaatregtelike verhoudings van 'n meer openbare aard vermy behoort te word. Hoewel daar dus erkenning aan (die behoefte aan) individuele vryhede in privaatregtelike verhoudings verleen moet word, moet dit altyd met inagneming van oorkoepelende beginsels in belang van die totale gemeenskap wees. Dit maak owerheidsingrype in privaatregtelike verhoudings in bepaalde (omskrewe?) uitsonderingsgevalle noodsaaklik.Die ingrype behoort gebalanseerd te geskied deur met sowel geloofsvryheid en verenigingsvryheid as die diskriminasieverbod rekening te hou.

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119 Sien hieroor veral Kruger "Die regbank in 'n nuwe Suid-Afrika" 1991 *Stell LR* 365 – 369.

It is important, particularly in the area of criminal law, which governs conduct, that society's notions of what is the law and what is right should coincide. One role of the legislator is to detect any disparity between these notions and to take appropriate action to close the gap (*per* Lord Lowry in *Airedale NHS Trust v Bland* (acting by his guardian *ad litem*) 1993-02-04 (HL) – unreported as yet).

Trade secrets through the cases: a study of the basis and scope of protection

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OPSOMMING

Die regspraak oor handelsgeheime: 'n ondersoek na die grondslag en omvang van beskerming

Handelsgeheime word in die algemeen in ons reg as 'n *species* van vertroulike inligting behandel. Hulle is belangrike en dikwels waardevolle ekonomiese bates. Hierdie artikel handel slegs oor een aspek van handelsgeheime, naamlik hulle regsbeskerming; in die besonder word klem op die juridiese basis en die omvang van beskerming in ons reg geplaas.

Beskerming van handelsgeheime in Suid-Afrika is grootliks op die gemenereg aangaande kontrakte en delikte gebaseer; statutêre beskerming ingevolge die maatskappye- en outeursreg speel egter ook 'n rol. Hierdie beskermingsgronde word sistematies aan die hand van ons regspraak ondersoek.

Die ondersoek na die omvang van die beskerming van handelsgeheime is gerig op die beleidsvraag in watter mate die reg sodanige beskerming sal verleen. Watter handelinge wat handelsgeheime skend, is gedingsvatbaar in ons reg? Die uiteindelike gevolgtrekking is dat ons howe vandag beskerming aan handelsgeheime sal verleen selfs in die afwesigheid van 'n mededingingsverhouding tussen die eienaar van die handelsgeheim en die persoon wat dit na bewering misbruik het.

> "To my mind the simple practical guide in cases of appropriation of confidential documents or ideas is the commandment 'Thou shalt not steal.'"[1]

1 INTRODUCTION

Trade secrets, know-how and other intangibles covering technical and commercial information are substantial economic assets. They represent the fastest-growing major commodity in many countries.[2] And, if judicial activity over the past decade or so is a reliable indicator, South Africa is no exception to the trend.

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1 Per Schutz AJ in *Easyfind International (SA) Pty Ltd v Instaplan Holdings* 1983 3 SA 917 (W) 927C.

2 Soltysinski "Are trade secrets property?" 1986 *IIC* 331.

Trade secrets are a species of confidential information, a concept which is not easy to define. This is how Joubert[3] puts it:

> "Die groot probleem is egter om vas te stel wat vertroulik is en wat nie. Vanselfsprekend is nie alle inligting wat die aanspraakmaker as vertroulik aandui regtens vertroulik nie. As die inligting reeds voor bekendmaking aan die verweerder bekend was, is dit wat hom betref nie vertroulike inligting nie. Inligting wat nie aan hom bekend is nie, maar wat reeds aan die publiek bekend of beskikbaar gestel is, kan ook nie as vertroulike inligting beskou word nie. Vertroulike inligting is dus inligting wat nie reeds aan die verweerder of aan die publiek bekend is nie. Daar kom egter iets by: die inligting moet deur die aanspraakmaker as vertroulik behandel word . . . Al die omstandighede moet egter in aanmerking geneem word en die reg sal die inligting as vertroulik behandel as 'n redelike persoon tot die gevolgtrekking sou gekom het dat die inligting as vertroulik beskou moet word."

This test is predominantly objective, but it contains a subjective element: the perception of the party who asserts that the information is confidential. Other tests will be encountered later.

In turning from the general to the particular, one finds it no easier to come to a clear definition of a trade secret in the South African reported judgments. According to Van Heerden and Neethling,[4] the term may be defined as "bedryfsinligting van 'n besondere ekonomiese waarde wat nie algemeen beskikbaar is vir en dus bekend is aan andere nie".

The American Restatement of the Law, Torts[5] denies that an exact definition is possible, yet states:

> "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers . . . Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialised customers, or a method of bookkeeping or other office management."

Solid juridical and conceptual foundations for the development of the law of trade secrets in this country have been laid by writers like Van Heerden and Neethling[6] and Joubert.[7] Others have also contributed.[8] Despite the efforts of these writers, there remain areas of uncertainty at the most fundamental level of principle. Consider, for instance, the juridical nature of a trade secret: Van Heerden and Neethling,[9] Copeling[10] and Knobel[11] persuasively argue that a

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3 "Die reg en inligting" 1985 *De Jure* 42.
4 *Onregmatige mededinging* (1983) 132.
5 (1939) s 757 (the topic has been omitted from Restatement, Second, Torts (1979)).
6 132 – 141; see also Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 559 – 563.
7 34 – 45.
8 See, eg, Knobel "Die deliktuele beskerming van die reg op die handelsgeheim in die mededingingstryd" in Neethling (ed) *Onregmatige mededinging/Unlawful competition* (1990) 70 (1990 *THRHR* 488); Leon "Trade secrets: protection in SA common law" 1982 *De Rebus* 379; Delport "Trade secrets and confidential information" 1982 *Businessman's Law* 164 186.
9 132 – 133.
10 1968 *THRHR* 188 – 190.
11 77 esp fn 44.

trade secret should be classified as immaterial property in law ("die regsobjek van 'n immaterieelgoederereg"). Joubert,[12] on the other hand, has authority to support his contention that what the law protects in confidential information such as a trade secret is not property, but confidentiality.[13] It will be necessary to return to this controversy in greater detail later on,[14] but only in so far as it is strictly relevant to the present topic.

This article is concerned with only one aspect of trade secrets: legal protection. The protection of trade secrets in South Africa falls almost exclusively under the common law, but in certain cases statutory law may also have a role to play. Suppose that the information to be protected relates to an invention: common-law protection cannot play any long-term role here, unless the invention can be put to commercial use without at the same time becoming public. So, for instance, a mechanical device will almost always reveal its workings (sometimes by the process of "reverse engineering") to experts once it is marketed. It is therefore futile for the inventor to rely on contractual or delictual obligations at common law in order to keep the invention secret: the only effective protection is afforded by a patent which gives him monopoly protection even against independent devisers of the same invention.

On the other hand, an invention relating to a process of manufacture may not be as easily detectable; then the inventor is faced with a difficult choice: again, he may seek statutory patent protection, but this lasts only for a limited period (20 years in South Africa), and is granted on condition that the invention is sufficiently described in the specification. Alternatively, he may rely on the common law to protect the secrecy of his invention. Protection of this nature, it is true, is not tied to specified time periods, but it holds good only against those who receive the information directly or (in some cases) indirectly from the inventor. Many countries have accepted that this choice should be provided, however much it may detract from the incentive to publicise, which is one root purpose of the patent system.[15]

Copyright, too, is capable of protecting confidential trade information, but only where the intrusion takes the form of making at least one copy, or of giving a performance in public, or of doing one of the other acts which the Copyright Act 98 of 1978 specifies as constituting infringement. Coupled with this, there must be a copying of the manner of expression and not merely of the substance of the information. The common law, on the other hand, protects the information in substance, not in form. This protection is not generally tied to particular ways of using the confidential trade material.[16] The relationship between trade secrets and copyright will be considered again later on.[17]

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12 37.

13 This debate is not confined to South Africa: see Stuckey "The equitable action for breach of confidence: is information ever property?" 1979–1982 *Sydney LR* 404; Soltysinski *op cit*; Cornish *Intellectual property* (1989) par 8–043 and 8–044.

14 See par 2 2 2 below.

15 Cornish par 8–003; see further on this point Soltysinski 356, who cites *Kewanee Oil Co v Bicron Corp* 416 US 470 (1974) 494.

16 Cornish par 8–005.

17 See par 2 5 below.

2 THE GROUNDS AND SCOPE OF PROTECTION

As the title of this article indicates, attention will focus specifically on the basis and scope of protection. Joubert stresses the importance of identifying the juridical basis of protection:[18]

> "Dit is belangrik om uit te maak op welke basis die reg inligting beskerm omdat dit lig werp op die regsbelang wat beskerm word en die remedies wat aangevra kan word. Hier verskil ons reg van die Engelse reg, waar daar met 'equity' regsbeskerming verleen kan word sonder dat gevra word na die regsbasis waarop die beskerming berus . . . Dié benadering het die Engelse howe ontdaan van die verpligting om vas te stel of die beskerming kontraktueel van aard is, indien wel, of dit uitdruklik of stilswyend bepaal is, of miskien op ander gronde verleen moes word . . . Niemand ontken vandag dat daar wel beskerming moet wees nie, maar hedendaags is die benadering veel meer om wel na die grondslag van die regsbeskerming te verneem."

As the discussion proceeds, it will become evident that too many of our judges ignore these vital precepts, and our law is much the poorer as a result.

In so far as the reported decisions of the courts allow, I shall attempt to classify and treat systematically the various grounds available in South African law for the protection of trade secrets.[19] These categories, however, are not watertight and mutually exclusive: it may well be that in a particular case a plaintiff has more than one ground of protection at his disposal.

The inquiry into scope gives rise to different questions: how far will the law go in protecting trade secrets? What is protectable and what is not? What acts of interference with trade secrets are actionable? (It will become apparent that the courts distinguish between appropriation, utilisation and divulgement of trade secrets.) Is the subject-matter of the trade secret at all relevant? (Van Heerden and Neethling[20] argue that it is not: any type of commercial information which is confidential or secret and is, viewed objectively, of economic value, constitutes a trade secret and thereby qualifies for protection.)

Since the theme is the essentially practical one of protection, this study leans heavily on the decisions of the courts. Under each head of protection the cases are discussed in chronological sequence as far as possible; this approach lends a sense of continuity and helps to clarify the development of the law. The reader will also find in many instances that the facts of a case, even if greatly simplified, have not been disdained, for it is only when principles are linked to the realities of commerce (or some other field of human activity) that the law leaps to life.

A word about terminology at the outset: since a trade secret is treated as a *species* of the *genus* confidential information, in what follows the larger will be taken to include the smaller. Judgments are examined which the reader will scour in vain for so much as a mention of the term "trade secret"; they are included because they deal with confidential information as such, so that, in general, the principles which they contain are equally applicable to trade secrets. The two terms are even used interchangeably where such use is felt to be justified by the context.

On occasion, the person legally entitled to a trade secret is described, for want of a more exact term, as the "owner" or "proprietor" of the trade secret. The

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18 36–37.
19 Cf Joubert 36–41.
20 133–134.

reader is asked to pardon the liberty[21] and to remember that, when used below, these terms do not bear the meaning ordinarily ascribed to them by the law of property.

2 1 Contractual protection

A distinction may conveniently be drawn between those South African reported cases in which the obligation of confidentiality or secrecy is expressly embodied in a contract, and those in which it takes the form of an implied term of the contract. The first situation arises where a person undertakes not to disclose to third parties or to use for his own benefit, any trade information which he has acquired either in confidence from, or in the service of another. A term of this nature commonly occurs in restraint of trade agreements between employer and employee.

In the absence of express agreement, the question sometimes arises whether a contractual obligation to respect secrecy may be implied in the circumstances of a particular case.

The latter type of obligation will be considered first, if only because it has by far the longer pedigree in our case law.

2 1 1 Implied contractual obligation to respect secrecy

The cases to be considered under this head had certain features in common. All of them concerned alleged misuse by an employee or ex-employee of confidential trade information acquired in the course of employment; at the core of each case was therefore a contract of employment. In some cases a third party alleged to have benefited from the information was also a party to the litigation. In every case, the relief sought by the employer was an interdict to restrain the employee or ex-employee from using or divulging the trade secret. Finally, in assessing their value as precedents, it is worth noting that all were single-judge decisions. Other similarities will emerge in the course of the discussion.

In the early case of *Pelunsky & Co v Teron*,[22] the court considered the juridical basis of an employee's liability for misappropriation of his employer's confidential trade information. Replying on English case authority, Ward J said:[23]

> "In equity it was regarded as a breach of good faith sufficient to give the court jurisdiction. In the common law it was regarded as a breach of an implied term of the contract of service: an implied promise 'as part of the good faith which is necessary to make the bargain effective'. It does not really matter on what ground it is put, but speaking generally, the principle is that a servant is not entitled to use information which he gained in his master's employment in any way inconsistent with good faith."

Exactly for what proposition does *Pelunsky*'s case stand as authority? Certainly for the principle that good faith lies at the heart of the employee's duty to respect secrecy. But what more? It is important to decide this question at the outset, for a number of later decisions concerning the basis of protection rest on the authority of *Pelunsky*'s case.

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21 The difficulty is no less real in Afrikaans: see Knobel fn 1.
22 1913 WLD 34.
23 38.

The crux of the quoted passage is Ward J's laconic statement that "it does not really matter on what ground it is put . . ." But it does matter: of the two grounds posited, namely equity and the breach of an implied term in the contract of service, only the second is available in South African law. It follows that *Pelunsky*'s case is valid authority only for the proposition that breach of an implied term in a contract of service is a legal basis of protection of trade secrets. This must be kept in mind when the *Pelunsky* case is cited as authority in later judgments.

Turning to the question of scope, Ward J inquired whether the information in issue (a list of names and addresses of the employer's customers and his private telegraphic code) qualified for protection. It did, he concluded, because the list was distinctive, it had been compiled by the employer with some care, it contained more names than any list produced by trade rivals, and it was the result of considerable business activity. The telegraphic code fell under the same principle.

The basis of the decision in *Marks v Luntz*[24] is not stated in the reported judgment. However, it seems clear that the employer, Marks, relied on an implied term in the contract of service prohibiting the prejudicial use of confidential information by his ex-employee, Luntz.[25]

Marks, a fruit merchant, applied for a very wide order restraining Luntz from ever making use of any materials or information acquired in the course of his employment. Buchanan J correctly refused the order, which would have precluded Luntz from ever carrying on business as a fruit merchant on his own behalf after leaving the service of Marks.

In the contract of service before the court in *Beeton v Peninsula Transport Co (Pty) Ltd*,[26] an employee expressly undertook to keep his employer's trade information secret at all times. It was clear, however, said Sutton J, that quite apart from express agreement, the employee owed a duty to his employer even after termination of the contract not to disclose confidential information acquired in the course of his employment. It is part of the implied contract between employer and employee that such confidential information will not be used to the employer's detriment. Sutton J confirmed, on the strength of *Pelunsky*'s case, that the courts will restrain such a breach of duty by means of an interdict and award damages for the breach.

Coolair Ventilator (SA) Pty Ltd v Liebenberg[27] is undoubtedly the leading case under this head. Marais J remarked[28] that under a system of free private enterprise and therefore of competition, it is to the advantage of a trader to obtain as much information as possible about the business of his rivals and to

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24 1915 CPD 712.

25 Per Marais J in *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 690G – H.

26 1934 CPD 53.

27 1967 1 SA 686 (W).

28 689A – E; these remarks were quoted with approval by the court in *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 1 SA 316 (T) 322A – C. However, it is arguable that the decision in that case (discussed below) was based as much on the equitable action for breach of confidence deriving from English law as on the breach of an implied term in a contract of service.

let them know as little as possible of his own. He would be happiest if only what he himself chooses to disclose comes to the knowledge of his competitors. He knows that his employees, while in his employ or even after leaving it, have it in their power to disclose to competitors trade or business secrets capable of use adverse to him. All this is well-known to employers and employees alike. It follows, said his lordship, that both parties to a contract of service would, if asked the question, confirm that there is implied in the contract a duty on the part of the employee or ex-employee not to disclose information which could harm the employer's business.

In tracing the development of the concept of good faith in an employee's dealings with his employer, the court considered and approved[29] the three earlier South African decisions. *Marks v Luntz* was, however, distinguished from the present case: in the *Marks* case, the information acquired by the employee in the course of his employment was subsequently used by him for the benefit of his own enterprise; in *Coolair Ventilator*'s case, Liebenberg divulged and exploited confidential trade information for the benefit of his employer's trade rival.

The court, in seeking to fix the dividing line between confidential and non-confidential information, held that regard must be had to the potential or actual usefulness of the information to a rival. Marais J elaborated:[30]

> "If . . . it is objectively established that a particular item of information could reasonably be useful to a competitor as such, ie to gain an advantage over the plaintiff, it would seem that such knowledge is *prima facie* confidential as between an employee and third parties and that disclosure would be a breach of the service contract. If use has in fact been made of it in an effort to harm the business interests of the plaintiff the presumption would be even stronger that the employer and the employee, who would in the course of his employment obtain knowledge of it, intended it to be treated as confidential information not to be divulged to third parties."

The ambit of the *Coolair Ventilator* judgment is, however, restricted by the proviso[31] that in order to succeed, the employer must establish that the disclosure complained of was made to a trade rival. Marais J cited no authority for this proposition. While this burden was discharged by the employer in the *Coolair Ventilator* case, the need for such a proviso must be questioned. Cases considered later in this study show that the owner of a trade secret may suffer financial prejudice by reason of disclosure to third parties who are not trade rivals.

Although the basis of protection of confidential information was not made entirely explicit in *Allied Electric (Pty) Ltd v Meyer*[32] it seems that King J[33] had in mind an implied term in the contract of service between the parties. The court approved the view that an ex-employee cannot in all fairness be restrained from using in any business which he conducts on his own account, confidential information which he acquired in the course of his employment. On the other hand, if the ex-employee takes up new employment, he can be restrained from

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29 690A – H.
30 689F – H.
31 691E – F.
32 1979 4 SA 326 (W).
33 335A.

divulging such information to the new employer.[34] The critical distinction, in other words, is between use of the confidential information for the ex-employee's own benefit, and disclosure of it to another employer. Relying on *Pelunsky v Teron supra*, King J held that the court would not interfere unless the exploitation or divulgement of trade secrets by the employee was inconsistent with good faith.

In *Freight Bureau (Pty) Ltd v Kruger*,[35] the same judge reaffirmed that an employee is not entitled to use information gained in the service of his employer in any way inconsistent with good faith. As *Pelunsky v Teron* was cited in support of this proposition, it is implicit in the judgment that the basis of the employee's liability in these circumstances was again the breach of an implied term in the contract of service.

Northern Office Micro Computers (Pty) Ltd v Rosenstein[36] illustrates the interesting situation where an employee enjoys copyright in confidential trade material belonging to his employer. The resulting conflict of interests was the subject of a lucid and impressive judgment handed down by Marais AJ.

Rosenstein, a computer systems analyst, was employed specifically to develop a suite of computer programmes to serve as an accounting and administrative system for doctors and dentists. This he did. After termination of his employment, his ex-employers sought a very wide order restraining him from communicating any information of whatsoever nature relating to the development and/or contents of the suite of programmes to any third party.

While the scope of protection of trade secrets is analysed in some depth, the judgment has little to say about the basis of protection. The ex-employers based their case solely upon the right of an employer to require an employee or ex-employee to respect and maintain the confidentiality of his employer's trade secrets. The court simply accepted, on the strength of, *inter alia*, the *Coolair Ventilator* case, that such a right and corresponding obligation exist in South African law. The inference once again is that the basis of the obligation was taken to be an implied term in the contract of service. Here, however, as in the *Freight Bureau* and *Allied Electric* judgments, one would have welcomed explicit recognition of the juridical ground of protection.

Rosenstein's contention that copyright in the programmes vested in him in terms of the Copyright Act 98 of 1978 was upheld by the court. However, it is no answer to the claim for an interdict for an ex-employee to say that he is vested with the copyright, if it turns out that the suite of programmes in issue is also a trade secret. The mere fact that copyright is vested in an employee in certain circumstances does not mean that, if the subject of the copyright is also confidential and a trade secret, the employee may divulge it to whom he pleases.

The critical question, then, was whether the ex-employers had established (the onus being on them to do so) that the suite of programmes was indeed a trade

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34 335C – E.
35 1979 4 SA 337 (W).
36 1981 4 SA 123 (C).

secret and, if so, to what extent Rosenstein should be restricted in dealing with it. In addressing this question of scope, Marais AJ said:[37]

> "The dividing line between the use by an employee of his own skill, knowledge and experience, and the use by him of his employer's trade secrets, is notoriously difficult to draw. An employer's trade secret may be no more than the result of the application by an employee of his own skill, knowledge and experience. But, if the employee was engaged to evolve the secret, it remains the employer's trade secret for all that. The employee may not simply copy it if, by copy, one means that literally. For example, if he has conducted a confidential market survey for his erstwhile employer to establish what demand, if any, exists in a particular area for a particular type of product, he cannot simply copy the survey and hand it to his new employer. But *non constat* that the employee may never again set out to establish the market demand for that particular type of product in the same area. Generally speaking, he cannot be prevented from using his own skill and experience to attain a particular result, merely because it is a result which he has achieved before for a previous employer."

Turning to the facts, his lordship was unable to accept that the concept *per se* of a computer programme of the kind in issue was confidential to the ex-employers and therefore a trade secret. Nevertheless, much work, skill and time was needed to produce a suite of programmes of this kind. If Rosenstein were permitted simply to copy it, he would be unfairly nullifying the advantage of the "long start" over anyone else to which his ex-employers were entitled. To that limited extent, the suite of programmes was held to be a trade secret.

It followed that the ex-employers were not entitled to an interdict of such sweeping scope as they desired. Instead, Rosenstein was restrained from copying, or permitting to be copied, the suite of programmes, or any part of it. He was also restrained from making use of, or permitting anyone else to make use of any existing copy of the suite.

In *SA Historical Mint (Pty) Ltd v Sutcliffe*[38] the scope of protection of trade secrets again received careful consideration at the expense of the basis. The respondent, Sutcliffe, was alleged to be using for his own benefit, confidential information obtained while he had been employed as marketing manager of the applicant, SA Historical Mint. In the words of Van den Heever J:[39]

> "It has been accepted in South Africa that an employee may not make use of information which has been entrusted to him in confidence in the course of his work, for the purpose of competing with his employer or former employer. One cannot protect what is ordinary general information by telling the employee that it is a trade secret: that cannot alter the quality of the material."

Two points arise from this passage: the first is that as Van den Heever J's remarks are made in the context of a contract of employment, it would not be wrong to infer that the unarticulated basis of protection is, as in the earlier cases, an implied term of that contract.

Secondly, the passage appears on a first reading to be in direct conflict with the views expressed by the court in the *Allied Electric* case. There, it will be recalled, King J said that the employee cannot, after leaving his employment, be restrained from using his ex-employer's confidential information in any business which he conducts for his own account. That however, is subject to the overriding requirement of good faith. The two cases are reconcilable on the

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37 136B – E.
38 1983 2 SA 84 (C).
39 89H.

basis of this requirement, which in my submission is implicit in the above passage. This impression is strengthened by the language used by Van den Heever J in a passage which occurs later in the judgment:[40]

> "There is not and cannot be a general duty burdening an employee, whether humble or at 'top management' level, not to compete with the company that formerly employed him. But in the process of competing he may not 'steal' what is the company's property – its trade secrets or confidential internal business information; or 'steal' the energy expended in efforts, whether of research or negotiation, made to benefit it."

Clearly, *bona fides* lies at the very root of an employee's duty to respect his employer's trade secrets; this point has been emphasised repeatedly in the judgments considered thus far.

On the question of scope, Van den Heever J, like the court in *Northern Office Micro Computer*, observed[41] how difficult it is to determine whether, on the facts of a given situation, a former employee is misappropriating what by rights is the company's, or merely using his own skill and knowledge, or using general information and methods that cannot be regarded as "belonging" to the company.

On the facts, however, the court in *SA Historical Mint* had no difficulty in concluding that the ex-employer was merely applying marketing techniques that were standard in its type of business (mail-order sales of porcelain figurines). There was nothing confidential about its marketing techniques and therefore nothing for an erstwhile employee to plagiarise; nor was there any confidentiality in its "process as a whole", a concept which recurs in a number of cases discussed below. The applicant's final argument, that respondent should not be permitted to use applicant as a "springboard", fared no better: there was no room here for application of the principle that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication.[42]

The last case to be examined under this head is *Multi Tube Systems (Pty) Ltd v Ponting*.[43] It is even more difficult here than in the earlier cases to determine the juridical basis of the decision; the judgment offers little assistance. While the respondent's conduct could as easily fit the delict of unlawful competition,[44] it is treated under this head for two reasons: firstly, the applicant company sought an interim interdict to restrain the first respondent, Ponting, from using or divulging methods and systems constituting confidential trade information which came to his knowledge in the context of a contract of employment between the parties; secondly, in formulating the applicable principles, Broome J relied on two passages from the *Coolair Ventilator* case, which is clear authority for founding the protection of trade secrets on an implied term in a contract of service.

The complaint was that Ponting, having obtained confidential information from Multi Tube, was now using it as a springboard for his present activities which, in the circumstances, amounted to unfair and unlawful competition. The information related to the manufacture and sale of a particular line of fibreglass furniture.

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40 90H – 91A.
41 91B.
42 94A.
43 1984 3 SA 182 (D).
44 Knobel 72 fn 24 places the *Multi Tube* case in this category.

It was held[45] that the applicant must establish (i) that confidential information exists; (ii) a relationship between the applicant and the first respondent in terms of which information was made known or became discoverable; (iii) express or implied knowledge of its confidentiality and value; (iv) revelation or disclosure to the potential or actual detriment of the employer. It was for these propositions that Broome J placed reliance on the *Coolair Ventilator* case.

The court was satisfied on the facts that Ponting had *prima facie* misappropriated or filched information which was, to his knowledge, secret and confidential and the property of Multi Tube. The latter's case nevertheless foundered on another ground: Multi Tube delayed for so long in bringing its application for an interdict that the benefit of the springboard or headstart conferred on Ponting by the confidential information had probably abated, if not completely disappeared. On the strength of *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd*[46] and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*,[47] Broome J took the view[48] that the unfair advantage of the springboard is usually of limited duration and that there must come a time when the matters in question are not longer secret. At that stage an interdict would no longer be warranted. Here our courts follow the so-called "Conmar" rule of American law which states that even though he breached the confidence when the subject-matter was still secret, a defendant is relieved of liability once it becomes public. (Opposed to this view is the "Shellmar" rule, according to which a defendant who has once breached a confidence while it is still secret will be restrained in perpetuity from using it, and he pays damages on all use subsequent to the breach.)

There is a unifying principle that underlies all the cases which base liability for breach of a trade secret on an implied term in a contract of service. It is the employee's invariable duty to exhibit good faith in his dealings with his employer's trade secrets or other confidential information. That being the case, it is submitted that in order to succeed under this head of liability, an employer must show that the misuse of his trade secrets by the employee or ex-employee was intentional; negligence will not suffice. (Where the protection of trade secrets rests on the delictual basis of unlawful competition, the position, as we shall see later, is different.) This proposition is not inconsistent with any of the cases which have been discussed under this head.[49]

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45 185I; see also Neethling 1991 *THRHR* 561.
46 1977 1 SA 316 (T).
47 1981 2 SA 173 (T).
48 189I.
49 A recent South African case in which an alleged misappropriation of confidential trade information was based upon the breach of an implied contractual term, was *Cambridge Plan AG v Moore* 1987 4 SA 821 (D). Unusually, the relationship between the parties was not one of employer and employee. Page J held (847D – G): "It is stated to be a relationship between independent contracting parties . . . The second applicant and the first respondent were each to conduct their own business in association with one another for their common benefit. The confidential information amassed during the period of that association was accordingly to be applied for their mutual benefit. I am unable to imply from this relationship any agreement that such information would on termination thereof be the sole property of one or the other of the parties thereto . . . It follows that . . . the applicants have failed to establish a prima facie case in respect of the relief claimed on the basis of breach of confidence."

2 1 2 Express contractual obligation to respect secrecy

In most, but not all, of the South African reported cases, the obligation arose in the context of a contract of employment and was expressed in a restraint of trade agreement.

Two cases in which a secrecy undertaking formed part of a restraint of trade agreement are *Ackermann-Göggingen Aktiengesellschaft v Marshing*[50] and *Recycling Industries (Pty) Ltd v Mohammed*.[51] Both decisions must now be regarded as suspect, for they follow the traditional approach to assessing the validity of covenants in restraint of trade. That approach, adopted from English law, has since been rejected by the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.[52]

The relationship between the parties in the *Recycling Industries* case was the familiar one of employer and erstwhile employee. In terms of the written contract of employment, the employee was restrained from disclosing or using confidential information acquired in the course of his employment.

The court held on the facts that what the employer sought to protect amounted to no more than its attempt to train the erstwhile employee in the organisational skills and methods necessary to run an efficient business. Training of this nature might serve to equip the employee as a possible competitor, but it did not amount to such trade secrets or confidential information as the employer was entitled to protect by a convenant in restraint of trade.

In *Aercrete South Africa (Pty) Ltd v Skema Engineering Co (Pty) Ltd*,[53] confidential information about a machine, constructed according to a patented process and used for the manufacture of lightweight concrete blocks, was made available by the second applicant (the British inventor of the process) to certain South African companies (the respondents) for an exclusive and limited purpose. The respondents gave express written undertakings not to abuse the confidential information. The applicants' complaint was that the information was now being misused and commercially exploited by the respondents. This case did not involve a contract of employment.

Findlay AJ was of the view that the condition imposed on the respondents was a form of restraint and therefore (in accordance with the approach approved by the Appellate Division in the *Magna Alloys* case), *prima facie* enforceable. Consequently, one might have expected the court to base its finding that secrecy had been breached on the written undertakings given by the respondents. Findlay AJ, however, chose instead to rest his decision on other, non-contractual grounds (to be discussed later).

A clear and detailed exposition of the principles of law laid down in the *Magna Alloys* case is to be found in the unreported judgment of Stegmann J in *Thorpe Timber Co (Pty) Ltd v CH Griffin*.[54] The judge, having considered the

50 1973 4 SA 62 (C).
51 1981 3 SA 250 (SE).
52 1984 4 SA 874 (A).
53 1984 4 SA 814 (D). This case concerned an urgent *ex parte* application for an "Anton Piller" order. In these circumstances, Findlay AJ's cautionary remarks (816B) should be kept in mind when evaluating the decision: "[I]t is obviously highly undesirable for me to express any views which might in any way be construed as a finding on the facts of the matter . . ."
54 1989-06-23 case no 9111/89 (W).

approach followed in some of the earlier cases, went on to give an admirably precise statement of our current law of restraint of trade in relation to trade secrets:[55]

> "I conclude that the previously supposed rule must be reformulated in the light of the principles set out in Magna Alloys. When this is done, the following rule emerges: A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the convenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the convenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connections, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose."

Stegmann J concluded[56] that the task of a trial court is to consider whether the employee has discharged the onus of proving such facts as are sufficient in law to displace the qualified predominance of *pacta sunt servanda* over the public interest in his freedom of employment.

The full bench of the Transvaal Provincial Division had the rare opportunity to make an authoritative pronouncement on the law of trade secrets in relation to restraints of trade in *Sibex Engineering Services (Pty) Ltd v Van Wyk*.[57] Instead, there was a split decision with a dissenting judgment which is in certain respects more cogent than the reasoning of the majority.

An employee, Van Wyk, undertook in terms of a restraint agreement not to utilise or reveal any confidential information or trade secrets of his employer, Sibex, even after termination of his employment. In particular, he agreed not to "make use of any trade secrets, chemical formulae, customer lists or other confidential information" which came into his possession during his period of employment. On terminating his employment, Van Wyk entered the service of a direct competitor of Sibex. Sibex's application for an order enforcing the terms of the restraint failed.

Harms J, giving the judgment of the majority, held that the fact that a party does not have any interest in the enforcement of the restraint would obviously establish that the restraint is unreasonable. The decision in this case accordingly turned on whether the restraint served any interest of Sibex and, if so, to what extent. The court found that, with the exception of certain specialised know-how, the trade secrets of confidential information of Sibex had never come into Van Wyk's possession. Moreover, on Sibex's own admission, the competitor already employed that specialised know-how. Thus it could not be regarded as having retained any element of confidentiality. The restraint was therefore incapable of protecting any interest of Sibex in its trade secrets or other confidential information. To enforce the restraint under such circumstances would be contrary to public policy.

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55 This extract from the judgment is quoted in *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 2 SA 482 (T) 502J – 503C.
56 The *Sibex* case 506E – F.
57 *Ibid.*

Stegmann J, in his thorough dissenting judgment, differed from the majority on the issue of Sibex's specialised know-how. His lordship said:[58]

> "[T]he mere fact that a trade secret is known to a group of people who compete with each other does not necessarily lead to the inference that it has ceased to be a trade secret. Cf *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) at 221F; *Harchris Heat Treatment (Pty) Ltd v ISCOR* 1983 (1) SA 548 (T) of 552B – C; and *South African Iron and Steel Industrial Corporation Ltd v Harchris Heat Treatment (Pty) Ltd* 1987 (4) 421 (A) . . . On these affidavits the first respondent (Van Wyk) has not at this stage discharged the onus of proving either that the appellants presently have no trade secrets to protect by means of the restraint in question, or that the first respondent had no access to any such trade secrets."

It is submitted that the authorities cited in this passage do not support the questionable proposition advanced by Stegmann J. On the other hand, his concluding remarks on the onus of proof are consonant with the approach adopted in *Magna Alloys*, and are therefore to be preferred to the line taken by the majority.

(*To be continued*)

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58 509B.

The law's reluctance to regard political utterances as defamatory no doubt stems in part from the recognition that right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him by other politicians or political commentators. At the same time, it seems to me, it also reflects the general approach properly adopted by our Courts that a wide latitude should be allowed in public debate on political matters (*per* Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 588).

Aspekte van die *privilegia militum* in die Romeins-Hollandse reg

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SUMMARY

Aspects of the *privilegia militum* in Roman-Dutch law

In the main, members of the armed forces of the Dutch Republic were not held in as high regard as their Roman counterparts. Nevertheless, it is possible to identify a surprisingly wide variety of *privilegia militum*. In contradistinction to Roman law, the emphasis fell on a suspension of civil legal remedies rather than on *restitutio in integrum* or *beneficium competentiae*.

Various privileges and disqualifications are enumerated and discussed. The conflict of opinion concerning the jurisdiction of civil and military courts is highlighted. Attention is focused on the various moratory measures affording civil relief to soldiers. These include the Edict of Charles V of 20 October 1547, section 12 of the Placcaet Raeckende alle Leger-Personen of 7 May 1630 as well as the Placcaet of the Estates-General of 8 December 1665 which regulated the suspension of certain civil legal remedies.

Comparable measures are to be found in moratory legislation enacted prior to or during the Anglo-Boer War, the First World War and the Second World War. Similar measures still form the core provisions of the present Moratorium Act 25 of 1963. These were amended rather drastically during 1977 and 1978 to afford even more comprehensive civil relief to servicemen, especially to those on active duty.

1 INLEIDING

Die Republiek van die Verenigde Nederlande was nie slegs in alle opsigte die bloeitydperk van die Romeins-Hollandse reg[1] en die Nederlandse regswetenskap in die algemeen nie,[2] maar dit was ook die periode van die hoogbloei van

1 Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 345; Hahlo en Kahn *The South African legal system and its background* (1968) 524; Wessels *History of the Roman-Dutch law* (1908) 294; Visagie *Regspleging en reg aan die Kaap van 1652 tot 1806* (1969) 14; Laspeyres *Geschichte der volkswirtschaftlichen Anschauungen der Niederländer und ihrer Literatur zur Zeit der Republik* (1862) 24; Van Heijnsbergen *Geschiedenis der rechtswetenskap in Nederland* (1925) 351; Coing *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Zweiter Band. Neuere Zeit (1500-1800)* (1977) 501; Kohler "Niederländisches Handelsrecht in der Blutezeit des Freistaates" 1907 *ZHR* 293; Robinson, Fergus en Gordon *An introduction to European legal history* (1985) 357; Kahn "Hugo Grotius 10 April 1583 – 29 August 1645. A sketch of his life and his writings on Roman-Dutch law" 1983 *SALJ* 192.

2 Van der Linden *Koopmans handboek* 4 1 5; Lee *Aspects of European history 1494 – 1789* (1978) 155 – 157; Temple *Observations upon the united provinces of the Netherlands* (1972) 108; Barbour *Capitalism in Amsterdam in the 17th century* (1963) 74; Diferee *De*

die Nederlandse handel.[3] So beskryf Defoe[4] Nederland tydens die sewentiende eeu, die sogenaamde goue eeu van die Nederlandse handel, treffend:

> "[T]he Carryers of the World, the middle Persons in Trade, the Factors and Brokers of Europe . . . they buy to sell again, take in to send out; and the Greatest Part of their vast Commerce consists in being supply'd from all parts of the World, that they may supply all the World again."

Dit was egter ook die tydperk van ekonomies ontwrigtende oorloë met Engeland[5] en Frankryk.[6] Die republiek was genoodsaak om selfs in vredestyd 'n relatief groot staande mag teen 'n koste van meer as ses miljoen gulden per jaar in stand te hou[7] en het na 1713, ekonomies verswak deur hierdie oorloë, sienderoë toegelaat dat sy leër en vloot gaandeweg degenereer.[8] Die Franse inval van 1795 het dan ook die einde van die polities verdeelde, ekonomies uitgemergelde en militêr verswakte republiek beteken.[9]

So skryf Johannes Voet (1647 – 1713) vanuit 'n gemeenskap wat weet wat oorlog en die ekonomies ontwrigtende uitwerking daarvan is. Hy was byvoorbeeld ongeveer 'n jaar oud toe die tagtigjarige oorlog tussen Nederland en Spanje beëindig is, so vyf jaar oud toe die Eerste Handelsoorlog tussen Engeland en Nederland uitgebreek het, in sy tienerjare toe Nederland en Engeland in die Tweede Handelsoorlog gewikkel was en in sy twintigerjare toe die Derde Handelsoorlog tussen Nederland en Frankryk en Engeland uitgebreek het.

Gunstige omstandighede het derhalwe bestaan vir die erkenning en ontwikkeling van regsfigure met die een of ander privilegie vir krygslui tot inhoud.[10] In 'n vorige bydrae is die aandag op aspekte van die *privilegia militum* in die Romeinse reg gevestig.[11] In die onderhawige bydrae word sodanige *privilegia* in die Romeins-Hollandse reg – veral binne respytregtelike konteks – van naderby beskou.

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vervolg van vorige bladsy

geschiedenis van den Nederlandschen handel tot den val der Republiek (1908) 330; Mayr *Lehrbuch der Handelsgeschichte* (1921) 123; Gaastra *De geschiedenis van de VOC* (1982) 136; Hohler 1907 *ZHR* 252; Fischer "Het oudvaderlandse handelsrecht en Hugo de Groot" 1952 *RMT* 602; Van Oven "One hundred and fifty years of Dutch commercial law" 1983 *Netherlands International LR* 187.

3 Van der Linden *Koopmans handboek* 4 1 5; Lee 155 – 157; Temple 108; Barbour 74; Diferee 330; Mayr 123; Rehme "Geschichte des Handelsrechts" in *Handbuch des gesamten Handelsrechts* (1913) 187; Gaastra 136; Kohler 1907 *ZHR* 252: "Im 17. Jahrhundert steht zunächst Holland an der Spitze des Welthandels".

4 Heaton *Economic history of Europe* (1948) 279.

5 1652 – 1654, 1665 – 1657, 1672 – 1674, 1780 – 1784.

6 1672 – 1678, 1688 – 1697, 1703 – 1713.

7 Temple *Observations* 129: "The standing-Forces in the year 70, upon so general a Peace, and after all the Reformations, were Twenty six thousand two hundred men, in Ten Regiments of Horse, consisting of Fifty Troops; and Nineteen of Foot, consisting of Three hundred and Eighty Companies. The constant charge of these forces stood them in Six Millions one hundred and nineteen thousand Gilders a year."

8 Heaton 285.

9 Lee *European history* 161.

10 Sien ook Van Oven 1983 *Netherlands International LR* 188 *sv* "surséance van betaling".

11 Sien Henning "Aspekte van die *privilegia militum* in die Romeinse reg" 1993 *THRHR* 38 ev.

2 VOORREGTE VAN KRYGSVOLK

2 1 Inleiding

Verskeie privilegies of voorregte is aan soldate in die Romeins-Hollandse reg toegeken as gevolg van die begunstiging verleen aan militêre diens.[12] Vanweë die besondere posisie en omstandighede van krygsliede is hul ook aan sekere beperkings onderworpe gestel. Voorbeelde van die *beneficia* en beperkings is dat soldate:

- eiendom kon vindiseer wat deur 'n ander persoon met hul geld gekoop is;[13]
- strafloos sekere regte kon verontagsaam;
- se aanspreeklikheid beperk is tot die bates van 'n bestorwe boedel selfs al het hul geadieer sonder die voordeel van 'n boedellys of inventaris;[14]
- onderskraag is deur die *beneficium competentiae* (wat later meer volledig bespreek word);[15]
- geldig onderling ten aansien van toekomstige erflatings kon beding;
- wat met die *condictio indebiti* ageer, nie die bewyslas dra nie;
- se eiendom nie verbeurd verklaar is as gevolg van die wanbetaling van belastings wanneer geen opgawe daarvoor ingedien is nie;
- se *testamentum militare* nie aan die gewone formaliteite en vormvereistes vir geldigheid hoef te voldoen het nie (soos onder[16] in meer besonderhede aangetoon word);[17]
- in sekere voorgeskrewe omstandighede die eienaars van roerende oorlogsbuit geword het – onroerende oorlogsbuit het die staat toegeval. *Res hostiles* is beskou as *res nullius* en die *occupatio* van *res hostiles* het in die algemeen 'n oorspronklike wyse van eiendomsverkryging daargestel;[18]
- geregtig was op soldy, inkwartiering en gratis mediese behandeling;[19]
- uitrusting, soos geweer en uniform, teen staatskoste ontvang het[20] en geregtig was op skadeloosstelling of *doceurgelden* vir eiendom wat in aksie op die slagveld verloor is en ander skade op kampanje gely;[21]
- slegs met spesiale verlof in die huwelik kon tree;[22]
- nie 'n militêre en politieke amp gelyktydig kon beklee nie.[23]

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12 Sien ook Van Winter *"Cingulum militiae.* Schwertleite en *miles*-terminologie als spiegel van veranderend menselijk gedrag" 1976 *TR* 1.
13 Voet *Commentarius* 6 1 21; Groenewegen *De leg abr ad C* 3 32 8 is egter van mening dat die privilegie nie meer in die Romeins-Hollandse reg behoort te geld nie aangesien die bestaansredes daarvoor verval het.
14 Voet *Commentarius* 28 8 28.
15 Sien par 2 5 3.
16 Sien par 2 5 4.
17 Voet *Commentarius* 29 1 1; *De jure militari* 6 28 – 6 30.
18 De Groot *Inleidinge* 2 4 34; *De jure belli ac pacis* 3 6 3 1; Voet *Commentarius* 41 1 1; *De jure militari* 6 28; Van Leeuwen *RHR* 2 3 10; Van der Keessel *Th* 191 192; *Praelectiones ad Gr* 2 4 34; *GPB* 2 1289 – 1290.
19 *GPB* 2 447 3 182 4 184 5 51 5 169 6 161 7 229 7 202 7 203 7 305 7 323 7 358 7 272 7 273 7 379 7 314 7 347 7 356 7 363 7 373 7 390.
20 *GPB* 5 1269 6 212 6 222 6 173 7 101.
21 *GPB* 7 278 7 279 7 342.
22 *GPB* 6 186 6 226 6 228 6 238.
23 *GPB* 7 55.

Aan sommige van hierdie en ander fasette van die regsposisie van soldate word vervolgens kortliks aandag geskenk. Die taakstelling is nie om 'n *numerus clausus* daar te stel of 'n absoluut volledige weergawe van elke teenstrydige standpunt te verskaf nie. Dit is veel eerder om enkele fasette vir 'n breër en beter perspektief op die *sui generis* regsposisie van die Nederlandse krygsman ietwat nader toe te lig.

2 2 Geen individuele respyt

Rebuffus[24] toon aan dat dit die tydgenootlike gebruik in Frankryk was om 'n individuele oftewel persoonlike respyt aan soldate te verleen op grond van hul krygsdiens.[25] Dit is *letres d'estat* oftewel *lettres d'état*[26] genoem wat "briewe van stilstand" beteken. Oor die algemeen is *letres d'estat* deur die koning of sy kanselary verleen waar beveel is dat iets spesifieks uitgestel moes word, selfs ten aansien van besondere strafregtelike aangeleenthede.[27] Gewoonlik is dit slegs vir ses maande verleen; in hoogs uitsonderlike gevalle kon 'n verlenging van die termyn egter plaasvind. Die gevolg van die verlening van hierdie briewe was dat alle regterlike prosedures teen die begunstigde geskors is.[28]

Geen pertinente vermelding blyk op die oog af uit Romeins-Hollandse bronne van 'n slaafse navolging van die spesifieke voorbeeld wat deur die Franse reg gestel is of van 'n gebruik om *rescripta inductionis*, *rescripta moratoria* of *surcheance van betaalinge*[29] algemeen of slegs aan krygsvolk vanweë militêre diens te verleen nie.

Hierdeur word nie te kenne gegee dat dit soldate in beginsel nie vrygestaan het om in gepaste gevalle vir sodanige regshulp aansoek te doen nie.[30] Trouens, die geval doen juis voor van ene Yves Marie de Marez Grave de Maillebois, generaal van die Hollandse infanterie wat *surchéance van betaalinge* versoek het van die State ten aansien van 'n vonnis wat deur die here Jacques Daufez en Compagnie, handelaars te Rotterdam verkry is.[31] Hierdie versoek is by resolusie van die Staaten van Holland op 26 Mei 1787 van die hand gewys aangesien op grond van die resolusie van 19 Oktober 1605[32] ten aansien van *sureté de corps* tot die gevolgtrekking geraak is dat "geene surcheances van betaaling werken tegen sententiën, gegaan in kragte van gewyijsde".[33]

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24 *Tractatus de literis dilatoriis* 1 42 in *In constitutiones regias commentarius ob ipsa iuris Romani fundamenta, ad planiorem rationis et veritatis intellectum reducta et ad usum practicum accommodata, non solum in scholis, sed in foro versantibus utilissimus* (1554). Sien ook Kinschott *De rescriptis gratiae a supremo senatu Brabantiae nomine Ducis concedi solitis tractatus VII* (1653) *tract* 4.

25 So ook *Worthington v Wilson* 1918 TPD 104 111. Oor die posisie in Italië sien Cucchus *De moratoria praescriptione tractatus* (1584).

26 Zwaardemaker *Over surseance van betaling* (1878) 10–11.

27 Rebuffus *Tractatus de literis dilatoriis* 1 42.

28 Zwaardemaker *Surseance van betaling* 11.

29 Sien Henning "Aspekte van *surcheance van betaalinge* in die respyt- en insolvensiereg" 1991 *THRHR* 523.

30 Sien ook Delprat *De Nederlandsche en Belgische wetgevingen betrekkelijk de surceance van betaling onderling vergeleken* (1854) 17: "Ieder kon het vragen."

31 *GPB* 9 561: Schaap "Surceance van betaling" 1882 *Nieuwe Bijdragen voor Rechtsgeleerdheid en Wetgewing* 224 227.

32 Resolutie van de Staaten van Holland raakende het verleen van Brieven van Seureté du Corps van 1605-10-19.

33 Resolutie van de Staaten van Holland, waar by verklaard word, dat geene Surcheances van betaaling werken tegen Sententien, gegaan in krag van gewysde op 1787-05-26 in GPB 9 561–562.

Voorafgaande beteken egter ten ene male nie dat krygsvolk hoegenaamd geen respyt van enige aard in enige omstandighede geniet het nie. Soos hieronder[34] aangetoon word, was aan soldate en ander krygsliede uitdruklik 'n algemene *moratorium* verleen in die vorm van beide die opskorting van siviele aksies voortspruitend uit kontraktuele skulde en die verbod op persoonlike arres en die beslaglegging op wapens, goedere en soldy.

Daar dien beklemtoon te word dat, anders as die tydgenootlike Franse reg, nie aan soldate 'n individuele *moratorium* van die een of ander aard verleen is nie, maar 'n algemene respyt wat gegeld het sonder aansiens des persoons en waarop daar bloedweinig uitsonderings, indien enige, bestaan het. Dit herinner sterk aan die aanvanklike werkswyse wat deur die Suid-Afrikaanse wetgewer by die uitbreek van die Eerste Wêreldoorlog gevolg is.[35]

2 3 *Praescriptio militiae* en konkurrente jurisdiksie

2 3 1 Inleiding

Oor wat presies die grense van die jurisdiksie van militêre en burgerlike howe ten aansien van lede van die gewapende magte in die praktyk was, het daar geen eenstemmigheid bestaan nie.[36] Selfs 'n vlugtige blik oor die verskillende standpunte oor die omstrede onderwerp, en veral oor die strafregtelike jurisdiksie van krygsrade, roep onwillekeurig Lichtenauer[37] se ietwat kras evaluasie in gedagte:

> "[E]ven verward ratjetoe als die overgeleverde klassieke rechtsstof in deze materie, een 'elck wat wils', waaruit iedere ketter zijn letter kan halen."

Die strafregtelike jurisdiksie van militêre en burgerlike howe word uitvoerig deur onder andere Voet,[38] Merula,[39] Van Bynkershoek[40] en Van Hasselt bespreek.[41] Vir die huidige is die detail en meriete van elke uiteenlopende standpunt en teenstrydige praktyksreëling nie direk tersake nie. Wel van belang is die algemene indruk dat krygsrade ten spyte van fel kritiek volhard het om

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34 Sien par 2 4.

35 Sien a 5(5) van die Openbare Welzijn en Moratorium Wet 1 van 1914.

36 Sien oa Peckius *Verhandelinghe van handt-opleggen* 5 6: De Groot *Verantwoordingh van de wettelycke regieringh van Hollandt ende West-Vrieslandt* (1662) *cap* 11; Van Leeuwen *RHR* 5 6 4; Voet *De jure militari* 7 9 – 7 11; *Commentarius* 5 1 104 – 5 1 107; Van der Linden *ad Voet* 5 1 103; Hüber *HR* 4 25 23; Van Zurck *Codex Batavus* 83 501 – 513 632; Loenius *Decisien en observatien cas* 51 *sv* "Verschil wegens judicature over een militair tusschen 't hoff van Holland en den Krygs-Raad"; Merula *Manier van procederen* 4 40 3 5; Lulius en Van der Linden *ad Merula* 4 40 3 5; Schomaker *Selecta consilia et responsa iuris* 5 18 15; Schrassert *Consultatien, advysen ende advertissementen* 5 298; De Haas *Nieuwe Hollandsche consultatien* 258 – 270; Van Bynkershoek *Quaestionum juris privati* 1 1 13 – 1 1 14; Van Hasselt *Consilia militaria* 1 317 2 37 – 38 3 18 3 110 3 286; *Tractatus de jurisdictione militari in praesidiis Belgicis* 2 77 – 190; Nassau La Leck *Algemeen beredeneerd register sv* "krygsraad", "krygstucht" en "militie"; Van der Linden *Judicieele practijcq* 1 1 8; *Koopmans handboek* 3 1 1 17.

37 *Geschiedenis van het wetenschap van het handelsrecht in Nederland tot 1809* (1956) 108.

38 *De jure militari* 7 1 – 7 11; *Commentarius* 5 1 104. Sien ook Van der Linden *ad Voet* 5 1 103.

39 *Manier van procederen* 2 4 40 5.

40 *Quaestionum juris privati* 1 1 13.

41 *Consilia militaria* 1 317 2 37 – 38 3 18 3 110 3 286; *Tractatus de jurisdictione* 2 71 – 90.

nie net jurisdiksie oor militêre misdrywe uit te oefen nie maar ook oor burgerlike misdade gepleeg deur soldate, en bowendien om hul selfs in sommige gevalle oor burgerlikes strafregtelike jurisdiksie aan te matig.

Waarskynlik hou die wisselvallige en uiteenlopende sienings oor die jurisdiksie van krygsrade verband met die uitgerekte konflik tussen twee belangegroepe wat die politieke toneel in die republiek oorheers het. Dit is die regente, wat die raadspensioenaris ingesluit het, aan die een kant en die stadhouer, wat normaalweg die hoof van die Huis van Oranje was, aan die ander kant.[42] Tereg merk Van der Linden[43] in die verband op:

> "Waar de zaken, Militaire persoonen rakende, behandelt moeten worden, is ten allen tijde een onderwerp van merkelijke twijffeling geweest, welks beslissing zeer veel verschilde, *naar mate men, al dan niet, eenen Stadhouer aan het hoofd der regeering had.*"[44]

Uiteindelik het Holland op 30 April 1783[45] en Wes-Friesland en Zeeland op 20 September 1783[46] ingegryp. Militêre jurisdiksie is sonder verdere omhaal afgeskaf. *De zogenaamde Hoogen Krygsraad* is summier en onomwonde aangesê om voortaan geen regspraak te beoefen of enige ander regterlike handeling binne Holland te verrig nie.[47]

2 3 2 Sivielregtelike jurisdiksie

Ook sover dit die jurisdiksie oor soldate in siviele sake betref, was teenstrydige reëlings en praktyke, uiteenlopende standpunte, op die oog af soms pure twis en tweedrag en moontlik ook blatante magsaanmatiging aan die orde van die dag.[48] Dit het uiteraard ook betrekking op die vraag of soldate in siviele sake in beginsel voor burgerlike howe beregbaar was, en indien wel, of slegs burgerlike howe sodanige aangeleenthede kon aanhoor en beredder; voorts of alle siviele aksies en remedies, of net sommige, gedingsvatbaar was teen 'n krygsman wat besig was om militêre diens te verrig.

Etlike skrywers neem die *constitutio* van Honorius en Theodosius van 413[49] as vertrekpunt met die aanname dat net krygsrade jurisdiksie ten aansien van siviele aksies teen soldate gehad het.[50] Peckius[51] en Sande[52] gee onomwonde te

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42 Sien hieroor veral Lee *European history* 158 – 159; Kahn 1983 *SALJ* 195 – 196.
43 *Koopmans handboek* 3 1 1 7.
44 Beklemtoning aangebring. Sien ook Van Hasselt *Tractatus de jurisdictione* 2 154 wat verwys na "die gelujjige tyd, en die voor de Republycq zoo dierbare Anstellinge van Zyn Doorl Hoogh deb Heere W C H F Prince van ORANGE en NASSAU . . . die geheel andere schikkingen en dispositien in en over de Militaite discipline en Jurisdictie, heeft te wege gebracht, als er in de tyden, dat er geen Capitien Generaal is geweest, plaatze hadden".
45 *GPB* 9 761.
46 *GPB* 9 763.
47 *GPB* 9 762.
48 Vgl Van der Linden *Koopmans handboek* 3 1 1 7; *Ad Voet* 5 1 103.
49 *C* 3 13 6 te dien effekte dat siviele sake tussen soldate, of tussen 'n burgerlike eiser en militêre verweerder deur die *magistri militum* besleg word.
50 Peckius *Handt-opleggen* 5 6: "Ende zoo veel als de Vierschaer betreft, hebben sy een voorrecht, dat sy nergens anders als voor haren Krijgsraedt in Recht aengesproocken mogen werden . . . op dat sy van het Leger niet en werden af-getrocken." Sien ook Van Hasselt *Tractatus de jurisdictione* 2 150; Van Bynkershoek *Quaestionum juris privati* 1 1 14.
51 *Handt-opleggen* 5 6.
52 *Decisiones Frisiorum* 1 1 4.

kenne dat dit ook die posisie in die Verenigde Nederlande was. Van Hasselt[53] is ook van mening dat soldate geregtig was op 'n *forum privilegiatum* en slegs voor 'n krygsraad tereg mag staan.

Merula[54] beroep hom op 'n plakkaat van die State-Generaal van 29 April 1589 vir die gevolgtrekking dat soldate in alle nie-militêre sake voor die Hof van Holland beregbaar was. Van Leeuwen[55] verwys na 'n Placaat van de Staten van Holland van dieselfde datum vir 'n soortgelyke gevolgtrekking. Ook Groenewegen[56] steun op hierdie plakkaat om die jurisdiksie van die Hof van Holland oor soldate tot siviele sake te beperk. Voet[57] verwys weer na hierdie plakkaat as gesag vir die jurisdiksie oor soldate in geval van *gemeene misdaden*. Voet[58] kom egter elders tot die gevolgtrekking dat wat siviele sake betref die posisie in Holland nie eintlik van die Romeinse reg verskil nie en dat 'n aksie wat deur 'n militêre of burgerlike eiser teen 'n soldaat ingestel is slegs deur 'n militêre regter verhoor mag word indien die soldaat dit so verkies. In sy *De jure militari* kom Voet[59] daarenteen tot die gevolgtrekking dat beide straf- en siviele sake onder die regsbevoegdheid van sowel burgerlike as militêre regters val. Daarna noop 'n plakkaat van die State-Generaal van 9 Februarie 1703[60] hom om in 'n volgende uitgawe van daardie werk daarop te wys dat soldate in siviele sake voor gewone regters beregbaar is en dat militêre regters in stede wat nie stemreg in die vergadering van die State-Generaal het nie, in die algemeen jurisdiksie in burgerlike sake ontsê is.[61]

Van Bynkershoek[62] merk tereg op dat indien die betrokke plakkaat van naderby beskou word, dit wil voorkom of die onderskeie kommentatore óf nie die maatreël gelees óf nie verstaan het nie. Trouens die Placaet op het uytlopen ende disorderen van het Krijghs-Volck van 29 April 1589 is deur die State-Generaal in oorleg met die Raad van State opgestel.[63] Dit handel oor jurisdiksie in geval van misdade van geweld wat deur soldate gepleeg is en hoegenaamd nie oor siviele sake of misdade in die algemeen nie.[64]

Volgens Voet[65] het die plakkaat van 9 Februarie 1703 die posisie ingevoer deur die plakkaat van die State-Generaal van 25 Maart 1651 in ere te herstel. Laasgenoemde was in werklikheid die Resolutie by de extrordinaris Vergadering van bondgenoten, op de groote Zaal van Hof van Holland genoomen, omtrent de Militaire Jurisdiksie in de Steeden stem in Staat hebbende. Daarin is uitdruklik aan die bevelvoerders van garnisoene in sodanige stede van Gelderland

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53 *Consilia militaria* 3 18; *Tractatus de jurisdictione* 2 171 – 172: "De cognitie van militaire zaken, zonder onderscheid, het zy dat Civile, het zy dat Criminele . . . alleen heeft gestaan aan de Militairen Regter . . . [D]at als nu wederom in het vervolg alle militaire zaken, zonder onderscheid moeten staan ter judicature van den militairen regter, zonder dat . . . den politycquen of burgerlyken regter zig op eenige wyze daar mede kan of mag bemoeyen."
54 *Manier van procederen* 4 40 3.
55 *Ad Peckius* 5 6. Sien ook *RHR* 5 6 4.
56 *De leg abr ad C* 3 13 6 en 9 3 1.
57 *De jure militari* 7 9.
58 *Commentarius* 5 1 107.
59 7 11.
60 *GPB* 8 840.
61 *Ibid.*
62 *Quaestionum juris privati* 1 1 14.
63 *GPB* 2 98.
64 Van Bynkershoek *Quaestionum juris privati* 1 1 14.
65 *De jure militari* 7 11.

kennis gegee dat die jurisdiksie van krygsrade tot militêre misdade beperk is en dat soldate in alle ander straf- en siviele sake voor die gewone burgerlike howe beregbaar is.[66] Die Gelderlandse reëling rakende die jurisdiksie van krygsrade is in Utrecht en sekere ander provinsies nagevolg.[67]

Uit die Resolutie van den Raad van Staate, op het beleyd van Militaire Justitie van 9 Februarie 1703 blyk dat krygsrade ten spyte van die resolusie van 25 Maart 1651 voortgegaan het nie net om militêre misdade te verhoor nie maar ook "alderande Civile, en particulierlyk mede van Huwelyks zaken, en van insolvente Boedels van Militairen". Derhalwe is weer eens besluit dat die krygsraad in beginsel

> "geen kennis sal nemen als alleen van de zaken, die in het Leger zullen voorvallen".

Desnieteenstaande het militêre howe blykbaar voortgegaan om jurisdiksie in siviele sake uit te oefen. Dit blyk onder andere uit die Resolutie van de Staaten Generaal, houdende, dat de Krygsraad in civiele zaaken, waar in Ingezeetenen deeser Landen zyn geconcerneert, geen Jurisdiksie heeft van 21 Januarie 1704.[68] Van Bynkershoek[69] bekla hom juis daaroor dat krygsrade hul gereeld bemoei het met siviele sake van allerlei aard en die spot dryf met die besluite van die Raad van State tot die teendeel.

Soos reeds aangetoon is, het Holland op 30 April 1783[70] en Wes-Friesland en Zeeland op 20 September 1783[71] uiteindelik militêre jurisdiksie summier afgeskaf. Onder andere is uitdruklik bepaal

> "[d]at in het generaal, zoo wel in Civile als Crimineele zaaken, Militaire Personen, volgens de Grondwetten van deese Provincie, te recht moeten staan voor de ordinaris Rechters binnen denzelve . . . ."[72]

Ook is *de zogenaamde Hoogen Krygsraad* uitdruklik en ondubbelsinnig verbied om voortaan regspraak te beoefen of enige ander judisiële handeling binne die Hollandse territorium te verrig.[73]

Daarna het Van der Linden[74] min moeite ondervind om tot die gevolgtrekking te kom dat

> "het krijgsvolk te water en te lande, met betrekking tot *alle burgerlijke regtszaaken*, en gemeene misdrijven, onderworpen is aan den Burgerlijken Regter".[75]

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66 Militêre misdade is soos volg omskryf: "[D]ie nalatigheid ende overtredinge in Tochten ende Wachten, overgaan aan den Vyand, desertie van Compagnien, ofte verloop van d'eene Compagnie onder de andere zonder paspoort, mitsgaders over excessen ende delicten, die de Officieren ende Soldaten onderling of d'eene tegens den anderen zullen komen begaan ende vorder niet."

67 Van Bynkershoek *Quaestionum juris privati* 1 1 14.

68 *GPB* 8 841.

69 *Verhandelingen over burgerlijke rechts-zaaken I* 240–241: "Ik verwacht derhalven andere Auctoriteiten, dan ik tot nog toe gezien heb, of de Groote en Kleine Krygsraad strekken de grenzen hunner Jurisdictie veel verder uit, dan billyk is, en de wetten toelaten."

70 Publicatie van de Staaten van Holland, tot afschaffing van de Militaire Jurisdiktie. Sien *GPB* 9 761.

71 *GPB* 9 763.

72 *GPB* 9 762. So merk Van der Linden *Judicieele practijcq* 1 1 8 op dat die "Collegie van den Hoogen Krijgraad der Vereenigde Nederlanden geheel vernietigd is".

73 Resolutie van de Staaten van Holland, houdende aanschryving aan den Hoogen Krygsraad, om op het Territoir deeser Provintie geene Justitieele Actens uit te oeffen van 1783-05-30. Sien *GPB* 9 762.

74 *Koopmans handboek* 3 1 1 8.

75 Beklemtoning aangebring.

Soos uit die voorafgaande blyk, was die posisie gedurende die bloeitydperk van die Republiek in die praktyk nie so eenvoudig of van alle onsekerheid ontdaan nie. Trouens, dit staan vas dat militêre howe in die praktyk vir 'n geruime tyd effektief jurisdiksie, en soms selfs uitsluitlike jurisdiksie, ook oor sekere siviele aangeleenthede rakende soldate uitgeoefen het.

Bowendien is die uitdrukking *alle burgerlijke regtszaaken* van Van der Linden te wyd in die lig van die bepalings van die Edik van Karel V en die plakkate van die Prins van Oranje en die State-Generaal rakende die opskorting van siviele regsmiddels voortspruitend uit kontraktuele skulde teen soldate op diens. Daarop word juis vervolgens gelet.

2 4 Opskorting van siviele regsmiddels

2 4 1 Edik van Karel V en latere plakkate

Hoewel die meeste bekender gemeenregtelike kenbronne 'n doodse stilswye oor die aangeleentheid handhaaf, het die Edik van Karel V van 20 Oktober 1547 volgens Eduard van Zurck[76] die volgende bepaal:

> "Niemant mag in 't Leger gearresteert of in regten betrokken worden om eenige oude actien of schulden buiten 't Leger gemaekt."

'n Bykans identiese bepaling verskyn in artikel 12 van die Placcaet Raeckende alle Leger-Personen uitgereik deur Frederik Hendrik, Prins van Oranje, op 7 Mei 1630.[77] Dit is soos volg verwoord:

> "Dat niemandt inden Leger sal mogen arresteren, ofte in Rechte betrecken, om eenighe oude Actien ofte schulden buyten den Legher gemaeckt."[78]

Die voorskrif is herhaal in 'n plakkaat van die State-Generaal van 8 Desember 1665.[79]

2 4 2 Opskorting van aksies vir kontraktuele skulde

Op grond van die bepalings van artikel 12 van die plakkaat van die Prins van Oranje van 7 Mei 1630, wat herhaal is in die plakkaat van die State-Generaal van 1665, kom Van Bynkershoek[80] onomwonde tot die gevolgtrekking dat 'n soldaat op kamp nóg gearresteer nóg gedagvaar kon word vir 'n ou kontraktuele skuld of 'n skuld buite die leër gekontrakteer.

In die praktyk het die voorskrif waarskynlik daarop neergekom dat vir sover dit kontraktuele skulde betref wat aangegaan is *voordat* die krygsman met militêre diens begin het, of buite die kamp aangegaan is *terwyl* hy militêre diens verrig het (dit wil sê nie in militêre verband gekontrakteer is nie), die howe as 't ware vir die krediteur gesluit was. Dit veral indien aanvaar word dat die skorsing in die edik en plakkate van die reg om die krygsman te *arresteren*, *ofte in Rechte betrecken* prakties daarop neergekom het dat alle siviele regsmiddels voortspruitend uit sodanige kontraktuele skulde teen die soldaat vir die duur van sy militêre diens opgeskort is.

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76 *Codex Batavus* 83.
77 Van Bynkershoek *Quaestionum juris privati* 1 1 13 verwys foutiewelik na die datum van uitreiking as *1650*-05-07.
78 *Nederlandtsche Placaet-Boeck II* 216.
79 Van Zurck *Codex Batavus* 83; Van Bynkershoek *Quaestionum juris privati* 1 1 13 en 1 1 14; *Burgerlijke rechts-zaaken I* 223 en 233.
80 *Quaestionum juris privati* 1 1 14; *Burgerlijke rechts-zaaken I* 233.

Alhoewel die statutêre *moratorium* baie wyd en algemeen gestel is – sonder enige beperkings van welke aard ook al – was daar waarskynlik twee uitsonderings. Hulle is die gevalle waar die skuldeiser reeds vonnis teen die soldaat verkry het voordat hy met sy militêre diens begin het; en waar die kontrak binne militêre verband aangegaan is.[81]

In beide gevalle kon 'n vonnis, selfs indien die skuldvernuwende werking daarvan aanvaar word, egter nie teen die persoon van die soldaat ten uitvoer gelê word nie, maar moontlik wel teen sommige van sy goedere. Sekere bates van die soldaat was egter van beslaglegging uitgesluit, soos vervolgens meer volledig aangetoon word.[82]

Bowendien moet daarmee rekening gehou word dat die opskorting van arres nie net op kontraktuele skulde betrekking gehad het nie. Soos sal blyk,[83] was hierdie *moratorium* rakende die opskorting van arres van soldate waarskynlik veel wyer en meer algemeen van aard as wat op die oog af uit die betrokke statutêre voorskrifte blyk.[84]

2 4 3 Skorsing van arres en beslaglegging

2 4 3 1 Arres

Soldate was nie onderworpe aan enige persoonlike arres met watter oogmerk ook al in siviele verrigtinge nie, byvoorbeeld óf met die oog op die instelling van 'n siviele geding teen hom óf *ad fundandam* of *confirmandam jurisdictionem* óf voortspruitend uit 'n bevel of vonnis verleen in enige siviele aksie of geding.[85]

Alhoewel sommige skrywers[86] hierdie omvattende persoonlike prosesregtelike *moratorium* slegs aan soldate verleen wat teen die vyand uittrek, met ander woorde aan soldate op aktiewe diens, toon Voet[87] die toepaslikheid daarvan duidelik aan ook op diegene wat onderweg is na hul vaandels of garnisoene, of besig is met die verrigting van garnisoendiens.

2 4 3 2 Beslaglegging

Daarbenewens kon geen tenuitvoerlegging teen of beslaglegging op die wapens,[88] diere[89] of soldy[90] van soldate plaasvind in enige siviele verrigtinge nie, byvoorbeeld uit hoofde van enige bevel of vonnis wat in 'n siviele aksie of geding verleen is.

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81 *Ibid.*
82 Sien par 2 4 3 2.
83 *Ibid.*
84 Die Edik van Karel V van 1547-10-20; a 12 van die Placcaet Raeckende alle Leger-Personen uitgereik deur Frederik Hendrik, Prins van Oranje, op 1630-05-07; plakkaat van die State-Generaal van 1665-12-08.
85 Peckius *Handt-opleggen* 5 6; Bort *Arresten* 4 27; Van Leeuwen *RHR* 5 7 14; Voet *Commentarius* 2 4 39; Hüber *HR* 4 25 23; *Holl cons* 6 324; Van Bynkershoek *Quaestionum juris privati* 1 1 13 en 1 1 14; Van Hasselt *Consilia militaria* 1 350 – 351; Van der Linden *Koopmans handboek* 3 2 4 2; *Judicieele practycq* 2 18 2 7.
86 Peckius *Handt-opleggen* 5 6; Bort *Arresten* 4 27; Van der Linden *Koopmans handboek* 3 1 4 2; *Judicieele practycq* 2 18 2 7.
87 *Commentarius* 2 4 39.
88 *Peckius Handt-opleggen* 5 6; Bort *Arresten* 4 27; Hüber *HR* 5 40 31.
89 Peckius *Handt-opleggen* 5 6; Bort *Arresten* 4 27.
90 *Ibid.*

Latere skrywers meen dat wel op 'n gedeelte van die soldaat se soldy beslag gelê kon word.[91] Trouens, daar is herhaaldelik onomwonde bepaal dat net een derde van die soldy, pensioen en *tractamenten* van militêre offisiere onderworpe is aan beslaglegging of kortinge,[92] byvoorbeeld deur die Resolutie van Gecommitteerde Raaden, dat de Tractamenten en Pensioenen van Militaire Officieren niet verder dan voor een derde arrestabel ofte aan kortingen subject zullen zyn van 5 Mei 1725.[93]

Ook is in die Resolutie van Gecommiteerde Raaden, houdende orde, om geen kortingen op Militaire Tractamenten te verzoeken wegens schulden beneden de 25 guldens van 15 September 1727 uitdruklik voorgeskryf dat geen beslaglegginsbevel op of aftrekorder teen 'n soldaat se soldy toelaatbaar is ten opsigte van skulde wat minder as vyf en twintig gulden beloop nie. In hierdie geval was die hele soldy van die soldaat dus ingesluit by die trefwydte van en beskerm deur die betrokke *moratorium*.[94]

Laasgenoemde voorskrif herinner nogal sterk aan soortgelyke bepalings in die Britse Army Act van 1881 en die Wet voor de Staats-Artillerie van de Zuid-Afrikaansche Republiek 1 van 1896.

2 4 4 Ontstaansredes

Die *moratoria* is verleen aan soldate "om dat sy met hare bloedige wapenen de ghemeene saecke beschermen"[95] en ook omdat inbreukmaking op militêre opleiding of die afwesigheid van soldate van hul eenhede as uiters onwenslik geag is.[96]

2 4 5 Tydstip van ontstaan van skuldoorsaak

Peckius[97] is van mening dat sover dit kontraktuele skulde betref, die respyt slegs betrekking gehad het op skulde aangegaan tydens aktiewe diens. Merula[98] sluit weer van die respytskulde uit wat gekontrakteer is voor die datum waarop militêre diens 'n aanvang geneem het. Ander skrywers maak egter geen melding van hierdie beperkings nie. Dit wil derhalwe voorkom of moontlik tog aanvaar kan word dat die tydstip van ontstaan van die skuldoorsaak geen rol by die beskikbaarheid van hierdie *privilegia* gespeel het nie.[99]

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91 Van der Linden *Koopmans handboek* 3 1 4 2: *Judicieele practycq* 2 18 2 7; Hüber *HR* 4 32 5.

92 *GPB* (1658-1796) 7 1093 7 1050 7 1123 7 1127 7 1128 7 1211 7 1575.

93 *GPB* 8 197 8 845 8 859.

94 Die bedrag van 25 gulde is in 1751 verhoog tot 30 gulde volgens die Resolutie van den Hoogen Krygsraad der Vereenigde Nederlanden, omtrent het vorderen van pretentien ten laste van Officieren, ter somme van dertig Guldens of daar onder van 1751-03-22.

95 Bort *Arresten* 4 27.

96 De Groot *Inleidinge* 3 3 20; Voet *Commentarius* 2 4 39; Van der Keessel *Praelectiones ad Gr* 3 3 20.

97 *Handt-opleggen* 5 6.

98 *Manier van procederen* 4 2 25 2.

99 Hierdie eksekusierespyt is in die Suid-Afrikaanse reg geresipieer deur *Casson v Conolly* (1881) 1 SC 68; *Dougherty v Willoughby* (1881) 2 NLR 161; *Price Bros v Wiggell* (1902) 16 EDC 53; *Lewis v Wheeler* (ongerapporteerde beslissing van die Kaapse Hooggeregshof 1902-11-01: sien 1902 *SALJ* 270); *Marriot v Haigh* (1892) 9 SC 501.

2 4 6 Deserteurs

'n Deserteur kon hom nie op hierdie *privilegia* beroep nie.[100] Dieselfde het gegeld vir 'n soldaat wat op die punt staan om na die buiteland te vertrek om by vreemde magte aan te sluit,[101] want

> "neque enim tunc disciplinae militaris favor, aut respublicae defensio a bellorum calamitatibus, amplius in hisce militat, atque adeo eos ad instar non militantium sisti, ne abeant, & incolas debito fraudent, aequum est".[102]

2 5 Ander aspekte van die *sui generis* regsposisie

2 5 1 Restitutio in integrum

Afwesigheid vanweë militêre diens is een van die billikheidsoorwegings op grond waarvan in die Romeinse reg *restitutio in integrum* beveel kon word. So is aan 'n soldaat wat 'n veldtog meegemaak het *restitutio in integrum* verleen teen verlies van regte as gevolg van tydsverloop.[103]

Alhoewel in Frankryk tot die teendeel beslis is, het die *Grote Raad van Mechelen*[104] tot die gevolgtrekking gekom dat dieselfde regsposisie steeds in die Romeins-Hollandse reg geld.[105] Ook Van Bynkershoek[106] het die mening gehandhaaf dat indien 'n soldaat in diens van sy land oorsee was, hy op grond van privilegie geregtig was op herstel in vorige stand indien hy as gevolg daarvan enige verlies gely het.

Volgens Groenewegen[107] het die Romeinsregtelike reël – te wete dat 'n soldaat teen wie vonnis verleen is omdat hy as gevolg van regsonkunde versuim het om die verwere tot sy beskikking te pleit, wel toegelaat is om die verwere te opper wanneer hy op die vonnis aangespreek word – nie meer in die Romeins-Hollandse reg aanwending gevind nie. Hy was van mening dat soldate die verwere wat nie betyds opgewerp is nie tydens die appèl moes voorlê.

Hüber[108] was egter weer van mening dat afwesigheid vanweë militêre diens nog steeds 'n grond vir die verlening van *restitutio in integrum* daargestel het. Hoewel Voet[109] nie onomwonde te kenne gee dat Groenewegen[110] verkeerd is nie, het hy tog die sienswyse gehandhaaf dat indien keerdatums vir 'n appèl weens 'n soldaat se onkunde verstryk het met die gevolg dat die remedie van appèl nie meer beskikbaar is nie, die soldaat tog makliker as andere volledige herwinning van sy regte met betrekking tot die verstryking van die keerdatums behoort te verkry.

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100 Peckius *Handt-opleggen* 5 6.
101 Bort *Arresten* 4 27 en 4 28; Van Zurck *Codex Batavus* 83; Merula *Manier van procederen* 4 2 25 2; Nassau La Leck *Algemeen beredeneerd register sv* "Arrest"; *Holl cons* 6 324: "Op een verzoek gedaan tegen de Perzoon van de Ritmeester Areshijn, die vertrekken wilde na Engeland, is verstaan, indien blijkt, dat hy wil vertrekken, dat men 't arrest zal verleenen, niet tegenstaande dat soldaten niet gearresteert worden, om d'onderdanene van 't Land niet te doen verliezen haar schuld, den 30 Novemb. 1610."
102 Voet *Commentarius* 2 4 39.
103 Sien Henning 1993 *THRHR* 43–44.
104 Sien Van Zyl *Romeins-Hollandse reg* 335 oor die *Grote Raad van Mechelen*.
105 Groenewegen *De leg abr ad C* 2 51 (50) 8.
106 *Quaestionum juris privati* 1.5.
107 *De leg abr ad D* 14 6 11; *De leg abr ad C* 1 18 1.
108 *HR* 4 41 10.
109 *De jure militari* 6 28.
110 *De leg abr ad D* 14 6 11; *De leg abr ad C* 1 18 1.

2 5 2 Beneficium competentiae

Indien 'n siviele aksie deur 'n krediteur ingestel is teen 'n *miles* of 'n oudgediende was hy Romeinsregtelik geregtig op die sogenaamde *beneficium competentiae* en is die *condemnatio* dus beperk tot *id quod facere potest*.[111]

Die reël is volgens Rebuffus,[112] Bugnonius,[113] Gothofredus[114] en Autumnus[115] nie in Frankryk gevolg nie.

In die Romeins-Hollandse reg is die beginsel dat 'n soldaat nie gevonnis mag word tot meer as wat hy in staat is om te betaal nie, egter steeds gehandhaaf.[116] So deel Voet[117] mee dat soldate wat kampanjes in die gewapende magte voltooi het, onderskraag is deur die *beneficium competentiae* aangesien dieselfde redes wat die Romeinse voorregte laat toestaan het, steeds vir die soldate van sy tyd gegeld het. Hulle trotseer dieselfde gevare en doen niks minder tot voordeel van die staat nie.[118]

Die voorreg het tot gevolg gehad dat nie verdere eksekusie teen die bevoorregte persoon gehef kon word as wat hy in staat was om finansieel te dra nie. Hy was geregtig om soveel terug te hou as wat vir sy lewensonderhoud nodig was, met ander woorde 'n bedrag wat sou verhoed dat hy gebrek ly. Die omvang van die bedrag het afgehang van persoonlike omstandighede. In die opsig kon onder meer rang, stand en ouderdom 'n deurslaggewende rol speel. Algemeen gestel, beteken dit 'n bedrag waarmee hy hom ooreenkomstig sy posisie kon onderhou deur die beoefening van een of ander ambag, bedryf en dies meer.[119] Schorer[120] stel die gevolg van die *beneficium* nogal treffend, naamlik dat die skuldenaar "bij gevolg niet geheel en al mag worden uitgeschud, of, zoo als men anders zegt, tot op het hembd uitgeleed".

Dit volg by noodwendige implikasie dat 'n soldaat wat die voorreg van vrywaring teen algehele uitskudding met sukses as verweer opwerp, effektief boedeloorgawe en siviele gyseling vrygespring het.[121]

2 5 3 Testamentum militare

'n Soldaat kon volgens die Romeinse reg 'n geldige testament vry van enige formaliteite hoegenaamd verly, mits die krygsman op aktiewe diens was. So 'n

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111 Sien Henning 1993 *THRHR* 48.
112 *Ad cons regias* 5 91.
113 *Legum abrogatarum et inusitatarum in omnibus curiis, terris, jurisdictionibus et dominiis regni Franciae tractatus* (1646) 1 12.
114 *Ad D* 42 1 6 *pr.*
115 *La conference du droict Francois avec le droict Romain* (1610) *ad D* 42 1 6 *pr.*
116 Groenewegen *De leg abr ad D* 42 1 6.
117 *De jure militari* 6 28; *Commentarius* 39 1 1 42 1 46.
118 Voet *De jure militari* 6 28. Sien ook Von Gail *Practicarum observationum* (1663) 2 188 2; Gudelinus *Commentariorum de jure novissimo* (1620) 5 21.
119 Hüber *HR* 5 41 9; Voet *Commentarius* 42 1 6; Van der Keessel *Th* 888; *Praelectiones ad Gr* 3 51 6.
120 *Ad Gr* 3 12 7. Sien ook *Holl cons* 3 70; Van Tonder *Index to the opinions of Roman-Dutch lawyers and the decisions of the courts of the Netherlands which have been digested in the Algemeen Beredeneerd Register of Nassau La Leck* (1985) *sv* "beneficium competentiae".
121 Hüber *HR* 5 41 9; Voet *Commentarius* 42 1 6; Van Bynkershoek *Obs tum* I 90 I 808 II 1141.

testamentum militare het regskrag behou tot een jaar nadat die soldaat sy eervolle ontslag ontvang het.[122]

Die bevoorregting wat die *testamentum militare* in die Romeinse reg geniet het, is in die Romeins-Hollandse reg noulettend nagevolg.[123] Geen vormvereistes het vir 'n *testamentum militare* gegeld nie. 'n Kryger wat op 'n land- of seetog[124] uit was *ofte in 't leger zijnde*[125] en wat by sy volle positiewe was, kon sy uiterste wil regsgeldig te kenne gee deur skrif (selfs op grond) of mondeling of deur tekeninge.[126] So kon 'n gewonde soldaat op die slagveld sy testament met sy bloed skryf op sy skild of die skede van sy swaard, of selfs in die stof wat met sy eie bloed[127] rooi besmeer is. Al wat moes vasstaan, was die kryger *in expeditionibus* se bedoeling om 'n testament daar te stel.[128]

So verreikend was die *privilegium militum* wat die verlyding van testamente betref, dat 'n testament wat 'n krygsman voor sy vertrek op aktiewe diens sonder die nodige formaliteite opgestel het, regskrag as soldatetestament kon verkry indien die kryger terwyl hy op aktiewe diens was duidelik te kenne gegee het dat hy die betrokke dokument nog as sy testament beskou, deur byvoorbeeld iets daaraan toe te voeg of daaruit te skrap.[129]

De Groot[130] gee te kenne dat die *testamentum militare* sy regsgeldigheid inboet na afloop van een jaar vanaf die testateur se terugkeer vanaf die krygstog. Van der Keessel[131] handhaaf egter die Romeinsregtelike standpunt[132] dat 'n soldatetestament wat *de iure militari* verly is selfs na afloop van 'n jaar na aktiewe diens geldig bly mits die testateur nog nie uit militêre diens ontslaan is nie. Die juiste standpunt is dus dat die jaar bereken word vanaf datum van eervolle ontslag en dit kan immers eers lank na afloop van die krygstog verleen word.[133]

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122 Sien Henning 1993 *THRHR* 40.

123 Sien oa Christinaeus *Practicarum quaestionum rerumque in Supremis Belgarum curiis actarum et observatarum decisiones* (1626) 4 3 5; Von Gail *Liber singularis de pignorationibus practicarum observationum* (1598) 2 118 1 en 6; Gudelinus *Commentariorum de jure novissimo* (1620) 5 21 *in fin*; Perezius *ad C* 6 21 23; Viglius *Commentarius in decem titulos Institutionum* (1534) 2 11 11; Vinnius *ad I* 2 11 6; De Groot *Inleidinge* 2 17 29; Groenewegen *De leg abr ad I* 2 11; Van Leeuwen *RHR* 3 2 14; Voet *De jure militari* 6 14; *Commentarius* 29 1 11; *Ad Gr* 2 17 28; Van den Berg *Nederlands advysboek* 2 240; Huber *HR* 1 2 13 15; Scheltinga *Dictata ad Gr* 2 17 29; Schorer *Aantekeninge op Gr* 2 17 28; *Holl cons* 4 209; Van der Kop *Nieuw Nederlands advysboek* 1 18; Van der Keessel *Th* 299; Pauw *Obs tum nov* 414; Van der Keessel *Praelectiones ad Gr* 2 17 29; Lee *An introduction to Roman-Dutch law* (1953) 360; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 138 – 145; Corbett, Hahlo en Hofmeyr *The law of succession in South Africa* (1980) 44.

124 *Holl cons* 4 209.

125 De Groot *Inleidinge* 2 17 29.

126 *Ibid*; Voet *Commentarius* 29 1 11; Van Leeuwen *RHR* 3 2 14 1

127 Voet *Commentarius* 29 1 2.

128 Van Leeuwen *RHR* 3 2 14; De Groot *Inleidinge* 2 17 29: "[M]ids dat het zeecker zy dat het gunt hy gezeit ofte beteickent heeft, is geschied met vaste meening dat zulcks zoude strecken voor zijn uiterste wille . . ."

129 Voet *Commentarius* 29 1 11; De Groot *Inleidinge* 2 17 19; Hüber *HR* 1 2 13 15.

130 *Inleidinge* 2 17 29.

131 *Th* 299.

132 *I* 2 11 3.

133 Van der Keessel *Praelectiones ad Gr* 2 17 29.

In die geval van 'n testamentêre beskikking deur 'n soldaat was die erkende reël dat 'n latere testament nie 'n vroeëre kragteloos maak nie tensy die erflater die teendeel gewil het.[134]

Enigsins gelyk aan die bevoorregte soldate-testament was die testament wat op reis gemaak is deur persone wat na Oos- en Wes-Indië vaar terwyl hul in diens van die betrokke twee maatskappye gestaan het. Hulle kon voor die *Opper Koopman*, *Koopman*, *Onder-Koopman of Boekhouder* en twee getuies 'n testament maak. Sodanige testamente moes opgeteken word in die register wat daarvoor bestem is.[135]

2 5 4 Borg, gevolmagtigde en lasgewer

Inbreukmaking op militêre opleiding of die afwesigheid van soldate van hul vaandels is in die Romeinse reg as uiters ongewens beskou.[136] Om dieselfde rede[137] was krygsmanne volgens De Groot[138] in die Romeins-Hollandse reg steeds verbied om hulle te verbind as borge *in zaecken van rechtspleging of landverhuiring*. 'n Soldaat mag dus nie vir iemand se aanwesigheid in die hof borg staan, of dat die vonnisskuld betaal sal word nie, of ten opsigte van 'n huurkontrak van grond nie.[139]

Groenewegen[140] is weer van mening dat die redes waarom 'n soldaat Romeinsregtelik verbied was om op te tree as die *conductor* van *res aliena* of as 'n *procurator*, *fideiussor* of *mandator* van so 'n *conductor* drieledig was. Eerstens kon die aandag van soldate afgetrek word van hul militêre verpligtinge deur hul geesdrif vir die landbou. Tweedens kon hul die mag van hul wapens misbruik teen hul bure, dit wil sê die persone wat hul juis moes beskerm. Derdens was sodanige betrekkings nie waardig genoeg geag vir 'n Romeinse soldaat nie. Groenewegen[141] kom op grond van verskeie oorwegings en steunende onder andere op Christinaeus[142] tot die gevolgtrekking dat nie een van die redes meer water hou nie en dat die beletsels derhalwe in onbruik verval het en nie deel van die Romeins-Hollandse reg vorm nie. Die belangrikste hiervan skyn veral sy lae dunk[143] te wees van die tipiese soldaat van sy tyd:

> "[H]odierni enim milites sordidi potius, nullius existimationis atque infimae notae homines censentur. [Q]uia passim 'Nulla salus pietasque viris, qui castra sequuntur'."[144]

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134 Voet *Commentarius* 28 3 8; Van der Keessel *Th* 329; *Praelectiones ad Gr* 2 24 9.
135 *GPB* 3 1319; Voet *Commentarius* 29 1 11; Van der Keessel *Th* 299; Scheltinga *Dictata ad Gr* 2 17 29.
136 Vgl *C* 4 65 31.
137 Vgl Van der Keessel *Th* 497; *Praelectiones ad Gr* 3 3 20.
138 *Inleidinge* 3 3 20.
139 Van der Keessel *Praelectiones ad Gr* 3 3 20.
140 *De leg abr ad C* 3 4 65 31.
141 *Ibid.*
142 *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatorum decisiones* (1636) 4 3 5.
143 Sien ook Groenewegen *De leg abr ad C* 3 12 34(33) 4.
144 Beinart en Hewitt *Simon à Groenewegen van der Made. A treatise on the laws abrogated and no longer in use in Holland and neighbouring regions III* (1984) 229 vertaal die passasie: "[F]or the soldiers of today are considered to be rather sordid people, of no esteem and of very low reputation. [B]ecause everywhere '*There is no wholesomeness and piety in persons who follow the camp*'."

Sande[145] en Hüber[146] wys op beslissings van die hof van Friesland waarin bevind is dat 'n skuldeiser kan weier om 'n soldaat as borg te aanvaar, en dit vanweë die Romeinsregtelike oorwegings; die gevolg is dat die verbod op soldate as borge onderskryf is.[147] Hierteenoor steun Voet[148] Groenewegen dat 'n soldaat hom net soos enige ander persoon as borg kan verbind.[149] Hy word op sy beurt weer deur Scheltinga ondersteun.[150]

Van der Keessel[151] is van mening dat Groenewegen en Voet nie ondersteun kan word nie, met die voorbehoud dat soldate nie verbied behoort te word om as borge op te tree indien diegene wie se belange daardeur geraak word, toestem nie. 'n Soldaat mag egter in geen omstandighede op 'n onwillige eiser afgedwing word nie. Aangesien garnisoene dikwels vervang word en nie van hul vaandels weggeroep mag word nie, is hy van mening dat die Romeinsregtelike oorwegings hoegenaamd nie in so 'n geval verval nie. Hy wys daarop dat Christinaeus self die uitsonderlike regte van soldate erken in 'n geval waar die bestaansrede vir die regte in die Romeinse reg steeds aanwesig was.[152]

2 5 5 Voogdy

Volgens Groenewegen[153] en Voet[154] het die Romeinsregtelike verbod[155] vanweë veranderde omstandighede in onbruik verval en het dit soldate vrygestaan om die rol van voog te vervul.[156]

Vinnius[157] en De Groot[158] was egter die teenoorgestelde mening toegedaan. Eienaardig genoeg word die mening van De Groot ook weer deur Voet[159] gedeel. Insgelyks was 'n praktisyn van opinie dat 'n krygsman nie 'n voog oor weeskinders mag wees nie.[160] Van der Keessel[161] kon ook geen rede sien waarom van die Romeinse reg afgewyk moes word nie aangesien die bestaansrede(s) vir die diskwalifikasie allermins verval het; te wete dat kampe en standplase van soldate tog dikwels verwissel, en dat hulle nóg van hul vaandels nóg van die voogdybeheer verwyder behoort te word.[162]

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145 *Decisiones* 3 10 1.
146 *HR* 3 27 2.
147 *Ibid.*
148 *Commentarius* 46 1 5; *De jure militari* 6 30.
149 Vgl ook Van Leeuwen *RHR* 4 4 2.
150 *Dictata ad Gr* 3 3 20. Vgl De Vos en Visagie *Scheltinga se "Dictata" oor Hugo de Groot se "Inleiding tot de Hollandsche Rechtsgeleerdheid"* (1986) 342.
151 *Th* 497; *Praelectiones ad Gr* 3 3 20: "[N]am, cum saepe praesidia militaria hodie mutentur et milites a signis suis non sint avocandi, non prorsus in iis cessat ratio in d. L. 31 C. adducta."
152 *Ibid.*
153 *De leg abr* 1 1 25 14.
154 *De jure militari* 6 30; *contra Commentarius* 26 1 4.
155 *I* 1 25 14; *D* 26 5 21 3; *N* 123 5.
156 Sien ook De Pape *Observationes* 292.
157 *Ad I* 1 25 14.
158 *Inleiding* 1 7 6.
159 *Commentarius* 26 1 4; *contra De jure militari* 6 30.
160 *Holl cons* 2 157; sien ook Van Hasselt *Aantekeningen en byvoegzelen op de Hollandsche advysen* 2 155.
161 *Th* 113; *Praelectiones ad Gr* 1 7 6.
162 Kyk ook Scheltinga *Dictata ad Gr* 1 7 6.

In Frankryk het 'n verbod op optrede as voog slegs gegeld ten opsigte van die lede van die koninklike wag, dit wil sê soldate wat afgesonder is om die koning te bewaak.[163]

Dit kan wees dat Groenewegen[164] ten onregte die algemene Franse regsposisie ongekwalifiseerd op Holland van toepassing gemaak het – dit nogal terwyl Voet hom in die een werk[165] klakkeloos nagepraat en in 'n ander[166] sonder meer weerspreek het. Nogtans het Voet[167] dit as billik beskou dat krygsdiens diegene van voogdy verskoon wat onwillig is om daarmee belas te wees. Trouens, tydens krygsdiens bly soldate nie altyd in dieselfde kampe of by dieselfde standplaas gestasioneer nie maar word vanweë militêre dienstigheid dikwels verplig om op kort kennisgewing met hul eenhede te versit of te vertrek. Daarom kan hul nie eers altyd vir hul eie sake aanwesig wees wanneer hul teenwoordigheid gewens is of aan hul eie persoonlike aangeleenthede voldoende aandag skenk nie, wat nog te sê die aangeleenthede van weeskinders.[168]

3 MOONTLIKE NALATENSKAP

Wat sivielregtelike jurisdiksie betref, het die Romeins-Hollandse meningverskil, teenstrydighede en twisvrae nie in die Suid-Afrikaanse reg weerklank gevind nie.[169] Die jurisdiksie van Suid-Afrikaanse krygsrade is onomwonde beperk tot sekere misdade gepleeg deur persone wat onderworpe is aan die sogenaamde Reglement van Dissipline,[170] bestaande uit die Eerste Bylae tot die Verdedigingswet van 1957[171] en die reëls ingevolge dié uitgevaardig ter uitvoering daarvan.[172] Wat strafregtelike jurisdiksie oor dienende lede van die weermag betref, bestaan daar in beginsel konkurrente jurisdiksie tussen burgerlike en militêre howe.[173] Kwelvrae in die verband, soos die presiese afbakening van die strafregtelike jurisdiksie van krygsrade,[174] watter beskerming weermaglede teen dubbele blootstelling geniet[175] en of militêre howe, soos krygsrade, as geregshowe geklassifiseer kan word of ten minste behoort te word,[176] het op die oog af nie 'n suiwer Romeins-Hollandse herkoms nie. Dit val in elk geval buite die bestek van hierdie oorsig.

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163 Groenewegen *De leg abr* 1 1 25 14.
164 *Ibid.*
165 *De jure militari* 6 30.
166 *Commentarius* 26 1 14.
167 *De jure militari* 6 30.
168 *Ibid.*
169 Sien ook Henning en Nieuwenhuis 7 *LAWSA* 314.
170 Sien *ibid*; Kirsten *Administratiefregtelike aspekte van die dissiplinêre kode van die Republikeinse weermag* (1970) 13; Postma "Military courts in the Republic of South Africa" 1967 *Military Law and Law of War Review* 38; Pretorius "Regspleging in die Suid-Afrikaanse weermag" 1973 *DRP* 317.
171 Wet 44 van 1957.
172 A 104 van die Verdedigingswet 44 van 1957.
173 A 106.
174 Sien Postma "Roman military law" 1968 *SALJ* 319; De Villiers "Die Suid-Afrikaanse militêre regstelsel" 1974 (2) *Codicillus* 9.
175 Sien ook Alberts 1986 *THRHR* 459. A 106 van die Verdedigingswet 44 van 1957 is in elk geval sedertdien gewysig om dié probleem uit te skakel (a 30 van Wet 132 van 1992).
176 Sien bv Anderson *The legal classification of military tribunals as courts of law* (1988) 133 – 147.

Die privilegie van soldate teen persoonlike arres is deur 'n reeks hofuitsprake in die Suid-Afrikaanse reg geresipieer.[177] Beginsels soortgelyk aan dié vervat in Romeins-Hollandse maatreëls dat soldate 'n respyt geniet wat betref siviele regsmiddels, asook 'n wyer en omvattender *moratorium* ten aansien van persoonlike arres en beslaglegging op hul soldy en toelaes, is aan te tref in Suider-Afrikaanse en Suid-Afrikaanse moratoriumwetgewing ten aansien van persone op aktiewe diens tydens die Tweede Vryheidsoorlog,[178] die Eerste Wêreldoorlog,[179] die Tweede Wêreldoorlog[180] en die noodtoestand in 1960.[181] Hierdie bepalings is deur die huidige Moratoriumwet 25 van 1963 oorgeneem. Dit word ook in die Verdedigingswet 44 van 1957 verwoord sover dit beslaglegging op soldy en toelaes betref.[182]

Die ander *privilegia* van krygsliede in die Romeins-Hollandse reg het wisselvallige lotgevalle gehad. So het die *testamentum militare* oorleef om tot 1992 deel van die Suid-Afrikaanse krygsman se regsmondering te vorm.[183] Aan die ander kant het die *beneficium competentiae* stilweg uit die moderne reg verdwyn.[184]

4 TEN SLOTTE

Die Romeins-Hollandse reg bied 'n wye verskeidenheid regsfigure waardeur getrag is om onderstand en verademing aan krygsliede te verleen. Anders as die Romeinse reg[185] het die klem eerder op 'n omvattende opskorting van gedingvoering as op *restitutio in integrum* geval.

In hierdie bydrae is meer op die verskyningsvorme van *moratorium* as die ander *privilegia* vir krygsliede gekonsentreer in 'n poging om die trefpunt te identifiseer waar die begunstiging van krygsliede die eerste keer blywend die vorm van 'n *moratorium* in regstegniese sin aanneem. Dit veral aangesien vroeëre regsfigure wat as *moratoria* geïdentifiseer kon word, nie die vuurproef van wetenskaplike ontleding kan deurstaan nie en merendeels veel eerder 'n algehele kwytskelding of aflating as 'n blote skuld- of betalingstilstand of 'n prosesregtelike verademing daarstel.[186]

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177 *Casson v Conolly* (1881) 1 SC 68 69: "[T]he applicant . . . was about to proceed on active service. I do not think a person in such a position is liable to be arrested. [V]an der Linden might be taken as authority . . ." Sien ook *Dougherty v Willoughby* (1881) 2 NLR 161; *Marriot v Haigh* (1892) 9 SC 501; *Lewis v Wheeler* 1902 SALJ 270; *Price Brothers v Wiggell* (1902) 16 EDC 53: "The principle on which the law went was that a trooper upon active service was taken to be necessary for his country, and therefore when defendant was on active service the plaintiff, as a private individual, had temporarily to set aside an advantage he would otherwise have." Sien verder Bell "Immunity of arrest of persons on military service" 1901 *SALJ* 450.

178 Oa a 66 van De Krijgs- en Commandowet 10 van 1899 van die Oranje-Vrystaat; a 8 van die Wet voor den Krijgsdiens in de Zuid-Afrikaansche Republiek 20 van 1898.

179 A 3 van die Openbare Welzijn en Moratorium Wet Wijzigingswet 37 van 1917.

180 A 8 van die Verdedigings Spesiale Pensioen- en Moratoriumwet 29 van 1940.

181 A 1 van die Moratoriumwet 51 van 1960.

182 Sien ook Henning en Nieuwenhuis 7 *LAWSA* 242–244.

183 A 3 van die Wet op Testamente 7 van 1953, wat herroep is deur a 5 van die Wet tot Wysiging van die Erfreg 43 van 1992.

184 Hahlo en Kahn *South Africa. The development of its laws and constitution* (1960) 704. *Contra* Lee *Roman-Dutch law* 288.

185 Bv *D* 4 6 35 9; *C* 2 51 (52) 3; *C* 2 50 (51) 2.

186 Vgl Henning "Die belang van die misarum- en analoë maatreëls vir die respytreg" 1990 *TRW* 1.

'n Duidelike voorbeeld van so 'n regshistories onbetwiste trefpunt word deur die Romeins-Hollandse reg verskaf. Dit is naamlik die agtereenvolgende voorskrifte in die Edik van Karel V van 20 Oktober 1547, artikel 12 van die Placcaet Raeckende alle Leger-Personen van 7 Mei 1630 en die plakkaat van die State-Generaal van 8 Desember 1665 wat 'n opskorting van sekere regsprosesse teen soldate gereël het.

Alhoewel daar gewag gemaak is van vroeëre voorbeelde van so 'n trefpunt in die Oud-Franse reg, is en word die spesifieke Franse tegniek om individuele *moratoria* aan krygsliede te verleen nie in die Romeins-Hollandse of die Suid-Afrikaanse reg aangewend of nagevolg nie. Ook die Romanistiese gebruik om eerder *restitutio in integrum* met retrospektiewe werking toe te staan as 'n proaktiewe algemene *moratorium*,[187] het nie eintlik aftrek gekry nie. Trouens, 'n aanmerklike aantal standpuntinnames deur Franse juriste oor die nie-navolging van Romeinsregtelike *privilegia* het nie onder tydgenootlike Romeins-Hollandse skrywers byval gevind nie. Dit skep die indruk dat die Nederlandse krygsman ten aansien van sivielregtelike beskerming beter daaraan toe was as sy Franse eweknie. Groenewegen se minagtende evaluasie en lae dunk van die karakter en moraliteit van die tipiese krygsliede van sy tyd doen nie noodwendig aan hierdie gevolgtrekking afbreuk nie. Dit kan egter deels verklaar waarom die Nederlandse soldaat nie so besonder geprivilegieerd was as sy Romeinse voorganger nie. So 'n gevolgtrekking veronderstel egter 'n direkte verwantskap tussen status en aansien aan die een kant en juridiese bevoorregting aan die ander kant.

'n Bepaling soortgelyk aan Romeins-Hollandse voorskrifte rakende die opskorting van siviele gedingvoering teen soldate op aktiewe diens verskyn in De Krijgs- en Commandowet 10 van 1899 van die Oranje-Vrystaat en in die Wet voor den Krijgsdiens in de Zuid-Afrikaansche Republiek 20 van 1898. Laasgenoemde tipe onderstand asook 'n wyer en omvattender moratorium ten aansien van persoonlike arres en beslaglegging op hul soldy en toelaes, is aan te tref in Suid-Afrikaanse moratoriumwetgewing aangeneem tydens die Eerste en Tweede Wêreldoorlog, die 1960-noodtoestand en met die invoering van algemene verpligte militêre opleiding in 1962. Dit vorm steeds die kernbepalings van die huidige Moratoriumwet 25 van 1963[188] wat aanwending gevind het onder andere gedurende die Angolese konflik,[189] en veral gedurende 1977 en 1978 ingrypend gewysig is om 'n veelal uitgebreide onderstand te bewerkstellig, veral tot voordeel van weerpligtiges op aktiewe diens.[190]

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187 Sien Henning 1993 *THRHR* 43 – 44.

188 A 2(2)(c)(iii) van die Moratoriumwet 25 van 1963.

189 Sien hieroor Spies *Operasie Savannah. Angola 1975 – 1976* (1989) 73 – 86; Breytenbach *Forged in battle* (1989) 146 – 147; Du Preez *Avontuur in Angola* (1989) 91; Steenkamp *South Africa's border war* (1989) 232; Bridgland *The war for Africa* (1990) 254.

190 Sien verder Henning "Rimpels en reste van Savannah en ander Angolese avonture in die respytreg" 1991 *De Jure* 24.

AANTEKENINGE

TRUST LAW IN THE 90s: CHALLENGES AND CHANGE*

If I were to ask – what is the link between the Crusades of the 13th Century and the modern South African law of trusts? – I dare say that there would be some, at least, who might be hard pressed to provide an answer. Yet, tenuous though it may be, there is such a link; and this link illustrates the antiquity of the trust and the multiplicity of the strands which have gone into its evolution.

In Bracton's *Note-book* (first discovered in 1884, but compiled by Bracton during the 13th Century) there is record of a case in which one Robert, before setting out for the Holy Land, committed his land to his brother Wydo, as custodian, to keep for the use of his (that is Robert's) sons. (Part of the note reads: "Et Robertus post mortem patris sui tenuit eandem terram . . . et habuit filios et ivit in terram sanctum, et commisit terram illam custodiendam Wydoni fratri suo ad opus puerorum suorum" (see Holdsworth *A history of English law* vol IV 415 fn 3; Pollock and Maitland *History of English law* 2 ed 231 235).) After Robert's death his eldest son demanded the land from his uncle Wydo, but the latter refused to surrender it. The dispute came before a seignorial court in 1224. In the end the suit was compromised by each being allotted half the land.

But despite its inconclusive outcome, this ancient case illustrates a practice which had taken root in mediaeval England of conveying land to another with the understanding that the transferee ("feoffee") would hold it for the benefit of another. The standard formula was to transfer the land to A "*ad opus*" and "*in usum*" of the beneficiary: and the transaction became known as a "use" (though the word "use" is derived from the Latin *opus* and not *usus*: see Pollock and Maitland 228).

There were a number of other situations in which the use was resorted to. For example, Franciscan friars were bound by vows of poverty and were therefore unable to own property. But they had to have somewhere to live. And when they came as missionaries to England in the 13th Century and established themselves in, say, a town, a benefactor who was minded to give them a house, would convey that house to the borough community "to the use of" the friars. There are records of many such conveyances in the City of London (see Pollock and Maitland 231 237 – 239). Chattels too were made the subject-matter of uses.

The use was the forerunner of the trust. Initially in England, the Courts of Common Law did not recognise uses and trusts and refused to protect the rights

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* Paper read at a seminar on Trusts conducted by the Department of Private Law, University of South Africa, on 1992-06-12.

of the beneficiary. Accordingly the practice evolved that such beneficiaries would petition the Lord Chancellor for relief against owners setting up their legal rights; and that the Chancellor, and the Court of Chancery, provided equitable remedies which enabled the trust to survive and indeed flourish as a legal institution. The trust beneficiary was said to enjoy an "equitable interest" in the trust property.

It was pointed out by Mr Justice Oliver Wendell Holmes (1885 *LQR* 163 – 164; see also Holdsworth 410 – 412) that the root idea underlying the use was first to be found in the Salman or Treuhand of early Germanic law; and he expressed the view that the feoffee to uses was the Salman transplanted. The Salman, according to Sir William Holdsworth (411), was

> "a person to whom property had been transferred for certain purposes, to be carried out either in the lifetime or after the death of the person conveying it. The recognition, if not by law at least by public opinion, of the binding character of his obligation, involved the recognition of the broad principle that such a duty ought to be enforced. It was the breadth of the principle thus recognized that has made the institution by which effect was given to it the ancestor of many important institutions and principles of our modern law".

I mention these ancient origins of the trust as a prelude to a broad review of the development of the South African law of trusts. My brief is to speak about "Trust law in the 90s – challenges and change" but, not having the gift of prophesy, I feel that I can best discern the possibilities which the future holds by first taking a look at the past.

The trust was not an institution know to Roman or Roman-Dutch law (see *Braun v Blan and Botha* 1984 SA 850 (A) 859 – 859). Nevertheless, in the 19th Century, British settlers in the Cape and Natal brought the institution with them in the sense that they incorporated trusts and used the words "trust" and "trustees" in their wills, their deeds of gift, their antenuptial contracts, their transfers of land. This went on for about a century before the courts were called upon to decide authoritatively whether our law could and should give legal effect to a South African trust; and, if so, upon what basis. And this brings one to the first significant landmark in the South African law of trusts: the case of *Estate Kemp v McDonald's Trustee* 1915 AD 494.

This case came to the Appellate Division *via* the Cape Provincial Division, where the judgment had been delivered by Juta JP (1914 CPD 1084). So much has been written and said about this case that it is difficult to discuss it without sounding commonplace and banal. Be that as it may, what emerges from the decision of the Appellate Division – and also from the judgment of Juta JP – is, in the first place, that the courts were adamant that the English law of trusts formed no part of our jurisprudence and had not been adopted by our courts; and, in the second place, that from the point of view of legal policy it was, in the view of the court, necessary that a testamentary disposition expressed in the form of a trust should be accommodated and given effect to by our law. As Solomon JA put it,

> "the constitution of trusts and the appointment of trustees are matters of common occurrence in South Africa at the present day. Thus it is a recognised practice to convey property to trustees under antenuptial contracts; trustees are appointed by deed of gift or by will to hold and administer property for charitable or ecclesiastical or other public purposes; the property of limited companies and other corporate bodies is vested in trustees and the term is used in a variety of other cases, as, e.g., in connection with assigned or insolvent estates. The underlying conception in these and other

> cases is that while the legal *dominium* of property is vested in the trustees, they have no beneficial interest in it but are bound to hold and apply it for the benefit of some person or persons or for the accomplishment of some special purpose. The idea is now so firmly rooted in our practice, that it would be quite impossible to eradicate it or to seek to abolish the use of the expression trustee, nor indeed is there anything in our law which is inconsistent with the conception" (507 – 508).

The difficulty which confronted the court, however, was to find an appropriate legal niche in which to place the South African trust. Innes CJ used the *fideicommissum purum* (501 502 503), but here he drew criticism from academic writers and also from the Appellate Division in *Braun's* case *supra* 860A – 861H. Solomon JA, on the other hand, preferred not to attempt to translate the English terms in the will under consideration into the language of Roman-Dutch law and simply accepted that legal effect had to be given to the intention of the testator and that such a trust would be recognised and enforced by our courts. Maasdorp JA was also inclined to use the *fideicommissum* as the means of accommodating what the testator had devised.

Much has also been written about the true basis for the evolution of our law of trusts. But the more one studies the question, the more one is convinced that the decision in *Kemp*'s case constitutes, in the realm of testamentary trusts, a form of jurisprudential osmosis; but osmosis on a selective basis, absorbing so much of the English law as was considered to be desirable and appropriate, having regard to the general principles of our common law. And this process demonstrates, I venture to suggest, the genius of Roman-Dutch law: its capacity to sustain development in new directions, to branch out when necessary, to absorb concepts from elsewhere and generally to adapt to the needs of society. It demonstrates, too, the advantages of a legal system based upon a common law rooted in broad general principle, as compared with one whose common law has been created casuistically or has been subjected to the relative rigidity of a codification.

The next group of judicial landmarks are those which deal with the place of the trust *inter vivos* in our law: *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656, *Commissioner for Inland Revenue v Smollan's Estate* 1955 3 SA 266 (A) and *Crookes v Watson* 1956 1 SA 277 (A). The first two cases dealt with the complex topic of death duties, but in the course of the judgments it was necessary to characterise a trust deed and the rights of the parties under it. In both cases the court treated the trust as a contract for the benefit of a third party. As in *Kemp*'s case, it was emphasised that the English law of trusts formed no part of our law, but that this was no reason why the problem presented in our law by trusts created *inter vivos* should not be solved by the application of the principles of our law of contract. Indeed, one detects in the judgments in these two cases the same general conviction that legal policy required the recognition and accommodation of the trust *inter vivos* by our law.

Now one of the legal incidents of a *stipulatio alteri*, or contract for the benefit of a third party, is that, in general, prior to the acceptance of the benefit or the promise thereof by the third party, the contract may be varied or indeed cancelled by agreement between the other two contracting parties. I say "in general" because there is an exception, known as the *Perezius* exception, to which I will refer later. The identification of the trust *inter vivos* with the *stipulatio alteri* would, therefore, appear to lead to the consequence that prior to acceptance by a trust beneficiary of the benefits due to him under the trust, the trust

would be susceptible to a variation, or even a cancellation, agreed to by all the other interested parties. Such a legal consequence would not be consistent with English common law, where the rule is that once the trust is completely constituted it is generally binding and irrevocable in the absence of an express power of revocation (see *Honoré's South African law of trusts* 4 ed (by Honoré and Cameron) 418; also *Halsbury's Laws of England* 4 ed vol 48 par 565). And it appears that in England a trust may be completely constituted without communication of it to the trustee or to the beneficiary (Halsbury par 557).

As you will recall, this very problem, that is the revocability or variability of a trust, arose in *Crookes v Watson supra*. What happened there, in essence, was that in 1936 a settlor donated upon trust certain shares and directed the two trustees (of whom he was one) to hold the shares and apply portion of the income for the benefit of the settlor's daughter, E, (the balance of the income being capitalised) and to distribute the capital on E's death among various beneficiaries, who were determinable only upon her death. The settlor was given the power to remove a trustee and appoint another in his place. Nearly 20 years later, the settlor wished to amend the trust so that a capital payment could be made to E and the income received by her from the trust could be increased. It is clear that these amendments would adversely affect the ultimate beneficiaries under the trust, whoever they might turn out to be. The matter came to court as an application for an order declaring that it was competent for the trust deed to be varied in this way. A number of major interested parties consented to the proposed order and also purported to consent on behalf of their minor children (who were also interested parties). There were, however, other possible beneficiaries (including unborn issue) who had not, or could not, consent.

The immediate issue in the case was whether, in our law, as Centlivres CJ put it

> "a settlor, having executed a trust deed and having handed over the subject matter of the trust to the two trustees appointed in terms of the deed, one of whom is himself and the other of whom holds his office during the pleasure of the settlor, is entitled to amend the deed with the concurrence of his co-trustee and of the only beneficiary who has accepted any benefit under the deed, if the result of such an amendment will be to prejudice the rights of other beneficiaries who have not notified their acceptance of any benefit and who have not agreed to the amendment" (284B – C).

But while this was the immediate issue, as the case developed on appeal, it brought to the fore the more fundamental issue of the juristic nature of a trust *inter vivos* in our law.

The court consisted of Centlivres CJ and Schreiner, Van den Heever, Fagan and Steyn JJA. It turned out to be a veritable battle of the titans. The court split 3:2 and each member wrote a judgment. The majority, consisting of Centlivres CJ, Van den Heever JA and Steyn JA, held that (as had been decided in the previous two cases) such a trust constituted a contract between the settlor and the trustee for the benefit of a third person; that on general principle the settlor and the trustee could cancel such a contract before the third party had accepted the benefits conferred on him under the trust; and that the so-called *Perezius* exception, relating to the settlement of property to remain within a family, had no application to the case under consideration. In accordance with the decision of the majority the applicant was entitled to the declaratory order as prayed.

On the other hand, the minority (consisting of Schreiner and Fagan JJA) were not in favour of identifying the trust *inter vivos* with the contract for the benefit of a third party. As Schreiner JA put it

> "our modern law of trusts should not be unduly hampered by views regarding its association with other branches of our own law which may not be historically justified and which, in any event, should not govern, through they may sometimes assist the development of the law of trusts" (290D).

And later:

> "Care must be exercised not to force a legal instrument of great potential efficiency and usefulness into a mould that is not properly shaped for it" (291A).

The minority voiced various objections in principle to a trust *inter vivos* being identified with a contract for the benefit of a third party and to a settlor and the trustee being permitted to cancel or amend the trust prior to acceptance by the beneficiary; and concluded that the court was not precluded by previous authority (mainly in the shape of *Crewe*'s case) from holding that the settlor and the trustees were not entitled to so cancel or amend the trust.

The critics at the time tended to side with the minority point of view, but today that is of historical interest only. The notion that a trust *inter vivos* fits under the rubric of *stipulatio alteri*, albeit differing in certain respects from the classic contract for the benefit of a third party, is by now well-entrenched in our jurisprudence. I should, however, add that in the view of Honoré (25 – 26) this is not to say that trusts *inter vivos are* contracts or a species of contract. It merely means that problems relating to the formation and revocation of trusts *inter vivos* can be solved by reference to the law of contract and more particularly the principles concerning the *stipulatio alteri*. And here he makes the point that a trust is much more than just a contract: it is a public-law institution over which the courts have certain powers of control (see also Gauntlett 31 *LAWSA* par 426).

The question of revocability was taken a step further three years later in the case of *Commissioner for Inland Revenue v Estate Merensky* 1959 2 SA 600 (A), in which it was decided, in the case of a trust created *inter vivos*, that the settlor could not unilaterally revoke the trust prior to the acceptance of benefits by beneficiaries. In terms of the trust deed in that case, the settlor donated the trust property "irrevocably" to the trustees; and the decision appears to be confined to the case where the trust is made irrevocable expressly or by necessary implication (see 600H 614C 615C; see further the discussion of this point by Gauntlett 31 *LAWSA* par 436).

A further *caveat* should perhaps be sounded in regard to the revocability or variability of a trust prior to acceptance of benefits by the beneficiary. It may well be, as suggested by Honoré and Cameron (417), that a trustee will not always be free to agree with the settlor that the trust should be cancelled or varied, even if it is not expressed to be irrevocable. As the authors put it:

> "A trustee holds an office and is not merely party to a contract with the founder. In principle therefore, in the absence of an express provision in the trust instrument, he is entitled to agree to revocation or variation only if he thinks that to do so is in the interests both of the founder and of the actual or potential beneficiaries."

The landmark decisions to which I have thus far referred, assimilated in our law the two main categories of trust, the testamentary trust and the trust *inter vivos*, and also delineated in broad outline where they were to be accommodated in our jurisprudence. But while the broad outline was reasonably clear,

much of the detail remained relatively obscure. For example, there was uncertainty about the precise legal relationship between the trustee and the trust property committed to his administration and, in particular, what was to happen on the insolvency of the trustee; about the powers and duties of the trustee in regard to the trust assets and especially his powers of investment; about whether or not a trust constituted a juristic person; about the vesting in the beneficiaries of rights to the trust property; about the extent to which a testamentary trust could vest the trustee with discretionary powers; about the treatment of charitable trusts; about the powers of the court to vary and administer trusts; and so on.

Over the years these topics have to some extent been dealt with by judicial decision, but in the 1980s a feeling arose that some of them raised intractable problems and that the intervention of the legislature was needed. And so the whole matter was referred to the South African Law Commission. In April 1983 the Commission published a working paper, which identified a number of problems (or "shortcomings") in the law of trusts, discussed them and produced a draft bill designed to remedy the shortcomings. This working paper was extensively circulated and discussed at various seminars. Written comments were received from various sources. These comments were considered and assimilated by the Commission, which in June 1987 published a report reviewing the law of trusts and containing a modified draft bill. Acting with a celerity which is perhaps unusual in respect of legislation of this nature, Parliament passed the Trust Property Control Act 57 of 1988, which largely adopted the recommendations of the Law Commission.

The act, which came into operation on 31 March 1989, is the next major landmark in the evolution of our trust law. It has, on the whole, been favourably received. In their introduction to the 4th edition Honoré and Cameron state:

> "The 1988 Act, the drafting of which deserves high praise, rightly makes no attempt to codify the South African law of trusts. Instead it contributes to its development as a distinctive body of trust law by settling certain important issues which were in dispute . . ."

This was, of course, not the first act of Parliament affecting trusts. There had been the Trust Moneys Protection Act of 1934, which dealt with the obligation of certain trustees to provide security to the satisfaction of the Master; and chapter III of the Administration of Estates Act of 1965. Both were repealed by the 1988 act – chapter III before it came into operation.

Much of the 1988 act is devoted to establishing firmer control over trustees and their stewardship of the trust by the Master of the Supreme Court. This is effected by requiring trustees to lodge their trust instruments with the Master; to furnish the Master with an address for the service of notices and process; and to obtain from the Master a written authorisation to act in the capacity of trustee, the grant of which is contingent on the furnishing of security or being exempted therefrom. The Master is also given certain powers to appoint trustees and co-trustees in circumstances when it was formerly necessary to obtain an order of court. Other important administrative provisions relate to requirements that the trustee keep trust moneys in a separate trust account and keep generally separate, and separately identifiable from his own personal property, property which he holds and administers in terms of the trust.

Of prime importance is section 12 of the act which provides:

> "Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property."

Although this section does not pointedly refer to insolvency (cf s 13 of the Law Commission's draft bill), it is obviously designed to clarify the position, *inter alia*, where a trustee is declared insolvent in his personal capacity. Prior to the adoption of the act the position was far from clear. On the one hand, it was argued that since *dominium* in the trust assets normally vested in the trustee and the beneficiaries enjoyed only personal rights against the trustee to receive what was due to them, it followed that upon the insolvency of the trustee the trust assets formed part of his insolvent estate; and that the beneficiaries were left with concurrent claims against the estate. On the other hand, others contended that, in terms of the Insolvency Act, the trustee in his capacity as such constituted a separate debtor from himself in his personal capacity and that the trust assets formed an estate separate from the trustee's personal estate (see generally Honoré *The South African law of trusts* 3ed 441 *et seq*). In *Magnum Financial Holdings (Pty) Ltd (In Liquidation) v Summerly* 1984 1 SA 160 (W) it was held that a trust as such (as distinct from the personal estates of the trustees) could be made the subject-matter of a sequestration order, lending some support to this viewpoint.

While section 12 clarifies the position in regard to trusts falling under the act, it must be pointed out that an oral trust (not incorporated in a trust instrument) does not, and continues to be governed by the common law. As Honoré and Cameron (474 – 480) point out, too, problems may arise where the trustee has failed in his duty to keep separate and identifiable the trust property.

Another important section in the 1988 act is section 13, which defines the powers of the court to vary the provisions of a trust and actually empowers the court to order the termination of the trust. Generally speaking, the common-law powers which previously existed (and continue to exist side-by-side with the new statutory powers) have been substantially enlarged by this section.

Section 9(1) of the act deals with the standard of care, diligence and skill required of a trustee in the performance of his duties and the exercise of his powers and defines it as

> "that which can reasonably be expected of a person who manages the affairs of another".

This clarifies a certain inconsistency in the decided cases. Section 9(2) renders void any provision in the trust instrument which would have the effect of exempting a trustee from liability or indemnifying him against liability for failing to show this degree of care, diligence and skill. This latter measure has its pros and cons (see Honoré and Cameron 304 *et seq*; Wunsch 1988 *De Rebus* 550), but on the whole I would be inclined to favour it.

One matter not dealt with, advisedly, by the Commission in its proposals, and by Parliament in its legislation, is the question of juristic personality (see the Law Commission's report 79 – 81). The position at common law is that a trust is not a legal *persona* (*Commissioner for Inland Revenue v MacNeillie's Estate* 1961 3 SA 833 (A) 840F – H; *Kohlberg v Burnett* 1986 3 SA 12 (A) 25F – H; *Friedman v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue* 1991 2 SA 340 (W) 342B – F; cf *Crundall Brothers (Pvt) Ltd v Lazarus* 1992 2 SA 423 (ZSC)), and it is only by statute that a notional legal personality can be (and has been) ascribed to it. Thus, for example, the definition of "person" in the Income Tax Act of

1962 was recently expanded (s 2(1)(b) Act 129 of 1991, promulgated on 1991-07-12) to include not only the estate of a deceased person but also

> "any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a trust deed or by agreement or under the will of a deceased person".

This amendment, which was made retrospective to 1 March 1986, was evidently inspired by the decision of the court in *Phillip Frame Will Trust supra* which is presently on appeal to the Appellate Division. Which only goes to show that in the end it is usually the *fiscus* that has the last word.

This brings me to the end of my resumé of the legal development of the trust in South Africa. It spans a period of more than 150 years, the earliest reported case concerning a trust having been in 1833 (*Twentyman v Hewitt* (1833) Menz 156), but it is only in the latter half of this period that the courts have grappled with the jurisprudential implications of the recognition of the trust and its reception into our law. Such recognition and reception constituted legal policy decisions of the greatest importance, facilitated, I would suggest, by the inherent adaptability of our legal heritage, Roman-Dutch law. The problems encountered in dealing with the South African brand of trust have for the most part been solved by the courts applying basic principles, but also seeking guidance, where this seemed appropriate, from other legal systems, particularly the Anglo-American common law. In this way slowly and incrementally a South African law of trusts has been evolved. Where, seemingly, an impasse had been reached or where the reach of the common law had proved inadequate, recourse was had to legislation; but the remedy of legislation has been used as sparingly as possible. And that is where we stand today.

But what of the future? What of the Nineties? I have no practical knowledge or experience of the present-day position, but from what I have read, it would seem that the trust is more popular than ever before. Its uses and purposes are multifarious; and such is its inherent flexibility and adaptability that new applications are constantly being invented. One such new application is the so-called business or trading trust, which, I understand, is gaining rapidly in popularity in this country (see particularly Honoré and Cameron 74 – 77; Wunsch 1986 *SALJ* 561; Theron 1991 *SALJ* 277). This form of trust has a number of advantages over a company or a close corporation as a vehicle for the carrying on of a business. I do not propose to enlarge on this. It is a topic upon which much can be, and has been, said; and I have no doubt that others who possess far greater knowledge of the subject than I will be dealing with it. One aspect that may arise for discussion is the impact, if any, of the 1991 amendment to the definition of "person" in the Income Tax Act on the popularity of the business trust. This is a matter upon which I would prefer not to comment.

Of course, one of the controversies to which the emergence of the business trust has given rise, is that of statutory regulation. Thusfar, as I have shown, the legal evolution of the trust in this country has, mercifully, been accompanied by a minimum of such regulation. It is to be hoped that this continues to be the trend. Happily, the Law Commission reached the conclusion that there was no evidence which indicated that trading trusts were being abused to such an extent as to justify far-reaching legislation; they pointed out that it would be difficult to define a trading trust in such a way that it would, on the one hand, cover only cases where additional protection might perhaps be necessary and on the other hand could not be evaded too easily. The difficulties of definition

and the dangers of a legislative overkill are, in my opinion, self-evident. Having said all this, I recognise that the legal accommodation of the business trust must undoubtedly rank as one of the major challenges of the Nineties.

To conclude the topic of "challenge and change": outside the realm of the business trust, I do not visualise a great deal of change during this decade in the inherent nature of the trust or in the traditional, incremental, *ad hoc* approach of the courts in accommodating and giving legal effect to the trust as an institution. Nor do I visualise major legislative change in the law of trusts. In fact, one of the challenges of the Nineties will be to avoid statutory regulation as far as possible. I further visualise that the trust will continue to play a useful, flexible and ubiquitous role in our society.

MM CORBETT
Chief Justice
The Supreme Court of South Africa

FOTO'S EN PRIVAATHEIDSBESKERMING

Inleiding

Die onlangse uitspraak in *Culverwell v Beira* 1992 4 SA 490 (W) het in verband met privaatheidsbeskerming die hele kwessie van die regmatigheid al dan nie van die neem en publikasie van foto's van persone weer op die voorgrond geplaas. Aangesien daar heelwat onsekerheid oor die regsposisie bestaan, is dit miskien goed om oorsigtelik 'n geheelbeeld van die toepaslike regsbeginsels te probeer verkry.

Die feite van die *Culverwell*-saak was kortliks soos volg. Die applikant (A) en respondent (B) was minnaars. Gedurende hierdie tyd het B foto's van A geneem terwyl sy in onderklere en feitlik nakend geposeer het. Kort na beëindiging van hulle verhouding het A met 'n ander persoon in die huwelik getree en sedertdien was sy en B in 'n voortdurende vete betrokke wat onder andere in regsgedinge tot uiting gekom het. Eers het A getuienis ten gunste van B se vrou gelewer in 'n egskeidingsgeding wat sy teen hom aanhangig gemaak het. Daarna het B 'n private vervolging teen A ingestel. Gedurende dié verhoor het B getuig dat hy steeds oor die negatiewe van die foto's beskik. Omdat A bevrees was dat B foto's van die negatiewe sou maak en hulle dan sou publiseer, het sy in 'n *ex parte*-aansoek 'n bevel *nisi* – wat toegestaan is – vir onder meer die volgende regshulp aangevra (491E – F):

> "1.1 directing the respondent to deliver to the applicant all negative film and photographs in the respondent's possession or under his control taken of and which depict the applicant in the nude or partly clad;
>
> 1.2 interdicting the respondent from making any further photographs from the negatives;
>
> 1.3 interdicting the respondent from publishing the negatives and/or photographs in any manner whatsoever to any person."

Die bevel het B ook gelas om alle negatiewe en foto's in sy besit aan die adjunkbalju te oorhandig vir veilige bewaring tot met die dag van verhoor. B weier egter om aan die bevel *nisi* gehoor te gee en A vra nou in 'n dringende aansoek bekragtiging van die bevel aan.

Regter Goldstein wys die aansoek van die hand. Volgens hom het paragraaf 1.1 van die bevel geen regsbasis nie aangesien B klaarblyklik eienaar van die negatiewe en foto's is (hy het die film gekoop en vir die ontwikkeling betaal); A nie, in die afwesigheid van gesag, bloot "because of their intimate and private nature" (492E) op die foto's geregtig is nie; en daar ook geen kontraktuele grondslag bewys is op grond waarvan B "was 'impliedly obliged' to return the photographs at the termination of the parties' relationship" (*ibid*). Insgelyks is daar wat paragraaf 1.2 betref, ook geen regsbeginsel wat B verbied om kopieë te maak van foto's wat aan hom behoort nie. Laastens is daar ook geen rede om te vermoed dat B beoog om die foto's te publiseer ten einde A te verneder en in verleentheid te stel nie. Regter Goldstein verklaar (492J – 493B):

> "The incident occurred more than three years ago and in all that time the respondent had done nothing to publish the material concerned. Indeed, he desisted both at the divorce and at the private prosecution from referring to the photographs until he was cross-examined in regard thereto. All of this satisfies me that no basis has been laid in the founding affidavit for the applicant's fear that the respondent will publish the material concerned other than during legal proceedings in order to attempt to discredit the applicant. And I cannot find that this would necessarily be unlawful."

Die hof se verwysing na die moontlike regmatigheid van 'n openbaarmaking van die foto's tydens 'n hofgeding, vestig die aandag op die stand van die Suid-Afrikaanse reg aangaande privaatheidsbeskerming by die neem en publikasie van 'n foto van 'n persoon. Soos sal blyk, staan ons reg in hierdie verband nog in sy kinderskoene. Om doelmatigheidsoorwegings kan onderskei word tussen (a) gevalle waar die fotografering én publikasie sonder die toestemming van die betrokkene plaasvind, en (b) gevalle (soos in die *Culverwell*-saak) waar die neem van die gewraakte foto met instemming geskied maar die publikasie dan ongemagtig plaasvind. Voordat hierdie twee gevalle bespreek word, is dit ter wille van agtergrond nodig om 'n paar inleidende opmerkings te maak.

Dit is gevestigde reg dat privaatheid as 'n unieke persoonlikheidsgoed in ons reg erkenning geniet (sien Neethling *Persoonlikheidsreg* (1991) 223-226; vgl ook die resente beslissings in *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 2 SA 117 (W) 129 – 131; *Nell v Nell* 1990 3 SA 889 (T) 895 896; *Boka Enterprises (Pvt) Ltd v Manatse* 1990 3 SA 626 (ZH) 632). Privaatheid is 'n individuele lewenstoestand van afsondering van openbaarheid. Dit impliseer 'n afwesigheid van kennisname met die individu of sy persoonlike aangeleenthede in daardie toestand. Dienooreenkomstig kan privaatheid slegs deur 'n ongeoorloofde kennismaking met die individu of sy persoonlike sake deur buitestanders geskend word. Sodanige kennismaking kan weer op twee wyses geskied: Enersyds wanneer 'n buitestander self met die individu of sy persoonlike sake kennis maak (soos meeluister of afloer). Hulle kan as *kennisname-of indringingsgevalle* bestempel word. Andersyds wanneer die buitestander derdes laat kennis maak met die individu of sy persoonlike sake wat, alhoewel hulle aan die buitestander self bekend is, steeds privaat is (soos massapublikasie). Hierdie gevalle kan as *kennismededelings- of openbaarmakingsgevalle* beskryf word (sien in die algemeen Neethling 31 – 34). Hierbenewens skep die *vasleggings of beliggaming* van private feite (soos fotografering) 'n vergrote risiko van privaatheidskending (sien *idem* 244). Die onregmatigheid van sowel 'n (feitelike)

privaatheidskending as 'n vasleggingshandeling word aan die hand van die algemene onregmatigheidsnorm, te wete die *boni mores*- of redelikheidsmaatstaf, bepaal (sien bv *S v A* 1971 2 SA 293 (T) 299; *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (K); *Gosschalk v Rossouw* 1966 2 SA 476 (K) 492; Neethling 226); en soos by ander *iniuriae* hef die bestaan van 'n regverdigingsgrond die onregmatigheid van 'n privaatheidskending of vaslegging op (sien Neethling 247 ev). In die lig hiervan kan vermelde twee gevalle nou van nader beskou word.

(a) Neem en publikasie van foto sonder toestemming

As uitgangspunt word aanvaar dat die ongemagtigde fotografering van 'n persoon in beginsel onregmatig is. Joubert "Die persoonlikheidsreg: 'n belangwekkende ontwikkeling in die jongste regspraak in Duitsland" 1960 *THRHR* 44 (vgl Amerasinghe *Aspects of the actio iniuriarum in Roman-Dutch law* (1966) 182) stel dit onomwonde:

> "[I]n ons samelewing word nie betwyfel dat elke mens in sy private verhoudinge 'n uitsluitingsreg het wat betref die neem en publikasie van sy foto."

Om hierdie uitgangspunt te verduidelik, moet enigsins uitgewei word. In eerste instansie is die neem van 'n persoon se foto sonder sy toestemming *per se* ongeoorloof. Dit spreek eintlik vanself dat niemand hoef te duld of hom daaraan te onderwerp dat 'n ander hom fotografeer nie. Die uitspraak in *La Grange v Schoeman* 1980 1 SA 885 (OK) bevestig hierdie benadering onomwonde. Die hof gee onder andere te kenne dat 'n koerantfotograaf nie die reg het om onwillige persone te dwing om hulle te laat fotografeer nie. Regter Kannemeyer verklaar (895):

> "It may be that to publish a photograph of a person which is taken against that person's will would not, were that person not one concerning whom injurious allegations have been made in court ground an action for *injuria* if that person had been 'catapulted into the public eye' against his will. This, however, does not mean that the photographer can compel such an one to submit to being photographed or require him not to take steps to prevent such a photograph being taken. Mr Kroon conceded that there was nothing to prevent the first or second respondent from avoiding being photographed by, for instance, shielding his face with a newspaper. If this is so, as I am satisfied it is, the applicant has not shown a clear right in respect of which he is entitled to claim protection from the Court."

Die teenoorgestelde standpunt sou die mens se geregverdigde aanspraak om nie deur die opdringing van dinge aan hom (soos om teen sy sin heimlik of openlik gefotografeer te word) in sy rustige lewe versteur te word nie, blatant negeer (vgl Neethling 35). In *Deneys Reitz v SA Commercial, Catering and Allied Workers Union* 1991 SA 685 (W) 696 beklemtoon adjunk-regterpresident Flemming juis in 'n ander verband dat "the right to peace of mind free from another making a nuisance of himself can be an adequate basis for legal protection". Op die keper beskou, is die persoonlikheidsgoed wat hier in gedrang kom, egter nie die privaatheid nie (soos Joubert *Grondslae van die persoonlikheidsreg* (1953) 136 te onregte beweer), maar wel die fisies-sinlike gevoelens as deel van die fisiese integriteit (sien Neethling 35 84 – 85).

Afgesien daarvan dat die fotografering van 'n persoon sonder sy toestemming *per se* onregmatig is, skep dit ook 'n *direkte bedreiging vir die reg op privaatheid* en behoort daarom ook om hierdie rede onregmatig te wees. Dit is wel so dat die blote neem van 'n foto, oftewel die vaslegging van 'n persoon se gestaltebeeld, op sigself nie die reg op privaatheid skend nie daar 'n onregmatige

indringing in of openbaarmaking van private feite ontbreek. Nietemin stel die fotografering die betrokkene se reg op privaatheid aan die gevaar of risiko van 'n onregmatige indringings- of openbaarmakingshandeling bloot (Neethling 244). (Volgens Maass *Information und Geheimnis in Zivilrecht* (1970) 36 – 37 gaan dit hier om 'n "abstraktes Gefährdungsdelikt". Vgl ook Giesker *Das Recht der Privaten an der Eigenen Geheimsphäre* (1905) 49 vn 1.) Hier kan tussen twee gevalle onderskei word, te wete (i) die fotografering van 'n persoon deur 'n buitestander in omstandighede wat vir niemand of slegs vir bepaalde persone toeganklik is, en (ii) die neem van 'n foto deur 'n persoon wat self gemagtig en dus bevoeg is om die omstandighede waar te neem.

(i) Aangesien nie alleen 'n kennisname van private feite deur 'n buitestander in hierdie omstandighede feitlik deurgaans onregmatig is nie (soos die binnedringing van 'n private woning (bv *S v I* 1976 1 SA 781 (RA)), die afloer van persone in geslote kwartiere (bv *R v Holliday* 1925 CPD 395) en die voortdurende agtervolging van 'n persoon (bv *Epstein v Epstein* 1906 TH 87)), maar ook die mededeling van private feite wat deur sodanige indringingshandeling bekom is (bv *Goodman v Von Moltke* 1938 CPD 153; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993-02-18 saaknr 612/90 (A) 32 – 33) (sien in die algemeen Neethling 227 – 233), behoef dit geen betoog nie dat die blote neem van 'n foto in die omstandighede deur 'n buitestander ook as onregmatig aangemerk behoort te word. Sodanige fotografering skep naamlik 'n *direkte bedreiging* vir die reg op privaatheid juis omdat enige kennisname of openbaarmaking van die foto 'n onregmatige privaatheidskending daar sou stel (sien ook *idem* 245).

(ii) Die vraag na die onregmatigheid van die neem van 'n foto deur persone wat self bevoeg is om die omstandighede waar te neem, is ietwat meer ingewikkeld. In hierdie gevalle word die reg op privaatheid geensins deur 'n indringingshandeling van die fotograaf bedreig nie. Bowendien is 'n kennismededeling in die afwesigheid van 'n besondere vertroulike verhouding (soos waar 'n dokter sy bewustelose pasiënt of 'n man sy slapende vrou afneem en die foto's sonder toestemming van die betrokkenes dan aan vriende gewys word), of waar 'n massapublikasie (bv in 'n dagblad) ontbreek, ook nie onregmatig nie (sien in die algemeen *idem* 233-244). Nietemin behoort die fotografering myns insiens ook in hierdie omstandighede deurgaans as onregmatig beskou te word. Eerstens bestaan die gevaar steeds dat 'n buitestander self op ongeoorloofde wyse (soos dmv diefstal) kennis van die foto kan neem. Tweedens is die feitelike aantasting van privaatheid deur die openbaarmaking van die foto (soos 'n foto van die gasheer in sy dronkenskap wat heimlik deur 'n gas op 'n partytjie geneem is, of die foto van 'n paartjie wat mekaar op straat omhels), van 'n veel ernstiger aard as die blote mededeling van kennis aangaande hierdie feite. Sodanige openbaarmaking behoort gevolglik as *contra bonos mores* aangemerk te word. So gesien, behoort ook die blote fotografering onregmatig te wees aangesien dit insgelyks 'n *direkte bedreiging* vir die reg op privaatheid inhou. In *La Grange v Schoeman supra* 895 verwerp die hof in verband met privaatheidsbeskerming nie summier die standpunt dat die fotografering van 'n persoon sonder sy toestemming – selfs in 'n openbare plek – op sigself in beginsel as onregmatig geag moet word nie. Die hof gee trouens onder andere te kenne, soos reeds aangedui is, dat 'n koerantfotograaf nie die reg het om onwillige persone te dwing om hulle te laat fotografeer nie. Die werking van die beginsel *de minimis non curat lex* moet in hierdie verband net goed voor oë gehou word. Waar 'n

persoon nie spesifiek as "objek" van 'n foto uitgebeeld word nie, maar hy, ofskoon identifiseerbaar, slegs insidenteel saam met ander mense of voorwerpe voorkom, sal 'n remedie waarskynlik op grond van die *de minimis*-beginsel faal (vgl Neethling 243 – 244).

Die interdik is 'n baie belangrike remedie by onregmatige fotografering. Hierdie handeling skep, soos gesê, 'n regstreekse bedreiging vir die reg op privaatheid deur die moontlikheid van daaropvolgende onregmatige indringings- of openbaarmakingshandelinge; hierbenewens bestaan die gevaar van voortsetting van sodanige handelinge. In hierdie verband behoort beide vorme van die interdik, naamlik 'n gebod en 'n verbod, toepaslik te wees. Enersyds moet die dader verbied word om die negatiewe te ontwikkel of die foto's aan andere te openbaar. Andersyds moet die dader ook gebied word om die foto's en hulle negatiewe te vernietig of onbruikbaar te maak. Sonder hierdie gebod kan die bedreiging of voortgesette skending van die reg op privaatheid nie effektief verhinder word nie.

Aangesien die fotografering van 'n persoon sonder sy toestemming in beginsel onregmatig is, behoef dit weinig betoog dat 'n daaropvolgende openbaarmaking ook in beginsel onregmatig sal wees, óf bloot omdat onregmatigheid van 'n deurlopende aard is, óf omdat, soos reeds aangedui is, die openbaarmaking weens die ingrypender aard daarvan, die bestaan van 'n vertroulike verhouding of publikasie in die massamedia op 'n selfstandige skending van die reg op privaatheid neerkom (vgl oor massapublikasie *Mhlongo v Bailey* 1958 1 SA 370 (W); *Kidson v SA Associated Newspapers Ltd* 1957 3 SA 461 (W); die *O'Keeffe*-saak *supra* – in lg twee sake het dit primêr oor identiteitskending gegaan (sien Neethling 240 – 241 268 – 269)). In *Le Grange v Schoeman supra* word by implikasie tereg aanvaar dat selfs die publikasie van 'n foto van 'n persoon wat sonder sy toestemming in 'n openbare plek geneem is, in die afwesigheid van 'n regverdigingsgrond onregmatig is (vgl Neethling 1980 *THRHR* 316 – 318). Insgelyks verklaar Klopper *Strauss, Strydom en Van der Walt: Mediareg* (1987) 308:

> "Of die publikasie van 'n foto van 'n dame op die Durbanse strand, of van mnr X op die sypaadjie van 'n besige straat in Johannesburg, regmatig of onregmatig is, is nie maklik te bepaal nie. Die argument dat sulke persone reeds in die openbaarheid verkeer en dat publikasie van 'n foto van hulle in dié omstandighede nie op hulle privaatheid inbreuk kan maak nie, hou nie steek nie, want elke persoon het die bevoegdheid om self te besluit op welke wyse en tydstip hy in die openbaar wil verkeer. Daar word aan die hand gegee dat die publikasie van sulke foto's in beginsel onregmatig is, behalwe as toestemming tot publikasie verleen is. Dit is derhalwe wenslik dat in gevalle waar daar enige twyfel bestaan of die publikasie van 'n besondere foto geregverdig is, toestemming tot publikasie verkry word."

Net soos by die neem van 'n foto in die openbaar, moet ook hier die *de minimis*-beginsel voor oë gehou word. McQuoid-Mason 1975 *SALJ* 257 (sien ook Klopper 308 vn 18) noem die volgende voorbeelde:

> "[W]here in an article concerning travel or of general news value the plaintiff's privacy is violated only incidentally, if for instance he is photographed as part of a street scene, or his house or garden is photographed as part of a suburban picture, or he appears as part of a crowd in a newsreel . . . an action will not lie."

(b) Neem van foto met toestemming maar publikasie sonder toestemming

In *Culverwell v Beira supra* het die hof met hierdie tipe geval te doen gehad. Anders as by (a) waar die fotografering op sigself onregmatig is, het die betrokkene

hier – in die afwesigheid van eiendomsreg of 'n ooreenkoms te dien effekte (soos die hof tereg uitwys) – geen aanspraak op die gewraakte foto's of die vernietiging daarvan nie. Nietemin kan in die reël aanvaar word dat toestemming tot die neem van 'n foto nie terselfdertyd toestemming tot publikasie daarvan impliseer nie. Of sodanige toestemming bestaan, sal geheel en al van die omstandighede van elke geval afhang. 'n Mens kan in elk geval aanneem dat die hof nie geredelik met betrekking tot 'n geval soos die *Culverwell*-saak sal bevind dat toestemming wel verleen is nie tensy uitdruklike instemming bewys word. In hierdie saak was daar naamlik naakte en semi-naakte foto's betrokke van 'n vrou wat afgeneem is terwyl sy 'n (seksuele) verhouding met die fotograaf gehad het. McQuoid-Mason *The law of privacy in South Africa* (1978) 183 verklaar in laasgenoemde verband:

> "A person's sexual relationship with another is probably the most intimate of all human relationships . . . and any invasion of sexual privacy must be one of the most flagrant invasions of privacy imaginable."

Hoe dit ook al sy, noukeurig beskou lyk dit of publikasie onder hierdie hoof net soos dié by (a) beoordeel moet word. Die openbaarmaking van die foto is in die afwesigheid van 'n regverdigingsgrond naamlik onregmatig weens die ingrypender aard van die privaatheidskending, die bestaan van 'n vertroulike verhouding (wat ook op grond van 'n geheimhoudingsooreenkoms tussen die partye tot stand kan kom: Neethling 235), of die feit dat dit 'n massapublikasie is. Hierdie standpunt kan ook uit die *Culverwell*-saak *supra* afgelei word aangesien regter Goldstein (493A – B, aangehaal *supra*) bevind dat die openbaarmaking van die gewraakte foto's tydens 'n hofgeding – die regverdigingsgrond bevoorregte geleentheid is dus ter sprake – nie noodwendig onregmatig sou wees nie.

Regverdigingsgronde

Die *prima facie* onregmatigheid van die neem en/of publikasie van 'n persoon se foto word natuurlik deur die aanwesigheid van 'n regverdigingsgrond opgehef. Regverdigingsgronde wat hier ter sprake kan kom, is noodtoestand (bv waar 'n vader 'n foto van sy seun, wat aan geheueverlies ly en vermis word, laat publiseer in die hoop dat dit tot sy opsporing sal lei); noodweer en die waarneming van die belang in die verkryging van bewysmateriaal (bv waar 'n man met 'n buite-egtelike verhouding doenig is en 'n privaatspeurder van sy aktiwiteite vir bewysdoeleindes fotografeer: vgl Neethling 249 – 250); statutêre of amptelike bevoegdheid (bv waar die polisie foto's van 'n verdagte misdadiger neem); toestemming (hier moet weer eens beklemtoon word dat toestemming tot fotografering (of tot publikasie van die foto in een vorm), nie toestemming tot publikasie (of tot publikasie in 'n ander vorm) insluit nie (sien ook Klopper 310)); en die regverdigingsgronde wat by laster ter sprake kan kom (vgl Neethling 260): in die *Culverwell*-saak *supra* 493 word melding gemaak van bevoorregte geleentheid in die vorm van die openbaarmaking van die foto's tydens 'n regsgeding, en in *La Grange v Schoeman supra* 893 – 894 bevind die hof dat die bevoorregte geleentheid om verslag aangaande hofverrigtinge te doen, oorskry word deur die publikasie van foto's van die betrokkenes.

Die belangrikste regverdigingsgrond by die massapublikasie van 'n persoon se foto is sekerlik die openbare inligtingsbelang (sien in die algemeen Neethling

252 ev). Die openbare inligtingsbelang omvat die verlening van publisiteit aan openbare figure enersyds, en andersyds aan persone wat by nuuswaardige gebeurtenisse betrokke is (vgl *La Grange v Schoeman supra* 892 ev). Die grense van hierdie regverdigingsgrond word met verwysing na die *boni mores* of algemene regsgevoel bepaal. Wat openbare figure betref, is die publikasie van foto's van hulle openbare lewe – maar nie van hulle private lewe nie – sonder meer regmatig. Klopper 307 – 308 (sien ook McQuoid-Mason 219 – 220) stel dit soos volg:

> "Die privaatheid van so 'n persoon mag nie versteur word onder die dekmantel dat hy 'n openbare figuur is, en dat die publikasie van sy foto te alle tye en onder alle omstandighede in die openbare belang is nie. Die publikasie van 'n foto van die Staatspresident wat hom bv toon in sy slaapkamer of in die hoekie waar hy gereeld sonbaddens neem, stel in die afwesigheid van sy toestemming tot publikasie 'n ongeregverdigde inbreukmaking op sy privaatheid daar. Ook die publikasie van 'n foto van 'n bekende atleet waar hy in sy tuin ontspan, kan nie sonder sy toestemming regmatiglik gepubliseer word nie. Aan die ander kant kan ons aanvaar dat 'n foto van die Staatspresident waar hy besig is om die hoeksteen van 'n openbare gebou te lê, of van 'n bekende atleet wat die wêreldrekord slaan, in die afwesigheid van heel besondere omstandighede altyd regmatiglik gepubliseer word selfs al geskied dit in stryd met die betrokkene se wense."

Of 'n foto van 'n persoon wat by 'n nuuswaardige gebeurtenis betrokke is, gepubliseer mag word, sal daarvan afhang of die publiek 'n belang in sy gestaltebeeld (foto) het. 'n Faktor wat 'n belangrike rol in hierdie verband speel, is die motief waarmee die publikasie gedoen is. Foto's wat net gepubliseer word om die publiek se sensasielus of nuuskierigheid te bevredig, kan geredelik as onregmatig beoordeel word (*idem* 307).

Die toelaatbaarheid van die identifisering deur middel van foto's van persone wat by hofsake betrokke is, moet ook in die lig van bostaande beginsels beoordeel word (sien Neethling 255). 'n Mens kan as uitgangspunt aanvaar dat die publikasie van foto's van beskuldigdes by strafverhore in die openbare belang is. Dieselfde gevolgtrekking is egter nie sonder meer waar met betrekking tot getuies in strafverhore of die partye en getuies in siviele gedinge nie. Myns insiens behoort sodanige identifisering in beginsel slegs regmatig te wees indien die publiek inderdaad 'n belang in die gestaltebeeld (foto) van die betrokke persoon het. Of dit die geval is, moet in die lig van die omringende omstandighede en met verwysing na die algemene regsgevoel beantwoord word. 'n Mens kan aanvaar dat die publikasie van 'n foto van 'n openbare figuur wat by 'n hofsaak betrokke is, hetsy as eiser, verweerder of getuie in beginsel regmatig is selfs al wek die verhoor weens die alledaagsheid daarvan op sigself geen openbare belangstelling nie. Andersins moet nie aangeneem word dat die publiek noodwendig 'n belang in die foto's van persone het wat by opspraakwekkende of nuuswaardige verhore betrokke is nie. In *La Grange v Schoeman supra* 893 – 894 is die regter trouens van mening dat die publikasie van 'n foto in sodanige geval slegs ten doel sal hê om die publieke nuuskierigheid te bevredig en bygevolg ontoelaatbaar is. Die besondere omstandighede van die geval behoort nietemin die deurslag te gee.

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DOMICILE AND RESIDENCE – THE INDEPENDENT GROUNDS FOR DIVORCE JURISDICTION

Introduction

The significance of the decision in *Le Mesurier v Le Mesurier* 1895 AC 517 (PC) is that it established the doctrine of the unity of domicile of spouses as the sole jurisdictional connecting factor for the exercise of divorce jurisdiction and moreover, conclusively decided that the court of the common domicile of the parties has exclusive jurisdiction to determine their status for the purpose of divorce proceedings (540). Through the consolidation of these two principles, *Le Mesurier*'s case formulated a rule that would influence the exercise of divorce jurisdiction in common-law countries for almost a century. Being an appeal from the High Court of Ceylon where the Roman-Dutch law applied, the decision in *Le Mesurier* was regarded as a binding precedent by the pre-Union courts. In this manner the decision in *Le Mesurier* was incorporated into South African law (Pollak *The South African law of jurisdiction* (1937) 146; Hahlo *The South African law of husband and wife* (1975) 44).

Le Mesurier's case proved to be a blight in both South Africa and other common-law systems. Over and above the constraints imposed upon the wife by her domicile of dependence during the subsistence of the marriage, she was upon desertion by her husband not competent to institute divorce proceedings in her own court of residence and was forced to follow her husband to his court of domicile. This caused untold hardship for the wife. For this reason the rule enunciated in *Le Mesurier*'s case fell into disfavour. What is forgotten, though, is that the decision in *Le Mesurier* was regarded as a milestone in its time because it settled a controversial issue regarding the exercise of divorce jurisdiction.

The Matrimonial Proceedings Act (20 & 21 Vict c 85 (1857)) came into operation in 1858. The historical importance of the act lies in its transference of jurisdiction to the English civil courts to adjudicate upon all matrimonial causes. Prior to 1858, the ecclesiastical courts were the only courts of competent jurisdiction that could decide on all matrimonial causes except divorce *a vinculo matrimonii*; divorce *a vinculo matrimonii* could be granted only by a private act of parliament (Worsley-Boden *Mischiefs of the marriage law* (1932) 97 – 119; Jackson *The formation and annulment of marriage* (1969) 29 – 40). But there was a serious *lacuna* in the act: it failed definitively to prescribe the grounds for the exercise of divorce jurisdiction (Cheshire *Private international law* (1948) 470 – 471; Jackson (ed) *Rayden's law and practice in divorce and family matters* vol 1 (1979) 36-38). Hence, prior to 1895, the English courts vacillated in regard to the grounds upon which judicial divorce was to be exercised. The *Niboyet* cases serve as a prime example. In *Niboyet v Niboyet* (1878) 3 PD 52 the court of first instance refused to grant a decree of divorce to a deserted wife on account of the fact that her husband was not domiciled in England (58 – 60); the decision of the court *a quo* was reversed on appeal in *Niboyet v Niboyet* (1878) 4 PD 1 (CA) on the ground that, because residence had formed the basis for the exercise of jurisdiction in the ecclesiastical courts prior to 1858,

jurisdiction for the granting of a judicial divorce could also be exercised on the basis of residence after 1858 (6–7 9; Toose *et al Australian divorce law and practice* (1968) xcviii – ci; Davies *Power on divorce and other matrimonial causes* vol 1 (1976) 1 – 6; Sim *Sim's divorce law and practice in New Zealand* (1965) 3 – 4). Early Cape practice was not involved in the controversy. Under section 31 of the Charter of Justice, Roman-Dutch law had been retained as the common law of the Cape and the substantive and jurisdictional grounds for divorce were clearly circumscribed (see *Reeves v Reeves* (1832) 1 Menzies 244; *Bestandig v Bestandig* (1847) 1 Menzies 280).

Although *Le Mesurier*'s case settled the jurisdictional grounds for divorce, it failed to consider the personal and social consequences for the deserted wife. The jurisdictional exclusivity of the husband's domicile as a jurisdictional connecting factor placed an inordinate hardship upon a wife whose husband had deserted her and resumed or acquired another or a foreign domicile. Judicial attempts to remedy the hardship thus inflicted upon the wife through the application of the common-law rule did little to alleviate her plight and legislative intervention became necessary (Palsson "Marriage and divorce" in Lipstein (ed) *International encyclopedia of comparative law* vol 3 (1978) 108; Cheshire 623; Collins *Dicey and Morris on the conflict of laws* (1987) 682; Hahlo 544 – 546).

Statutory grounds: avoiding the impact of *Le Mesurier*

During the initial phase of legislative reform, jurisdictional competence was granted to a court to deviate from the common-law rule in certain specified instances. For example, in the United Kingdom, section 13 of the Matrimonial Causes Act of 1937 (1 Edw 8 & 1 Geo 6 c 57) introduced the husband's antecedent domicile as a jurisdictional ground in cases where the wife had been deserted or the husband had been deported. But this type of reform was cosmetic. Retention of the wife's domicile of dependence still entailed a chronological or historical investigation of the husband's domicile as a prerequisite for the exercise of divorce jurisdiction; jurisdiction could not be exercised on the basis of the wife's presence within the area of her court of residence. From the late 1960s onwards, the legislation shows a marked understanding of the social reality of the situation.

What with hindsight may be regarded as a transitional phase, the wife was granted a deemed domicile but only for the purpose of instituting divorce proceedings (New Zealand: Matrimonial Proceedings Act 71 of 1973 s 3; Canada: Divorce Act 1967 – 1968 c 24 s 6(1); Australia: Family Law Act 53 of 1975 s 4(3)(b)). This legislation went a long way towards alleviating any hardship or inconvenience caused to the wife, but as yet equality between spouses had not been achieved. In 1973, the United Kingdom took the ultimate step of abolishing the wife's domicile of dependence by granting married women an independent domicile for all legal purposes; this had the desired effect of placing the spouses on an equal footing in regard to the exercise of divorce jurisdiction (Domicile and Matrimonial Proceedings Act of 1973 c 45 s 1(1)). New Zealand and Australia followed suit in 1976 and 1982, respectively (New Zealand: Domicile Act 17 of 1976 s 5(1); Australia: Domicile Act of 1982 (Commonwealth) s 6). In all three countries domicile is retained as the sole or alternative ground for the exercise of divorce jurisdiction, but in a setting where the domicile of either party to the marriage is a competent ground for the exercise of divorce jurisdiction (United Kingdom: Domicile and Matrimonial Proceedings Act of 1973 s 5(2)(a); Australia: Family Law Act of 1975 s 39(3)(b);

New Zealand: Family Proceedings Act 94 of 1980 s 37(2)). Moreover, residence has been introduced as an independent and alternative ground for the exercise of divorce jurisdiction; this has diminished the previous importance attached to domicile as an exclusive jurisdictional connecting factor (United Kingdom: Domicile and Matrimonial Proceedings Act of 1973 s 5(2)(b); Australia: Family Law Act of 1975 s 39(3)(b); see also North and Fawcett *Cheshire and North private international law* (1987) 625; Rayden 44; Rose (ed) *Nygh and Turner's The family law service* (1976) 2074). In Canada, residence is the sole ground for the exercise of divorce jurisdiction and is applied in an instance where either spouse has been resident in a province for a period of at least one year immediately prior to the commencement of the proceedings (Divorce Act 1986 c 4 s 3(1); see also Payne *Payne on divorce* (1988) 15 – 20). Apart from domicile and residence, citizenship also constitutes an independent though alternative ground for the exercise of divorce jurisdiction in Australia (Family Law Act of 1975 s 39(3)(a)).

The South African model

Domicile and residence have always been statutory grounds for the exercise of divorce jurisdiction in South Africa, but to date have never been recognised as independent and alternative jurisdictional grounds. A survey of the enactments dealing with the statutory grounds for divorce jurisdiction illustrates a distinct pattern. The common-law grounds for the exercise of divorce jurisdiction were extended to grant a married woman competence to institute divorce proceedings in a court other than her husband's court of domicile if she complied with a residence and a domicile/citizenship requirement. Compliance with both was compulsory.

The residence requirement has always entailed both divisional and national residence. Originally, in terms of section 1(1) of the Matrimonial Causes Jurisdiction Act 21 of 1939, a married woman wishing to commence proceedings in a division of the supreme court other than her husband's court of domicile, had to prove over and above the domicile requirement that she was ordinarily resident in the area of jurisdiction of that division immediately before the institution of proceedings. In 1953, section 1(1) was amended by the introduction of the additional provision that the wife had to prove that she had been resident in the then Union for a period of one year immediately preceding the institution of the proceeding (see s 6 of the Matrimonial Affairs Act 37 of 1953). Compliance with the residence requirements was compulsory for the exercise of divorce jurisdiction but residence alone did not form an independent or alternative ground for the exercise of divorce jurisdiction. Residence had to be linked to a domicile/citizenship requirement.

The statutory extension of the domicile requirement shows a distinct departure from the strict application of the common-law rule. Under section 1(1) of the Matrimonial Causes Act of 1939, a wife needed only to prove the domicile of her husband within the Union as a whole instead of his domicile within a particular division of the supreme court. In 1953, the domicile requirement was further extended by the introduction of the husband's antecedent domicile as an additional jurisdictional ground for divorce. This applied in instances where the husband had deserted the wife or had been deported from the Union and was domiciled in the Union immediately before the desertion or deportation (s 6 of the Matrimonial Affairs Act of 1953).

Although not directly related to the question of domicile, a further jurisdictional ground became operative in 1968. The wife's domicile or citizenship immediately prior to the marriage was recognised as a valid jurisdictional ground for divorce: a division of the supreme court was empowered to adjudicate divorce proceedings instituted by the wife whose husband was no longer domiciled in the Republic, provided that she was a South African citizen or domiciled in the Republic immediately before her marriage (s 21 of the General Law Amendment Act 70 of 1968 that inserted s 1(1A) of the Matrimonial Causes Act of 1939). The intention of this provision was to assist a South African woman who had married a foreigner in South Africa and was later deserted by her husband who had returned to his country of origin (Hansard (Senate) vol 2 (1968) 4277 – 4278).

In 1979, section 1(1) – 1(1A) of the Matrimonial Causes Jurisdiction Act of 1939 was repealed and the statutory grounds for the exercise of divorce jurisdiction were consolidated under the provisions of section 2(1) of the Divorce Act 70 of 1979. Section 2(1)(a) of this act merely restated the common law: the court of the common domicile of the parties had jurisdiction to entertain divorce proceedings. However, in regard to the position of the deserted wife, section 2(1)(b) provided that a division of the supreme court was competent to hear divorce proceedings instituted by the wife if she could prove both divisional residence at the time of the institution of the proceedings and one year's national residence prior to that date. In addition, she had to comply with one of the following domicile/citizenship requirements: that she was presently domiciled in the Republic; that she was domiciled in the Republic immediately before cohabitation ceased or that she was domiciled in the Republic or a South African citizen immediately prior to the marriage. According to the provisions of section 2(4), the term "domicile" retained its meaning at common law and hence every reference to the word "domicile" had to be interpreted as a reference to the husband's domicile. (For comment on the provisions of s 2(1), see Hahlo and Sinclair *The reform of the South African law of husband and wife* (1979) 10 – 13; Forsyth and Bennett *Private international law* (1990) 206 – 210.)

Since 1 August 1992, the provisions of section 2(1) have become academic, their only useful purpose being a basis for comparison with the new statutory grounds for the exercise of divorce jurisdiction that have recently come into operation (see Proc 76 of 1992-07-20).

The Domicile Act 3 of 1992 has introduced domicile and residence as independent and alternative grounds for the exercise of divorce jurisdiction (s 6 of the Domicile Act of 1992 has replaced s 2(1) of the Divorce Act of 1979). In its amended form, section 2(1) of the Divorce Act of 1979 now provides:

> "(1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is –
> (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
> (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date."

The interpretation clauses contained in section 1(1) of the Divorce Act of 1979 still apply. The word "court" is defined in section 1(1)(i) as a provincial or local division of the supreme court or a divorce court established under section 10 of the Black Administration Act 1927 Amendment Act 9 of 1929 which has

jurisdiction in regard to a divorce action. So too, the term "divorce action" is defined in section 1(1)(ii) as an action by which a decree of divorce or other ancillary relief is applied for and includes (a) an application *pendente lite* for an interdict or for interim custody of or access to a minor child or for the payment of maintenance or (b) an application for a contribution towards costs of the action or to bring an application *in forma pauperis*, or for substituted service or process in or the edictal citation of a party to such action or application. Section 1(2) provides that a divorce action will be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or delivered under the rules of court.

However, the new provisions of section 2(1) of the Divorce Act must be read in conjunction with section 1(1) of the Domicile Act of 1992. Section 1(1) provides as follows:

> "Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status."

The effect is to enable a married woman to acquire a domicile independent to that of her husband, thereby abolishing the doctrine of the unity of domicile of spouses. In relation to section 2(1) of the Divorce Act of 1979, the word "domicile" now means the independent domicile of either the husband or the wife. In this respect, the common-law rule enunciated in *Le Mesurier*'s case has been waived in so far as the common domicile of the parties is no longer the sole jurisdictional connecting factor. The independent domicile or residence of either spouse has replaced the common domicile of the parties as the jurisdictional connecting factor for divorce proceedings.

By comparison with its previous provisions, section 2(1) is now founded upon considerations of policy that acknowledge the social equality of both spouses as well as the altered status of women in society. In relation to the exercise of divorce jurisdiction, the introduction of domicile and residence as independent and alternative jurisdictional grounds, enables either spouse to institute divorce proceedings without the qualification of the other spouse's domiciliary status. Divorce jurisdiction may now be exercised on the basis of the position of a spouse at the time of the institution of the proceedings without any need to investigate and prove extraneous facts. Complicated notions of domicile formulated as the matrimonial domicile, antecedent domicile or the wife's pre-marital domicile have been discarded. All that is required is proof of a substantial jurisdictional connecting factor based on the independent domicile or residence of the one spouse *vis-à-vis* a division of the supreme court.

However, the relaxation of the common-law rule is not without attendant difficulties. Once it has been accepted that either spouse is competent to institute divorce proceedings, the problem of spouses domiciled or resident in different countries is accentuated. Compliance with the provisions of either section 2(1)(a) or (b) is a sufficient jurisdictional connecting factor to confer divorce jurisdiction. A division is therefore competent to entertain divorce proceedings upon a divorce action being commenced by one spouse even if the other spouse has never set foot in the Republic. Moreover, jurisdiction is now based on the domicile or residence of either party. According to the literal wording of section 2(1), jurisdiction is conferred upon a division "if either of the parties" complies with the provisions of section 2(1)(a) or (b); there is no qualification

as to who the plaintiff must be. Hence, if one spouse satisfies the provisions of section 2(1)(a) or (b), then the court of a division will be competent to hear divorce proceedings instituted by the other spouse, even if that other spouse lives abroad and has never had any personal connection with the Republic. This construction is given to similar provisions in the United Kingdom (North and Fawcett 624 – 625). These are the natural consequences arising from the abolition of the common domicile of the parties as a jurisdictional connecting factor. To introduce any restrictions in this respect would only serve to frustrate any of the benefits derived from the introduction of domicile and residence as independent jurisdictional grounds and reintroduce some of the former hardships.

The introduction of residence as an independent and alternative jurisdictional ground for divorce could prove to be highly problematic. It is conceivable that a person can be resident in one country but domiciled in another. Thus a court of a person's residence could grant a divorce to the exclusion of his court of domicile. This is permissible and indeed acceptable in terms of the legislation currently applicable in the United Kingdom, Australia and Canada. But the social and geographical conditions in these countries differ from those in South Africa. Millions of migrant workers from the TBVC countries and neighbouring South African states are, because of their work situation, ordinarily resident in one or other division of the supreme court as well as in the Republic as a whole, but are in fact domiciled in these foreign states. The provisions of section 2(1)(b) entitle such persons to commence proceedings in a South African court notwithstanding their domiciliary connection with a court of some other state. Commentators point out that there is a preference for residence as a jurisdictional ground because it is easier to prove than domicile (North and Fawcett 627 – 628; Rayden 44; Nygh and Turner 207; Chisholm *et al Australian family law* vol 1 (1987) 1201). This could well lead to South Africa's becoming the divorce haven of Southern Africa, depending on whether the jurisdictional grounds for divorce are or will become as lenient in other Southern African states. Given the social and geographical circumstances of South Africa, it may have been preferable to have introduced the independent domicile of either spouse as the sole ground for the exercise of divorce jurisdiction in order to obviate this potential problem.

A minor consideration is that of the ante-nuptial residence of the spouse seeking a divorce. In addition to ordinary residence within a division immediately before the institution of the proceedings, section 2(1)(b) requires that a spouse be ordinarily resident within the Republic for at least one year immediately preceding that date. Based on the application of the same provisions in previous South African legislation, the period of ante-nuptial residence would be included within this time span of at least one year's residence in the Republic. However, the previous legislation dealt with residence as a partial requirement and not as an independent ground for the exercise of divorce jurisdiction. A necessary implication of the introduction of residence as an independent ground is that a spouse who has been resident in the Republic for at least one year but who has been married for less than a year, is entitled to institute divorce proceedings in accordance with the provisions of section 2(1)(b). In the absence of any provisions to the contrary, it seems that ante-nuptial residence will continue to be included in the calculation of the period of uninterrupted national residence for the purposes of section 2(1)(b), notwithstanding the fact that residence

now constitutes an independent ground for the exercise of divorce jurisdiction. This would be in keeping with practice in the United Kingdom (Collins 68).

The relic of *Le Mesurier*

Important procedural consequences follow from the abolition of the wife's domicile of dependence. Once the principle has been accepted that both spouses are competent to institute divorce proceedings, the divisional structure of the supreme court becomes accentuated. Normally, after the breakdown of the marriage, the spouses separate and either live in the same division or settle in different divisions. According to the literal wording of section 2(1), a court of a division is competent to entertain divorce proceedings if either one of the two spouses is domiciled or resident in its area of jurisdiction. The possibility therefore exists that where each spouse is domiciled or resident in different divisions, summons could be issued out of two divisions simultaneously or on different days, with the result that divorce proceedings based on the same cause of action would be pending in two divisions.

According to the existing rules of procedure, the conventional method of dealing with such a situation would be to raise a special plea *lis pendens* (Van Winsen and Eksteen *Herbstein and Van Winsen's The civil practice of the superior courts of South Africa* (1979) 269 – 272). But it is doubtful whether a special plea to proceedings pending in another court on the same cause of action can solve the problem where statutory jurisdiction to adjudicate the matter has been expressly conferred on both courts. The issue is not whether the other court has a better right to hear the proceedings. The provisions of section 2(1) grant the court of each division in which a spouse is domiciled or resident an equal right to exercise exclusive jurisdiction for divorce. Where both spouses are domiciled or resident in the same division and both issue summons out of that division simultaneously or on different days, there should be no objection to the court's exercising its inherent jurisdiction to stay the proceedings of the one spouse. However, in the case of a conflict of jurisdiction between two divisions, there are no established grounds that entitle the court of one division to stay its own proceedings in favour of the proceedings pending in the court of another division, thereby waiving the exclusive jurisdiction conferred upon it at common law.

Legislation in other common-law countries with a multiple court system anticipates this potential problem and deals with it definitively. In Canada, for example, when divorce proceedings are instituted on different days in two courts having concurrent jurisdiction, the proceeding first in time prevails if not discontinued within thirty days of its commencement; if each spouse commences proceedings on the same day in different courts, the federal court-trial division has exclusive jurisdiction over the proceedings (s 3(2) – (3) of the Divorce Act of 1985; Payne 20; MacDonald and Ferrier *Canadian divorce law and practice* vol 1 (1986) 3.2 3.5 – 3.6). Moreover, a court that is seized with jurisdiction for divorce has a discretion to transfer the divorce proceedings to a competent court in another province in an instance where the divorce proceedings include an opposed application for interim or permanent custody or an access order and where the child of the marriage is most substantially connected with the province to which the divorce proceedings have been transferred; exclusive jurisdiction to hear and determine the proceedings is conferred upon the latter court (s 6 of the Divorce Act of 1985; Payne 20). The same applies to variation proceedings (s 5 of the Divorce Act of 1985; Payne 21 – 22).

The Canadian model also gives guidance in the situation where proceedings are commenced by each of the spouses out of the same court on the same day or within days of each other. Where two divorce petitions had been issued by spouses against each other, within a matter of an hour on the same date out of the same court, it was held in *Stewart v Stewart* (1980) 30 OR (2d) 63 that the petition first signed by the clerk of the court had been issued first and should therefore take precedence, the other petition being so amended to stand as a counter-petition (MacDonald and Ferrier 5.6).

In the United Kingdom two situations are distinguished: where proceedings are being simultaneously conducted in some part of the British Isles or alternatively, are continuing in both the British Isles and in any country outside England and Wales. In the first instance a court may order a mandatory stay of proceedings and in the latter provision is made for a discretionary stay. The object is to ensure that proceedings are heard in the more appropriate court (see schedule 1 par 8 – 9 of the Domicile and Matrimonial Proceedings Act of 1973; Cheshire and North 628 – 632; Passingham and Harmer *Law and practice in matrimonial causes* (1985) 64 – 66).

In Australia the situation is somewhat different because proceedings for matrimonial relief under the Family Law Act of 1975 are instituted, subject to certain exceptions, in the family court. Jurisdictional issues relate mainly to the distinction between the exercise of non-federal jurisdiction and federal jurisdiction. The problem has been solved by a scheme that accommodates the cross-vesting of jurisdiction (Sykes and Pryles *Australian private international law* (1991) 453 – 454).

What is abundantly clear from the comparative models above, is that the dual nature of the rule stated in the *Le Mesurier* case has been accommodated. The replacement of the common domicile of the parties as the sole jurisdictional connecting factor by the domicile or residence of either spouse as independent and alternative grounds also entails that, in a multiple court system, a conflict of jurisdiction between two competing national courts is possible and must be regulated by determining which of the two courts has exclusive jurisdiction. Failure to recognise this would result in the maintenance of a contradiction in terms: that by granting a stay of its own proceedings *mero motu* a court would be waiving its jurisdiction at common law to exercise exclusive jurisdiction for divorce, in favour of another court. In any event, it is doubtful whether a court endowed with exclusive jurisdiction at common law may stay its own proceedings in favour of another court in the absence of any enabling statutory provision or without the authority of a decision given by a higher court.

The same holds true for South Africa. The problem, though, is that the Divorce Act of 1979 does not provide for a conflict between two divisions with concurrent jurisdiction for divorce. Previous case law is to no avail (cf *Green v Green* 1987 3 SA 131 (E)). Jurisdiction for divorce is now applied in a totally different setting and at some stage this matter will have to be addressed either by legislative intervention or by a ruling of the Appellate Division. Because appeals to the Privy Council were abolished in 1952, the remnant of the decision in *Le Mesurier* that the court which has a substantial interest in the status of the parties has exclusive jurisdiction for divorce, may be set aside by the Appellate Division (see *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A)) but, in the meanwhile, it is still binding on all provincial and local divisions. Legislative

intervention is possible and indeed preferable to the determination of the issue by the Appellate Division, given the time and expenditure involved in an appeal as well as the uncertainty in the interim. What is certain is that at some stage the competing jurisdiction of two divisions competent to exercise divorce jurisdiction will have to be settled. Only then will the last relic of *Le Mesurier*'s case be removed from our system.

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DIE AARD, INHOUD, OMVANG EN BELANGRIKHEID VAN DERDEPARTYVERGOEDINGSREG

1 Inleiding

Die afgelope vyf jaar (handboeke en stukke van 'n blote inligtingsaard uitgesluit) het weinig substantiewe artikels of navorsingstukke oor derdepartyvergoedingsreg verskyn (sien Klopper *Derdepartyvergoedingsreg* (1991) 320). Die vraag wat uit hierdie verskynsel ontstaan, is waarom daar so min aandag aan 'n belangrike en dinamiese deel van die reg bestee word – 'n gebied van die reg wat bykans elke landsburger of sy naasbestaandes op die een of ander stadium van sy lewe op 'n praktiese en ingrypende wyse raak of kan raak.[1] Is hierdie verskynsel moontlik toe te skryf aan die opvatting van die samestellers van akademiese *curriculae* dat derdepartyvergoedingsreg so 'n klein en onbeduidende deel van versekeringsreg uitmaak dat dit slegs beperkte of geensins aandag regverdig nie, en is hierdie opvatting juis en gegrond? Hierdie vrae kan beantwoord word deur eers die doel van derdepartyvergoedingswetgewing vas te stel, daarna die ware aard, plek, omvang en inhoud van derdepartyvergoedingsreg te bepaal, en laastens te wys op die werklike belangrikheid van dié regsgebied.

2 Doel van derdepartyvergoedingswetgewing

Die doel van Suid-Afrikaanse derdepartyvergoedingswetgewing is om aan die slagoffer van 'n motorvoertuigongeluk die wydste moontlike dekking te gee teen

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1 Statistiek wat deur die Nasionale Verkeersveiligheidsraad saamgestel is, toon aan dat daar in 1991 443 569 motorbotsings was waarin 11 022 persone gesterf het. Hierdie sterftes kan dus, indien die meerderheid van die oorledenes broodwinners was, meer as 44 000 lewens raak. Dit is afgesien van die beserings wat deur van die ander betrokkenes opgedoen is: in 1991 was daar 34 621 ernstig beseerde en 90 400 gering beseerde persone. Die probleem word selfs duideliker as 'n mens die handboeke, artikels ens wat bv reeds lank gelede in Amerika daaroor verskyn het, in ag neem (sien bv Tunc *Encyclopaedia of comparative international law* "Torts" vol II 14 ev).

die nadelige gevolge wat uit so 'n ongeluk voortspruit. Die nadeel wat die wetgewer hier beoog, is liggaamlike beserings of die dood of besering van 'n broodwinner, asook bepaalde en beperkte geldelike verlies wat uit so 'n motorvoertuigongeluk kan voortspruit (sien Klopper (1991) 7). In *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A) 285 verklaar appèlregter Ramsbottom:

> "The obvious evil that it is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil the Act provides a system of compulsory insurance. The scheme of the Act is that the owner of a motor vehicle must obtain a declaration of insurance from a registered company. Not only is the owner compelled to insure the vehicle – failure to do so is an offence – but all registered companies are compelled, subject to certain qualifications, to issue declarations of insurance in respect of a motor vehicle when the owner thereof has applied for insurance of the vehicle in a prescribed form. The insurance enures for the benefit of any person who has been injured and of any person who has suffered loss through the death of a person who has been killed; such persons claim compensation direct from the registered company."

(Sien ook die aanhef van die Motorvoertuigassuransiewet 29 van 1942 (MVA-wet); Verpligte Motorvoertuigassuransiewet 56 van 1972 (VMV-wet); Motorvoertuigongelukkefondswet 84 van 1986 (MVO-wet); die huidige Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 (MMF-wet); oa *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A); *Van Blerk v African Guarantee & Indemnity Co Ltd* 1964 1 SA 336 (A); *AA Mutual Insurance Co Ltd v Biddulph* 1976 1 SA 725 (A); *Masombuka v Constantia Versekeringsmaatskappy Bpk* 1987 1 SA 525 (T).)

3 Ware aard, plek, omvang en inhoud van derdepartyvergoedingsreg

3 1 Aard

3 1 1 Vóór 1986

Derdepartyvergoedingsreg was aanvanklik as 'n afdeling van versekeringsreg beskou (ingevolge die bepalings van die MVA-wet 1942 en die VMV-wet 1972). Inderdaad was die bestaan van geldige verpligte versekering van die risiko wat uit die bestuur van 'n motorvoertuig volg, 'n wesenlike voorafgaande vraagstuk wat beantwoord moes word voordat 'n bevoegde versekeraar aanspreeklikheid opgedoen het (sien Suzman, Gordon en Hodes *The law of compulsory motor vehicle insurance in South Africa* (1982) 1 – 140). Dit het egter nie beteken dat die delikspleger geheel en al van sy aanspreeklikheid onthef word nie, maar wel dat sy aanspreeklikheid deur die verpligte versekering verskuif is na die betrokke bevoegde versekeraar vir solank as wat daar 'n geldige, afdwingbare versekeringsverhouding tussen so 'n versekeraar en die delikplegende bestuurder aanwesig was en vir sover daardie versekeringsdekking ingevolge tersaaklike wetgewing bestaan het. Indien daar 'n beperking op die bevoegde versekeraar se aanspreeklikheid ingevolge wetgewing was, was die dader steeds deliktueel aanspreeklik vir enige tekort wat nie regtens van die bevoegde versekeraar verhaal kon word nie. Ook waar daar uitsluiting van die bevoegde versekeraar se aanspreeklikheid was of waar die versekeraar nie in staat was om te betaal nie, was die dader ten volle vir die nadeel wat deur die onregmatige en nalatige bestuur van sy motorvoertuig veroorsaak was, deliktueel aanspreeklik (sien

Klopper (1991) 33 – 36; *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A); *Union and South West Africa Insurance Co Ltd v Quntana* 1977 4 SA 410 (N); *Motor Insurers Association of South Africa v Schuurman and Landsaat* 1961 1 SA 486 (A); *Palmer v Joe Borg's Transport* 1963 4 SA 488 (N); *Louwrens v Amery* 1965 1 SA 477 (W); *Davids v Gwynn* 1966 4 SA 493 (OK)).

Dit beteken dat die gemeenregtelike grondslag van derdepartyvergoedingsreg nie in die eerste plek versekeringsreg was nie maar wel deliktereg. Trouens, indien die aanspreeklikheidsvestigende bepalings van derdepartywetgewing wat verpligte assuransie ten doel gehad het onder die loep geneem word, sal duidelik besef word dat al die elemente van 'n delik in daardie artikels opgesluit is en dat die artikels en regspraak wat *nie* oor die versekeringsaspek handel nie, 'n substantiewe deel van die totale wetgewing, praktyk en regspraak van derdepartyvergoedingsreg uitmaak. (Sien a 1 – 10 van die MVA-wet 1942 wat hoofsaaklik oor assuransie handel in vergelyking met a 11 – 35 wat oorwegend oor ander sake handel; a 1 – 20 van die VMV-wet 1972 teenoor a 21 – 37 wat in die geval van a 21 – 23 uit sowat 25 subartikels bestaan. Sien ook a 10 van die MVO-wet 1986 en a 48 van die MMF-wet 1989 wat die gemeenregtelike deliktuele grondslag van derdeparty-eise behou en bevestig.) Verder is die assuransie-element in 1986[2] uit die derdepartyvergoedingstelsel verwyder sonder dat die stelsel radikaal gewysig is of in duie gestort het. Om dus te sê dat derdepartyvergoedingsreg 'n onderafdeling van versekeringsreg is, is om die ware aard van derdepartyvergoedingsreg te misken. Derdepartyvergoedingsreg was nog altyd toegepaste deliktereg met die aanspreeklikheidselemente op die deliktereg gegrond. Hierdie elemente is 'n handeling (die bestuur van 'n motorvoertuig), onregmatigheid (in die vorm van die aantasting van 'n persoon se *corpus* of reg op onderhoud op 'n *boni mores*-strydige wyse), skuld (in die vorm van nalatigheid), skade (in die vorm van vermoënskade of nie-vermoënskade) en kousaliteit (sien oor die afsonderlike elemente Klopper (1991) 38 ev). In hierdie gevalle is die beginsels van die deliktereg dus op motorvoertuigongevalle

2 Met die promulgering van die MVO-wet 84 van 1986 wat op 1 Mei 1986 in werking getree het. Daar is sommige wat meen dat die promulgering van hierdie wet steeds die assuransiegrondslag vir aanspreeklikheid van benoemde agente behou het (sien bv die argumente en die uitspraak in *Rabie v Kimberley Munisipaliteit* 1991 4 SA 243 (NK) wat ek in 1992 *De Rebus* 513 – 516 bespreek en die *Verslag van die kommissie van ondersoek na die sake van die Multilaterale Motorvoertuigongelukkefonds* (115 – 116) deur Melamet R (die Melamet-kommissieverslag)). Indien hierdie standpunt korrek is, moet die bepalings van die MVO-wet 1986 al die *essentialia* van versekering bevat of dui op handelinge wat versekering ingevolge vermelde wet daarstel. Die *essentialia* van versekering volgens Gordon *South African law of insurance* (1983) 78 en *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) is dat daar 'n wederkerige kontrak moet wees, dat hierdie kontrak *uberrimae fides* aangegaan moet word, dat daar 'n premie deur die versekerde betaalbaar is en dat daar 'n versekerbare belang moet wees wat verseker word teen die plaasvind van 'n toekomstige skadeberokkenende gebeurtenis. *Geen* versekeringskontrak word tussen die benoemde agent en die motorvoertuigeienaar of -bestuurder ingevolge die bepalings van die betrokke wet geskep nie. Daar is geen versekeringsverklaring gerig aan 'n bepaalde benoemde agent (versekeraar) onderteken deur die motoris of eienaar nie en nog minder is daar direkte betaling van 'n versekeringspremie in verband met die risiko deur die betrokke bestuurder of eienaar aan 'n spesifieke benoemde agent (versekeraar) (sien a 8 gelees met reg 7 van die MVO-wet 1986). Trouens, alle direkte en indirekte verwysings na *kontrak, assuransie, versekering, selfversekering* of *verpligte assuransie* is uitdruklik uit die MVO-wet 1986 gelaat. Lg herroep die VMV-wet 1972 in sy geheel. Nóg die bestuurder of die eienaar van 'n motorvoertuig, nóg die benoemde agent verrig ingevolge die bepalings van die wet enige handeling wat as versekering gekonstrueer kan word.

toegepas. Die versekeringselement daarvan was slegs 'n meganisme om te verseker dat daar genoegsame fondse bekom word om die slagoffer van 'n motorvoertuigongeluk paslik en voldoende vir die nadeel wat hy gely het, te vergoed (sien hierbo).

3 1 2 Ná 1986

Met die inwerkingstelling van die Motorvoertuigongelukkefondswet op 1 Mei 1986 het alle verwysings na versekering en selfversekering verdwyn. Die stelsel word vanaf vermelde datum befonds deur die oorbetaling deur die sentrale regering van 'n heffing van vier tot ses sent wat op elke liter brandstof gehef word (sien Bedeker *'n Kritiese ontleding van die artikels van die MMF-wet, 1989 wat die aanspreeklikheid van die MMF of sy benoemde agent beperk en uitsluit* (LLB-skripsie UP 1991) 28. Inligting ivm brandstofheffings is "strategies" van aard en is onderworpe aan beperkings ingevolge die Wet op die Sentrale Energiefonds 38 van 1977: sien Klopper *Mediareg* (1987) 214). Wat inderdaad gebeur het, is dat die stelsel van verpligte assuransie vervang is deur 'n stelsel waarvolgens fondse vir die betaling van skadevergoeding vir liggaamlike beserings of die dood van 'n broodwinner voortspruitend uit motorbotsings uit brandstofheffings bewerkstellig is. In hierdie skema speel die staat 'n onmisbare rol deurdat hy van sy wetgewende mag gebruik gemaak het om die stelsel van verpligte versekering deur versekeringsmaatskappye af te skaf, en tans die brandstofheffing op elke liter brandstof van elke motoris verhaal en hierdie heffing aan die administrerende liggaam, die Motorvoertuigongelukkefonds, oorbetaal (a 5 gelees met a 3 van die MVO-wet 1986).

Die algemene struktuur en aanspreeklikheidstellende asook aanspreeklikheidsuitsluitende en -beperkende bepalings van die voorafgaande wetgewing is behou en hier en daar aangepas (vgl bv a 9 van die MVO-wet 1986).

Hierdie grondslag is net so behou toe die Multilaterale Motorvoertuigongelukkefondswet op 1 Mei 1989 in werking getree het. Die enigste wesenlike beginselverandering wat deur hierdie wet teweeggebring word, is dat dit van toepassing word op al die SA TBVC-lande, Namibië en die Caprivi Zipfel en dat die verantwoordelike benoemde agent nie meer ingevolge 'n uitkenningskyfie aangewys word nie, maar uitsluitlik kragtens die datumskedule vervat in Bylae B tot die regulasies. (Sedert Namibië se onafhanklikwording op 1990-03-21 het hy sy eie statutêre derdepartyvergoedingstelsel: sien die Namibiese Motor Vehicle Accidents Fund Act 30 van 1990 en die regulasies daarkragtens uitgevaardig. Hierdie wet het op 1991-11-09 terugwerkend vanaf 1991-01-01 in werking getree. Sien ook *Van Rensburg v Russer* 1991 3 SA 471 (Nm). Sien tov die aanwysing van benoemde agente, a 40 gelees met reg 2 van die MMF-wet 1989.)

3 1 3 Huidige stand van sake

Die huidige stand van sake is dat die gemeenregtelike grondslag van derdepartyvergoedingsreg steeds die deliktereg is soos dit op motorvoertuigongevalle toegepas en wetteregtelik medebepaal en omskryf word. Dit kom daarop neer dat die aanspreeklikheid van die delikspleger wetteregtelik na die MMF of sy benoemde agent (na gelang van die geval) verplaas word. Die huidige stelsel kan as *sosiale wetgewing* beskryf word. (Dit is so omdat die staat 'n bedreiging vir die samelewing wat uit 'n gevaarlike sosiale bedrywigheid ontstaan, nl motorverkeer, deur wetgewing die hoof bied. Dit doen die staat deur bydraes in die vorm van brandstofheffings van deelnemers aan die besondere gevaarlike

aktiwiteit in die algemeen te vorder. Hierdie bydraes word aangewend om die nadeel wat besondere lede van die samelewing uit sodanige gevaarlike bedrywigheid ly, te vergoed (sien Klopper (1991) 5 ev). So gesien, het dit dieselfde grondslag as die Ongevallewet 30 van 1941. In lg wet word die eis van 'n werksman of sy naasbestaandes vir beserings of dood aan diens teen sy werkgewer statutêr uitgesluit en na die Ongevallekommissaris verplaas.)

4 Omvang en inhoud van derdepartyvergoedingsreg

4 1 Deliktereg

Derdepartyvergoedingsreg oorspan verskeie regsterreine.[3] Die hoofinhoud daarvan is wél die deliktereg (sien die aanspreeklikheidskeppende a 40 van die MMF-wet 1989 wat die vyf aanspreeklikheidselemente van 'n onregmatige daad wat vroeër reeds vermeld is, omvat) omdat dit by 'n derdeparty-eis juis gaan om die verhaal van vergoeding vir persoonlike nadeel en sekere vermoënskade weens die onregmatige en nalatige bestuur van 'n motorvoertuig. Aanspreeklikheid by derdeparty-eise is op nalatigheid gegrond en daarom is die nalatigheidselement soos toegepas op verkeersituasies 'n uiters belangrike, onontbeerlike en integrerende deel van die deliktuele aanspreeklikheidselemente van derdepartyvergoedingsreg (sien oor die nalatigheidselement bv Cooper 47 ev; Klopper (1991) 50 ev). Afgesien van nalatigheid is 'n grondige kennis van die bepalings van die Wet op Verdeling van Skadevergoeding 34 van 1956 noodsaaklik.

4 2 Familiereg

Aangesien dit ook om die verhaal van verlies van onderhoud gaan, is die familiereg van belang omdat die reëls van die familiereg bepaal of daar 'n onderhoudsplig bestaan al dan nie en ook wat die omvang en duur daarvan is (sien Davel *Skadevergoeding aan afhanklikes* (1987)).

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3 Daar is ook die volgende belangrike ondergeskikte nie-regsdissiplines: *Fisika*: Om nalatigheid te kan bepaal en te beoordeel, is 'n mate van kennis van die dinamika en fisika van motorbotsings nodig. Hierdie kennis is nodig om die fisiese tekens wat deur die botsing op die toneel van die botsing gelaat word, die foto's wat daar kan bestaan en die ongeluksplan te kan vertolk en die waarskynlikhede daarvolgens te bepaal. Sodanige kennis is noodsaaklik vir die beoordeling van getuienis en die effektiewe kruisondervraging van deskundiges en getuies op die waarskynlikhede omdat die bewyslas juis op 'n oorwig van waarskynlikheid gekwyt moet word (sien Cooper *Motor law* vol 2 (1987) 433 – 443 oor remafstande). *Mediese wetenskap*: Omdat dit oor liggaamlike beserings gaan, is 'n mate van kennis oor die menslike anatomie en fisiologie nuttig en selfs noodsaaklik. Wanneer vergoeding vir pyn en lyding beraam moet word, maak die regsgeleerde op regsmediese verslae en mediese getuienis staat. Kennis van anatomie en die menslike fisiologie asook die mediese begrippe wat in hierdie verslae gebruik word, is onontbeerlik ten einde 'n waarde-oordeel oor so 'n verslag te kan fel en effektief daaroor te kan kruisondervra. Sodanige kennis is ook nodig om te bepaal of 'n derdeparty-eis op 'n bepaalde tydstip ingestel moet word al dan nie (sien Corbett en Honey *The quantum of damages in bodily and fatal injury cases* (1992) vol 4 xxv ev). *Aktuariële wetenskap*: Kennis van die wyse van berekening van 'n enkelsom vir toekomstige skade is wenslik wanneer 'n aktuariële verslag aangevra word en die meriete van so 'n verslag tov verlies van verdienste of onderhoud beoordeel moet word (sien Koch *Damages for lost income* (1984)). 'n Gebrek aan blootstelling aan hierdie terrein kan die regsgeleerde duur te staan kom (sien *Lebona v Presidentversekeringsmaatskappy Bpk* 1991 3 SA 395 (W)).

4 3 Skadevergoedingsreg

Die skadevergoedingsreg speel 'n belangrike rol wanneer bepaal moet word welke bedrag vergoeding geëis moet word vir die persoonlike nadeel en sekere geldelike skade wat uit die nalatige en onregmatige bestuur van 'n motorvoertuig voortvloei (sien in die algemeen Visser en Potgieter *Skadevergoedingsreg* (1992) *passim*).

4 4 Persoonlikheidsreg

Die persoonlikheidsreg beheer die reëls wat by die aantasting van persoonlikheidsgoedere geld. In die geval van derdepartyvergoedingsreg is die persoonlikheidsgoed die *corpus*. Die persoonlikheidsreg bepaal ook wanneer eise vir pyn en lyding gedingsvatbaar en oordraagbaar is (sien Klopper (1991) 39 vn 66 – 68).

4 5 Personereg

Die personereg bepaal wanneer persone *locus standi in iudicio* het en gevolglik wanneer 'n persoon bevoeg is om 'n derdeparty-eis in te stel (sien *idem* 272 ev).

4 6 Wetgewing

Die derdepartyvergoedingswetgewing bepaal in welke omstandighede daar 'n derdeparty-eis ingestel kan word en wanneer so 'n eis uitgesluit of beperk is. Hierdie wetgewing bepaal ook die verjaring van derdeparty-eise en die prosedure wat gevolg moet word om 'n geldige en afdwingbare derdeparty-eis in te stel. Ook ander wetgewing, soos die Ongevallewet 30 van 1941, het 'n uitwerking op derdeparty-eise (sien *idem* 207 ev 254 ev).

4 7 Elemente

Derdepartyvergoedingsreg bestaan gevolglik uit die volgende elemente: *Deliktereg*, met die klem op die nalatigheidselement by motorbotsings en die verdeling van skadevergoeding; *familiereg*, hoofsaaklik die ontstaan, omvang en tot niet gaan van die onderhoudsplig; *skadevergoedingsreg*, naamlik die beraming van skadevergoeding vir persoonlikheidsnadeel en sekere geldelike verlies; en *wettereg*, naamlik die besondere regulerende en aanspreeklikheidskeppende, -uitsluitende en -beperkende wet wat op derdeparty-eise van toepassing is en wat die prosedure vir die indien van so 'n eis voorskryf.

4 8 Fisiese omvang

Uit voorgaande is dit duidelik dat die omvang en inhoud van derdepartyvergoedingsreg veel meer behels as wat algemeen aanvaar word. Indien al die aspekte daarvan behandel word, beslaan dit 313 bladsye van 'n handboek. (Sien Klopper (1991). Dan word net die belangrikste beginsels van bv die familiereg behandel sonder om 'n volledige uiteensetting te gee. Die regspraak wat met derdepartyvergoedingsreg verband hou, beslaan ongeveer 1 000 sake. Dit sluit nie al die sake in wat in Corbett en Buchanan *The quantum of damages in bodily and fatal injury cases* (1982) vol I – IV opgeneem is nie.)

5 Belangrikheid

5 1 Prakties

Daar is hierbo (vn 1) aangetoon hoeveel mense gedurende 1991 in motorbotsings gedood en beseer is. Die beraamde verlies vir die landsekonomie in 1989

was R5 862,6 miljoen. Hierdie statistiek toon dat die lewens van 'n beduidende deel van ons landsburgers deur motorbotsings geraak word.

5 2 Derde party

Die derde party betaal vir, verwag en is geregtig op professionele, kundige en effektiewe regsdienste. Die gebrek aan voldoende kundigheid sal beteken dat daar nie effektiewe toegang tot die regspleging is nie aangesien dié toegang kundige en professionele regsbegeleiding veronderstel. (Daar kom volgens eise-klerke in diens van benoemde agente gevalle voor van regsgeleerdes wat derdeparty-eise instel vir skade wat nie met 'n derdeparty-eis verhaal kan word nie!) Daarbenewens beteken onkunde van die derdepartyvergoedingsreg dat daar vertragings voorkom en dat kliënte benadeel word; in laasgenoemde geval deur die nie-verhaling of die onderverhaling van skadevergoeding, en in eersgenoemde geval deur die instel van oordrewe of foutiewe skadevergoedingseise (sien 60 van die Melamet-kommissieverslag).

5 3 Regsgeleerde

'n Groot persentasie motorongelukke is aan menslike faktore toe te skryf. Na aanleiding hiervan stel regter PJJ Olivier in die voorwoord tot Klopper (1991) derdepartyvergoedingsreg, wat die regsberoep betref, volkome in perspektief:

> "Uit hierdie ongelukkige toedrag van sake ontstaan daar 'n groot aantal eise. Die spoedige en billike beregting daarvan stel hoë eise aan ons regstelsel. In hierdie proses speel die regpraktisyn 'n onontbeerlike rol."

Uit 'n fooiverdienende oogpunt, is die totale bedrag aan party-en-partyregskostes wat deur die MMF bestee word in die orde van R55 miljoen per jaar (sien die *Jaarverslag van die Multilaterale Motorvoertuigongelukkefonds* vir 1989/90 par 14). Indien die geskatte prokureur-en-kliëntfooi van ongeveer R95 miljoen per jaar hierby gevoeg word, word die bron van potensiële inkomste vir die regsberoep uit derdeparty-eise ongeveer R150 miljoen per jaar. (Amerikaanse navorsing dui daarop dat die prokureur-en-kliëntfooi ongeveer een derde van die eisbedrag is wat aan 'n derdeparty-eiser uitbetaal word: Dit onderstreep die feit dat derdepartyvergoedingsreg 'n baie belangrike deel van 'n regsgeleerde se mondering behoort uit te maak.)

6 Gevolgtrekking

Derdepartyvergoedingsreg is nie meer versekering nie maar neem eerder die vorm van sosiale wetgewing aan (soos die Ongevallewet 30 van 1941). Die agterliggende gemeenregtelike beginsels wat derdeparty-eise beheer, is nie dié van die versekeringsreg nie maar wel van die deliktereg. Derdepartyvergoedingsreg kan trouens as toegepaste deliktereg beskou word (dws die beginsels van die deliktereg soos toegepas op persoonlike en verwante geldelike nadeel wat spruit uit die onregmatige en nalatige bestuur van 'n motorvoertuig soos aangevul en medebepaal deur wetteregtelike bepalings). Derdepartyvergoedingsreg omvat 'n hele aantal regsdissiplines. Die belangrikheid daarvan word bevestig deur die groot getal derdeparty-eise, die derde party se belange, die eise wat derdeparty-eise aan die regsberoep stel en die potensiële fooiverdienmoontlikhede vir regsgeleerdes. Derdepartyvergoedingsreg is gevolglik veel belangriker as wat algemeen aanvaar word en vereis 'n prominente plek in leergange as 'n noodsaaklike, volwaardige en selfstandige dissipline.

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DIE VERWEER VAN GEESTESKRANKHEID IN RUDIMENTÊRE REGSTELSELS: 'N STRAFREGTELIK-EVOLUSIONÊRE BESKOUING

1 Inleiding

In die lig van moderne navorsing en insig wil dit voorkom of die menslike waardesisteem (insluitende die reg) in breë trekke 'n biososiale en -psigiese basis het (sien bv Ruse "Sociobiology and determinism" in Mortensen en Sorensen (reds) *Free will and determinism* (1987) 116; Collier "Economics, psychology, and racism: an analysis of oppression" 1977 *Journal of Black Psychology* 52). Die reg het hiervolgens 'n natuurbasis wat tot gevolg het dat dit volgens vaste patrone ontwikkel of evolueer. In ander publikasies het ek daarop gewys dat 'n diachroniese beskouing van die ontwikkeling van die strafreg 'n mens onvermydelik tot die konklusie bring dat ten minste vier evolusie- of vernuwingsprosesse duidelik sigbaar is, naamlik:

(i) die proses van individualisering; (ii) die proses van dekonkretisering; (iii) die proses van humanisering; en (iv) die proses van dereligiëring en deritualisering ("Strafsinvolheid: opmerkinge oor die wese van strafregtelike aanspreeklikheid" in Joubert (red) *EM Hamman-gedenkbundel* (1984) 224 – 226; "Die eindbestemming van die dekonkretiseringsproses in die strafreg" 1990 *THRHR* 99; "Die paradoks van die individualiseringsproses in die strafreg" 1991 *THRHR* 116). In hierdie kort aantekening word aandag gegee aan die "verweer" van geesteskrankheid in primigene of rudimentêre regstelsels. In dié verband word hoofsaaklik ag geslaan op die posisie in die Romeinse reg, die Germaanse reg en Suider-Afrikaanse gewoonteregstelsels. Daarbenewens word kortliks gewys op die rol van genoemde vernuwingsprosesse in die latere ontwikkeling van die strafregtelike verweer van geesteskrankheid. Daar moet in gedagte gehou word dat die reg en die psigiatrie in baie opsigte verskillende benaderings in die verband volg (Smith *Trial by medicine* (1981) 168 – 169).

2 Groepsaanspreeklikheid

In die vroeë Romeinse reg was die geesteskranke aanvanklik onder beheer van sy agnate-groep of "clan". Die *potestas* van die agnate-groep het later oorgegaan op 'n kurator wat dieselfde funksies as die *tutor infantis* gehad het (Manthe "Bemerkungen zur *cura furiosi*" 1989 *Tijdschrift voor Rechtsgeschiedenis* 157 158; Kruger *Mental health law in South Africa* (1980) 1 – 3).

In die vroeëre fase van die Middeleeue is by die *Angelsaksers* vereis dat indien 'n geesteskranke 'n ander sou dood, sy familie vergoeding aan die oorledene se familie moes betaal (Salker *Crime and insanity in England* 1 (1968) 15); Verschoor *Die strafregtelike verantwoordelikheid van die psigopaat en ander analoë figure* (LLD-proefskrif UP 1980) 51). Volgens Wilda moes die verwante van 'n geesteskranke in die Germaanse reg vir sy wandade instaan (*Das Strafrecht der Germanen* (1842) 647 – 648). Maes wys daarop dat die "volslagen krankzinnige" nie in die Middeleeue gestraf is nie maar dat sy familie sy wandade moes vergoed (*Vijf eeuwen stedelijk strafrecht* (1947) 485). Onder die titel

"kranksinnigheid" (*penga*) verklaar Cloete, wat oor die *Venda* skryf, dat die voog (kraalhoof) van 'n geesteskranke wat 'n meisie defloreer het, aanspreeklik gehou word (*Die geslagsonregmatighede en judisiële stelsel van die Vhavenda van Dzanani* (LLD-proefskrif PU vir CHO 1980) 301). Daar bestaan inligting wat daarop dui dat 'n geesteskranke by die *Rolong* van ThabaNchu in vrede gelaat word maar dat sy verwante verantwoordelik gehou word vir skade wat hy kan aanrig (Joest "Bei den Barolong" 1884 *Das Ausland* 465; Myburgh *Indigenous criminal law in Bophuthatswana* (1980) 40; Van den Heever *'n Sistematiek vir die inheemse deliktereg van die swartman* (LLD-proefskrif UP 1984) 296). Daar bestaan insgelyks inligting wat aandui dat die familie in *Okavango* aanspreeklik is vir wandade deur 'n geesteskranke gepleeg (Van Tonder *The Ambukushu of Okavango land* (D Phil-proefskrif UPE 1966) 197; Van Rooyen *Die inheemse reg van die Kavango* (MA-verhandeling US 1977) 121 aangehaal deur Van den Heever 297).

Uit bogaande bespreking blyk duidelik dat die groep aanspreeklik gehou is of word vir die wandade wat 'n geesteskranke gepleeg het.

3 Die rol van die religieuse

Die mens, anders as die dier, het 'n analitiese selfbewussyn wat onder meer inhou dat hy sy gedrag nie alleen met dié van andere kan vergelyk nie maar ook verklarings daarvoor kan gee. In die lig hiervan verklaar Millon soos volg:

> "Primitive man and ancient civilizations alike viewed the unusual and strange within a magical and mythological frame of reference. Behavior which could not be understood was thought to be controlled by anamistic spirits. Although both good and evil spirits were conjectured, the bizarre and often frightening behavior of the mentally disordered led to a prevailing belief that demon spirits must inhabit them. The possession of evil spirits was viewed as a punishment for failure to obey the teachings of the gods and priests. Fears that demons might spread to afflict others often lead to cruel and barbaric tortures" (*Modern psychopathology* (1969) 4–5; sien ook Masserman *Principles of dynamic psychiatry* (1946) 4).

Hierdie toedrag van sake bestaan tot vandag toe in die inheemse gewoonteregstelsels (sien bv Ashton *The Basuto* (1967) 244; Van den Heever 295; Botha *Inheemse strafreg in Qwaqwa* (1986) 17; Myburgh en Prinsloo *Indigenous public law in KwaNdebele* (1985) 86). Siektetoestande wat volgens moderne psigiatriese kennis as psigoses, soos skisofrenie, gediagnoseer sou kan word, word aan die werking van geeste, dikwels veroorsaak deur toorkuns, toegeskryf (Laubscher *Sex, custom and psychopathology* (1951) 221–227). Geloof in toorkuns (en die bestaan van geeste) kom voor in alle gemeenskappe wat op 'n sekere vlak van ontwikkeling is (Labuschagne "Geloof in toorkuns: 'n morele dilemma vir die strafreg?" 1990 *SAS* 246). Interessant is dat Hippocrates reeds geargumenteer het dat die oorsaak van siektetoestande binne die pasiënt en nie in spirituele verskynsels nie, gesoek moes word (Millon 5). In Europa was die Hollander Johann Weyer (1515–1588) blykbaar die eerste persoon wat hom openlik teen demonologie uitgespreek het (*idem* 7).

4 Die belang van die konkreet-sigbare

In die Romeinse reg is aanvanklik na 'n geesteskranke verwys as 'n *furiosus*. 'n *Furiosus* was iemand wat in 'n toestand van raserny (furie) verkeer het, dit wil sê 'n beserker of 'n waansinnige (Manthe 159; Rein *Das Kriminalrecht der Römer* (1844) 208). Uit inligting wat Wilda verskaf, blyk dat dit ook die posisie

in die Germaanse reg was (644 – 645). In 'n ou Engelse saak (*R v Arnold* 1724 Hon St Tr 695 765) word in dieselfde trant na 'n geesteskranke verwys as iemand

> "totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute, or a wild beast".

(Sien ook Moore "Legal conceptions of mental illness" in Brody en Engelhardt (reds) *Mental illness: law and public policy* (1980) 25 28; Verschoor 57.) Daar bestaan egter nie duidelikheid oor die posisie in die inheemse gewoonteregstelsels nie. Myburgh en Prinsloo 85 wys ten aansien van die Ndebele daarop dat 'n (aangebore) idioot (*isidolwa*) en 'n algehele geesteskranke ("complete lunatic"; *ihlanya*) nie aanspreeklik gehou word nie.

Dit wil voorkom of die afleiding gemaak kan word dat slegs diegene wat uitwendig-sigbaar abnormaal opgetree het, aanvanklik as geesteskrank beskou is. Hierdie konklusie word bevestig deur die feit dat die geesteskranke dikwels aan die kind gelykgestel is (Moore 27; De Beer *Groepsgebondenheid in die familie-, opvolgings- en erfreg van die Noord-Ndebele* (DPhil-proefskrif UP (1986) 219 – 220). Die kind is juis die persoon wat sigbaar irrasioneel (in primigene konteks: gewoontestrydig) optree.

5 Afsondering van die geesteskranke

Tot ongeveer die einde van die Middeleeue het die belange van die geesteskranke nie veel gewig gedra nie. Indien die familie hom nie kon beheer nie is hy in 'n klooster of gevangenis opgesluit (Walker 19; Maes 485). Dié aanhouding het bloot geskied om die gemeenskap te beskerm. Van werklike behandeling van die geesteskranke was daar nog geen sprake nie (Kruger 7). Eers vanaf die 17de eeu is begin om inrigtings te vestig waarin geesteskrankes opgeneem is (Doerner *Madmen and the bourgeoisie* (1981) 15).

6 Konklusie

Uit bogaande bespreking blyk dat al vier bogenoemde evolusieprosesse in die strafreg ten aansien van die ontwikkeling van die posisie van die geesteskranke duidelik sigbaar is: (i) *Die individualiseringsproses* Dit blyk dat die familie of groep aanvanklik verantwoordelik gehou is vir die optrede van die geesteskranke. Later is egter in 'n toenemende mate gefokus op die individuele dader (die geesteskranke) self. (ii) *Die dekonkretiseringsproses* Aanvanklik is geesteskrankheid aan die hand van die sigbaar-konkrete beoordeel. Vandag weet ons egter dat baie geesteskrankes se gedrag nie sigbaar verskil van dié van niegeesteskrankes nie. Geesteskrankheid word hedendaags hoofsaaklik bepaal aan die hand van (dikwels) onsigbare gediagnoseerde geestesprosesse. Daar is gevolglik 'n duidelike proses van dekonkretisering in dié verband aan die werk. (iii) *Die proses van dereligiëring en deritualisering* Aanvanklik is geesteskrankheid aan die werking van religieuse (bonatuurlike) magte toegeskryf. Vandag weet ons dat die oorsaak van geesteskrankheid in die immanente bio- en psigologiese wese van die betrokkene lê en word die uitvoering van rites nie meer aangewend om die "geeste" uit te dryf nie. 'n Duidelike proses van dereligiëring en derituali-sering is derhalwe aan die werk. (iv) *Die proses van humanisering* Daar was aanvanklik geen begrip vir die dilemma van geesteskrankheid nie. Uit die altruïsme-instink, wat reeds by primate en ook ander diersoorte teenwoordig is, het die mens se deernis en begrip vir andere, in besonder ook vir sy medemens,

geëvolueer (Boorman en Levitt *The genetics of altruism* (1980) 1 ev). Hierdie altruïsme-instink vorm myns insiens ook die genetiese grondslag van die Christelike gebod tot naasteliefde wat niks anders as 'n vorm van humanisme (menslikheid) is nie. Die gevolg was dat ook die geesteskranke met meer deernis en menslikheid behandel is.

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A definition, however widely worded, is not an invitation to obtuseness or flights of fancy; the Legislature is not presumed to have attended the Mad Hatter's teaparty but to have had specific, discernible and sensible objectives in mind (*per* Kriegler AJA in *Administrator* (*Cape*) *v Raats Röntgen & Vermeulen* (*Pty*) *Ltd* 1992 1 SA 245 (A) 258).

I have stated that the Minister's opinion is subjective. Yet it is not unfettered. Like a dog on a leash its free and wilful movement is constrained by the dominant legislator by means of the enabling enactment. It can sniff only at trees which the length of the leash permits (*per* Van Dijkhorst J in *Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs* 1992 3 SA 838 (T) 848).

VONNISSE

GOOD FAITH IN NEGOTIATING A CONTRACT. THE DUTY TO ENQUIRE IF THERE IS A PERCEIVED OR APPARENT MISTAKE IN COMMUNICATION*

Sonap Petroleum SA (Pty) Ltd v Pappadogianis 1992 3 SA 234 (A)

1 Introduction

Should we approach the question of the formation of contracts from the point of view of positive requirements, or should we concentrate on the circumstances in which one or more of such requirements is or are absent? In particular, should we have regard, primarily, to

> "good faith (*bona fides*) as a criterion in interpreting a contract (Wessels para 1976) and in evaluating the conduct of the parties . . . in respect of its antecedent negotiation" (*Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802A *per* Jansen J),

or should we prefer to have regard, primarily, to the circumstances in which what is often called "unilateral mistake" has or does not have an effect on the parties' legal position? The conclusion, and some of the language in the decision in *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* supports the first approach; but some of the language of the opinion is in terms of the second.

2 The facts

The facts of the *Sonap Petroleum* case were that appellant (plaintiff in the court *a quo*, a supplier of petroleum products (235J)), lent money to owners who erected garages and then let the garages to *Sonap Petroleum* on long leases. *Sonap Petroleum*, as lessee, then sublet to operators who sold its products. Mortgage bonds over the respective properties were registered to secure the loans to the owners (235J – 236A).

Respondent was the owner of a property in Randfontein which was let to appellant for a period of 20 years under a lease entered into on 18 February 1975 and registered on 21 May 1975 which provided, *inter alia*, for a fixed rent of R770 per month (236B – D). Clause 4 of the lease provided that it (the lease) was to commence

> "on a date to be specified in terms of a certificate to be issued by Sonarep [the earlier name of appellant]" (236E).

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* See also 1992 *THRHR* 668 ff for a discussion of this case (editor).

The mortgage bond registered on 14 May 1975 had provisions relating to the lease so it was clear that, in the words of Harms AJA (236I),

> "the respective provisions of the notarial lease and of the mortgage bond were interrelated and interdependent".

The certificate was never issued. Instead, when its absence was noticed by an employee of appellant approximately two years after the premises had been completed and occupied (1 December 1974) the attorney instructed by the appellant to issue it decided that a notarial addendum to the lease should be executed and registered (237A – B). The respondent's signature and that of the appellant's managing director were obtained (*ibid*); but it is not stated in the report who signed first. (Whoever signed first became the offeror: *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 596E 597C 597H.) From the order in which the two persons are referred to (237B) one can presume that the respondent signed first. The addendum specified the date of commencement of the lease as 1 December 1974 but described it as a lease "for a fixed period of 15 years certain" (237C) thus seeming to reduce the lease from 20 years to 15. This was only noticed in 1987. When appellant raised the question the respondent insisted "that no mistake had occurred" and appellant then

> "claimed rectification of the addendum by replacing the 15 year term with a 20 year term and, in the alternative, an order declaring the addendum in the light of the mistake to be void" (*per* Harms AJA 237D – E).

The court found that there was no common intention to retain the original 20-year period so the claim for rectification failed.

Concerning the claim to declare the addendum void, it is important to note that the court took the view that on the evidence

> "it must be accepted as overwhelmingly probable that the respondent did in fact read the document, and that he thereafter telephoned his attorney and read the document to him over the telephone. This must be so in the light of the importance to the respondent of the lease (especially it's term of duration). Both he and his attorney were fully aware that the original lease provided for a term of 20 years and that the bond repayments were linked thereto. It is, therefore, in spite of their denials, more than probable that they did discuss the change in term. At the trial, the appellant's counsel, in cross-examination, valiantly attempted to get the respondent to concede that, on reading the document, he did in fact realise that a mistake had occurred. The answers given indicated that that possibility did occur to him but, before counsel could drive the point home, respondent's counsel intervened and that gave the respondent the opportunity to reconsider and deny" (*per* Harms AJA 238A – C).

Later (242A – B) the learned Judge of Appeal said that respondent's "retraction is not convincing".

3 The decision of the court

It will be remembered that in the court *a quo*

> "the appellant claimed rectification of the addendum by replacing the 15 year term with a 20 year term and in the alternative, an order declaring the addendum in the light of the mistake to be void" (*per* Harms AJA 237E).

Both courts rejected the claim for rectification, the Appellate Division because it found that the respondent had read the addendum and wished to "agree" to the apparent reduction (237F 238F). Harms AJA summarised the finding in the court *a quo* by saying that

> "the learned Judge concluded that:
>
> (i) . . .

(ii) the appellant's mistake was not *iustus* because it was due to its fault, ie the carelessness and inattention of its employees in not reading the proposed amendment to clause 4 properly before executing it;
(iii) the appellant did not prove that the respondent knew or ought to have known of the appellant's unilateral mistake" (237F – G).

The Appellate Division found that

> "the respondent was not misled by the appellant to believe that it was its intention to amend the period, but, on the contrary, that he was alive to the real possibility of a mistake and that he had, in the circumstances, a duty to speak and to enquire. He did not but decided to snatch the bargain. That he could not do. There was, therefore, no *consensus*, actual or imputed, on this issue" (242B – C).

The court then declared to be void that part of the addendum which stated that the lease was for a period of 15 years (242D – E).

4 The legal basis of the decision

The decision is to be welcomed on three grounds. The first is that it was declared that there are circumstances in which a prospective contracting party has "a duty to speak and to enquire" (242B). The court did not specify the origin of the duty. It is suggested, with respect, that it can best be understood as an application of the criterion of good faith referred to in the opening paragraph of this note.

The second reason for welcoming the decision is that, so far as I am aware, it is the first time that the Appellate Division has expressly approved the decision in *Sherry v Moss* (WLD 1952-09-03 reported in 1952 *Annual Survey of South African Law* 100 – 101 and in Kahn *Contract and mercantile law. A source book* vol I (1988) 300 – 301) (241B). *Sherry*'s case differs, so far as one can gather from the reports mentioned, from leading cases such as *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) and *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) in that all the parties seem to have been well aware of all the relevant circumstances. The offers were made by M and Mrs M after the advice of S's attorney had been sought; so presumably S, Mrs S, M, and Mrs M had all agreed that what the attorney suggested was the best way of solving their problem. There seems to have been no reliance on any representations by any of the parties. If this is so, *Sherry*'s case highlights the requirement of good faith in circumstances other than those referred to by Harms AJA in the *Sonap Petroleum* case:

> "[T]he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed [on this phrase see below], lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? See *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 906C – G; *Spindrifter (Pty) Ltd v Donovan (Pty) Ltd* 1986 (1) SA 303(A) at 316I – 317B. The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978(A) at 984D – H, 985G – H" (239I – 240B).

Hence *Sherry v Moss supra* supplements, rather than falls wholly within, the decision in *Sonap Petroleum*. Perhaps now, forty years after *Sherry v Moss* was decided, it could be fully reported in the South African Law Reports.

The third ground for welcoming the decision in *Sonap Petroleum* is the ruling (240C – I) that the representee is not required to prove fault on the part

of the representor. This confirms the view that our law does allow a remedy (or remedies) on simple misrepresentation, a proposition that has engendered controversy in the past (see my *The principles of the law of contract* (1989) 214 – 218 (*Contract*)).

5 Terminology

5 1 "Unilateral mistake"

The reference to *bona fides* (241D) is to be welcomed; but the references to "unilateral mistake" in the court *a quo* (237G) and in the Appellate Division (238D 242C – D) give rise to a number of problems, as the court itself seems to have been aware – it referred elsewhere (238H 239A – B) to a "so-called unilateral mistake". The first problem is that there is no generally accepted single meaning of the term "unilateral mistake". *Prima facie* it means mistake on one side only and hence in a contractual context mistake by one party only; but some authorities use it to refer both to that situation and to one where both parties are mistaken (Van Rensburg, Lotz and Van Rhijn 5 *LAWSA* par 125). There can be a single mistake by one party only; but when the circumstances in most cases are analysed, it will be found that there is more than one mistake (*Contract* 168 – 177). In the *Sonap Petroleum* case Harms AJA said that the appellant

> "mistakenly believed that its declared intention conformed to its actual intention. The respondent's declared intention, on the other hand, did not differ from his actual intention. The *dissensus* is, therefore, in a sense the result of the appellant's so-called unilateral mistake" (238G – H).

With respect, this reasoning omits any reference to a vital mistake on defendant's part. Having omitted to comply with his duty to speak and to enquire (241A – B), he thought that the appellant intended to offer him the opportunity to agree to a reduction in the term of the lease. Just as in the case of the Cornelian and Sempronian estates (*Contract* 170 – 172) this was a mistake and, as in the case of those two estates (*ibid*), "[t]here was . . . no *consensus*, actual or imputed, on this issue" (per Harms AJA 242B – C).

In parenthesis, the term *iustus error* is not a satisfactory alternative to "unilateral mistake" because *error* is singular and when there is more than one mistake it is not an acceptable solution to refer to a single mistake in Latin any more than it is in English.

I suggest that the term "unilateral mistake" should not be used in situations in which, as in the *Sonap Petroleum* case, there are mistakes on both sides. I suggest also that what courts seek to emphasise on many occasions when the term is used, is that the series of mistakes in the case referred to (some on each side) originated from, or was the consequence of, a mistake made by one of the parties. Thus in the *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* case *supra* (quoted in *Sonap Petroleum* 239E), Schreiner JA spoke of a party setting up

> "*his own mistake* in certain circumstances in order to escape liability under a contract into which he has entered [*sc* appears to have entered]" (emphasis added).

5 2 Other phrases

Care often needs to be taken in regard to use of language in other contexts also. The statement concerning "the common intention expressed" (239I) is quoted

in paragraph 4 above. As the court found that there was "no *consensus*, actual or imputed" on the issue (242B – C) it presumably meant to refer (239I) to an actual intention which did not conform to what appeared in the signed document to be a common intention.

6 Raised but not decided: Does the test for the duty to speak and to enquire include the question whether a reasonable man should have realised the real possibility of a mistake in expression?

The Appellate Division held on the facts that the defendant

> "was alive to the real possibility of a mistake and that he had, in the circumstances, a duty to speak and to enquire" (*per* Harms AJA 242B).

This being so, the court left open the question whether, if he had not in fact been alive to that possibility, he should, as a reasonable man, have appreciated the possibility of a mistake (242C). Earlier (241A) there is an indication that if the question had required decision the court would have found that the test does include the question, as indeed was said in *Slavin's Packaging Ltd v Anglo African Shipping Co Ltd* 1989 1 SA 337(W) 344B. This is in conformity with the rule in *Smith v Hughes* (1871) LR 6 QB 597 607 (quoted 239) which envisages an offeror considering the conduct of the offeree as a reasonable man in his (the offeror's) position would consider it.

7 Possible remedies

The remedy granted in the *Sonap Petroleum* case was to declare void that part of the addendum which stated that the lease was for a period of 15 years (242D – E). It is important to note that it was only part of the addendum that was declared void, not the whole addendum. This left intact the portion that said that the lease commenced on 1 December 1974.

Another remedy is to read the document as if the mistake were not there, a remedy which is indicated in the exposition of the law in *Boerne v Harris* 1949 1 SA 793 (A), an exposition on which the majority and the minority were in agreement (*Contract* 26, where, in addition, the facts are referred to). If this remedy had been applied in the *Sonap Petroleum* case, the addendum would have been read as stating that the lease was for a period of 20 years. Conversely, if the approach in the *Sonap Petroleum* case had been applied in *Boerne*'s case, the reference to 15 October 1946 would have been deleted and the notice would have read: "our client intends to renew [this meant 'renews' (808)] the lease for a further period of (5) years in terms thereof" and this would have been effective to renew the lease (811). In *Boerne*'s case the mistake in the notice of renewal was noticed by the lessor who did not give his apparent assent to it; there was therefore no apparent *consensus* on the renewal of the lease, but it appears that the approach in the *Sonap Petroleum* case extends to the deletion of mistakes in offers and acceptances if the other party knows, or should as a reasonable man know, of the mistake – the plaintiff in *Sonap Petroleum*'s case prepared the addendum and the mistake was there before either party signed, that is, before the one became the offeror and the other the offeree. The facts of both cases involve the question of good faith in the "antecedent negotiation" of the contract, to use the phrase in *Meskin*'s case above.

In parenthesis it may be asked if the decision in *Boerne*'s case would be the same today. The exposition of the law in it is not criticised; but should a reasonable

man in the position of the lessor not have enquired whether "15th April 1947" was not intended instead of "15 October 1946"? I suggest that he should. The lessor must have known, or if he did not, a reasonable man in his position would have known, that 15 October 1946 was, in terms of the lease, not the correct date. As Greenberg JA stated in the majority judgment: "I agree that in order to construe the letter it must be read together with the lease itself to which the letter plainly refers" (801 – 802; see also Schreiner JA's minority judgment 814). Hence it appears that if the law were applied as stated in *Boerne*'s case itself, and having in mind the approach in the *Sonap Petroleum* case, the decision in *Boerne*'s case would have been different had it been before the court today.

There may, however, be circumstances in which it is not clear what was intended, circumstances in which neither the approach in *Boerne*'s case nor that in the *Sonap Petroleum* case can give a satisfactory answer because it is not clear how the document should be read (*Boerne*) and no excision is possible that will leave intact what was intended (*Sonap Petroleum*). Suppose, for example, that a lease gives the lessee an option to renew and that the notice sent by the lessee is such that the lessor on receiving it says to himself, or a reasonable man in his position would say to himself, "There is a mistake here; but I cannot make out precisely what it is, or precisely what the lessee intended". A lessor in that position who fulfilled his "duty to speak and to enquire" (the *Sonap Petroleum* case 241A – B) would ask the lessee to clear up the difficulty which the lessee would presumably do. What remedy does the lessee have if the lessor does not ask about the possibility of a mistake? *Ex hypothesi* (see above) the solution in *Boerne*'s case is not available. Neither is that in *Sonap Petroleum*'s case. The legal position, I suggest, is that if the lessor were to claim that the lease had not been renewed and, after the date on which the original lease would have terminated if not renewed, were to sue for the lessee's ejectment, the lessee could plead the *exceptio doli generalis* until such time as the lessor were to give him the opportunity to renew. Despite what is said on the *exceptio doli generalis* in *Bank of Lisbon and South Africa v De Ornelas* 1988 3 SA 580 (A) (on which see *Contract* 477 – 503), the re-affirmation of the *replicatio doli* in *Van der Merwe v Meades* 1991 2 SA 1 (A) means that the Appellate Division is at liberty to choose whichever of the earlier cases it considers to be correct, or to give the decision it considers to be correct if it finds that both earlier cases are wrong (Oelschig, Midgley and Kerr "Stare decisis in provincial and local divisions" 1985 *SALJ* 372 – 373; Kerr "The *replicatio doli* reaffirmed. The *exceptio doli* available in our law" 1991 *SALJ* 586). It is suggested that lower courts have the same freedom, though there is support for the point of view that a lower court would probably follow the later decision, in this instance *Van der Merwe*'s case (*ibid*). When a court chooses which of the conflicting Appellate Division decisions it will follow, it should be noted that what is said in the *Bank of Lisbon and South Africa* case on the *exceptio doli generalis* is, with respect, open to many criticisms (*Contract loc cit*). Further, the consequences for our law as a whole would be far more disadvantageous if courts were not to follow *Van der Merwe*'s case than if they were not to follow the *Bank of Lisbon and South Africa* case. In this connection the reference to *dolus malus* and *bona fides* in the *Sonap Petroleum* case (241B,D) need to be borne in mind. (It also needs to be borne in mind that the *exceptio doli generalis* allows an action to be denied if there is bad faith (using these words in an extended sense) on the part of the plaintiff *at the time action is brought*; hence

its availability does not run counter to the ruling in the *Sonap Petroleum* case that the representee is not required to prove fault on the part of the representor when the rule in *Smith v Hughes* is in issue.)

8 Conclusion

In circumstances similar to those in the *Sonap Petroleum* case, a defendant is entitled (i) to claim that the text be read with the meaning which can be shown to be correct or which a reasonable man in the plaintiff's position would give it (the law as expounded in *Boerne*'s case above, not its application in that case); or (ii) to claim the excision of the incorrect part of the transaction (the *Sonap Petroleum* case); or (iii) to raise the *exceptio doli generalis* if sued by a plaintiff whose cause of action depends on the document (or other communication) being maintained in its uncorrected state. Further, in circumstances similar to those in *Sherry v Moss*, neither party can claim that only part of a complex combined transaction be enforced. All these propositions are in accord with the rule that no-one is entitled to snatch at an advantage, which in turn is a reflection of the principle enunciated in *Meskin*'s case (quoted *supra* par 1).

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VRYWILLIGE AANVAARDING VAN RISIKO: TOESTEMMING TOT BENADELING, MEDEWERKENDE SKULD EN DIE *ACTIO DE PAUPERIE*

Maartens v Pope 1992 4 SA 883 (N)

Die eiser, 'n loodgieter, is deur die verweerder se hond gebyt en ernstig beseer toe hy die verweerder se perseel betree het ten einde sekere werk daar te doen. In appèl handel die uitspraak hoofsaaklik oor die vraag of die verweerder met die *actio de pauperie* aanspreeklik gehou kan word vir die skade wat sy hond aangerig het. In die besonder moet die hof oorweeg of die eiser op grond van sy beweerde "vrywillige aanvaarding van risiko" sy eis verbeur: hy het naamlik 'n duidelike pasop-vir-die-hond-kennisgewing verontagsaam toe hy die perseel betree het. 'n Tweede verweer wat oorweeg moet word, is of die eiser se "substantial imprudence" tot die skade bygedra het.

Regter Didcott wys (886 – 887) op die oorvleueling enersyds en die duidelike onderskeid andersyds tussen "vrywillige aanvaarding van risiko" en medewerkende nalatigheid (wat effektief met "substantial imprudence" gelykgestel word):

> "Both concentrate on the disregard by the plaintiff of the sign. But they differ . . . in the angles from which they require us to view that single fact" (887A).

Die ondersoek na vrywillige aanvaarding van risiko fokus op die benadeelde se subjektiewe gedagtewêreld; dié na medewerkende nalatigheid op objektiewe

standaarde van redelikheid (886I – J). Die regter beklemtoon – met verwysing na sake soos *Waring & Gillow v Sherborne* 1904 TS 304 en *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) – dat by vrywillige aanvaarding van risiko die benadeelde werklik die risiko moet voorsien het en inderdaad daartoe toegestem het:

> "What must always be proved is that the nature and extent of the danger which subsequently materialised was apparent to and appreciated by the claimant, and that he assented to undergo the risk entailed in it. His assent may have been expressed verbally. Or it may have been a tacit assent, one implicit in and demonstrated by his conduct in consciously running the risk . . . The question is not . . . whether the claimant should have foreseen the risk [soos wel die geval by medewerkende nalatigheid is]. It is whether he must have foreseen the risk [in die sin dat hy nie anders kon as om dit te voorsien nie], and therefore in fact foresaw it" (887G – 888B).

Die hof bevind dat die eiser inderdaad "knowledge and appreciation" van die gevaar gehad het (888E), en dat sy eie getuienis oor sy bewustelike verontagsaming van die pasop-vir-die-hond-kennisgewing bevestig dat hy die risiko voorsien en aanvaar het: "[s]o he ran the risk deliberately, assenting to it tacitly" (889B – D).

Namens die eiser is gewag gemaak van die praktyk van baie huiseienaars om pasop-vir-die-hond-kennisgewings te vertoon ter wille van die afskrikwaarde van die waarskuwing self, sonder dat hulle enige honde het wat gedug genoeg is om substansie aan die waarskuwing te gee. Die argument is dan dat die eiser se erkenning dat hy die waarskuwing gesien en nietemin die perseel betree het, nie noodwendig op aanvaarding van die risiko dui nie aangesien die kennisgewing bloot 'n holle dreigement kon wees. Regter Didcott beklemtoon (889F – I) dat dit 'n feitevraag is of die risiko voorsien is; dit moet beantwoord word met verwysing na die omstandighede van die betrokke geval. Dit is moontlik om 'n geval te bedink waar die benadeelde die kennisgewing lees en tog geen risiko voorsien nie, soos waar hy 'n perseel herhaaldelik besoek en telkens – ten spyte daarvan dat die gebruiklike kennisgewing vertoon word – net 'n saggeaarde Chihuahua opmerk, om dan op 'n dag deur 'n Rottweiler aangeval te word wat die huiseienaar ná sy laaste besoek aangeskaf het. In die onderhawige saak was daar egter geen omstandighede aanwesig wat die eiser 'n vals gerustheid kon gee om nie die waarskuwing ernstig op te neem nie.

In die lig van sy bevinding dat die eiser die risiko vrywillig aanvaar het, ag die hof dit onnodig om oor die verweer van "substantial imprudence" te beslis (889J).

Die howe is gewoonlik nie bereid om hulle oor die aard van "vrywillige aanvaarding van risiko" of selfs *volenti non fit iniuria* in die algemeen uit te spreek nie (bv *Santam v Vorster supra* 777), en in *Maartens v Pope* laat die hof hom ook nie daaroor uit nie. Die voor-die-hand-liggende interpretasie is waarskynlik dat daar *in casu* 'n geval van toestemming tot die risiko van benadeling aanwesig is, wat volgens die gangbare opvatting onder skrywers oor die deliktereg 'n regverdigingsgrond is en dus onregmatigheid uitskakel (Neethling, Potgieter en Visser *Deliktereg* (1992) 90 ev; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 89 ev; Van der Walt *Delict: Principles and cases* (1979) 50 ev; vgl Boberg *The law of delict I: Aquilian liability* (1984) 724 ev; Van Aswegen en Knobel "Sportbeserings en toestemming" 1989 *THRHR* 586).

'n Alternatiewe interpretasie van die verweer "vrywillige aanvaarding van risiko" in *Maartens v Pope* lyk ook moontlik. 'n Beroep op toestemming –

hétsy tot benadeling, hétsy tot die risiko van benadeling – kan alleen slaag as die toestemming nie teen die gemeenskapsopvattinge indruis nie (Neethling, Potgieter en Visser 96–97; Van der Merwe en Olivier 92–93 97; Van der Walt 53–54; vgl Boberg 729). Toestemming tot die risiko van ernstige liggaamlike besering sal gewoonlik *contra bonos mores* wees; uitsonderings geld in die gevalle van mediese behandeling en georganiseerde sport (Neethling, Potgieter en Visser 96–97 en gesag daar aangehaal; Van der Merwe en Olivier 92–93 97). Sou die benadeelde vrywillig 'n risiko aanvaar het wat *contra bonos mores* is, word geleer dat 'n beroep op die regverdigingsgrond toestemming nie kan slaag nie en handel die verweerder steeds onregmatig. Die verweer van *medewerkende opset* kan nietemin wel ter sprake kom aangesien die benadeelde sy wil gerig het op sy eie benadeling – in die sin dat hy dit as 'n moontlikheid voorsien het en hom daarmee versoen het – en hy boonop bewus was van die onredelikheid daarvan (Neethling, Potgieter en Visser 154–155; Van der Merwe en Olivier 167–169). En dit is presies wat in *Maartens v Pope* gebeur het. Die risiko wat die eiser aanvaar het, was een van ernstige liggaamlike besering. Regsgeldige toestemming kan nie daartoe gegee word nie aangesien dit *contra bonos mores* is. So gesien, beteken sy "vrywillige aanvaarding van risiko" dat hy medewerkende opset met betrekking tot sy besering gehad het. (Vgl die kommentaar van Neethling, Potgieter en Visser 155–156 en Van der Merwe en Olivier 170–171 op *Lampert v Hefer* 1955 2 SA 507 (A).)

Ek meen egter nie dat aanvaarding van die pas gestelde vertolking noodwendig beteken dat toestemming tot die risiko van ernstige liggaamlike besering in die konteks van die *actio de pauperie* altyd *contra bonos mores* sal wees nie. Twee voorbeelde, ontleen aan die regspraak, kan ter illustrasie dien. As 'n persoon vir eie ontspanning 'n perd huur, is dit nie noodwendig gemeenskapstrydig as hy sou toestem tot die risiko dat die perd *contra naturam* optree en hom beseer nie (vgl *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D)). Insgelyks hoef dit nie *contra bonos mores* te wees nie as 'n huurder van 'n tuinwoonstel toestem tot die risiko dat die huiseienaar se honde hom kan byt nie. Die huurder het immers die voordeel van die tuinwoonstel, en waarskynlik dien die honde ook om sy besittings op die perseel te beskerm (vgl *Joubert v Combrink* 1980 3 SA 680 (T)). Daar is dus wel plek vir 'n verweer van *volenti* in die vorm van toestemming tot die risiko van benadeling in die konteks van die *actio de pauperie*, alhoewel die howe die verweer skynbaar met groot omsigtigheid hanteer: in beide die sake waaraan die voorbeelde ontleen is, is op die feite bevind dat die eiser(es) nie inderdaad toegestem het nie.

Die vereiste – soos beklemtoon deur regter Didcott – dat die benadeelde inderdaad subjektief die benadeling moet voorsien en aanvaar het, geld eweseer vir die regverdigingsgrond toestemming en die verweer medewerkende opset. Dit onderskei beide ook van die verweer medewerkende nalatigheid waar met 'n objektiewe redelikheidstandaard gewerk word, naamlik of die benadeelde soos 'n redelike man opgetree het.

In die onderhawige saak maak dit geen verskil aan die praktiese eindresultaat of 'n mens die "vrywillige aanvaarding van risiko" as toestemming tot die risiko van benadeling dan wel as medewerkende opset konstrueer nie. Toestemming tot die risiko van benadeling is 'n volkome verweer en sluit die verweerder se aanspreeklikheid geheel en al uit. Net so is skuld aan die kant van die eiser ook 'n volkome verweer teen die *actio de pauperie*, waar immers vir aanspreeklikheid geen skuld aan die kant van die verweerder vereis word nie. (Neethling,

Potgieter en Visser 357. Streng genome is "medewerkende" opset hier nie 'n gepaste term nie: dit verwys bloot na skuld wat die eiser mbt tot sy eie skade gehad het en nie na skuld wat met skuld van die verweerder "meegewerk" het tot die eiser se skade nie: vgl Van der Merwe en Olivier 177 – 178.)

Die enigste geval waar 'n prakties verskillende resultaat bereik sal word as die verweer medewerkende opset in plaas van toestemming tot die risiko van benadeling geopper word, is indien die eiser en die verweerder albei opset gehad het (dit sal dus nie 'n geval van skuldlose aanspreeklikheid – soos die *actio de pauperie* – kan wees nie) en, bygesê, as die howe bereid sou wees om dan 'n verdeling van skadevergoeding te maak soos by medewerkende nalatigheid ingevolge artikel 1(1)(a) van die Wet op Verdeling van Skadevergoeding 34 van 1956 (sien Van der Merwe en Olivier 168 – 169; vgl Neethling, Potgieter en Visser 148 – 149 155). Die appèlhof het egter reeds *obiter* te kenne gegee dat dit hoogs twyfelagtig is of daar in ons reg 'n verdeling van skadevergoeding op grond van medewerkende opset gemaak kan word (*Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; *Mabaso v Felix* 1981 3 SA 865 (A) 876 – 877; vgl nietemin *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569 – 570). Dit lyk jammer aangesien 'n mens gevalle kan bedink wat val tussen daardie geval waar die eiser regsgeldig toestem en die verweerder skotvry gaan, en die geval waar die eiser geen aandeel in sy eie besering het nie en die verweerder vir die volle skadevergoedingsbedrag aanspreeklik is: dit is byvoorbeeld die geval waar die eiser ernstige beserings opdoen in 'n kroeggeveg waarin hy betrokke geraak het, volkome bewus van die risiko's daaraan verbonde. In so 'n geval lyk 'n verdeling van skadevergoeding na 'n billike uitweg: die "toestemming" van die eiser was *contra bonos mores*, maar 'n mens voel tog dat hy gedeeltelik die blaam vir sy besering moet dra (*contra* Van der Walt 93 wat meen dat so 'n eiser glad nie moet slaag nie – wat 'n beroep op medewerkende opset dan weer eens dieselfde eindresultaat as 'n beroep op toestemming sal gee).

Vir doeleindes van artikel 2 van die Wet op Verdeling van Skadevergoeding, wat handel oor mededaders, het die howe nie beswaar teen 'n verdeling van skadevergoeding tussen opsetlike mededaders nie, dit wil sê twee of meer opsetlike verweerders wat deliktueel vir dieselfde skade aanspreeklik is. In *Randbond Investments v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) stel regter Mahomed dit so (620I – 621A):

> "Apportioning liability between joint tortfeasors is very often a difficult exercise, but I am not persuaded that the difficulty becomes insuperable merely because the delictual act concerned was intentional. There can be degrees of culpability even between different joint wrongdoers perpetrating an intentional act which attracts delictual liability. There is, for example, a clear difference between the kind of intention which is inferred from a *dolus eventualis* on the one hand and *dolus directus* on the other. Even between different wrongdoers whose intention is to be inferred from a *dolus eventualis* there are different gradations of culpability. This is one of the reasons why the Legislature probably provided that what the Court had eventually to do was to apportion the damages against the joint wrongdoers in such proportions as the Court 'may deem just and equitable'" (sien ook die *Ntsane*-saak *supra* 569).

(Terloops, die vraag ontstaan of twee mededaders met *dolus directus* nie ook moontlik verskillende grade van skuld kan hê nie. Byvoorbeeld: A en B dra beide opsetlik by tot C se dood en word as mededaders deur C se afhanklikes aangespreek. A, 'n rower, het C 'n noodlottige messteek gegee. B, 'n geneesheer en C se broer, dien C 'n oordosis verdowingsmiddels toe om C geweldige lyding te spaar en verhaas so laasgenoemde se dood. A en B het albei oogmerkopset tov C se dood, maar weeg A se skuld in verhouding nie dalk swaarder as B s'n nie?)

Daar is dus positiefregtelike gesag dat 'n skadevergoedingsverdeling tussen opsetlike mededaders gedoen kan word; waarom dan nie tussen 'n medewerkend opsetlike eiser en 'n opsetlike verweerder nie? Die probleem is dat laasgenoemde situasie óf deur die gemenereg – waarvolgens skadevergoedingsverdeling nie moontlik is nie – óf deur artikel 1 beheers moet word; en artikel 1 is volgens sy opskrif en die lang titel van die wet daar om medewerkende *nalatigheid* te reël. 'n Moontlike uitweg word voorgestel deur Neethling en Potgieter ("Bydraende opset en die Wet op Verdeling van Skadevergoeding" 1992 *THRHR* 658 ev). As vertrekpunt neem hulle die siening van die regspraak (bv *S v Ngubane* 1985 3 SA 677 (A)) dat indien 'n dader opsetlik handel, nalatigheid terselfdertyd outomaties aanwesig is. Deur opset ook as 'n afwyking van die standaard van die redelike man – en dus as nalatigheid – te sien, so lui die argument, word die deur geopen vir die toepassing van artikel 1(1)(a) op 'n geval van medewerkende opset. 'n Persentasiewaarde kan op die afwyking van die redelike man-standaard geplaas word, wat dan as 'n grondslag vir die berekening van die verdelingsverhouding kan dien – net soos by die (meer tradisionele) gevalle van medewerkende nalatigheid. So gesien, hoef die verdelingsproses nie suiwer spekulatief en arbitrêr te wees nie.

Hoe dit ook al sy, die appèlhof se huiwering om 'n verweer van medewerkende opset te erken, betrek net 'n verdeling van skadevergoeding waar sowel eiser as verweerder opset gehad het. Dit werp geen twyfel op die gemeenregtelike reël dat 'n opsetlike eiser nie teen 'n nalatige verweerder kan slaag nie (*Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; Neethling, Potgieter en Visser 148). Verder behoort dit ook nie die geval te raak waar 'n opsetlike eiser misluk wanneer hy – soos hier in *Maartens v Pope* – 'n verweerder skuldloos aanspreeklik wil stel nie.

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CONCURRENCE OF ACTIONS

Otto v Santam Versekeringsmaatskappy Bpk 1992 3 SA 615 (O)

One of the issues in this case concerned concurrence of actions. Unfortunately, notwithstanding recent academic analysis of the principles involved, the case illustrates once again that our jurisprudence in this area lacks a coherent framework. As a result, the court erred in its application of the law and, if its interpretation of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) is to be accepted, our law is in need of serious overhaul.

The facts were as follows: Santam Insurance Company elected, in terms of their insurance agreement, to repair damage to Otto's motor vehicle instead of paying him an amount of money. Santam then instructed a garage (Wessels Motors) to effect the repairs. However, the garage failed to ensure that a water

pipe would not be chafed through by the air-conditioner's pulley and some time later the vehicle's engine overheated. Otto had to have the vehicle repaired a second time, the bill being R5 372. He then sued Santam (in contract) and Wessels Motors (in delict) for the loss suffered. He failed on both counts in the magistrate's court and appealed to the Orange Free State Provincial Division.

On appeal, Otto's contractual claim against Santam succeeded, the court holding that where a company elects to repair damage it should be done properly and professionally and that the company's contractual obligation is not affected by the fact that it does not effect the repairs personally (621A – D). In addition, a clause in the contract exempting Santam from "[e]nige eis wat uit enige kontraktuele aanspreeklikheid voortspruit" did not exclude the company's liability in terms of the contract, for such an interpretation would render the insurance contract itself a nullity (621H – I).

However, Otto's claim against the second respondent, Wessels Motors, was seen in a different light. The court found that nothing in the pleadings or in the evidence indicated any contractual liability (623D – E) and that any possible delictual liability on the part of the garage was complicated by Santam's concurrent contractual liability for the same loss (623E – F). The court noted that the contractual obligations between Santam and the garage had arisen out of Santam's prior contractual obligation to repair the damage properly (623H – I) and, relying on an extract from *Lillicrap*'s case *supra* (which is quoted below), stated (625C – E):

> "Ek is derhalwe nie oortuig dat die tweede respondent, bo en behalwe sy kontraktuele verpligting teenoor *eerste respondent*, ook nog 'n bykomstige regsplig gehad het *teenoor die appellant* om die voertuig behoorlik te herstel of om te waak teen die veroorsaking van skade aan die voertuig weens enige nalatige versuim aan sy kant nie of dat sy nalatige versuim om die voertuig behoorlik te herstel wederregtelik was *vis-a-vis* die appellant nie. Ek is gevolglik van mening dat tweede respondent nie as gevolg van onregmatige daad aanspreeklik gehou kan word teenoor appellant nie."

The first point to consider is whether the court was correct in classifying the issue as one of concurrence of actions. Although, in the past, most instances had involved only one plaintiff and one defendant, the court noted that three parties were involved in the *Lillicrap* case and that the facts of the two cases were to some extent similar (624A – B). It then relied upon the following passage in Grosskopf AJA's judgment in *Lillicrap supra* 502H – 503A:

> "Up to the present I have considered the policy considerations which, in my view, render it undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of professional service like the present. Would these considerations fall away if the contract were assigned, as happened in 1976? In my view the answer must be in the negative. The relationship between the three parties is still one which has its origin in contract. One must assume that their respective rights and obligations were regulated to accord with their wishes, and that the contractual remedies which would be available were those which the parties desire to have at their disposal. The same arguments which militate against a delictual duty where the parties are in a direct contractual relationship, apply, in my view, to the situation where the relationship is tripartite, namely that a delictual remedy is unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the application of the law of delict."

Even if this passage states our law correctly (and this is open to some doubt), it should not have been applied in *Otto*'s case. The similarities which the court

relied upon, namely, that in both cases three parties where involved, that both defendants knew that the work was being carried out for a particular person and that in each case the defendants held themselves out to be experts, were not material to the question of concurrence. First of all, it is not the number of parties involved, but the quality of the relationship, which should be examined, while the second aspect has never been regarded as relevant to the concurrence issue. The third factor, although relevant, is rendered nugatory by the fact that the representation was never made to Otto and therefore could not be used to determine rights and duties between Otto and Wessels Motors.

On the other hand, the difference between the two cases is substantial. In *Lillicrap* the three parties involved were in a direct contractual relationship, because an assignment of rights and obligations requires consensus between all the parties involved. There was in fact a tripartite relationship. Salanc, the assignee, owed direct contractual obligations to Pilkington Brothers, who could sue Salanc in contract for any breach of contract; and it was this fact that barred the delictual action. In *Otto*'s case there was no tripartite agreement. The garage assumed obligations *vis-à-vis* Santam in terms of a sub-contract to which Otto was not a party. No contractual relationship existed between Otto and Wessels Motors. In contrast to the position in *Lillicrap*, at no stage could it be said that the rights and duties of Otto and of the garage were "regulated by *their* contractual arrangements": there was no *relationship* which had its origin in contract. Nor could it be said that their contractual rights and duties would be "circumvented by the application of law of delict", since there were no such contractual rights and duties in existence.

In the light of the above, it is suggested that a concurrence of actions can occur only where a plaintiff has a *choice* of two or more different remedies against *a particular defendant*, unless the rights and duties of the plaintiff and defendant are governed by an agreement such as the one in *Lillicrap* to which both were a party.

One does have sympathy for the position in which the court found itself. Clearly, it was concerned with the question of concurrence of actions, not the delictual element of wrongfulness. Yet, the leading case on the issue, *Lillicrap*, did not appreciate the distinction, with the result that the policy considerations applicable to these two aspects have been blurred. The purpose in deciding whether to allow or refuse concurrence is to determine whether a plaintiff should be allowed to bring a delictual action; whether the plaintiff should be given the opportunity to prove that he has a delictual claim. The problem is similar to that of *locus standi*. During the concurrence inquiry a court is not concerned with whether the elements of a delict are present. On the other hand, policy factors applicable to pure economic loss cases are considered when courts inquire into the wrongfulness of a defendant's conduct – only after it has been established that the plaintiff can bring the action. (See generally Midgley *The nature and scope of lawyers' liability for the negligent rendering of professional services* (PhD thesis Rhodes University 1990) ch 3 5; Midgley "The nature of the inquiry into concurrence of actions" 1990 *SALJ* 626–629; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis Unisa 1991); Lubbe and Murray *Farlam and Hathaway: Contract – cases,*

materials and commentary (1988) 11.) The procedure is not revolutionary, merely logical, but unless courts are prepared to accept that the issues are separate, inconsistent decisions will become the order of the day.

The final criticism of the *Otto* judgment concerns the application of the *stare decisis* doctrine: *Lillicrap*'s case involved a claim for pure economic loss, while in *Otto* the claim arose out of an infringement of a right of property. A similar distinction – a claim for pure economic loss as opposed to one for personal injuries – justified the Appellate Division's departure in *Lillicrap* from its previous decisions in *Van Wyk v Lewis* 1924 AD 438 (see the *Lillicrap* case *supra* 499D – E) and it also was the basis for Findlay AJ's decision not to follow the *Lillicrap* case in *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D) 53C – D. The court in the *Otto* case therefore erred in holding that the policy considerations mentioned in *Lillicrap* applied with equal force to the case before it. They should not have done so, since the court was not concerned with the extent to which a claim for pure economic loss should be circumscribed. Even if the approach followed by the Appellate Division is open to criticism, the court was nevertheless bound, by both *Van Wyk v Lewis* and the *Lillicrap* case, to hold that the delictual claim was not barred by any contractual remedy.

The extent to which the judgment is inharmonious with established delictual principles is illustrated by comparing the result in *Otto*'s case with the law relating to subcontractors' delicts. Wessels Motors was found to be a subcontractor for Santam in so far as the garage had to effect the repairs (623I – J). The first effect of the judgment is that a subcontractor, if sued by the client of the main contractor, may escape liability for defective work by pointing to the existence of a contract between the client and the main contractor. If, as often happens, the main contractor is insolvent, the plaintiff is left without an effective remedy, even against the person whose unlawful conduct has caused the plaintiff's loss. This situation, it is suggested, is untenable. The matter is further compounded if a plaintiff client seeks to hold the main contractor vicariously liable for the subcontractor's delict. For an employer or a principal to be held vicariously liable, two elements must be present: a recognised relationship and the commission of a delict in the course and scope of the tortfeasor's duties. In many instances *Otto*'s case will prevent the second requirement from ever being fulfilled, for any contractual relationship between the plaintiff and the employer or principal will prevent anyone from asserting that a delict has been committed. This is a further indication that the *Otto* decision is wrong.

Otto's case is a product of its time. During the 1980s, courts, in South Africa and abroad, tended to follow a restrictive approach to the question of concurrence of actions. With delictual claims for pure economic loss becoming the order of the day, judges apparently felt that the expansion of delict into the domain of contract needed to be curbed. *Otto*'s case is an extreme instance of such judicial inhibition. In future, it is hoped courts will not be as eager to find reasons for disallowing delictual claims.

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REG VAN TOEGANG VIR DIE VADER VAN DIE BUITE-EGTELIKE KIND – OUTOMATIESE TOEGANGSREGTE – SAL DIE BESTE BELANG VAN DIE KIND ALTYD SEËVIER?

Van Erk v Holmer 1992 2 SA 636 (W)

Inleiding

Die sogenaamde toegangsregte van 'n vader tot sy buite-egtelike kind word indringend in hierdie sleuteluitspraak bespreek. 'n Nuwe rigting word ingeslaan deurdat regter Van Zyl bevind dat 'n vader se inherente reg van toegang tot sy buite-egtelike kind erken behoort te word.

Vorige regspraak

Om die volle implikasie van die beslissing te verstaan, is dit nodig om 'n oorsig te gee van die beoordeling van die vraag na 'n vader se reg op toegang tot sy buite-egtelike kind in vorige Suid-Afrikaanse beslissings.

Op gesag van *Matthews v Haswari* 1937 WLD 110 en *Wilson v Eli* 1914 WR 34 is in die verlede algemeen aanvaar dat die vader van 'n buite-egtelike kind 'n (*inherente*) reg van toegang ten opsigte van so 'n kind het. Hierdie siening word egter verwerp in 'n reeks beslissings sedert 1987 (*Douglas v Mayers* 1987 1 SA 910 (Z); *F v L* 1987 4 SA 525 (W) (ook gerapporteer as *D v L* 1990 1 SA 894 (W); *F v B* 1988 3 SA 948 (D); *J v O* saaknr 1407/90 (W); *B v P* 1991 4 SA 113 (T)).

Uit laasgenoemde sake blyk as algemene reël dat die voogdy en beheer en toesig van 'n buite-egtelike kind uitsluitlik by die moeder berus; die vader van die buite-egtelike kind het dus geen inherente reg van toegang tot die betrokke kind nie. Toegangsregte word beskou as 'n faset van ouerlike gesagsregte. Die vader van 'n buite-egtelike kind mag egter aansoek doen om toegang tot die kind; die aansoek sal net slaag as die vader kan bewys dat toegang in die beste belang van die kind is. Die primêre oorweging, naamlik die beste belang van die kind, word egter deur die howe gekwalifiseer en beperk tot die aanwesigheid van *besondere omstandighede*. In die *Douglas*-saak *supra* 914E – F byvoorbeeld vereis die hof "a very strong ground" alvorens ingemeng sal word met die beheer en toesig van die moeder deur aan die vader 'n reg op toegang te verleen, en in *F v B supra* 950G was die hof net bereid om in "exceptional cases" tussenbeide te tree. (Vgl ook *W v S* 1988 1 SA 475 (N) 490B waar die hof te kenne gee dat net die bestaan van "spesiale gronde" inmenging sal regverdig.) Hierdie benadering is hopelik die nek ingeslaan in *B v P supra* waar die volbank beslis het dat die primêre (belangrikste) oorweging met betrekking tot 'n vader se aansoek om toegang tot sy buite-egtelike kind die beste belang van die kind moet wees. Die hof formuleer die toets soos volg:

> "[A]n applicant must prove on a preponderance of probability that the relief sought, ie access, is in the best interests of the illegitimate child (the paramount consideration) and that such relief will not unduly interfere with the mother's right of custody. The Court's decision in any particular case will depend upon the facts thereof" (117F – G).

Onlangse ontwikkeling

In *Van Erk v Holmer* kry regter Van Zyl weer die geleentheid om die vader se inherente reg van toegang tot sy buite-egtelike kind te ondersoek.

Die tersaaklike feite is kortliks die volgende: die applikant doen aansoek om redelike toegang tot sy minderjarige buite-egtelike kind. Die partye het vir 'n tydperk van ongeveer drie jaar saamgewoon. Uit hierdie saamleefverhouding is 'n seun gebore. Ongeveer twee jaar na die geboorte van die seun is die verhouding tussen die partye beëindig. Die vader doen aansoek om redelike toegang tot sy kind op grond van die feit dat die moeder van die kind weier dat hy die kind besoek. Die aangeleentheid word verwys na die gesinsadvokaat wat aanbeveel dat die applikant redelike toegangsregte ten opsigte van die seun behoort te verkry. Die aanbeveling van die gesinsadvokaat word aanvaar en 'n bevel word verleen waarin redelike toegang aan die applikant toegestaan word.

Ten spyte van die bestaan van presedente tot die teendeel (sien die sake *supra*) is regter Van Zyl van mening dat 'n inherente reg van toegang aan die vader verleen moet word en dat so 'n reg net ontneem kan word as toegang deur die vader nie in die beste belang van die kind is nie.

Die ondersoek na die regsposisie *in casu* behels 'n oorweging van die gemenereg, 'n verslag van die regskommissie oor die aangeleentheid, vorige regspraak, menings van skrywers en buitelandse gesag.

Suid-Afrikaanse gemenereg

Die vraag na 'n vader se reg van toegang tot sy buite-egtelike kind word nie spesifiek in die Romeins-Hollandse reg, wat die grondslag van die Suid-Afrikaanse gemenereg uitmaak, bespreek nie. Volgens die Romeins-Hollandse reg val die buite-egtelike kind onder die ouerlike gesag en voogdyskap van die moeder, en het die vader dus geen ouerlike gesagsregte oor sy buite-egtelike kind nie. Die vader word geag geen verwantskap met sy buite-egtelike kind te hê nie. Volgens regter Van Zyl berus hierdie siening op 'n fiksie aangesien die vader, net soos die moeder, in die gemenereg 'n onderhoudsplig teenoor sy buite-egtelike kind het wat suiwer op bloedverwantskap met die kind berus.

Sonnekus en Van Westing ("Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 239 vn 43) is egter van mening dat die posisie in die gemenereg nie op 'n fiksie berus nie maar bloot dui op die bestaan van die onderskeid tussen binne- en buite-egtelike kinders met betrekking tot ouerlike gesagsregte.

Die Suid-Afrikaanse Regskommissie

Die hof wys vervolgens op die belang van die verslag van die Suid-Afrikaanse Regskommissie (Werkstuk 7, projek 38, 1984) oor die regsposisie van buite-egtelike kinders. Volgens regter Van Zyl blyk dit dat die regskommissie ten gunste is van die beginsel dat 'n vader 'n inherente reg van toegang tot sy buite-egtelike kind behoort te hê. Sonnekus en Van Westing 1992 *TSAR* 240 voer egter as teenargument vir regter Van Zyl se siening aan dat die regskommissie dit duidelik stel dat ouerlike gesag nie *ex lege* aan alle vaders van buite-egtelike kinders toegeken kan word nie.

Vorige regspraak

Regter Van Zyl bevind tereg dat die benadering van ons howe sedert 1987 (sien *supra*) beslis teenstrydig is met die regskommissie se bevinding dat regsontwikkeling in die rigting neig om aan die vader inherente toegangsregte tot sy

buite-egtelike kind te verleen. In die lig hiervan slaan regter Van Zyl in sy uitspraak 'n ander rigting as die vorige regspraak in.

Menings van regskrywers

Die siening wat in vorige regspraak gehuldig word, het al dikwels skerp kritiek uitgelok. Regter Van Zyl verwys byvoorbeeld na Boberg ("The would-be father and the intractable court" 1988 *BML* 115) wat die uitspraak in *F v L supra* kritiseer aangesien dit nie in ooreenstemming met "the social realities of our times" is nie. Boberg ("The sins of the fathers – and the law's retribution" 1988 *BML* 35) spreek ook kritiek uit teen die ander beslissings wat hierbo genoem is.

In 'n onlangse bydrae beweer Ohannessian en Steyn ("To see or not to see? – that is the question" 1991 *THRHR* 254) ook dat die hofsake wat die vader 'n inherente toegangsreg ontsê "appear to be unjust" (255) en dat hierdie beslissings nie die probleem "according to equity and justice" (258) oplos nie. Die hof "should formulate a socially and legally equitable solution" (*ibid*) deur oorweging te skenk aan die gemeenregtelike beginsels van redelikheid, die voorskrifte van die natuurreg en billikheidsbeginsels. 'n Verdere aspek waarop die skrywers wys, is dat die gemeenskap se *mores* en norme verander het sedert die gemenereg. Kinders se status word in die gemenereg bepaal ooreenkomstig die bestaan van 'n siviele huwelik wat gebaseer is op Christelike waardes. Die status van kinders wat gebore word uit byvoorbeeld Mohammedaanse, Hindu of swart inheemsregtelike verbintenisse is problematies. Om 'n reg van toegang op grond van verouderde sieninge te bepaal, is onbillik en nie in die beste belang van die kind nie. Regter Van Zyl steun hierdie argument.

'n Insiggewende bydrae waarna die hof nie verwys nie, is gelewer deur Eckard ("Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 122). Die skrywer huldig die standpunt dat die huidige regsproses, ingevolge waarvan die vader geen inherente reg van toegang tot sy buite-egtelike kind het nie, nie die belange van die kind in dié gevalle laat seëvier nie. Dié standpunt word gesteun deur die uitspraak in *B v P supra* waar regter Kirk-Cohen beslis dat die primêre oorweging die beste belang van die buite-egtelike kind is. Om die primêre oorweging te kwalifiseer met betrekking tot 'n buite-egtelike kind is onvanpas omdat dit nie hier gaan oor die toesig en beheer van binne-egtelike kinders wat by 'n egskeidingsgeding betrokke is nie.

'n Verdere bydrae waarna regter Van Zyl verwys, is dié van Clark en Van Heerden ("The legal position of children born out of wedlock: a comparative and predictive analysis" in Burman en Preston-Whyte (reds) *Questionable issue? – Illegitimacy in South Africa* (1992)). Volgens hierdie skrywers moet 'n reg van toegang slegs aan die vader van 'n buite-egtelike kind verleen word indien hy kan bewys dat hy vrywillig die verantwoordelikhede en pligte voortspruitend uit vaderskap van sy buite-egtelike kind aanvaar. Hierdie standpunt word deur regter Van Zyl verwerp hoofsaaklik op grond van die bewyslas. Hierdeur stel die regter hom myns insiens bloot aan kritiek. Sonnekus en Van Westing 1992 *TSAR* 241 is naamlik tereg van mening dat 'n vader wat nie eers 'n verantwoordelikheidsin met betrekking tot sy kind openbaar nie, nie in die beste belang van die kind optree nie. Die vrywillige aanvaarding van ouerlike verantwoordelikhede behoort dus 'n minimum vereiste vir die verlening van toegangsregte aan die betrokke vader te wees.

Dit is ten slotte jammer dat die hof nie na ander argumente oor die aangeleentheid verwys nie.

So argumenteer Jordaan ("Biologiese vaderskap: moet dit altyd seëvier?" 1988 *THRHR* 393 – 394) byvoorbeeld:

> "Dit sou nie wenslik wees om 'n onbuigsame reël neer te lê wat op alle gevalle van toepassing is waar 'n reg op toegang ter sprake is nie."

Sy meen dus dat dit in die hof se diskresie behoort te wees om met die beste belang van die kind as maatstaf, in elke geval te bepaal of die natuurlike vader 'n reg van toegang moet verkry.

Regsvergelykende ondersoek

Die regter loods 'n ondersoek na 'n aantal Anglo-Amerikaanse regstelsels, naamlik die Verenigde Koninkryk, Australië, Kanada en die Verenigde State van Amerika. By oorweging van hierdie regstelsels kom die hof tot die volgende slotsom:

> "From this comparative survey of related Anglo-American sources it would appear that the question relating to the father's right of access, if any, to his illegitimate child has not been ventilated or debated. Except in the case of the Australian Family Law Council's suggestion that the father's *prima facie* or inherent right of access should not be recognised, there is no indication that it has hitherto come up for specific consideration" (646I – 647A).

Volgens Church ("*Secundum ius et aequitatem naturalem*: a note on the recent decision in *Van Erk v Holmer*" 1992 *Codicillus* 35 – 36) is dit jammer dat regter Van Zyl hom net tot die Anglo-Amerikaanse stelsels beperk en nalaat om 'n vergelyking te trek met die inheemse reg waar die term "buite-egtelikheid" onbekend is – veral dan in die lig van die beklemtoning van die beginsels van redelikheid, billikheid en die openbare beleid.

Sonnekus en Van Westing 1992 *TSAR* 239 vn 41 merk verder op dat daar geen verwysing na Vastelandse gesag, onder andere uit Nederland of Duitsland, is nie en dat dit moontlik op 'n leemte in die uitspraak dui.

Slotsom

Regter Van Zyl verklaar dat daar niks in die gemeenregtelike bronne te vinde is wat regstreeks verband hou met 'n vader se toegangsregte tot sy buite-egtelike kind nie. Wat betref die Suid-Afrikaanse hofbeslissings is die hof ook nie bereid om die uitspraak in die *Wilson*- en *Matthews*-saak *supra* as gesag vir enige regsbeginsel te aanvaar nie. In dié verband stem regter Van Zyl saam met regter Harms in *F v L supra* dat die benadering in die *Wilson*-saak, naamlik dat die reg van toegang 'n *quid pro quo* vir betaling van onderhoud is, nie opgaan nie.

Wat betref die vraag of toegangsregte as 'n uitvloeisel van ouerlike gesag beskou kan word, laat regter Van Zyl hom soos volg uit:

> "I do not believe, however, that access to a child should always or necessarily be regarded as an incidence of parental authority" (647F).

Hy sluit aan by Boberg, Ohannessian en Steyn wat ten gunste daarvan is dat 'n inherente reg op toegang aan die vader van die buite-egtelike kind verleen word. Regter Van Zyl wys verder daarop dat die skrywers, in 'n poging om aan die vader 'n inherente toegangsreg te verleen, eerder die klem laat val op die kind se reg van toegang tot sy vader, as omgekeerd. Eckard 1992 *TSAR* 124 moet ook hier genoem word. Sy huldig die standpunt dat die tyd ryp is om oorweging te skenk aan die erkenning van toegang as 'n fundamentele reg van die kind self. Verder lei die verlening van 'n inherente reg op toegang aan

die vader van 'n buite-egtelike kind daartoe dat die onderskeid tussen binne- en buite-egtelike kinders verval – 'n gedagte waarmee die regter hom vereenselwig.

In die afwesigheid van gemeenregtelike beginsels, presedente, wetgewing en gewoontereg wat uitsluitsel oor die vraag gee, laat regter Van Zyl hom by die beoordeling van die vraag na inherente toegangsregte grotendeels lei deur oorwegings van billikheid, redelikheid en die openbare beleid. Hy sê dit is billik en redelik om toegangsregte aan die vader van 'n buite-egtelike kind te verleen én dat oorwegings van openbare beleid 'n nuwe benadering op die gebied van toegangsregte vereis. As steun vir sy standpunt maak die regter die volgende stellings:

> "It hence falls to the judge to decide the case in accordance with the principles of reasonableness, justice, equity and, I would add, the *boni mores* or public policy, which cannot be ignored in these times of change . . .
>
> In establishing whether public policy requires a new approach to and fresh outlook upon existing law one must, I believe, take cognisance of what the general public's views are on the subject" (648B 649C).

Na aanleiding hiervan kom die regter tot die volgende slotsom:

> "[T]he time has indeed arrived for the recognition by our courts of an inherent right of access by a natural father to his illegitimate child. That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy" (649I – 649J).

Enkele opmerkings na aanleiding van die *Van Erk*-saak

Sonnekus en Van Westing 1992 *TSAR* 255 is van mening dat die regter te veel klem lê op die *boni mores* van die gemeenskap en daardeur tred verloor met die beste belang van die kind wat as primêre oorweging moet dien by enige aansoek om 'n reg van toegang deur 'n vader tot sy buite-egtelike kind. Die primêre oorweging is tog die beste belang van die kind en nie die belang van die vader nie.

Hoewel Church 1992 *Codicillus* 36 die uitspraak verwelkom, is daar wat haar betref tog sekere voorbehoude met betrekking tot die erkenning van 'n vader se inherente reg van toegang. Die implikasie van inherente toegangsregte is dat die bewyslas nou op die moeder rus om te bewys dat dit in die beste belang van die kind is dat die vader se reg op toegang ontneem word en dit kan veral in swart gemeenskappe problematies wees. Sonnekus en Van Westing 1992 *TSAR* 240 vn 50 voer hierdie argument verder deur te wys op die afwesigheid van voldoende gesubsidieerde regshulp aan swart vroue met spesifieke verwysing na kinders wat uit inheemsregtelike verbintenisse gebore word.

Volgens Horak ("Om te trou of nie te trou nie – besluit in *Van Erk v Holmer* aangeval" 1992 *De Rebus* 515) kan hierdie uitspraak as 'n pleidooi gesien word vir die gelykstelling van die saamleefverhouding aan die huwelik. So 'n benadering ondermyn die belangrikheid van 'n gesonde gesinslewe as kern van 'n gesonde samelewing (sien ook Sonnekus en Van Westing 1992 *TSAR* 241).

Die effek van die benadering in die *Van Erk*-saak is om die toegangsreg van die vader eerder as die beste belang van die kind te beklemtoon. Hierdeur kan die indruk geskep word dat die ontkenning van so 'n reg onregverdig en onbillik teenoor die vader is. Myns insiens behoort die uitgangspunt egter nie die vader se belange te wees nie. So 'n benadering druis teen bestaande gesag op die punt in, naamlik dat die beste belang van die *kind* by die verlening van toegangsregte

altyd as primêre oorweging moet dien. Die vraag behoort dus altyd te wees of die verlening van toegang in 'n bepaalde geval in die beste belang van die minderjarige kind is.

In die *Van Erk*-saak is die regter verder van mening dat in die geval van 'n inherente toegangsreg die moeder die hof kan nader indien die toegangsreg nie in belang van die kind uitgeoefen word nie. Hier wil ek aansluit by Sonnekus en Van Westing 1992 *TSAR* 240 vn 50 wat daarop wys dat die meerderheid vroue – as gevolg van die ekonomiese ongelykheid tussen mans en vroue – nie altyd finansieel daartoe in staat sal wees om sodanige aansoek by die hof in te dien nie. Die noodwendige implikasie hiervan sal dus wees dat die beste belang van die kind ondermyn word.

Dit kan miskien so wees dat daar in die lig van die huidige *boni mores* geen bestaansreg meer is vir die ontkenning van 'n vader se inherente toegangsreg tot sy buite-egtelike kind nie. Die vraag is egter of so 'n outomatiese erkenning van toegangsregte altyd die beste belang van die kind sal laat seëvier.

Hierdie aangeleentheid is nou in 'n see van onsekerheid gedompel. Dit het dus tyd geword dat die wetgewer ingryp en uitsluitsel gee oor die vraag na die sogenaamde reg van toegang van 'n natuurlike vader tot sy buite-egtelike kind.

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THE *CONDICTIO INDEBITI*, ERROR OF LAW AND EXCUSABILITY

Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue
1992 4 SA 202 (A)

1 Introduction

The distinction between errors of fact and errors of law and the availability of remedies in the former instance, but not the latter, has in the past marred certain areas of our law for no good reason. As far as the *condictio indebiti* is concerned, the ruling precedent was laid down by the High Court of the then South African Republic in *Rooth v The State* (1888) 2 SAR 259. The exposition of law relating to the *condictio* in this decision, however, left some room for doubt as to what the court intended. On the one hand the headnote reads as follows:

> "Where transfer dues had been paid under a mistake of law on the transfer of claims, it was held that they were not recoverable at the suit of the party who had so paid them by mistake."

On the other hand Kotzé CJ said the following (265):

> "It appears to me, however, that the jurists of our own time, regard being had to these exceptions, are more or less inclined to adopt a middle view, and (as Glück expresses

> it) discard the distinction between mistake of law and mistake of fact, and simply consider if the error, whether *juris* or *facti*, be excusable (*verzeilich, entschuldbar*) or not. (Compare *Thibaut* par 29, and *Savigny Ic* note (a) thereon; Mackeldey *Lehrbuch* (1862 ed) pars 165 and 467; *Goudsmit* par 52; *Modderman* par 79; *Windscheid* par 79a, and par 426 n 3.) Whether, according to the strict interpretation of the Roman law, we are justified in adopting this view of the modern school as correct, is a question upon which I need not enter; for even admitting the correctness of that view, there exists no element of excusability in the present case."

Then again, concerning excusability, the Chief Justice said the following:

> "I can discover no equity in favour of the applicants, but rather the reverse; and here I wish to point out that the rule 'ignorance of law is no excuse', and the disallowing of an action for the recovery of that which has been unduly paid, do not conflict with the principles of the *aequum et bonum*, and in support of this reference may be made to what Story says in his *Equity Jurisprudence* (par 111): 'It is a well-known maxim that ignorance of the law will not furnish an excuse for any person either for a breach or for an omission of duty; *ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity as in law' . . ."

Be that as it may, from there the position in positive law was that error of law was in general a bar to the remedy available under the *condictio indebiti* (see eg *Benning v Union Government (Minister of Finance)* 1914 AD 420; *Heydenrych v Standard Bank of SA Ltd* 1924 CPD 335; *Balagooroo Senaithalway Education Trust v Soobramooney* 1965 3 SA 627 (N); *Miller v Bellville Municipality* 1973 1 SA 914 (C)). In some instances the rule was not applied without reservation (see eg *HK Outfitters (Pty) Ltd v Legal and General Assurance Society Ltd* 1975 1 SA 55 (T) 67; *Rulten v Herald Industries (Pty) Ltd* 1982 3 SA 600 (D) 607; *Vluvo Investments (Pty) Ltd v Bezri* 1985 4 SA 367 (T) 369). There were also some exceptions (see De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 183 – 184) and in the event of a mixture of error of law and error of fact there was a tendency to allow the *condictio* (see the *Vluvo* case above).

On the whole, academics accepted that the *Rooth* case paved the way for exclusion of the *condictio* where an *indebitum* was paid *per errorem iuris* (Visser *Die rol van dwaling by die condictio indebiti – 'n regshistoriese ondersoek met 'n regsvergelykende ekskursus* (*Dr Jur* thesis Leyden) 236 – 242; Lotz "Enrichment" 9 *LAWSA* 50; Van der Walt "Die *condictio indebiti* as verrykingsaksie" 1966 *THRHR* 226) while, notably, De Vos (183) was of the opinion that the question was left open in this decision. All these writers were, however, unanimous in their opinion that an *error iuris* should not *per se* exclude the *condictio* (Visser 287 *et seq*; Lotz 50 – 51; Van der Walt 1966 *THRHR* 227; see also Visser's criticism of the approach adopted by the court in the *Rooth* decision: "*Daedalus* in the supreme court – the common law today" 1986 *THRHR* 135 – 136). Fortunately the Appellate Division was presented with the opportunity to rectify the matter in *Willis Faber Enthoven (Pty) Ltd v The Receiver of Revenue*.

2 Facts

The facts relevant to this discussion are as follows: Prior to a merger in 1985, two companies, Willis Faber and Co (Pty) Ltd and Rovert Enthoven and Co (Pty) Ltd, traded separately as insurance brokers. Both conducted business which was underwritten by underwriters at Lloyds ("Lloyds business") and consequently taxable in terms of section 60(1) of the Insurance Act 27 of 1943 as

amended. They also effected and renewed insurance business, which was not reinsurance, through a broker at Lloyds but which was not underwritten by an underwriter at Lloyds ("other business"). Both companies proceeded to pay tax on the latter type of business under the impression that it attracted tax under section 60(1)(f) of the act. When the erstwhile financial manager of Robert Enthoven and Co (Pty) Ltd assumed duty with the company, he came across a circular issued by the Registrar of Insurance directing that tax was payable for business placed with underwriters at Lloyds (including reinsurance) as well as business placed outside the Lloyds market. He telephoned the Registrar's office to enquire whether tax was indeed payable on other business but the Assistant Registrar to whom he spoke merely referred him to the circular. Satisfied, he did not pursue the matter further and continued to pay the tax. Once the companies had merged to form Willis Faber Enthoven (Pty) Ltd the matter came up again and this company (appellant) instituted action against the Receiver of Revenue (respondent) in the Transvaal Provincial Division for recovery of the moneys paid as tax on the other business. The trial court concluded that tax was indeed not payable in respect of the other business but found for the respondent on the basis that payments made as a result of a mistake of law were not recoverable.

3 The *condictio indebiti* and error of law

The Appellate Division confirmed that tax was not payable under section 60(1)(f) on the other business and the appeal furthermore succeeded as regards the availability of the *condictio* even where money is paid in error of law. In the light of extensive historical research done in the *Rooth* case and by academics (see De Vos 23 – 26 70 – 71; Visser *Thesis* 31 – 60 144 – 176) the court merely gave a brief *résumé* of the main texts in the *Corpus juris* and the way in which the jurists of the sixteenth and seventeenth century applied them. The following was said in this regard (217F – H):

> "From the time of the Glossators the jurists were never in agreement on the effect of an error of law and after the reception of the Roman law in Western Europe two very distinct schools of thought developed. On the one hand there were writers like *Cujacius*, *Donellus*, *Noodt* and *Johannes Voet* who were of the opinion that the payment of an *indebitum* made in *errorem juris* was as a rule not recoverable. But there were others who took the opposite view. Among these were *Grotius*, *Vinnius*, *Huber*, *Van Leeuwen* and *Van der Keessel*."

Moving on to the *Rooth* decision, the court quoted extensively from it and, mindful of the objections to the course taken by the High Court, concluded as follows (219I – J):

> "The fact of the matter is that the Court was faced with a situation where the Roman-Dutch writers whom we usually turn to for an exposition of the law were not in agreement. As Van den Heever JA explained in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) at 874, in such a situation 'we may choose to rely upon those opinions which appear to us to be more conformable to reason' (and, I would add, more in conformance with the law and requirements of our time). In *Rooth's* case the Court, probably as a matter of legal policy, elected to follow Voet."

In preparation for its onslaught on the legal position, the Appellate Division cited decisions that stressed the inherent adaptability of Roman-Dutch law and emphasised the need, when the time arises, for the modification of ancient formulae that no longer answer to the requirements of changing conditions. The

following passage contains the essence of the matter and indicates the real justification for legal reform as far as errors of law and the *condictio* are concerned (220H – 221C):

> "What is immediately apparent is that there is no logic in the distinction between mistakes of fact and mistakes of law in the context of the *condictio indebiti*. This *condictio* has since Roman times always been regarded as a remedy *ex aequo et bono* to prevent one person being unjustifiably enriched at the expense of another. (Even those favouring the distinction concede that this is so.) Bearing in mind that the remedy lies in respect of the payment of an *indebitum* (ie a payment, without any underlying civil or natural obligation), it is clear that, where such a payment is made in error, it matters not whether the error is one of fact or of law: in either case it remains the payment of an *indebitum* and, if not repaid, the receiver remains enriched. The nature of the error thus has no bearing either on the *indebitum* or on the enrichment. The same result is achieved when the *condictio indebiti* is viewed (as it often is) as one of the *condictiones sine causa*. Again it matters not whether the error is one of fact or law for in both cases the payment is made *sine causa* (cf JC van der Walt 'Die *Condictio Indebiti* as Verrykingsaksie' (1966) 29 *THRHR* 220 at 227).
>
> It is equally plain that a strict application of the distinction will often, if indeed not in the majority of cases, work an injustice on the payer. Considered as a matter of simple justice between man and man, there is no conceivable reason why the receiver of money paid in error of fact should in the eyes of the law be in a better position than one who has received money paid in error of law." (I assume that "error of fact" and "error of law" were meant to be interchanged in the last sentence.)

This old rule, quite simply, did not measure up to the dictates of modern legal policy and the necessity for its abolition at the earliest convenience goes almost without saying (see 223G – H). The preference that, *inter alios*, Voet (see 223D – E) accorded the strict application of the *ignorantia iuris* rule was largely unjustified, because it really did not significantly achieve its aim of promoting knowledge of the law; certainly it promoted injustice as far as actions under the *condictio indebiti* are concerned. The court furthermore went on to say that there is no evidence of a general application of this rule in South African civil law and mentioned instances in which it was not applied (the law relating to the renunciation of rights: 221F – 222D; relief granted to parties to antenuptial contracts to depart from the terms of such in certain instances: 222E – F; and adiation and repudiation in the law of succession: 222G – I). Similarly, in the criminal law, the landmark decision in *S v De Blom* 1977 3 SA 513 (A) led the way for further reform and indicated that abolition of the distinction between errors of law and errors of fact for the purpose of excusing otherwise criminal behaviour did not lead to the anarchy that protagonists of the *ignorantia iuris* rule feared.

No doubt the Appellate Division's decision to abolish this age-old distinction as far as the *condictio* is concerned, will be welcomed unanimously (see eg Visser "Error of law and mistaken payments: a milestone" 1992 *SALJ* 179 – 181).

4 Excusability

The court then went on to state that not every error of law would be sufficient ground for a successful condiction. It decided that mistakes of law should be treated in the same fashion as mistakes of fact, so that an *indebitum* paid as a result of the former may be recovered only if the mistake is found to be excusable in the circumstances of the particular case (223I – 224C). The following passage indicates that the court did not lightly reach this decision (224C – E):

> "I am not unmindful of the criticism against such an approach, *inter alia*, by Professor Visser; nor of the fact that the retention of an element of excusability will not entirely

rid the *condictio indebiti* of its illogical character. But the historic nature of the remedy as one granted *ex aequo et bono* should be preserved and care should be taken to avoid it being turned into a tool of injustice to the receiver of money paid *indebite*. As Tindall J (as he then was) warned in *Trahair v Webb and Co* 1924 WLD 227 at 235:

'(W)here the plaintiff bases his claim for relief on an equitable doctrine the Court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done to the defendant.'."

In *casu* the court found that the error on the part of Robert Enthoven and Co (Pty) Ltd was excusable and judgment with costs was granted to the appellant on this claim only. The position of the other company was not clear and insufficient evidence prevented a finding of excusability. In her dissenting judgment Van den Heever JA found that the error on the part of Robert Enthoven and Co (Pty) Ltd was not excusable because insufficient enquiry had been made.

It is on the point of excusability that this case will attract criticism. It does not, however, come as a shock that the court steered the law in this direction (see Visser *Thesis* 288 *et seq*). Compare the sentiments of Van der Walt 1966 *THRHR* 227 as regards *inter alia* the reasonableness of an error:

"Die vraag ontstaan of die dwalingsvereiste te versoen is met die *condictio indebiti* as 'n verrykingsaksie. Kan 'n mens beweer dat in die geval waar 'n persoon onder 'n regsdwaling of *onredelike*, feitlike dwaling *indebite* presteer het, die ontvanger nie *sine causa* ten koste van die eiser verryk is nie? Die enigste moontlike rede op grond waarvan die verarmde in sulke gevalle nie die verryking wat ten koste van hom plaasgevind het met sy *condictio indebiti*, as verrykingsaksie, sal kan verhaal nie, is dat die verryking nie as *sine causa* aanvaar word nie. Soos reeds verduidelik, is die toets om vas te stel of verryking ongeregverdig was of nie 'n suiwer objektiewe kriterium, waarby subjektiewe faktore soos die dwaling en aard van die dwaling van die partye geen rol speel nie. Die vraag is net of die ontvanger van die prestasie, die verrykte, enige verbintenisregtelike aanspraak op die ontvange prestasie gehad het; indien nie, dan was sy verryking ongeregverdig."

De Vos (185) sees the matter differently and after referring to the opinion of Van der Walt, says:

"'n Beter grondslag vir die uitsluiting van die *condictio* sou egter wees dat die positiewe reg om redes van die regsbeleid, of openbare belang, 'n aksie aan die verarmde ontsê, alhoewel die verryking van die persoon wat ten koste van hom verryk is, *sine causa* is. Mens moet naamlik as een van die vereistes vir 'n verrykingsaksie die reël stel dat daar nie 'n regsreël moet wees wat, ten spyte van die aanwesigheid van die ander vereistes (nl die *sine causa*-verryking van die verweerder ten koste van die eiser), 'n aksie aan die verarmde ontsê nie."

Visser's concern with this aspect of the decision is apparent (1992 *SALJ* 182 – 185). He argues that excusability played no role in the Roman-Dutch law relating to the *condictio* (183) and that Voet's opinion, to which the court referred, that inexcusable errors were a bar to the *condictio*, was not representative (183 – 184). He considers further whether the Appellate Division sought to introduce policy considerations via the back door when it opted for excusability and suggests the following (185):

"Why not rather state openly that in all enrichment actions the retention will only be classified as *sine causa* if there are no policy considerations which militate against such a conclusion? This would pave the way for open debate about the factors which should determine the ambit of liability for unjustified enrichment and to contribute to a properly justifiable development of this part of our law."

The court included the element of excusability in an attempt to preserve the historic, albeit slightly illogical, character of the *condictio*. It is a remedy born of equity and in keeping with this, the Appellate Division trusted that the element of excusability would imbue the *condictio* with enough flexibility to ensure

that the needs of justice are met. One should not hasten to conclude that the *condictio* will cause further problems in practice. As long as the courts bear the nature of this remedy in mind, it should be applied correctly. If time proves otherwise, perhaps the legislature will have the final say regarding the *condictio* after all.

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CONTINUANCE OF JURISDICTION AND EFFECTIVENESS

Coin Security Group (Pty) Ltd v Smit 1991 2 SA 315 (T); 1992 3 SA 333 (A)

This decision of the Appellate Division has confirmed the principle of *continuance of jurisdiction* in a case which afforded an opportunity to highlight the relationship of this principle to that of *effectiveness*. Milne JA (Botha JA, Kumleben JA, Van den Heever JA and Van Coller AJA concurring) upheld the appeal from a decision in which Leveson J held that the appellant would have been successful in the proceedings but for the fact that the court no longer had jurisdiction as a result of Namibia's becoming independent.

In this case the appellant was engaged in the business of conveying money and other valuables throughout South Africa and South West Africa/Namibia for reward on behalf of certain banks and financial institutions (316F). Part of that conveyance was done by aircraft and to this end it operated an air service within the meaning of the provisions of the International Air Services Act 51 of 1949, for which it was granted a licence (316G). When the appellant decided to operate its air service for the banks in SWA/Namibia on a regular basis, it lodged an application for the amendment of the conditions of its licence to add Windhoek as an extra base of operation on 6 December 1989 (340B). Notice of the application for amendment was published in the *Government Gazette* and two other air carriers objected to the application (340F). On 22 February 1990 a hearing took place before the National Transport Commission (established under s 3 of the Transport (Co-Ordination) Act 44 of 1948) which refused the application. As a result, the applicant brought proceedings for the review of the Commission's decision under notice of motion dated 9 March 1990.

This date is of particular importance, since the principle of continuance of jurisdiction states that it does not matter whether the original ground for assuming jurisdiction has ceased to exist, provided that the court had jurisdiction at the time of commencement of an action (Forsyth *Private international law* (1990) 163). This is the time when the summons or notice of motion is served (*R v De Jager* 1903 TS 36 38; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 2 SA 295 (A) 310D – E; *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A) 780H; *Mills*

v Starwell Finance (Pty) Ltd 1981 3 SA 84 (N) 90H; *Small Business Development Corporation Ltd v Amey* 1989 4 SA 890 (W) 894G). *In casu* it appears that the action commenced on 9 March 1990, that is to say before Namibia became independent on 21 March 1990. The principle of continuance of jurisdiction would therefore imply that Namibia's independence would have had no influence on the court's jurisdiction.

Leveson J held, however, that the principle could not apply in the *Coin Security* case, for two reasons. First of all, the judge considered that it had lost jurisdiction as a result of the coming into force, on 21 March 1990, of section 2(1) of the South African Recognition of the Independence of Namibia Act 34 of 1990 which reads:

> "The Republic shall cease to exercise any authority in the Territory referred to in the Treaty of Peace and the South West Africa Mandate Act 49 of 1919."

The judge interpreted this provision to mean that the authority of the South African judiciary no longer extended to the territory now referred to as the State of Namibia (317F). Secondly, Leveson J pointed out that, since 21 March 1990, the Namibian authorities have been entitled to ignore an order issued by a South African court, with the consequence that relief granted by the latter would not be capable of enforcement (318H).

No authority was cited for this interpretation of section 2(1). Such authority would have been most welcome, since the interpretation resulted in the exclusion of the application of the principle of continuance of jurisidiction, which is undoubtedly part of South African law. Moreover, the better interpretation (which was adopted by Milne JA) appears to be that there is no inconsistency between the principle of continuance of jurisdiction and section 2(1). According to the latter, the South African legislature did not in that section consider the question of the continuance of proceedings validly commenced in a South African court before the act came into operation on 21 March 1990 (344D).

On the other hand, the fact that the new Namibian authorities would be entitled to ignore the court's order appears irrelevant. This is because once the action has commenced, the court having jurisdiction at the time of commencement, it does not matter whether the relief to be granted appears incapable of enforcement afterwards. The purpose of the principle of continuance of jurisdiction is precisely to ensure that the requirements of the due administration of justice prevail over the logic of the principle of effectiveness (the *Thermo Radiant* case *supra* 310H) since "[t]o hold otherwise would work great hardship and inconvenience" (Forsyth 164). Consequently, a court does not lose its jurisdiction because the defendant changes his/her residence or domicile during the proceedings (*Milner v Friedman* 1911 TPD 935 943; *Becker v Foster* 1913 CPD 962 969; *Balfour v Balfour* 1922 WLD 133 135; *Frankenberg v Frankenberg* 1943 EDL 147 149; *Howard v Howard* 1966 2 SA 718 (R) 719A – C; *Briktec (Pty) Ltd v Pantland* 1977 2 SA 489 (T) 491E; *McConnell v McConnell* 1981 4 SA 300 (Z) 302A – D), nor in the case where the property attached to found or confirm jurisdiction later ceases to exist or becomes valueless (the *Thermo Radiant* case *supra* 301F). Moreover, in *R v De Jager* 1903 TS 36 38 the court ruled that the Special Criminal Court at Pretoria retained its jurisdiction over the accused arrested at Vryheid on a charge of infanticide and concealment of birth committed within the district of Vryheid despite the fact that the latter had ceased to be part of the Transvaal and was annexed to Natal during the course of the proceedings.

The *De Jager* case has many similarities to the *Coin Security* case. In the former, however, the question of effectiveness did not create any problem since the accused had already been arrested. The situation was different in the *Coin Security* case but it is submitted that Leveson J rendered his decision on the basis of an incorrect conception of the role of the principle of effectiveness in the law of jurisdiction.

To avoid such an error, it appears important to distinguish carefully between, on the one hand, the assessment whether a future decision will be capable of enforcement and, on the other hand, the question whether, once rendered, the decision is actually capable of enforcement. The principle of effectiveness cannot mean that a court has jurisdiction only where its decision is actually capable of enforcement, since it is only possible to ascertain fully whether a decision is capable of enforcement when the decision has already been given and an attempt is made to enforce it. A court decides whether it has jurisdiction at the start of the proceedings, long before there is any question of enforcing the decision. During that period, many things beyond the control of the court may happen, resulting in a future decision becoming unenforceable. In other words, any assessment of the enforceability of the decision which a court may make at the beginning of the proceedings, amounts to a kind of prediction which could prove inaccurate as a result of a change of circumstances. But, in the words of Van Schalkwyk AJ in *Utah International Inc v Honeth* 1987 4 SA 145 (W), once jurisdiction has been secured

> "the court will not concern itself whether the judgment which might be given will be effective or not" (147D).

Thus once the court has established that it has jurisdiction on the basis that it would indeed be capable of enforcement should the decision be made and enforced immediately, it is irrelevant whether any element of the situation may change at a later stage in such a way that any future decision will not be enforceable. Moreover, it must be stressed that when a court assesses the enforceability of its future decision at the start of the proceedings, such an assessment is made *in abstracto* in the sense that the court does not inquire whether its ruling will be effective against the defendant in the case in point but rather whether its decision would normally be effective against a person in the position of the defendant (Pollak *The South African law of jurisdiction* (1937) 208 fn 2).

The decision of Leveson J is also questionable in that, as Milne JA demonstrated, the principle of effectiveness was not problematical. What was required to give effect to the order was that the National Transport Commission, which had its residence within the court's jurisdiction, had to amend the appellant's licence:

> "That is an act which would have to be carried out within the jurisdiction of the Court" (343G).

In conclusion, it is submitted that Leveson J was correct in assuming that the South African parliament may exclude the principle of continuance of jurisdiction by statute but incorrect in interpreting section 2(1) of the Recognition of the Independence of Namibia Act 34 of 1990 as excluding the application of the said principle.

On the other hand, it is submitted that Leveson J wrongly contrasted the principle of effectiveness with that of continuance of jurisdiction; understood correctly, the principle of continuance of jurisdiction complements the principle

of effectiveness. The two principles apply to different stages of the proceedings: the principle of effectiveness applies in the first stage, that of continuance of jurisdiction at later stages. The principle of continuance of jurisdiction applies at later stages only where the principle of effectiveness was adhered to in the initial stage. Conversely, once the principle of effectiveness has been applied in the first stage, it gives way to the principle of continuance of jurisdiction.

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OPENBARE BELANG AS SELFSTANDIGE VERWEER BY LASTER?

Iyman v Natal Witness Printing & Publishing Co (Pty) Ltd 1991 4 SA 677 (N)

Hierdie saak het hoofsaaklik oor die aard van die bewyslas by laster gehandel. Die hof bevestig die appèlhofbeslissing in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A) (wat daarna ook in *Borgin v De Villiers* 1980 3 SA 556 (A) 571, *May v Udwin* 1981 1 SA 1 (A) 10 en *Marais v Richard* 1981 1 SA 1157 (A) 1166 aanvaar is) waarin beslis is dat daar op die verweerder slegs 'n *weerleggingslas*, in teenstelling met 'n volle bewyslas (soos *obiter* in *Joubert v Venter* 1985 1 SA 654 (A) 696 aan die hand gedoen is), rus om die vermoede van onregmatigheid by laster te weerlê. Hierop word nie verder ingegaan nie.

In hierdie bespreking word net aandag gegee aan die uitgangspunt van regter Page met betrekking tot die verweer waarheid en openbare belang dat

> "[t]he publication of defamatory matter which is only partly true can, of course, never be in the public interest" (686A).

Hierdie stelling hou egter nie rekening met resente regspraak nie. Reeds in *Zillie v Johnson* 1984 2 SA 186 (W) beslis regter Coetzee naamlik dat in besondere omstandighede die openbare belang *op sigself* – dit wil sê sonder dat die lasterlike bewerings ook waar is – 'n lasterlike publikasie kan regverdig en dus as selfstandige regverdigingsgrond kan dien. Regter Coetzee (195) grond hierdie siening daarop dat die

> "[w]ell-known defences such as privilege, fair comment and justification are mere instances of lawful publication and do not constitute a *numerus clausus*",

en dat

> "[t]he general principle is whether public policy justifies the publication and requires that it be found to be a lawful one. As the test is an objective one it involves an application of the 'general standard of reasonableness' but it relates to the sense of justice prevailing in South Africa as opposed to that in other countries or systems".

(Sien ook oor die standpunt dat regverdigingsgronde nie 'n geslote getal uitmaak nie maar dat openbare beleid in hierdie verband steeds 'n uitbreidende

funksie kan vervul, die *O'Malley*-saak *supra* 402 – 403 en *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 589 – 590. Wat die benaming *openbare belang* as selfstandige regverdigingsgrond betref, kan in die verbygaan vermeld word dat dié verweer soms as 'n kategorie van *relatiewe privilegie* bestempel word: sien die *Zillie*-saak 196F – G; Neethling *Persoonlikheidsreg* (1991) 142 vn 150 153; Burchell *The law of defamation in South Africa* (1985) 248 – 249.) Die beoordeling van die vraag of die publikasie van openbare belang is, of, anders gestel, of die publikasie relevant is tot 'n aangeleentheid waarby die publiek 'n geregverdigde belang het, moet volgens regter Coetzee geskied aan die hand van die maatstaf van die redelike man of "the average right-thinking person".

Hierdie uitspraak word onomwonde deur regter Kriegler in *Neethling v Du Preez* 1991-01-17 saaknr 24659/89 (W) 29 ev gesteun. Hy sê (29 32) met verwysing na die *Zillie*-saak:

> "[Op d]ie vraag of daar in bepaalde omstandighede 'n houdbare beroep op regverdiging kan wees al is die geopenbaarde laster nie waar nie . . . is daar na my mening 'n duidelik bevestigende antwoord te gee . . . Die geleerde regter se ontleding van die tersaaklike reg en uitleg van die rigtinggewende gewysdes is so kennelik suiwer dat ek my eerbiedig daarby aansluit sonder enige toevoeging."

Waar dit hier oor die regverdiging van *onwaarhede* gaan, spreek dit vanself dat hierdie verweer met die grootste omsigtigheid hanteer moet word en slegs, indien hoegenaamd, in hoogs uitsonderlike omstandighede toepassing behoort te vind. Tentatief word aan die hand gedoen dat onder meer die volgende faktore 'n rol kan speel ten einde die regmatigheid van lasterlike bewerings in hierdie verband te bepaal (sien in die algemeen Neethling 153 vn 246):

Benewens die faktore wat gewoonweg by die verweer waarheid en openbare belang oorweeg word om te bepaal of 'n publikasie in openbare belang is (te wete die onderwerp of aangeleentheid waaroor die lasterlike aantyging handel en "the time, the manner and the occasion of the publication": sien bv *Patterson v Engelenburg and Wallach's Ltd* 1917 TPD 350 361; Neethling 151 vn 234), kan ook die *erns* van die aangeleentheid waarop die laster betrekking het (byvoorbeeld dat dit die voortbestaan van die regsorde bedreig: sien die *Neethling*-saak *supra* 244 – 245), of die *dringendheid* van die kommunikasie aan die publiek, of die feit dat die inligting van 'n *betroubare bron* afkomstig is, aanduidend van die regmatigheid van die onware lasterlike publikasie wees (vgl Burchell 248 se verwysings na Engelse sake in hierdie verband). Daarenteen behoort 'n *onbehoorlike motief* (soos waar die verweerder *geweet* het dat die publikasie onwaarhede bevat, of waar die publikasie net ten doel het om die publiek se sensasielus te bevredig (vgl die *Neethling*-saak *supra* 224)) op 'n oorskryding van die perke van die verweer te dui. Die toelaatbaarheid al dan nie van onware (relevante) inligting behoort, net soos by relatiewe privilegie met betrekking tot die nakoming van 'n plig of die waarneming van 'n belang, objektief volgens die redelike man-maatstaf beoordeel te word (Neethling 144).

In laasgenoemde verband kan ook kers opgesteek word by die *de lege ferenda*-hantering van die *openbare inligtingsbelang* as regverdigingsgrond by *identiteitskending*. (Sien in die algemeen oor identiteit as persoonlikheidsgoed, Neethling 37 – 39 263 – 272.) Identiteit is in hierdie verband van belang omdat dié regsgoed *net* deur die publikasie van *vals* persoonsinligting aangetas kan word; 'n mens het dus ook hier met die moontlike regverdiging van onware bewerings te make.

Coetser *Die reg op identiteit* (LLM-verhandeling Unisa 1986) 224 – 226 aanvaar as uitgangspunt dat die publiek 'n belang in nuuswaardige inligting het maar dat 'n berig net nuuswaardig is as dit oor *ware* feite handel. Hy laat nietemin hierop volg (224):

> "Indien hierdie beginsel egter te nougeset nagekom word, sal die pers baie gou ondoeltreffend word en nie meer hul openbare funksie en plig as inligtingsbron, opvoeder en meningsvormer teenoor die publiek kan nakom nie. Dit is so weens die feit dat *spoed* en *saaklikheid* gebiedend is by die verspreiding van nuus. Immers, inligting wat 'oud' is, is nie meer nuus nie – dit moet die ontvanger oondvars bereik om enige waarde te hê. Daarbenewens kan elke politikus en openbare figuur se mondelinge of skriftelike uitlatings ook nie *in toto* aangehaal word nie. Parafrase is dus noodsaaklik. Aangesien daar noodwendig weens die kumulatiewe effek van hierdie faktore foute kan insluip wanneer 'n persoon in die pers uitgebeeld word, sal die pers hom in 'n onmoontlike situasie bevind as elke valse persoonlikheidsuitbeelding tot aanspreeklikheid aanleiding gee."

Ten einde hierdie situasie te beredder, doen Coetser aan die hand (225 – 226) dat die toets van die *redelike man* (persorgaan) in dieselfde omstandighede toegepas moet word; die toets hou in dat die persoonlikheidsuitbeelding so ver as wat *redelikerwys* (of binne die vermoë van die redelike man) *moontlik* is, met die waarheid moet ooreenstem. (In so 'n geval het 'n mens, op die keper beskou, ook met die regverdigingsgrond *onmoontlikheid* te make: Coetser 226 vn 16. Dit is belangrik om daarop te let dat dit nie hier gaan oor absolute of fisiese onmoontlikheid nie, maar wel oor onmoontlikheid volgens die oordeel van die redelike man, of dan wel wat redelikerwys of volgens die gemeenskapsopvattinge (*boni mores*) as onmoontlik geag word (Neethling, Potgieter en Visser *Deliktereg* (1992) 85).) Of dit die geval is, sal die algemeen van die omstandighede van elke geval afhang. In die besonder kan die volgende faktore volgens Coetser (226 – 228) die toepassing van die redelikheidskriterium vergemaklik:

(a) die noodsaaklikheid nie alleen van die feit van publikasie nie, maar ook van die wyse waarop dit gedoen is (hier kan die volgende oorwegings weer 'n rol speel: die dringendheid al dan nie van die nuus – as dit nie dringend is nie, behoort meer tyd aan verifiëring bestee te word; verdagte berigte behoort nie prominensie te geniet nie; en sodanige berigte behoort ook te vermeld dat die feite *na bewering* op die eiser betrekking het (*idem* 226 – 227));

(b) die motief of bedoeling waarmee die publikasie geskied het (dit is duidelik, soos reeds hierbo aangedui is, dat indien 'n publikasie wat vals feite bevat *slegs* beoog om die publieke nuuskierigheid of sensasielus te bevredig, dit kwalik as redelik beskou kan word (vgl ook Neethling 256; Klopper *Strauss, Strydom en Van der Walt: Mediareg* (1987) 307; *La Grange v Schoeman* 1980 1 SA 885 (OK) 893 – 894 mbt privaatheidskending));

(c) die omvang van die verspreiding en die mark waarop die publikasie gemik was; en

(d) die aard of graad van onwaarhede omtrent die eiser.

Ten spyte van die uitdruklike erkenning in die *Zillie-* en *Neethling*-saak *supra* van die verweer dat onware feite deur die openbare belang geregverdig kan word, en die riglyne wat voorlopig *de lege ferenda* hierbo aangedui is om die toepassing van die verweer binne perke te hou, moet gewaarsku word dat daar nog geen klinkklare saak uitgemaak is dat die verweer hoegenaamd erkenning behoort te geniet nie. Regter Page se onomwonde afwysing dat onware beriggewing ooit in die openbare belang kan wees (sien die aanhaling hierbo), spreek

reeds boekdele. Voorts blyk uit regstelsels wat ondersoek is dat sodanige verweer nie geredelik aldaar erken word nie. Die verweer word klaarblyklik deur buitelandse howe met die grootste omsigtigheid hanteer (sien bv *Blackshaw v Lord* 1984 2 All ER 311 327); hierbenewens is regskommissies in onder meer Australië en Nieu-Seeland eenstemmig in hul afwysing daarvan (vgl die Australiese Law Reform Commission *Unfair publication: defamation and privacy* (Report no 11, 1979) par 146; en die McKay-kommissie van ondersoek na laster in Nieu-Seeland: *Templeton v Jones* 1984 1 NZLR 448 (CA); Brown *The law of defamation in Canada* vol 1 (1987) 585 vn 955). Alhoewel in Nederland in die algemeen 'n soepeler benadering gevolg word, dui die gesag daarop dat die verweer nie geredelik toegestaan word nie (vgl in die algemeen Hartkamp *Asser: Verbintenissenrecht* Deel III (1986) 173 – 174 238 – 239). Waar die verweer wel erken word, soos in die Australiese state, het die uitbreiding deur middel van *wetgewing* geskied.

Indien 'n behoefte aan so 'n verweer wel in Suid-Afrika bestaan, is die aangewese weg dat die wetgewer, soos in die Australiese state, na 'n diepgaande regsvergelykende ondersoek deur die Suid-Afrikaanse Regskommissie, moet ingryp. By hierdie ondersoek moet deeglik voor oë gehou word dat 'n mens hier met twee botsende beskermingswaardige belange te make het: persvryheid, oftewel die openbare belang in inligting, en die individu se reg op sy persoonlikheidsbelange, in besonder sy goeie naam en identiteit. Daar behoort nie te geredelik aanvaar te word dat die bestaande regverdigingsgronde onvoldoende ruimte aan die media bied om die openbare inligtingsbelang te bevredig nie, veral nie waar die uitbreiding daarop gemik is om die publikasie van *onware* beriggewing te regverdig nie: die media kan waarskynlik deur middel van ondersoekende joernalistiek hulle vryheid steeds voldoende binne die grense van die bestaande regverdigingsgronde uitleef. Die volgende opmerking van die Australiese regskommissie (par 145) oor die kwessie van ondersoekende joernalistiek in die geval van die Amerikaanse Watergate-skandaal, illustreer hierdie punt treffend:

> "The question regarding Watergate exposure, raises a relevant issue, that the Watergate stories did not depend upon qualified privilege [die onderhawige verweer]. The investigating reporters have recorded their investigation on behalf of the *Washington Post* and the stories actually printed. Time and again material was checked, and double checked. With one exception no defamatory story was published which could not, with appropriate subpoena orders, have been proved true in court. So wary were the reporters, and their superiors, that reports were limited to those matters which were clearly established at the time. Conjecture and inference were rigorously eschewed. Facts were steadily built up, one upon another. If any Australian newspaper had reason to suspect a Watergate-type scandal, its problem would be the wisdom of devoting the substantial resources needed for a detailed investigation rather than the law of defamation."

Indien die Suid-Afrikaanse Regskommissie – of die appèlhof waar die geleentheid hom voordoen – desnieteenstaande sou bevind dat ons reg erkenning aan die verweer openbare belang (of "media-privilegie") behoort te verleen (en dit kan in hierdie stadium nog bevraagteken word), is dit uiters noodsaaklik dat die toepassing van die verweer streng beperk en die grense daarvan gevolglik duidelik uitgespel word. Vir hierdie doel kan die riglyne wat hierbo aan die hand gedoen is, onder meer in gedagte gehou word.

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BOEKE

WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW

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Eighth edition; Juta Cape Town Wetton Johannesburg 1991; cxxxix and 743 pp

Price R194,00 (hard cover); R154,00 (soft cover)

On its first publication in 1937 *Wille's principles* became one of the classic "second-wave" legal textbooks which heralded the birth of the modern South African legal science. As such, and combining as it does an introduction to law in general with an elementary exposition of the most important branches of private law, this book was an obvious choice for a students' textbook in private law. The publication of eight editions over the last 50 years bears testimony to its success in this role.

In this eighth edition, *Wille's principles* has been updated by four well-known and capable authors. In the Preface (v) the general editor states that the editors have decided to retain the basic format of the book, without shrinking from altering or rewriting the original text where necessary. It was also decided to pay more attention to the views of academic writers on contentious issues, without abandoning the original approach of setting out the law as stated by the courts as simply as possible. In the process the sections on family law, enrichment and delict have been rewritten virtually from scratch, while the sections on property law and succession have merely been updated. Cases and new legislation have been kept up to date until 31 August 1990.

In the final analysis any evaluation of the eighth edition of *Wille's principles* must be based upon one's attitude towards the seventh edition. For those who have always found it a useful and handy work of reference or a sensible basic textbook, the latest edition will undoubtedly come as a welcome update. It may well be argued that it is better for students to buy one basic text which covers the main branches of private law for R154,00 than to buy four, five or even six separate titles for between R50,00 and R100,00 each, especially in view of the fact that textbooks often become outdated and even obsolete before the student leaves the university. The same argument holds for practitioners who like to use one handy and introductory work of reference rather than sift through a large number of different books – an attitude that may find support in the general authority attached to an established work such as *Wille's principles*. On the other hand it may also be argued that it is better for students to buy textbooks as they are needed rather than buying one comprehensive volume, parts of which may and probably will also become outdated even before the student reaches that specific course. The trend to write separate and authoritative textbooks for each main branch of private law and the more recent trend to distil the main principles of each branch for the specific use of students may perhaps be described as the third and fourth waves of textbook

writing respectively, and in a sense they show up the shortcomings of comprehensive second-wave books such as *Wille's principles*. In this edition the main criticism from that point of view would pertain to the fact that the balance of the book does not satisfy all needs for the teaching of private law. A brief analysis of the space allotted to each section of the book illustrates the point:

Introduction to the law: 50 pages

Persons and family: 200 pages

Property: 100 pages

Succession: 50 pages

Contracts: 200 pages

Enrichment: 20 pages

Delict: 50 pages

Although this kind of comparison is obviously not a conclusive indication of the authority to be attached to any single section, it does suggest that the balance of the book might make it extremely difficult for at least some teachers to teach their branch of private law from the book without making use of supplementary material, which would defeat the purpose of having such a book at all. The same applies to practitioners using it as a basic reference work. Considering the fact that many sections of the book are excellent, well-researched and well-written expositions of the law the question arises whether it is really possible to compile a comprehensive introductory textbook for the whole of private law.

On a more technical level a number of problems arising from the original text have not been solved satisfactorily. Two examples from the section dealing with property illustrate the point. Despite the authors' declaration of intent in the Preface, this section reflects hardly anything of the views of academic authors with regard to contentious issues, although references to common-law authors abound. The majority of references are, true to the nature of the work, concerned with case law; and these are up to date and comprehensive. It seems strange, however, that the well-documented and often important debates and differences of opinion which embody the latest trends and developments in this branch of the law are ignored or kept from the attention of students. It is also disturbing to notice that a number of relics reflecting the early days of this discipline have not been cleared up or explained more carefully for the benefit of students. In this regard the section on "Limited ownership" in Chapter XXI is highly controversial. An introductory paragraph under the heading "Limited ownership" concludes with the statement that "[t]hese forms of ownership will be treated in the order mentioned", followed by the headings "Leasehold" (including "Registered long leases", "Unregistered long leases" and "Short leases"), "Resolutive ownership", "Contingent ownership" and "Diminished ownership". The text does not always sufficiently clear up the plethora of misconceptions, ambiguities and confusion reflected in or caused by this scheme.

In the final analysis, as stated above, any evaluation of this book will be determined by one's attitude towards and use of its earlier editions. As a comprehensive textbook for students it will be useful to those who are used to it, but teachers not used to it will be well-advised to study it carefully before prescribing it. As an updated edition of a classic text it is excellent – academic and practising lawyers interested in private law and well versed in the use of a number of sources should have it on their shelves.

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SENTENCING

deur DP VAN DER MERWE

Juta Kaapstad Wetton Johannesburg 1991; losbladdiens

Prys R107,80

Na 'n lang tydperk van stiefmoederlike behandeling in die Suid-Afrikaanse regsliteratuur, het die aantal regsbydraes oor straf en straftoemeting die afgelope aantal jare aansienlik toegeneem. Onder die regsbydraes in boekvorm is die bekendste en belangrikste waarmee Van der Merwe se *Sentencing* in kompetisie tree, Du Toit se *Straf in Suid-Afrika* (1981) en Rabie en Strauss se *Punishment: An introduction to principles* (1985).

Sentencing bestaan, benewens 'n voorwoord, 'n woordregister, 'n vonnisregister, 'n statuutregister, kommissieverslae en bylaes, uit twee afdelings: Afdeling I handel oor die algemene beginsels en is onderverdeel in vyf hoofstukke, waarvan hoofstuk 1 inleidende onderwerpe, hoofstuk 2 die geskiedenis van straf, hoofstuk 3 die aard en oogmerke van straf, hoofstuk 4 die strafvorme en hoofstuk 5 die strafmaat bespreek. Afdeling II handel oor die besondere misdade in twee hoofstukke, waarvan hoofstuk 6 moord en hoofstuk 7 strafbare manslag bespreek.

Inhoudelik lewer *Sentencing* uiteraard 'n aantal interessante gesigspunte en standpuntinnames op en bevat heelwat nuttige inligting; die geregte wat uiteindelik opgedis word, voldoen egter dikwels nie aan die verwagtinge wat die spyskaart wek nie. So beloof hoofstuk 1 onder meer 'n bespreking van die filosofie van strafoplegging, maar dit volstaan dan met 'n kort uiteensetting, aan die hand van een sekondêre bron, van Plato se opvattings aangaande straf, asook 'n bespreking van die deterministiese en indeterministiese denkrigtings en, in verband daarmee, die vraag of oorerwing dan wel omgewing bepalend is vir menslike gedrag. Na ander filosowe of regsfilosowe se menings oor strafoplegging word hier glad nie verwys nie (alhoewel daar elders in die werk wel sporadiese verwysings na die sienings van ander filosowe en regsfilosowe voorkom), en of die determinisme/indeterminisme en die vraag na die invloed van oorerwing/omgewing onder die *filosofie* van strafoplegging tuishoort, val minstens sterk te betwyfel. Dit verklaar waarskynlik waarom die skrywer in sy bespreking, steeds in hoofstuk 1, van die terminologie oor strafoplegging veelal nie daarin slaag om groter helderheid te bring ten opsigte van die begrippe wat hy onder die loep neem en die onderskeide wat hy in dié verband maak nie.

Vervolgens beloof hoofstuk 2 'n oorsig van die geskiedenis van *straf* (elders in die werk is daar egter ook sporadies historiese gegewens oor straf en straftoemeting te vinde; terloops, die skrywer gebruik hier (sien ook die opskrifte van hfst 3, 4 en 5) die begrip "punishment", en nie die begrip "sentencing" nie, wat meer in ooreenstemming met sy eie onderskeid (1 – 6) en die titel van sy boek sou wees), 'n faset van straf en straftoemeting wat tot dusver betreklik weinig aandag in die gepubliseerde regsliteratuur ontvang het, en moet dus in beginsel verwelkom word. Uit die besprekings van die Romeinse, Vroeg-Germaanse (waaronder Thomas van Aquinas se gedagtes oor straf en straftoemeting ook tuisgebring word!), Romeins-Hollandse (waaronder professor Middleton se gedagtes oor die regverdiging vir en die doel van straf ook 'n tuiste vind!), Vroeg-Italiaanse en Vroeg-Engelse reg aangaande straf blyk egter dat hulle bykans uitsluitlik op 'n fragmentariese en selektiewe weergawe van sekondêre gesag berus. Verder is die besprekings van die Suid-Afrikaanse reg oor die verskillende onderwerpe wat in *Sentencing* aangeroer word, feitlik deurgaans taamlik onvolledig en gaan hulle dikwels mank aan diepte, soos onder meer blyk uit die behandeling van omstrede aangeleenthede soos die

doodstraf (4 – 7 ev), lyfstraf (4 – 25 ev) en die rasfaktor by strafoplegging (5 – 40 ev). Trouens, afgesien daarvan dat die werk oor die algemeen opmerklik skraps en willekeurig na bestaande regsliteratuur oor strafoplegging verwys, is daar etlike onderwerpe wat behandel word sonder verwysing na enige gesag, en selfs gevalle waar daar van skrywers (bv Damhouder (2 – 3)) of publikasies (bv 'n artikel oor Smuts en Senghor (2 – 5)) melding gemaak word sonder om enige verdere besonderhede te verskaf.

Die outeur se skryfstyl en taalgebruik is deurspek met hinderlikhede en eienaardighede. Hiervan is die opvallendste die skrywer se oordadige gebruik van die eerste persoon en verwysing na homself, en die veelal informele, soms onsamehangende geselstrant in groot dele van die werk, ten koste van bondigheid en saaklikheid van formulering en 'n logiese sisteem en vloei van uiteensetting. Uit talle beskikbare voorbeelde word hier slegs na enkeles verwys:

> "I am therefore personally of the species indeterminist" (1 – 2); "Personally I see the latter as helping to make up the former . . ." (1 – 7); "Personally I find the word 'meaning' rather confusing . . ." (1 – 7); "Personally I am also all in favour of a free discretion as far as the type of punishment for murder is concerned and in fact made the following suggestion in my thesis, way back in 1980" (6 – 5; terloops, 'n "ek" wat onpersoonlik funksioneer, is net so moeilik voorstelbaar as die keuselose indeterminisme wat die skrywer se begrip "free-will indeterminism" (3 – 3) impliseer); "In his unpublished thesis DP van der Merwe draws the distinction . . ." (1 – 2); "This is the model which I proposed in my doctoral thesis and certain articles which flowed from it" (1 – 14); "In my doctoral thesis: 'Die Leerstuk van Verminderde Toerekeningsvatbaarheid' I also established that the lack of a free sentencing discretion . . . causes problems . . ." (4 – 8 tot 4 – 9); "This argument fits in very well with my theory . . ." (4 – 20); "I have treated the quest for a uniform criterion for punishment . . . in an article published in 1982. Therein I pointed out . . ." (5 – 1); "The alternative criterion which I broached then, and in which I still believe . . . (5 – 2); "As is pointed out by Van der Merwe . . . I also show that . . ." (6 – 3); "In my thesis I asked the rethorical question . . ." (6 – 12); "The Van der Merwe Sentencing Guidelines" (onderopskrif V van hfst 7) (viii en 7 – 9); "[I]t would be presumptuous for a criminal lawyer, which is the only qualification of the present author . . ." (1 – 5); "The present author had to do some catching up but I also now understand the mysteries of the 'Chi-square' . . ." (1 – 9); "Readers who have been following my argument thus far . . ." (1 – 13); "Please do not take the slight exaggeration in my example as a tone of condescension . . ." (1 – 15); "I appeal to all practical sentencing officers who are gradually growing weary of this 'philosophising about punishment' to read on" (3 – 1); "As may be gathered from the subtitle above [The 'True' Nature of Punishment], some personal opinions will be expounded on the subject mentioned, but 80% of the book should remain usable to readers who differ from me . . ." (3 – 2); "At this stage I would urge the reader to read (or reread) the section of the scale of aims of punishment above . . ." (3 – 26); "Unfortunately Professor van Rooyen and I, both believing and practising Christians, differ on the question of capital punishment . . ." (4 – 22); "For this view [on the advantages of corporal punishment] I do not have much more than personal experience, when a moderate chastizement by my father persuaded me to stop bullying my younger brothers and the same treatment by my science teacher persuaded me to prepare a bit better for his tests" (4 – 27); "I had the privilege to know an old magistrate in the juvenile court who could bring tears to the eyes of young black offenders by speaking to them as a father in their own language" (4 – 50); "To end [!] this chapter on a personal[!] note" (1 – 20); "With apologies to Professor Stoker, I will divulge . . ." (1 – 10); "[C]riminal lawyers such as Professor JH van Rooyen of Unisa . . ." (1 – 16); "What the gentleman [Schur] is saying, in other words, is . . ." (3 – 25); "Du Toit shocks us by telling us . . ." (4 – 34); "On the next page of Du Toit, we learn . . ." (4 – 34); "Rabie and Strauss also have a nice collection of cases . . . many of them from the Prentice Hall (PH) series, which is unfortunately not widely available" (4 – 34); "A recent example was the actor Rob Lowe (definitely not the rugby player!) . . ." (4 – 51); "Thus were the Post-Glossators and Commentators written off in one sentence!" (2 – 25); "Jeremy Bentham . . . does not spend time in worrying about justification of punishment . . ." (2 – 27); "Here a simple lawyer will not suffice . . ." (1 – 15); "[T]he ideal sentence which jumped into your head . . ." (1 – 16); "The naturalistic school is split by Vold into the 'rationalists' . . ." (en wie nog?) (1 – 18);

"In the sixteenth and seventeenth centuries 'a whole school of materialistic, mechanical' writers . . . arose" (2 – 5); "In the first volume of their series [?] on South African Criminal Law and Procedure the authors [?] devote . . ." (2 – 18); "[E]ven at the time of a reasonably modern writer such as Beccaria, the law resembled nothing so much as early German[ic?] law . . ." (2 – 26); "[P]unishment law" in stede van "penal law" (3 – 5); "anti-community conduct" in plaas van "antisocial conduct" (3 – 8); "[T]he famous issue of the *SACJ* . . ." (4 – 9; sien ook 6 – 7 vn 9); "In a thoughtful article . . ." (4 – 21); "Some comparative law" (opskrif (b)) (4 – 29).

Ander lastighede en eienaardighede is die voortdurende heen en weer verwysings in die teks na reeds bespreekte standpunte en aangeleenthede en standpunte en aangeleenthede wat nog bespreek gaan word, 'n onnodige herhaling en oorvleueling by die behandeling van 'n hele aantal onderwerpe wat aan die orde gestel word, en die outeur se aanhalings uit sy eie regsbydraes asook sy latere aanhaling van vorige aanhalings van ander skrywers (2 – 24 3 – 29 4 – 3 5 – 2 5 – 13).

Verder bevat die werk heelwat irrelevante inligting. Enkele voorbeelde daarvan uit vele beskikbares is die volgende: die inligting wat verstrek word oor Stuart Nagel, die Durban-Konferensie, assistente, rekenaars (1 – 19; sien trouens ook die skrywer se verskaffing in sy Voorwoord (v) van inligting aan die leser oor die soort rekenaar en program wat hy by die skryf van die boek gebruik het); die opmerkings rakende evolusie, Senghor, Smuts en die VVO (2 – 5); die gedeelte oor die Romeinse reg (2 – 10 ev) wat relatief min oor straf en straftoemeting sê en heelwat oor ander aangeleenthede; die skrywer se bewandeling van sypaaie by sy bespreking van die doodstraf in die mate dat hy self opmerk: "To limit my arguments to the death penalty . . ." (4 – 10).

Ofskoon Van der Merwe se *Sentencing* (miskien sou 'n meer gepaste, dog ook meer pretensieuse titel *Reflections on sentencing* gewees het) nie sonder meriete is nie en inligting oor straf en straftoemeting bevat wat nie in die voormelde werke van Du Toit en Rabie en Strauss voorkom nie, kan dit nie as plaasvervanger daarvoor dien en staan dit nie op dieselfde peil nie. Dit kan egter met vrug in samehang met ander regsliteratuur oor die onderwerp geraadpleeg word.

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INTERNATIONAL LEGAL BIBLIOGRAPHIES – A WORLDWIDE GUIDE AND CRITIQUE

by JUERGEN CHRISTOPH GOEDAN
translated from German by JOHN E PICKRON

Transnational Publishers Ardsley-on-Hudson New York 1992; xx and 388 pp
Price US$95,00

This book is based on a work which was published in German in 1975 under the title *Die internationalen allgemeinjuristischen Fachbibliographien*. Five of the original bibliographies have been omitted because they are of minor interest today, while seven new bibliographies which have appeared on the market since 1975 have been added.

Object The stated object of this book is to remove barriers to the subject of general and international legal bibliography in two ways: first, by informing the user of the special

features, advantages and weaknesses of each bibliography. Secondly, by encouraging the bibliographer and specialist to discuss and criticise the methodology and technique of the legal bibliographies presented (1).

We are also reminded that the function of a bibliography is to bring a "principle of order in the organization of knowledge" (2).

Scope (i) General legal bibliographies are studied; (ii) only international bibliographies directed to worldwide coverage are included – thus no bibliography limited to a single country or region is included; (iii) only bibliographies published after the Second World War are considered; (iv) bibliographies that offer bibliographical descriptions of books, periodicals, and periodical articles are studied; and (v) the bibliographies discussed are generally accessible in large law libraries.

The following bibliographies are reviewed:

Law books recommended for libraries
Annual legal bibliography
National legal bibliography
Bibliographic guide to law
Szladits: A bibliography on foreign and comparative law
Karlsruher juristische Bibliographie
Index to foreign legal periodicals
Current law index
Index to periodical articles related to law
Verzeichnis rechtswissenschaftlicher Zeitschriften und Serien
Stollreither: *Internationale Bibliographie der juristischen Nachschlagewerke*
Catalogue des sources de documentation juridique dans le monde
Palsson: *Bibliografisk introduktion till fremmed og komparativ ret*
Meloncelli: *Sistema della bibliografia giuridica*
Itadera: *Hogaku bunken no shirabekata*
Landsky: *Bibliographisches Handbuch der Rechts- und Verwaltungswissenschaften*

Although I am of the opinion that the book will be used mostly by librarians, there is one attribute that makes the book ideally suited for serious law researchers – it is user friendly! And though it is stated that "the material remains unequalled in its dryness" (6) the user will actually enjoy handling the book. For easy usage there is the usual survey of contents, plus a more detailed table of contents, an extensive bibliography of materials consulted and an alphabetical subject index.

For easier use all the bibliographies are reviewed in the same manner, namely:

(A) In general
(B) Manner and frequency of publication
(C) Main catalog
  (1) Contents of literature included
  (2) Types of literature included
  (3) Structure
    (a) Manner of arrangement
    (b) Arrangement in detail
  (4) Single entries
  (5) Typographical form
  (6) Evaluation
(D) Index
  (1) Extent of coverage
  (2) Structure
    (a) Types of indexes
    (b) Arrangement in detail
  (3) Index entry

(4) Typographical form
(5) Evaluation
(E) Instructions for use
(F) Summary

By following the above outline, this work emphasises the methods of constructing and using bibliographies in the field of law (6).

This book succeeds in achieving much more than the stated object. The most important bibliographies available in the field of law are made known to the user. Their special features, advantages and weaknesses are highlighted. The reader is told how to use the different bibliographies and, most important, the different bibliographies are compared with one another. Another important feature is the discussion of prerequisites for compiling an international legal bibliography.

It is a fact that a comprehensive bibliography on South African law is long overdue. It is recommended that any person or publisher who is prepared to tackle this huge project, should first study this book by Goedan. The secrets of how to, and how not to, compile a comprehensive bibliography, are all there.

This book is a MUST READ for law librarians and researchers in law.

NICO M FERREIRA
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DIE SUID-AFRIKAANSE KONTRAKTEREG EN HANDELSREG

deur JC DE WET en AH VAN WYK

Volume 1 deur JC de Wet
Vyfde uitgawe; Butterworths Durban 1992; ix en 519 bl
Prys R152,90 (hardeband) en R126,50 (sagteband)

Die vyfde uitgawe van *Kontraktereg en Handelsreg* wyk in formaat van vorige uitgawes af deurdat die kontraktereg-gedeelte afsonderlik as volume 1 uitgegee is terwyl die handelsreg-gedeelte sy verskyning later sal maak as volume 2. Soos in die voorwoord te kenne gegee word, is hierdie toedrag van sake nie aan 'n beginselbesluit te wyte nie maar eerder veroorsaak deur die feit dat die kontraktereg-gedeelte deur professor De Wet pas voor sy afsterwe op 19 Oktober 1990 voltooi is en verwagte wetgewing op die gebied van die handelsreg, die publikasie van 'n enkele boek sou vertraag.

Oor die meriete van professor De Wet se gedeelte oor die kontraktereg (en die boek in geheel) is al veel gesê. Dit het 'n geweldige bydrae tot bevordering en bekendstelling van die Afrikaanse regstaal gemaak. Dit is al langer as 45 jaar in gebruik en is vir 'n groot deel van dié tydperk as die leidende handboek op die gebied van die kontraktereg beskou. Sowel praktisyns as akademici kon die werk met vrug raadpleeg aangesien dit enersyds een van die min regshandboeke was wat met gesag in die howe aangehaal kon word, en andersyds 'n waardevolle blik op die gemenereg verskaf het. Professor De Wet het met sy analitiese vermoë en skerp kritiese inslag 'n besondere bydrae as juris gelewer. Sy kritiek teen uitsprake was onverskrokke en soms onvleiend maar dit het aan die ander kant 'n positiewe uitwerking op die regspleging gehad. Sy menings het natuurlik ook kritiek ontlok maar sy nalatenskap sal nog vir vele jare waardeer word.

Om die boek nou breedvoerig te kritiseer, sal geen doel dien nie maar sekere punte moet, veral om die praktisyn se onthalwe, uitgelig word. Die belangrikste punt van kritiek teen veral die vorige uitgawe was dat daar nie na alle relevante regspraak, publikasies en ander navorsing verwys is nie. En waar daar wel na nuwe materiaal verwys is, is dit nie bevredigend bespreek of bygewerk nie. Veral die praktisyn kon hom vasloop indien hy net hierdie werk geraadpleeg het om die huidige regsposisie te bepaal. Dit blyk dat professor De Wet hom nie veel aan vorige resensente gesteur het nie aangesien hierdie tendens in die nuutste uitgawe voortgesit word. Alhoewel sekere regsontwikkelings behoorlik bygewerk is (sien bv die bespreking van die Wet op Huweliksgoedere 88 van 1984 op 69 ev), is die hantering van veral sekere nuwe aangeleenthede onbevredigend. Resensente se voorstelle aangaande die invoeging van sekere onderwerpe (soos aspekte aangaande die Wet op Huurbeheer 80 van 1976) om 'n vollediger werk daar te stel, en uitbreiding van die teks waar nodig (bv die gedeelte oor huur op 355 ev) is ook geïgnoreer.

Wat hofbeslissings betref, is daar heelwat gebreke. Daar word byvoorbeeld (29 vn 87) na sekere onlangse beslissings aangaande dwaling by kontraksluiting sydelings verwys sonder om verder daarop in te gaan of andersins na ander besprekings daarvan te verwys. Die teks self is amper onveranderd oorgedruk en die kriptiese invoeging van sake bring 'n mens tot geen beter insigte as die vorige uitgawe nie. Soms is daar ook 'n saak van belang wat nie eens in die voetnote verskyn nie, soos *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A). Die boek is ongelukkig deurspek met sodanige leemtes.

In die lig van nuwe regspraak is daar voorts gedeeltes van die boek wat ter aanvulling of wysiging van die teks herskryf benodig het. Die hantering van ooreenkomste ter beperking van handelsvryheid is byvoorbeeld besonder swak. Die somtotaal van professor De Wet se bydrae in hierdie verband lui soos volg (89 – 90):

> "n Konkurrensieverbod is nie sonder meer uit die bose nie, maar dit kan onafdwingbaar wees indien die hof oortuig is daarvan dat dit strydig is met die openbare belang om die verbod te handhaaf."

Daarna word volstaan met 'n verwysing in 'n voetnoot na die toonaangewende beslissing *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A). Dit is ietwat van 'n oorvereenvoudiging van hierdie aangeleentheid. Sowel die regsposisie voor die *Magna*-beslissing as drie belangrike sake wat dié beslissing voorafgegaan het, verdien vermelding (*Roffey v Catterall, Edwards and Goudré (Pty) Ltd* 1977 4 SA 494 (N); *National Chemsearch (Pty) Ltd v Borrowman* 1979 3 SA 1092 (T); *Drewtons (Pty) Ltd v Carlie* 1989 4 SA 305 (K)). Alhoewel die regsposisie deur die *Magna-saak* in die reine gestel is, is die aangeleentheid nie daarmee afgehandel nie aangesien heelwat verwante aspekte nie klinkklaar uitgespel is nie. 'n Mens kan jou kwalik indink dat 'n handboek oor die kontraktereg nie 'n behoorlike bespreking van die saak sou bevat nie.

Eweneens word *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) slegs in twee voetnote genoem (204 en 206) maar nie bespreek nie. Die lys word al hoe langer namate deur die boek gewerk word (sien bv ook die gedeelte aangaande repudiëring op 168 ev waar *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) slegs in voetnote genoem word), en die enkele gevalle hier genoem, is beslis nie die enigstes nie.

Alhoewel die werk seer sekerlik nog 'n bestaansreg het en die mening van professor De Wet deur baie nog hoog aangeskryf word, moet weer eens beklemtoon word dat die praktisyn die boek met omsigtigheid moet gebruik.

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THE RIGHTS, POWERS AND DUTIES OF DIRECTORS

JL VAN DORSTEN

Obiter Publishers CC 1992; 373 pp

Price R120,00 + VAT (soft cover)

The law regarding the rights, powers and duties of directors is controversial. Even some of the most basic questions, such as the basis for liability of directors for breach of faith, have not been answered satisfactorily (eg Du Plessis's analysis of *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 in his doctoral thesis *Maatskappyregtelike grondslae van die regsposisie van direkteure en besturende direkteure* (UOFS 1990) 100 – 103). Apart from controversies regarding the basic legal principles underlying the relationship of the director and his company, important legal developments and shifts in attitude and interpretation are adding to the general confusion. The debate about the duties of directors to creditors of the company and the difference in the approach of the bench in *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T) and *Ozinsky v Lloyd* 1992 3 SA 396 (C) about the nature of insolvency and the limits of lawful and prudent trading, are striking examples of the latter.

Directors of South African companies are generally somewhat bewildered when they get entangled in the legal and academic debates concerning their rights and obligations. A simple question in this field is usually not met with an equally simple answer. When the possibilities of breaches of faith and the potential for interdicts and civil and criminal liability are considered, the agitation of directors in search of the simple answer can be understood.

To their rescue comes Van Dorsten with an up-to-date, practical and comprehensive exposition of the main principles of the law regarding directors of South African companies. In the preface the author states that his purpose was to set out the leading principles of the law relating to the rights, powers and duties of directors in order to shed further light on this area of law and thereby help directors to understand their legal position. The publication of this book makes it difficult for South African company directors to blame their ignorance of their legal position on the lack of suitable publications or the inability of academics and lawyers to give clear guidance.

The rights, powers and duties of directors is divided into 16 chapters. In the initial chapters the nature and structure of a company, the status and different types of directors (including shadow directors) and the appointment, disqualification and removal of directors are discussed. The main part of the book is devoted to a detailed discussion of the general rights, powers and duties of directors. The law is stated as at 31 May 1992.

The author was, however, not content with a discussion of the general rights and duties of directors. Separate chapters are devoted to an exposition of the statutory duties of directors and the general rules regarding accounting and disclosure. A discussion of the provisions of the Companies Act relating to take-overs and mergers and the general principles and rules of the Securities Regulation Code on Take-Overs and Mergers is contained in a short but valuable chapter. Rights and duties in terms of the Deposit-taking Institutions Act 94 of 1990, and the rules of the Johannesburg Stock Exchange are also discussed, although very briefly. The book furthermore contains an up-to-date discussion of the law regarding insider trading in South Africa. As a caveat to all directors who treat any of the other chapters in the book with disdain, specific chapters are devoted to the personal and criminal liability of directors.

In a few instances a short discussion of the relevant company law is a prerequisite for a coherent exposition of the law regarding directors. Succinct discussions of matters such as the *Turquand* rule, the *ultra vires* rule and ratification have therefore also been included.

Van Dorsten's primary aim was to give an exposition of the relevant legal principles. He has avoided raising or taking sides in the many academic debates that are currently raging in the field. References to the academic contributions in the field of company law are mainly limited to the general textbooks in English and South African company law. Although his approach is in essence non-academic, this does not mean that the book is simply another shallow, practical guide for non-lawyers. The many excerpts from South African and international case law, the insight of the author and the wealth of his research make it a valuable reference work for company lawyers and law students.

In my opinion Van Dorsten has succeeded admirably in his general purpose for the book. His well-structured approach to the material enables readers to locate the relevant discussions with ease; the lucid style makes it easy for non-lawyers to follow the discussion and the many excerpts from judgments provide readers with valuable illustrations of the approach of the courts.

Although the book was written primarily for directors, its structure, style and broad scope makes it useful for a wider audience. Company officers, lawyers, auditors and law students in particular will find it an invaluable addition to their libraries.

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THE LAW OF AGENCY

deur AJ KERR

Derde uitgawe; Butterworths Durban 1991; 386 en xiii bl

Prys R98,00 + BTW (sagteband)

Hierdie is die derde uitgawe van professor Kerr se bekende werk oor die verteenwoordigingsreg. Die eerste uitgawe het reeds in 1972 verskyn. Die tweede uitgawe wat in 1979 verskyn het, is oral goed ontvang. Die nuwe uitgawe sal gewis ook oral verwelkom word (soos dit trouens reeds gedoen word – sien 1992 *SALJ* 565; 1992 *TSAR* 750).

Die nuutste uitgawe se inhoud verskil nie ingrypend van die vorige uitgawe nie en daarom sal die inhoud nie in besonderhede bespreek word nie. Die nuutste regspraak, regsliteratuur en wetgewing is bygewerk. Dit het soms daartoe gelei dat die teks verskil van die vorige uitgawe s'n. Enkele onderworpe is ook bygewerk.

Die skematiese indeling van die inhoud is wel verander. Die vorige uitgawe is in ses hoofstukke met onderafdelings ingedeel. Die huidige uitgawe bestaan uit vyf dele en een en twintig hoofstukke. Elke hoofstuk het verdere onderafdelings. Hierdie nuwe indeling is inderdaad 'n verbetering omdat dit die werk meer toeganklik maak.

Die skrywer se uitgangspunt is, net soos in die vorige uitgawe, die positiewe reg. Die positiewe reg word volledig bespreek en ontleed. Hierin lê dan ook die grootste waarde en bydrae van hierdie werk. 'n Teoretiese bespreking van die grondslae van die verborge prinsipaal, "implied warranty of authority" en onherroeplike volmag word egter gemis,

omdat dit die waarde van werk sou verhoog. Professor Kerr bespreek wel die teoretiese vraag of volmagverlening 'n eensydige of meersydige regshandeling is (6 – 10) en daarom is sy onwilligheid om 'n teoretiese bespreking van gemelde onderwerpe se grondslae te gee, ietwat vreemd.

Die tegniese versorging van die werk is goed. Dit word sonder voorbehoud vir alle juriste aanbeveel.

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INTERPRETATION OF STATUTES
deur GE DEVENISH
Juta Kaapstad Wetton Johannesburg 1992; 356 bl
Prys R132,00

Dié werk is in 13 hoofstukke ingedeel. Dit val sistematies sinvol uiteen en is tegnies en taalkundig voortreflik versorg.

Hoofstuk 1 (1 – 24) handel oor fundamentele begrippe en die historiese grondslag van die uitleg van wette in Suid-Afrika. Hierin wys die outeur op twee belangrike aspekte. Eerstens meld hy dat die regspreker onvermydelik meer as 'n passiewe interpreteerder is. Hy antisipeer ook 'n handves van menseregte vir 'n toekomstige Suid-Afrika. Tweedens wys hy op die feit dat ons howe aanknopingspunte vir die uitleg van wette in beide die Engelse en Romeins-Hollandse reg gevind het. Dit is myns insiens duidelik verkeerd om na ons gemenereg as die Romeins-Hollandse reg te verwys. 'n Beter beskrywing sou die "Romeins-Europese reg" wees (sien Labuschagne "Ons gemenereg en wetsuitleg" 1984 *De Jure* 364; Van Zyl R in *Van Erk v Holmer* 1992 2 SA 636 (W) 638).

Hoofstuk 2 (25 – 55) bevat die verskeie uitlegteorieë. Die skrywer sluit hom in beginsel ook aan by die doelteorie wat oral in Europa posgevat het en besig is om ook in Suid-Afrika veld te wen.

Hoofstuk 3 (56 – 75) bespreek restriktiewe interpretasie. Die skrywer wys tereg (by implikasie op 57) daarop dat 'n woord slegs in sy konteks werklik betekenis verkry (sien Kruger "'Bedoeling' in teks en konteks" 1991 *Stell LR* 242). Hy wys (70) ook tereg daarop dat die *eiusdem generis*-reël slegs kontekstueel, en nie meganies nie, aangewend behoort te word (sien Van Heerden en Labuschagne "Die eiusdem generis-reël" 1981 *De Jure* 79).

Hoofstuk 4 (76 – 99) handel oor ekstensiewe interpretasie. Dit is in dié verband interessant om daarop te let dat regsdenke na hul wese analogiese denke is (sien Kaufmann *Analogie und "Natur der Sache"* (1982) 55).

Hoofstuk 5 (100 – 117) gaan oor interne en hoofstuk 6 (118 – 143) oor eksterne hulpmiddels. Hier kon miskien meer aandag aan die internasionale dimensie van wetsuitleg gegee gewees het (sien *R v Ebrahim* 1991 2 SA 553 (A) bespreek in 1992 *THRHR* 155; Labuschagne "Interstaatlike verdrae en wetsuitleg" 1981 *THRHR* 292). Hoofstuk 7 (144 – 154) handel oor die problematiek verbonde aan die uitleg van meertalige wetsbepalings. Dit is verblydend dat die skrywer dit in 'n afsonderlike hoofstuk bespreek en meer aandag daaraan gee.

Hoofstuk 8 (156 – 222) behandel die sogenaamde vermoedens by wetsuitleg. By die vermoede dat die wetgewer nie onregverdige en onredelike gevolge beoog nie, kan die skrywer na die artikel van Van Heerden "Legaliteit en die uitleg van strafbepalings" 1991 *TRW* 109 verwys word. Verskeie van dié vermoedens sal in die lig van die toekomstige handves van menseregte die status van menseregte verwerf. Ten aansien van die vermoede dat woorde in wetgewing deurgaans dieselfde betekenis behou, kan die skrywer se aandag op Labuschagne "Regsekerheid en betekeniskonstantheid by wetsuitleg" 1991 *TRW* 15 gevestig word.

Hoofstuk 9 (223 – 238) handel oor die status van handelinge wat in stryd met wetsbepalings verrig word en hoofstuk 10 (239 – 262) oor die effek van die Interpretasiewet op die uitleg van 'n betrokke bepaling. Hoofstuk 11 (263 – 278) analiseer die aard van regsdenke betrokke by wetsuitleg terwyl Hoofstuk 12 (279 – 287) die probleme verbonde aan die uitleg van die strydige bepalings aanspreek. In dié verband is daar 'n onlangse Engelse saak (*Re Marr* 1990 2 All ER 880 (CA) bespreek in 1991 *De Jure* 201) wat 'n nuwe rigting inslaan (sien ook Labuschagne "Chronologisisme, strydige bepalings en wetsuitleg" 1985 *TRW* 193). Hoofstuk 13 (288 – 293) bevat 'n kort samevatting.

In die algemeen kan gesê word dat dit 'n goeie werk is wat by sowel akademici as praktisyns met vrymoedigheid aanbeveel kan word. Daar kan ten slotte in die algemeen met die opmerking van Marinus Wiechers in die voorwoord tot die boek (v – vi) saamgestem word, naamlik dat die werk in die toekoms 'n verwysingsbron sal word. Ook die ander opmerkinge wat Wiechers maak, kan ek onderskryf.

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In any event the [competition] question, 'In which province would you find the city of Johannesburg?' is extremely easy. One is required in answer to place a tick behind either Natal, Cape or Transvaal. It seems that the organisers did not want to complicate matters by adding the Orange Free State! (*per* Van Dijkhorst J in *Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs* 1992 3 SA 838 (T) 844).

Kontraksluiting namens 'n vennootskap: 'n ondernemingsregtelike perspektief

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SUMMARY

Contracting on behalf of a partnership: a business law perspective

It has been stated that the law of partnership primarily regulates the relationship between partners *inter se* and that it should, as far as external relations are concerned, simply be treated as a branch of the law of agency. Such a simplistic view ignores, *inter alia*, historical realities. This contribution does not aim at providing a historically based study of the law of partnership. The development of the law of partnership is, however, discounted in the discussion of a number of distinctive principles, rules and doctrines which are applicable when contracts are concluded on behalf of a partnership. Attention is given, *inter alia*, to the significance of the reciprocal fiduciary relationship between partners and the fact that a partner contracts both as agent and as principal. It focuses on the doctrine of mutual mandate (*mutua praepositio*) and the *Turquand* rule and discusses the circumstances in which these two rules may find application when a partner contracts on behalf of a partnership.

1 INLEIDING

Soms word te kenne gegee dat die vennootskapsreg primêr handel met die verhouding tussen vennote *inter se* en dat dit, wat eksterne verhoudings betref, bloot beskou behoort te word as 'n onderafdeling van die verteenwoordigingsreg.[1] So 'n te simplistiese benadering laat onder meer[2] regshistoriese werklikhede buite rekening, soos dat die bevoegdheid van 'n vennoot om 'n vennootskap kontraktueel teenoor derdes te bind, ontwikkel het voordat die reël *alteri stipulari*

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1 Sien bv *Divine Gates & Co v African Clothing Factory* 1930 CPD 238 240: "Where it deals with the relations of the group to outside persons, it may be said to be really a branch of the law of agency"; *Eaton & Louw v Arcade Properties (Pty) Ltd* 1961 4 SA 233 (T) 240; Gibson *South African mercantile and company law* (1988) 275: "Where it deals with the relationship between partners and third parties it is simply a branch of the law of agency"; Kahn (red) *Contract and mercantile law through the cases* vol 2 (1985) 439.

2 Sien verder Henning en Delport *Partnership* (1984) 304 par 412; Ribbens "Legal personality and partnership – quo vadis?" 1979 *Codicillus* 28.

non potest die knie finaal moes buig voor die verskynsel van direkte verteenwoordiging,[3] asook dat die *lex mercatoria* 'n besondere rol in die ontwikkeling van die eksterne vennootskapsreg gespeel het.[4] Dit hou voorts nie voldoende rekening met die wedersydse trouverhouding wat tussen vennote *inter se* bestaan nie, asook nie met die tweeledige hoedanigheid waarmee 'n handelende vennoot desnoods beklee word in regstelsels waarin die versamelingsteorie oor die regsaard van 'n vennootskap[5] aangehang word nie.[6]

Ongekwalifiseerde stellings oor die aanwending van die algemene beginsels van die verteenwoordigingsreg in vennootskapsregtelike verband behoort dus met 'n gewisse mate van omsigtigheid benader te word. Trouens, die regsposisie van 'n vennoot wat namens 'n vennootskap met buitestanders kontrakteer, vertoon heelwat eiesoortighede wanneer dit met dié van 'n gewone verteenwoordiger vergelyk word.

In hierdie bydrae word die aandag juis primêr toegespits op sodanige kenmerkende aspekte om sodoende 'n oorsig van die verteenwoordiging van 'n vennootskap by kontraksluiting weer te gee. Nogtans moet dit egter ook vooraf baie duidelik gestel word dat in hierdie bydrae hoegenaamd nie gepoog word om 'n uitputtende regshistories gefundeerde vennootskapsregtelike studie te verskaf nie. Hoewel 'n behoefte in die Suid-Afrikaanse reg aan so 'n bydrae onteenseglik bestaan, word vir huidige doeleindes volstaan met die oogmerk om 'n

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3 Vgl *D* 44 7 11; 50 17 73 4; 45 1 38 17; 41 1 53; *C* 4 27 1; 5 12 26; 8 38 (39) 3 *pr.*

4 Sien bv Baldus de Ubaldis *Consiliorum sive responsorum* (1559) 1 120; Felicius-Boxelius *Tractatus de societate* (1666) 14 44 28 6 (en veral Boxelius se aantekeninge op lg) 30 7 en 30 8; Zanchius *Tractatus de societate* (1786) 2 10; Hefele *Entwicklung der Lehre von der Societät* (1864) 51 – 57; Goldschmidt *Universalgeschichte des Handelsrechts* (1891) 274: "[D]ie (direkte) Stellvertretung ist hier, gegen römisches wie alteres germanisches Recht, voll anerkannt"; Rehme *Die geschichtliche Entwicklung der Haftung des Reeders* (1891) 9 – 11; Schmoller "Die geschichtliche Entwicklung der Unternehmung" 1893 *Zeitschrift für Wirtschafts- und Sozialwissenschaften* 1055; Bacmeister "Der Ausschluss sämtliche Gesellschafter einer offenen Handelsgesellschaft von deren Vertretung" 1904 *Zeitschrift für das gesammte Handelsrecht* 425; Van Brakel "Vennootschapsvormen in Holland gedurende de zeventiende eeuw" 1917 *Rechtsgeleerd Magazijn* 16: "De ook toen ter tijd . . . verkondigde theorie, dat de vennoten over en weer als elkanders *institor* waren beschouwd, schijnt inderdaad op die werkelijkheid te zijn gebouwd"; Rehme *Geschichte des Handelsrechts* (1913) 217; Lévy-Bruhl *Histoire juridique des sociétés de commerce en France aux XVII et XVIII siècles* (1938) 145; Duynstee *Commanditaire vraagstukken* (1940) 11 – 13; Cooke *Corporation, trust and company* (1950) 48; Stein "The mutual agency of partners in the Civil law" 1959 *Tulane LR* 598; Müller *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter* (1969) 16 – 22; Claus *Gewillkürte Stellvertretung im römischen Privatrecht* (1973) 67 71 – 73; Kniep *Societas publicanorum* (1896) 353 – 360; Asser *The Procurator in the development of agency in Roman law and the later Civil law* (1971) 28; Kirschner "Die Gesellschaftsformen des Mittelalters und der frühen Neuzeit" 1974 *Gesellschafter* 56; Joubert *Die verpligtings van die verteenwoordiger in die Suid-Afrikaanse reg* (LLD-proefskrif UP 1967) 38; Slagter en Zwemmer "Vennootschap onder firma" in *Personenassociaties* (1980) 1 – 1 tot 1 – 3; Asser *In solidum of pro parte* (1983) 199 – 209; Zimmermann *The law of obligations. Roman foundations of the Civilian tradition* (1990) 469.

5 En die entiteitsteorie derhalwe nie as algemene reël geld nie. Sien oor die inhoud en betekenis van hierdie teorieë Henning en Delport *Partnership* (1984) 278 – 287 par 386 – 390.

6 Vgl *Re Agriculturist Insurance Co* (*Baird's* case) 1870 LR 5 Ch App 725 733; Higgins en Fletcher *The law of partnership in Australia and New Zealand* (1987) 148; Ribstein *Business associations* (1983) 2 – 27 par 202; Miller *The law of partnership in Scotland* (1973) 207.

oriëntasie en vertrekpunt te verskaf vir diegene wat meer vertroud met die regsposisie in die maatskappyereg[7] is, veral aangesien algemene verteenwoordigingsregtelike beginsels en beginsels eie aan die ondernemingsreg ineengestrengel geraak het.[8] Soos reeds vermeld is, vertoon die bevoegdheid van 'n vennoot om die vennootskap teenoor derdes te bind heelwat eiesoortighede. In hierdie bydrae word volstaan om ten opsigte van hierdie kenmerkende aspekte 'n ondernemingsregtelike perspektief oor kontraksluiting namens 'n vennootskap te verskaf.

Bondigheidshalwe word kwelvrae soos oor die presiese aard van die wedersydse verhouding van vennote *stante societate*,[9] asook oor die aanwendingsgebied van die leerstuk van die versweë prinsipaal,[10] daargelaat.

Vooraf dien ook beklemtoon te word dat alhoewel telkens verwys word na kontraksluiting namens 'n vennootskap, die vennootskap in die Suid-Afrikaanse reg nie 'n regspersoon is nie.[11] Hoewel daar aanknopingspunte vir die entiteitsteorie oor die regsaard van 'n vennootskap in die Romeins-Hollandse reg aan

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7 Tov die maatskappyregtelike posisie, sien Benade *Die ultra vires-leerstuk in die maatskappyereg* (LLD-proefskrif Unisa 1964) 137; Naudé "Company contracts: the effect of section 36 of the new act" 1974 *SALJ* 316–317; Naudé "'n Nuwe benadering tot die funksie van maatskappydoelstellings" 1971 *SALJ* 507–508; Henning "Die aanspreeklikheid van 'n beslote korporasie vir die handelinge van 'n lid en enkele ander aspekte van eksterne verhoudings" 1984 *TRW* 158; Cilliers en Benade (*et al*) *Maatskappyereg* (1982) 121–122 par 9.03–9.04 125–126 par 9.15–9.17 300 par 21.08; Boberg "Contracting for a company" 1973 *SALJ* 119; Du Plessis "Maatskappygebondenheid vir die optrede van ongemagtigde maatskappyfunksionarisse" 1991 *SA Merc LJ* 281–282.

8 In *Intercontinental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 3 SA 740 (W) 748EF verduidelik Botha R soos volg: "I proceed to state what I conceive to be the legal principles that can be gathered from the cases and that I am called upon to apply to the facts of the present case. A is bound by an agreement purportedly entered into on his behalf by B with C if B had authority from A to enter into that agreement on A's behalf, or if A is precluded from denying such authority by virtue of the principles of estoppel. Between actual authority and estoppel I can perceive no intermediate situation in which A is bound by B's agreement with C." Juis in die vennootskaps- en maatskappyereg is sodanige tussenliggende gevalle in oa die leerstuk van wedersydse verteenwoordigingsbevoegdheid (*mutua praepositio*) en die *Turquand*-reël te vind. Sien Henning 1984 *TRW* 163; Henning en Delport *Partnership* 315 par 415; Du Plessis 1991 *SA Merc LJ* 281–284 en die bespreking *infra*.

9 Sien Henning en Delport *Partnership* 305 par 413.

10 Sien *idem* 317–319 par 416.

11 Sien oa *Muller v Pienaar* 1968 3 SA 195 (A) 202–203; *Ex parte Cohen* 1974 4 SA 674 (W) 675; *Standard Bank of SA Ltd v Lombard* 1977 2 SA 808 (T) 813; *Lombard v Standard Bank of SA Ltd* 1977 2 SA 806 (T) 807; *Strydom v Protea Eiendomsagente* 1979 2 SA 206 (T) 209–211; *Du Toit v Barclays Nasionale Bank* 1985 1 SA 563 (A) 575; *Greef v Janet* 1986 1 SA 647 (T) 655; *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd* 1989 4 SA 31 (T) 48; *Nedbank v Van Zyl* 1990 2 SA 469 (A). 'n Tendens in vorige uitsprake om veral in die insolvensiereg 'n mate van selfstandigheid aan 'n vennootskap te verleen en wat in *Noordkaap Lewende Kooöp Bpk v Raath* 1977 2 SA 815 (NK) 818 in soveel woorde erken is, is deur dieselfde regter onomwonde ontken in *P de V Reklame (Edms) Bpk v Gesamentlike Onderneming van SA Numismatiese Buro (Edms) Bpk en Vitaware (Edms) Bpk* 1985 4 SA 852 (K) 881. Sien verder Henning en Delport *Partnership* 281–287 par 388–389; Henning "Onderstand en privilegie ingevolge die Moratoriumwet, 1963. Ontwikkeling, toepassing en inkorting" 15 *Mededelings van die Sentrum vir Ondernemingsreg* (1991) 133–135.

te tref is,[12] en dit ook die vertrekpunt vorm van heelwat moderne vennootskapskodes,[13] word die omslagtige en verouderde versamelingsteorie steeds as uitgangspunt in die Suid-Afrikaanse reg geneem.[14] Die vennootskap word dus bloot as 'n versameling van individue beskou terwyl van die entiteitsteorie slegs in enkele sogenaamde uitsonderingsgevalle, en dan ook in 'n heel beperkte mate, kennis geneem word.[15] In die finale analise is dit dus regtens die vennote self wat kontraktuele en ander aanspreeklikheid teenoor derdes oploop en nie die vennootskap as 'n afsonderlike entiteit losstaande van die individuele vennote nie.[16]

2 BEGINSELS EIE AAN DIE VENNOOTSKAPS- EN ONDERNEMINGSREG

2 1 Trouverhouding wedersyds

Gewoonlik word geleer dat daar 'n fidusiêre verhouding tussen prinsipaal en verteenwoordiger bestaan en dat dit die verteenwoordiger noop om volgens die vereistes van goeie trou te handel.[17] Derhalwe word gewoonlik as 'n afsonderlike verpligting van die verteenwoordiger vermeld dat hy die vereistes van goeie trou teenoor sy prinsipaal moet nakom.[18] Daar rus gewoonlik egter geen vertrouensverpligting op die prinsipaal teenoor die verteenwoordiger nie.[19] Daarenteen word deur die totstandkoming van 'n vennootskap[20] 'n wedersydse verhouding van goeie trou tussen gewone vennote in die lewe geroep. Die verhouding tussen vennote *inter se* is so intiem en innig van aard dat dit al beskryf is as "very much the same as that between brothers, which is equivalent to saying that partnership is a contract *uberrimae fidei*".[21]

Higgins en Fletcher[22] beklemtoon die belang hiervan treffend uit 'n Engelsregtelike hoek:

> "[W]hilst the duties of the agent to a principal are governed by equitable principles, those of the principal to the agent are a matter of common law. In the case of partners . . . the obligations . . . inter se, are regulated by equitable rules. This intervention

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12 Barels *Advysen over den koophandel en zeevaart* (1780) 2 62 en 2 86; Henning en Delport *Partnership* 280 par 287.

13 So bepaal a 201 van die Amerikaanse Revised Uniform Partnership Act, gedurende 1992 deur die Commissioners on Uniform State Laws aanvaar, uitdruklik: "A partnership is an entity." Sien oa Wiedner "Revision of Uniform Partnership Act" 1992 *Business Lawyer* 248.

14 Henning en Delport *Partnership* 281 par 388; sien ook vn 11 *supra*.

15 Sien vn 11 *supra*.

16 *Ibid*.

17 Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 215.

18 Joubert *Die verpligtings van die verteenwoordiger* 647.

19 Joubert *Verteenwoordigingsreg* 183.

20 *Pezutto v Dreyer* 1992 3 SA 379 (A).

21 *Wegner v Surgeson* 1910 TPD 571 579; sien egter *Mutual and Federal Insurance Co v Municipality of Oudtshoorn* 1985 1 SA 419 (A) oor die uitdrukking *uberrimae fidei*.

22 *Partnership* 148. Sien ook *D* 17 2 63 *pr*: "Societas ius quammodo fraternitas in se habeat", asook Delport *Gedingvoering tussen vennote* (LLD-proefskrif UP 1977) 16–21 oor die betekenis en rol van die sogenaamde *ius fraternitas*. Oor die verhouding tussen vennote *inter se* in 'n vennootskap *en commandite* en ander tipes buitengewone vennootskappe, sien Ribbens *The personal fiduciary character of member's* inter se *relations in the incorporated partnership* (1988) 84–85; Bromberg en Ribsten *Partnership* vol 2 (1988) 6:70–6:71.

> of equity has important repercussions on the relationship between the partnership and persons dealing with one of its members in the ordinary course of the firm's business and may well be at the root of certain distinctions between partnership and agency as, for example . . . the extensive emergency powers of a partner."[23]

Die wedersydse trouverhouding is derhalwe die eerste kenmerkende of besondere beginsel wat by kontraksluiting namens vennootskappe geld.

2 2 Prinsipaal én verteenwoordiger

'n Vennootskap word in die Suid-Afrikaanse reg nie as 'n regspersoon beskou nie, maar bloot as 'n versameling van individue.[24] Dit noodsaak die siening[25] dat 'n vennoot wat namens 'n vennootskap kontrakteer, beide as verteenwoordiger en prinsipaal optree.[26] Hierdie onderskeid tussen verteenwoordiging en vennootskap word tereg benadruk:

> "The normal function of an agent is to create a legal relationship between the principal and third party. Once this is accomplished the agent has no further involvement in the relationship. On the other hand where a transaction is effected by a partner on behalf of a partnership, that partner, although in one sense an agent, is concurrently a principal, along with the other partners, which adds an extra dimension to the usual principal-agent relationship."[27]

Hierdie dubbele status van die vennoot is derhalwe die tweede kenmerkende of besondere beginsel wat by kontraksluiting namens vennootskappe geld.

2 3 *Mutua praepositio*

Dit is 'n *naturale* van 'n vennootskapsooreenkoms dat elke vennoot afsonderlik, sonder toestemming, medewerking of selfs medewete van die ander vennote, bevoeg is om regshandelinge wat met die vennootskapsbesigheid in verband staan namens die vennootskap te verrig.[28] Tensy anders ooreengekom is, het vennote

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23 Vgl James LJ in *Re Agriculturist Insurance Co (Baird's case) supra* 733; Milman en Flanagan *Modern partnership law* (1983) 66 – 67.

24 Sien vn 11 *supra*.

25 Vgl *Pooley v Driver* (1876) 5 Ch D 458 476: "If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for others, to the extent that he acts for others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity."

26 *Potchefstroom Dairies & Industries Co Ltd v Standard Fresh Milk Supply Co* 1913 TPD 506 511; *Muller v Pienaar* 1968 3 SA 195 (A); *Re Agriculturist Insurance Co (Baird's case) supra* 733; *Sadler v Whiteman* 1910 1 KB 868 889.

27 Higgins en Fletcher *Partnership* 149; sien ook Milman en Flanagan *Partnership law* 66 – 67.

28 Felicius-Boxelius *De societate* 14 44; Zanchius *De societate* 2 10; *Hollandsche consultatien* 1 303; Van Bynkershoek *Obs Tum* (1934) 2 1594; Barels *Advysen* 2 60; Pothier *Traité du contrat de societé* in *Oevres complétes de Pothier* (1844) 3 2 72, 5 1 90; Van der Keessel *Praelectiones iuris hodierni* (deur Van Warmelo, Coertze, Gonin en Pont) (1961) 3 21 7; Van der Linden *Rechtsgeleerd practicaal en koopmans handboek* (1806) 4 1 13; *In re Paarl Bank* 1891 8 SC 131 132; *Braker and Co v Deiner* 1934 TPD 203; *De Winter v Ajmeri Properties and Investments* 1957 2 SA 279 (D) 298; *Eaton and Louw v Arcade Properties (Pty) Ltd* 1961 4 SA 233 (T) 240E; *Setzkorn v Wessels* 1962 2 SA 218 (OK); *Goodrickes v Hall* 1978 4 SA 108 (N); De Wet en Van Wyk *Suid-Afrikaanse kontraktereg en handelsreg* (1978) 393; Oosthuizen *Die Turquand-reël in die Suid-Afrikaanse maatskappyereg* (hierna Oosthuizen *Die Turquand-reël*) (LLD-proefskrif Unisa 1976) 335.

dus gelyke regte om die vennootskap te verteenwoordig by die bestuur van sy besigheid.[29]

Die derde kenmerkende aspek van verteenwoordiging in vennootskapsregtelike verband het juis betrekking op hierdie leerstuk van wedersydse verteenwoordigingsbevoegdheid (*mutua praepositio*).[30] Dié leerstuk het sy ontstaan aan die invloed van die *lex mercatoria*[31] te danke en is reeds in die veertiende eeu deur Romanistiese kommentatore soos Baldus[32] tot wasdom gebring.[33] Volgens Story

> "this doctrine . . . as to the general right and authority of each partner . . . doubtless has its foundation in common convenience and public policy in regard to all commercial operations".[34]

Omdat elke vennoot wedersydse verteenwoordigingsbevoegdheid besit, kan die derde volstaan deur bewys te lewer dat die betrokke regshandeling binne die werkkring van die vennootskap geval het.[35] Daar word dus nie van hom verlang dat hy verder moet bewys dat die bepaalde vennoot ook teenoor sy medevennote die bevoegdheid gehad het om daardie spesifieke handeling te verrig nie.[36]

Wat alles binne die kring van bedrywighede van die vennootskap val, is 'n feitelike vraag. Dit kan net beantwoord word deur te let op

> "die vennootskapsdoel, die aard van die onderneming, en die algemene handelsgebruike ten opsigte van dergelike ondernemings".[37]

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29 Hüber *Hedendaegse rechtsgeleerdheyt* (1742) 1 11 29; Pothier 5 1 90; Voet 17 2 18; *Lochart v De Beer's Mining Co* 1886 4 HCG 85 97; *Setzkorn v Wessels supra*. Vir 'n bespreking van die vraag of onderlinge volmag 'n *essentiale* of 'n *naturale* van 'n vennootskapsooreenkoms is, sien Henning en Delport *Partnership* 264 par 371; vgl Henning 1984 *TRW* 163.

30 Ook soms genoem "die leerstuk van onderlinge volmag, oor-en-weer lasgewing" of, op Engels, "mutual mandate". Vgl Henning 1984 *TRW* 163; Henning en Delport *Partnership* 315 par 415.

31 Henning en Delport *Partnership* 244 par 362 vn 3; Bergstedt "Partnership in commendam. Louisiana's limited partnership" 1961 *Tulane LR* 815; Drake "Partnership entity and tenancy in partnership: the struggle for a definition" 1917 *Michigan LR* 610 – 613; Stein 1959 *Tulane LR* 595 – 606; Goldschmidt *Universalgeschichte* 283; Lehmann *Unternehmung und Unternehmungsformen* (1936) 226.

32 Baldus de Ubaldis *Consiliorum* 1 120: "[S]ocietas habet instar mandati, invicem enim sibi mandare videntur quia ea, quae fiunt negotiatione, communi nomine fiunt." Felicius-Boxelius *De societate* 14 44 28 6 (en veral aantekeninge van Boxelius op lg) 30 7 en 30 8; Zanchius *De societate* 2 10; vgl Henning 1984 *TRW* 163; sien verder vn 4 *supra*.

33 Vgl Henning 1984 *TRW* 163.

34 Story *Commentaries on the law of partnership* (1844) 155 – 157; vgl Henning 1984 *TRW* 163.

35 Barels *Advysen* 2 60; *Meyer v Mosenthal Bros* 1925 TPD 281; *Rand Advance (Pty) Ltd v Scala Café* 1974 1 SA 786 (D) 790; sien verder Henning en Delport *Partnership* 312 – 313 par 415; De Wet en Van Wyk 402. Vir potensiële gebondenheid in gevalle waar die handeling buite die sfeer van die vennootskapsbesigheid geval het, sien par 3 3 *infra*.

36 De Wet en Van Wyk 402.

37 *Idem* 401. Henning en Delport *Partnership* 313 par 415: "It is not always easy in practice to determine whether or not a particular transaction fell within the scope of the partnership business. If it fell outside, the contracting partner exceeded his implied authority to bind the partnership. The onus of proof to show that it fell within, lies on the third party seeking to hold the partnership liable." Vir spesifieke voorbeelde sien Henning en Delport *Partnership* 313 – 314 par 415; De Wet en Van Wyk 401.

Die vennootskap is normaalweg[38] gebonde aan die kontrak wanneer die derde op 'n oorwig van waarskynlikheid bewys dat die handeling binne die kring van die gewone bedrywigheid van die vennootskap geval het.

Ongelukkig word die belang van die leerstuk van *mutua praepositio* nie altyd waardeer nie en word estoppel dan sonder meer as verklaring vir die vennootskap se gebondenheid aangebied.[39] Hierdie vorm van gebondenheid het egter reeds bestaan voordat die Engelsregtelike leerstuk van estoppel hier te lande ingevoer is.[40]

2 4 Die *Turquand*-reël

2 4 1 Algemeen

Daar is oortuigend aangetoon dat die reël voortspruitend uit *Royal British Bank v Turquand*[41] 'n selfstandige billikheidsbeginsel van die verenigingsreg is.[42] Aangesien hierdie beginsel denkbaar ook by vennootskappe aanwending kan vind,[43] kan dit as 'n vierde kenmerkende aspek van verteenwoordiging in vennootskapsregtelike verband aangestip word. In wat volg, word kortliks stilgestaan by die inhoud van die *Turquand*-reël in die maatskappyereg en daarna word aangetoon hoedat die onderliggende beginsel ook in die vennootskapsreg aanwending kan vind.

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38 Sien egter par 3 *infra* tov spesifieke gevalle waar die vennootskap nie gebonde sal wees nie.

39 *Standard Bank v Goodchild and Britain* 1887 7 Buch 120; *Forder, Ritch and Eriksson v Engar's Heirs* 1973 1 SA 719 (N) 722 – 723; *Rand Advance (Pty) Ltd v Scala Café* 1974 1 SA 786 (D) 790; *Goodrickes v Hall* 1978 4 SA 108 (N); De Wet en Van Wyk 402. Sien in dié verband die bespreking van Henning 1984 *TRW* 163 – 164.

40 *Hollandsche consultatien* 1 303; Van Bynkershoek *Obs Tum* 2 1594; Barels *Advysen* 2 60; Pothier *Société* 6 1 98; Henning en Delport *Partnership* 315 par 415 vn 63; De Villiers "Partnership" in 13 *South African encyclopedia of forms and precedents* (1976) 161; De Wet *"Estoppel by representation" in die Suid-Afrikaanse reg* (1939) 72; vgl Henning 1984 *TRW* 164.

41 *Royal British Bank v Turquand* 1843 – 1860 All ER 435 437F – 438A. Vir Suid-Afrikaanse gesag sien oa *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A) 844 – 850; *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 2 SA 257 (W) 261A ev; *Levy v Zalrut Investments (Pty) Ltd* 1986 4 SA 479 (W) 487BD.

42 Oosthuizen *Die Turquand-reël* 118 – 126; Oosthuizen "Die Turquand-reël as reël van die verenigingsreg" 1977 *TSAR* 210 ev; Oosthuizen 1979 *TSAR* 10 vn 59; sien ook Henning 1984 *TRW* 162 vn 59. Vir 'n treffende uiteensetting van die redes vir die eiesoortige aard van hierdie reël, sien *The Registrar General v Northside Developments (Pty) Ltd* 14 ACLR 543 (SC(NSW)) 548 550 – 551, waarvan geselekteerde dele vervolgens aangehaal word: "[T]he reasons of policy which underlay the rule in *Turquand's* case when first pronounced provide, today, more than ample justification for the continuance of the rule . . . Behind the rule in *Turquand* . . . lies a practical choice made deliberately by law. It is true that, were the law to require that in every case dealing with a company those who deal must satisfy themselves about the authority of those who purport to act on behalf of the company, a few miscreants would be discovered. But the price of doing so would be far outweighed by formalistic investigations of corporate authority which would then be required. In the overwhelming bulk of cases such investigation would be completely pointless and of no utility." Die opskrif waaronder hierdie uiteensetting voorkom, naamlik dat die *Turquand*-reël "[a] cost/benefit equation of company law" is, som die verdere uiteensetting van Kirby R goed op.

43 Sien par 2 4 3 *infra*.

2 4 2 Maatskappyereg

In uitgebreide sin, en meer in die besonder in maatskappyverband, kom die *Turquand*-reël daarop neer dat die nie-nakoming van interne voorvereistes[44] nie deur die maatskappy as verweer opgewerp kan word om gebondenheid te ontken in gevalle waar met 'n derde onderhandel word nie.[45] In die maatskappyereg dien hierdie reël as 'n aanpassing van die wye werking van die leerstuk van toegerekende kennis.[46] Die derde word naamlik beskerm deurdat die maatskappy nie regsgevolge mag ontduik in omstandighede waar dit vir die derde feitlik onmoontlik is om vas te stel of daar voldoen is aan vereistes waaraan geen publisiteit verleen word nie.[47] 'n Te wye interpretasie van die *Turquand*-reël kan egter die oogmerke daarvan verydel en sodoende daartoe lei dat derdes onregverdig wye beskerming ten koste van die maatskappy geniet. Die reël is derhalwe mettertyd op twee wyses gekwalifiseer, naamlik dat daar nie van die beskerming daarvan gebruik gemaak mag word as die persoon wat daarop wil steun (a) daadwerklike kennis gehad het van die feit dat daar nie aan die interne

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44 In wye sin gebruik, sien Oosthuizen "Boekbespreking: *Maatskappyereg*" 1978 *THRHR* 110: "[Die *Turquand*-reël] kan toepassing vind ten opsigte van alle interne onreëlmatighede waaraan geen publisiteit verleen is nie, byvoorbeeld gebrekkige kennisgewing van vergaderings, nie-nakoming van kworum vereistes, gebrekkige aanstelling van beamptes en dies meer." Sien ook *Kreditbank Cassel GmbH v Schenkers Limited* 1927 1 KB 826 (CA) 844.

45 Benade "Opmerkings oor die Turquand-reël" 1962 *THRHR* 194; Benade *Die ultra vires-leerstuk* 139 – 140; Oosthuizen 1979 *TSAR* 67; Meskin *et al Henochsberg on the Companies Act* vol 1 (1985) 105 – 106; McLennan "The ultra vires doctrine and the Turquand rule in company law: a suggested solution" 1979 *SALJ* 344 – 345; Oosthuizen 1977 *TSAR* 210; Naudé 1974 *SALJ* 317; Henning 1984 *TRW* 161 – 162. Vir die toepassing van die beginsels in ander sake sien Oosthuizen *Die Turquand-reël* 1013; *Bargate v Shortridge* 10 ER 914 923; *In re Life and Educational Assurance Company* 120 ER 477 488. Sien verder *In re County Life Assurance Company* 1869 70 LR Ch App 288 293; *Mahony (Public Officer of National Bank of Ireland) v East Holyford Mining Co Ltd* 1874 80 All ER 427 (HL) 432GH 435H – I; *County of Gloucester Bank v Rudry Methyr Steam and House Coal Colliery Company* 1895 1 Ch 629 622 633 636; *Dey v Pullinger Engineering Company* 1921 1 KB 77 8082 8485 8687; *British Thompson Houston Company Limited v Federated European Bank Limited* 1932 2 KB 176 180; *Australian Capital Television (Pty) Ltd v Minister for Transport and Communications* 86 ALR 119 155 – 158.

46 Hierdie leerstuk geld nie igv vennootskappe nie, maar in die maatskappyereg hou die leerstuk regsgevolge in vir die persoon wat met die maatskappy onderhandel, veral omdat die leerstuk tot inhoud het dat geag word dat dié persoon oa kennis dra van alle uitdruklike beperkinge in die maatskappy se openbare dokumente; sien veral Benade *Die ultra vires-leerstuk* 139; Naudé 1971 *SALJ* 505; Oosthuizen *Die Turquand-reël* 2; Oosthuizen 1979 *TSAR* 10(ii); McLennan 1979 *SALJ* 349; Cilliers en Benade *Maatskappyereg* 124 par 9.11(ii); Fourie "Die wisselwerking tussen Suid-Afrikaanse maatskappyeregleerstukke" 1988 *THRHR* 219; Walton "Companies" in *Halsbury's laws of England* (red Hailsham) vol 7(1) (1988) 720 par 982; Griffin "Directors' authority: the Companies Act 1989" 1991 *Company Lawyer* 99. Sien in die algemeen *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 4 SA 588 (O) 593A – D.

47 *SA Securities v Nicholas* 1911 TPD 450 457 460; *TCB Ltd v Gray* 1986 1 All ER 587 (Ch) 595j; Cilliers & Benade *Maatskappyereg* 123 par 9.07; Naudé 1971 *SALJ* 506; Oosthuizen 1977 *TSAR* 210; Oosthuizen *Die Turquand-reël* 1 146; Oosthuizen "Sekerheidstelling in stryd met artikel 226 van die Maatskappywet: enkele aspekte" 1988 *TSAR* 137; Von Willich "Die uitwerking van a 228 van die Maatskappywet 61 van 1973 op die Turquand-reël" 1988 *MB* 12 14; Grobler 1415; Fourie 1992 *TSAR* 3; Milman en Evans "Corporate officers and the outside protection regime" 1985 *Company Lawyer* 68; Pennington "Managing director by estoppel" 1964 *Sol J* 722; Stiebel "The ostensible powers of directors" 1933 *LQR* 350 350 – 351.

voorvereiste voldoen is nie;[48] of (b) as omstandighede bestaan het waarin van die persoon verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes[49] en hy nie verdere ondersoek ingestel het nie.[50]

2 4 3 Vennootskapsreg

2 4 3 1 Enkele besondere oorwegings

Die vennootskapskontrak word nie geregistreer nie en is nie vir publieke inligting beskikbaar nie, want 'n vennootskap kan, anders as 'n maatskappy of beslote korporasie, bloot mondelings of selfs stilswyend deur gedrag tot stand kom. Die leerstuk van toegerekende kennis vind gevolglik nie by vennootskappe aanwending nie.[51] Hoewel kennis van die bestaan van byvoorbeeld die vennootskapskontrak, waarin interne voorvereistes ten opsigte van volmag[52] meesal vervat sal wees, nie aan derdes toegereken word nie, is dit wel denkbaar dat die derde inderdaad van die bestaan van interne voorvereistes ten opsigte van volmag bewus kan wees[53] met die gevolg dat die *Turquand*-reël in so 'n geval potensieel aanwending kan vind.

Die feit dat die *Turquand*-reël in die geval van die vennootskapsreg slegs ter sprake kan kom as die derde daadwerklike kennis van die bestaan van die interne voorvereistes ten opsigte van volmag gehad het, het tot gevolg dat sommige van

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48 *Howard v Patent Ivory Manufacturing Company (In re Patent Ivory Manufacturing Company)* 1888 38 ChD 156. Sien verder *Country of Gloucester Bank v Rudry Methyr Steam and House Coal Colliery Company* 1895 1 Ch 629 636; *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A) 845 846; *Wolpert v Uitzigt Properties (Pty) Ltd* 1961 2 SA 257 (W) 266F – G (punt (ii)); *Levy v Zalrut Investments (Pty) Ltd* 1986 4 SA 479 (W) 487B – C; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* 1985 3 All ER 52 (CA) 77g – 83h.

49 *County of Gloucester Bank v Rudry Methyr Steam and House Coal Colliery Company* 1895 1 Ch 629 636; *AL Underwood Limited v Bank of Liverpool and Martins* 1924 1 KB 776 788 797 798; *Houghton and Company v Nothard, Lowe and Wills Limited* 1927 1 KB 246 261 266 267; *Ligett (Liverpool) Ltd v Barclays Bank* 1928 1 KB 48 56 57. Sien verder *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 280B – C; *Wolpert v Uitzigt Properties (Pty) Ltd supra* 266F (punt (iii)); *Rolled Steel Products (Holdings) Ltd v British Steel Corp supra* 77j – 78d.

50 Sien par 2 4 3 *infra*. Tov die Australiese reg sien Lindgren "History of the rule in Royal British Bank v Turquand" 1975 *Monash University LR* 13 ev; *The Registrar General v Northside Developments Pty Ltd* (1988) 14 ACLR 543 (SC(NSW)) 551 552, maar vgl die verwarrende benaderings van die appèlsaak (*Northside Developments Pty Ltd v Registrar General* 1990 ALJR 427) en Sealy "Agency principles and the rule in Turquand's case" 1991 *Cambridge LJ* 47 se kommentaar op lg saak: "Despite the long and careful judgements, *Northside* has to be regarded as a source of disappointment."

51 Henning 1984 *TRW* 163; Oosthuizen *Turquand-reël* 336.

52 Bv dat vennoot A eers vennoot B se goedkeuring moet kry alvorens hy (A) kontrakte van meer as R1 000 namens die vennootskap mag sluit. Hierdie *interne voorvereistes tov volmag* moet onderskei word van *uitdruklike volmagbeperkinge*, bv dat vennoot A geen kontrakte namens die vennootskap mag sluit nie. Sien bespreking in par 3 2 *infra*.

53 Die derde het bv die vennootskapskontrak onder oë gehad of die derde is reeds voor die sluiting van die kontrak deur die vennote meegedeel dat daar 'n spesifieke interne voorvereiste is wat nagekom moet word voordat 'n bepaalde vennoot die bevoegdheid het om kontrakte namens die vennootskap te sluit. Die derde is nou bewus van *die bestaan van die interne voorvereiste*. Sou hy bewus gewees het van die *nie-nakoming van die interne voorvereiste*, geld ander oorwegings. Sien die eerste kwalifikasie op die *Turquand*-reël in par 3 2 *infra*.

die kwelvrae wat in die maatskappyereg voorhande is, nie in die geval van die vennootskapsreg ter sprake kom nie. In die maatskappyereg is daar al hewig debat gevoer[54] of die *Turquand*-reël nie slegs geld as die derde wat daarop steun daadwerklike kennis (in teenstelling met toegerekende kennis) van die interne voorvereiste gehad het nie.[55] Die redenasie lui naastenby dat maatskappye aan 'n te wye gebondenheidsrisiko blootgestel sal wees as derdes, wat nie daadwerklike kennis van die interne voorvereiste gehad het nie, die maatskappy op grond van die *Turquand*-reël gebonde sou kon hou. Want, so word aangevoer,

> "[i]t would . . . be contrary to all legal principle that a person should be able to rely on a state of affairs which he admits he did not know".[56]

Oosthuizen wys egter op die verskillende standpunte[57] en kom dan, op grond van onder andere *Mine Workers' Union v Prinsloo*,[58] tot die gevolgtrekking dat in die Suid-Afrikaanse reg kennis van die statute nie 'n vereiste vir 'n suksesvolle beroep op die *Turquand*-reël is nie:[59]

> "Om van die derde te verg dat hy positief moet kennis dra van die inhoud van die maatskappy se statute is nie alleen in stryd met die grondbeginsels waarop die *Turquand*-reël gebaseer is nie, maar open die deur tot misbruik. Wat verhoed die derde om bloot ten onregte te beweer dat hy die statute gelees het?"[60]

Op die keper beskou, kom dié argument daarop neer dat daadwerklike kennis aan die kant van die derde hom nie die beskerming van die *Turquand*-reël ontneem nie, maar dat ook die derde aan wie kennis ten opsigte van interne voorvereistes toegereken word, hom op die beskerming daarvan kan beroep.

Word vir 'n oomblik buite rekening gelaat dat die *Turquand*-reël op een tydstip juis net in die geval van daadwerklike kennis van die interne voorvereistes toegepas is, lei ideële redevoering tot 'n heel interessante gevolgtrekking. As die uitgangspunt is dat die *Turquand*-reël beskerming bied aan derdes teen die onbillike werking van die leerstuk van toegerekende kennis,[61] behoort dit juis

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54 Sien oa *Houghton and Company v Northard, Lowe and Wills Limited* 1927 1 KB 246 (CA) 267 268; *Rama Corporation Ltd v Proved Tin & General Investments Ltd* 1952 1 All ER 554 (KB) 556BD 569CD 571C; *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* 1964 1 All ER 630 (CA) 637G ev 647B ev; HRH (pseud) "Constructive notice of company's constitution" 1952 *SALJ* 415.

55 Frenkel "Ostensible authority of managing directors" 1964 *Australian Lawyer* 138 som dit soos volg op: "[A] reliance upon *Turquand*'s rule by a person dealing with a company is only available to him if in fact he had acted with knowledge of and reliance upon the Articles of Association; if he had been unaware of the articles, he cannot invoke the rule."

56 HRH (pseud) 1952 *SALJ* 417.

57 Oosthuizen *Die Turquand-reël* 168–170.

58 1948 3 SA 831 (A) 849.

59 Oosthuizen *Die Turquand-reël* 171–172. Vgl egter Du Plessis 1991 *SA Merc LJ* 300–301 wat verduidelik wat die rol is wat daadwerklike kennis in die geval van onderhandelinge met buitestanders vervul.

60 Oosthuizen *Die Turquand-reël* 172.

61 *SA Securities v Nicholas* 1911 TPD 450 457 460; *TCB Ltd v Gray* 1986 1 All ER 587 (Ch) 595j; Cilliers en Benade *Maatskappyereg* 123 par 9.07; Naudé 1971 *SALJ* 506; Oosthuizen 1977 *TSAR* 210; Oosthuizen *Die Turquand-reël* 1 146; Oosthuizen "Sekerheidstelling in stryd met artikel 226 van die Maatskappywet: enkele aspekte" 1988 *TSAR* 137; Von Willich 12 14; Grobler 14 15; Du Plessis *Maatskappyregtelike grondslae* 66 vn 65; Milman en Evans "Corporate officers and the outside protection regime" 1985 *Company Lawyer* 68; Pennington "Managing director by estoppel" 1964 *Sol J* 722; Stiebel 1933 *LQR* 350–351.

net aanwending te vind in gevalle waar die derde geen kennis van die interne voorvereistes gehad het nie, want dit is in hierdie gevalle waar hy onbillik benadeel word omdat kennis van die openbare dokumente hom toegereken word. Een van die gevalle waar die derde juis nie op die *Turquand*-beskerming geregtig sal wees nie, is waar omstandighede bestaan het waarin dit van hom verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes en hy nie verdere ondersoek ingestel het nie.[62] Daadwerklike kennis van die bestaan van die interne voorvereistes ten opsigte van volmag dien "as omstandigheid waaronder dit van hom verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes" en as "hy nie verdere ondersoek ingestel het nie", verbeur hy die *Turquand*-reël beskerming.

2 4 3 2 Toepassing

Die derde met daadwerklike kennis van die interne voorvereistes ten opsigte van volmag sal ingevolge die *Turquand*-reël kan aanvaar dat daar inderdaad aan dié interne voorvereistes voldoen is. Die vennootskap sal gevolglik aan die kontrak gebonde wees al is daar nie aan die interne vereistes voldoen nie, behalwe (a) as die derde geweet het dat daar nie aan die interne vereistes voldoen is nie; of (b) as omstandighede bestaan het waarin daar van die derde verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes en hy nie verdere ondersoek ingestel het nie. Met ander woorde, die vennootskap kan gebondenheid vryspring as enigeen van die twee kwalifikasies op die *Turquand*-reël op die derde van toepassing is.

Twee aspekte met betrekking tot laasgenoemde kwalifikasie verdien besondere vermelding. Eerstens blyk duidelik uit die bronne dat daadwerklike kennis van die bestaan van die interne voorvereistes ten opsigte van volmag[63] nie as agterdogwekkende omstandigheid beskou word nie.[64] Oënskynlik moet die omstandighede sodanig gewees het dat die derde "notice of some irregularity"[65] gehad het. Die bestaan van die interne voorvereistes word dan klaarblyklik nie as só 'n onreëlmatigheid bestempel nie.[66] Tweedens is dit logies dat indien van die derde verwag kon word om verdere ondersoek in te stel en hy inderdaad verdere ondersoek na die nakoming al dan nie van die interne voorvereistes ingestel het, hy weer potensieel op die beskerming van die *Turquand*-reël geregtig *kan* wees. Uiteraard sal dit nie die geval wees nie as hy

62 Sien par 2 4 2 *supra*.

63 Omdat die leerstuk van toegerekende kennis nie in die geval van die vennootskapsreg geld nie, kom die *Turquand*-reël eers ter sprake as die derde daadwerklike kennis van die interne voorvereistes tov volmag gehad het. Sien bespreking in par 2 4 3 1 *supra*.

64 Sien bespreking in par 2 4 3 1 *supra* en Oosthuizen *Die Turquand-reël* 264 272 338. Dit kom vreemd voor dat igv estoppel (maar nie by die *Turquand*-reël nie) kennis van die voorvereiste skynbaar wel as agterdogwekkend bestempel word: Oosthuizen *Die Turquand-reël* 337 vn 8; PA du Plessis "Vennootskappe" in Van Jaarsveldt en Oosthuizen (reds) *SA Handelsreg* (1988) 281.

65 *The Registrar General v Northside Developments Pty Ltd* 14 ACLR 543 (SC(NSW)) 552.

66 Oosthuizen *Die Turquand-reël* 265: "Die agterdogwekkende omstandighede kan verskeie verskyningsvorms aanneem, maar meestal kan dit in een van twee kategorieë ingedeel word. Dit bestaan òf ten aansien van die verlening van magtiging aan 'n bepaalde beampte òf dit het betrekking op die uitoefening van die verleende volmag."

slegs 'n gesimuleerde poging aangewend het om vas te stel wat die ware toedrag van sake in verband met die nakoming al dan nie van die interne voorvereistes was.[67] Na dié verdere ondersoek moet immers gesê kan word dat hy volwaardig op die *Turquand*-beskerming geregtig is, dit wil sê, dat hy kan aanneem dat die huishoudelike bestuur van die vennootskap na behore geskied het.[68]

2 4 3 3 Estoppel as alternatiewe gebondenheidsgrondslag

Alternatief tot die *Turquand*-reël sal die derde in die geval van daadwerklike kennis van interne voorvereistes van estoppel gebruik moet maak. Soos tereg beklemtoon is, staar 'n feitlik onmoontlike bewyslas die derde in hierdie geval in die gesig:

> "Kennis van . . . interne beperkings word nie aan die derde toegedig of van hom verwag nie. Was hy van die bestaan van voorvereistes bewus, maar onbewus van die nienakoming daarvan, kan hy die vennote alleen op grond van estoppel aanspreeklik hou as die vennote 'n skyn teenoor hom verwek het dat hulle wel nagekom is wat so sterk is dat dit sy aanvanklike agterdog as gevolg van sy kennis van die voorvereiste uit die weg geruim het. Omdat 'n suksesvolle beroep op estoppel in lg geval byna onmoontlik is, bepleit sommige skrywers dat die maatskappyregtelike Turquand-reël . . . by alle soorte verenigings toepassing moet vind."[69]

2 4 3 4 Perspektief

In die lig van die voorafgaande bespreking, is dit duidelik dat in die gevalle waarin interne voorvereistes ten opsigte van volmag gestel word en die derde bewus was van die bestaan van dié voorvereistes, maar onbewus van die nienakoming daarvan, die gebondenheid van die vennootskap verklaar moet word aan die hand van 'n billikheidsreël wat aanwending vind by alle tipes verenigings ter beskerming van *bona fide* buitestanders[70] eerder as wat dit op grond van estoppel verklaar word.

3 SPESIFIEKE GEVALLE

3 1 Uitdruklike verbod op volmag

3 1 1 Verteenwoordigingsbevoegdheid 'n naturale *van die vennootskapsooreenkoms*

Aangesien die verteenwoordigingsbevoegdheid 'n *naturale* van die vennootskapsooreenkoms is, kan hierdie bevoegdheid in die vennootskapsooreenkoms of 'n latere ooreenkoms tussen die vennote ingekort of selfs uitgesluit word.[71] Veronderstel byvoorbeeld dat die vennootskapsooreenkoms bepaal dat vennoot A geen kontrak namens die vennootskap mag sluit nie. Ondanks hierdie uitdruklike verbod sluit vennoot A 'n kontrak (wat in alle opsigte binne die kring van bedrywighede van die vennootskap val) in naam van die vennootskap. Is die vennootskap gebonde en wat is die grondslag van gebondenheid?

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67 Sien Du Plessis 1991 *THRHR* 797.
68 Oosthuizen *Die Turquand-reël* 1; Stiebel 352.
69 PA du Plessis 281. Daar word verwys na Oosthuizen 1977 *TSAR* 218 en Henning en Delport *Partnership* 315. Sien verder Oosthuizen *Turquand-reël* 337 – 338; Henning 1984 *TRW* 164.
70 De Villiers 161; Burdick *The law of partnership* (1917) 176; sien ook *Bank of Australasia v Breiliat* 1847 6 Moo PC 152 (13 ER 642) 193 – 194; Story 157 – 158.
71 De Wet en Van Wyk 385 – 393; Oosthuizen *Turquand-reël* 393; Henning 1984 *TRW* 163.

3 1 2 Verskillende grondslae van gebondenheid

Die vennootskapskontrak word nie geregistreer en is nie vir publieke inligting beskikbaar nie. Aangesien kennis van hierdie bepaling nie die derde toegereken word nie,[72] is dit moontlik (hoewel onwaarskynlik) dat die derde op 'n oorwig van waarskynlikheid sal kan aantoon dat die ander vennote, wat die derde betref, inderdaad volmag aan vennoot A verleen het om die kontrak te sluit. Die uitdruklike verbod het immers normaalweg[73] net werking teenoor die vennote onderling.[74] Die derde sal verder ook op 'n oorwig van waarskynlikheid kan bewys dat die ander vennote *ex post facto* vennoot A se volmaglose optrede geratifiseer het.[75] Derdens sal die derde ook op estoppel kan steun ten einde die vennootskap gebonde te hou aan die kontrak. Alle vereistes van estoppel moet bewys word, onder andere dat die ander vennote 'n skyn verwek het.[76] Die feit dat dit 'n vennoot was wat namens die vennootskap opgetree het en dit 'n kontrak is wat binne die werkkring van die vennootskap val, behoort onses insiens nie alleenstaande as 'n *skyn* deur die ander vennote aangemerk te word nie.

Die leerstuk van wedersydse verteenwoordigingsbevoegdheid is onses insiens egter die voor-die-hand-liggendste grondslag van gebondenheid in hierdie geval.[77] Die derde kan immers aanvaar dat die persoon wat as vennoot die kontrak (wat in alle opsigte binne die kring van bedrywighede van die vennootskap val) in naam van die vennootskap gesluit het, die nodige volmag het. Die uitdruklike verbod op volmag (A mag geen kontrakte namens die vennootskap aangaan nie) gaan die derde normaalweg nie *per se* aan nie, aangesien dit net werking teenoor die vennote onderling het. Uiteraard sal die posisie daar heel anders uitsien as die derde daadwerklike kennis van hierdie bepaling gehad het. Gebondenheid op grond van die leerstuk van wedersydse verteenwoordigingsbevoegdheid is gebaseer op billikheid en die bevordering van

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72 *Ibid*; Oosthuizen *Turquand-reël* 336.

73 Sien bespreking *infra* tov die gevalle waar die derde daadwerklike kennis van die bestaan van hierdie uitdruklike volmagbeperking gehad het.

74 Aangesien die leerstuk van toegerekende kennis in die maatskappyereg aanwending vind, sien die posisie by uitdruklike volmagbeperkinge in openbare dokumente van maatskappye daar heel anders uit: Weens die werking van die leerstuk van toegerekende kennis sal derdes nie mag opwerp dat hulle onbewus was van uitdruklike volmagbeperkinge (beperkinge waaraan daar geen voorvereistes gekoppel is nie, bv dat 'n bepaalde direkteur glad nie namens die maatskappy mag optree nie) in bv die statute nie. Die gevolg van sodanige bepalings is dat derdes verhoed word om estoppel as verweer op te werp aangesien daar weens die bestaan van hierdie bepalings nooit enige skyn oor die besondere verteenwoordiger se volmag kon gewees het nie – die besondere maatskappyverteenwoordiger kon tog nooit enige volmag hê nie; sien Du Plessis 1991 *SA Merc LJ* 289–290.

75 Henning 1984 *TRW* 162; Henning en Delport *Partnership* 314 par 415.

76 *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd supra* 282E–H; Oosthuizen "Aanpassing van die verteenwoordigingsreg in maatskappyverband" 1979 *TSAR* 9. Kyk verder *B & B Hardware Distributors (Pty) Ltd v Administrator, Cape* 1989 1 SA 957 (A); *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 4 SA 626 (E) 634I–635G; De Wet *"Estoppel by representation" in die Suid-Afrikaanse reg* 16; Van Huysteen en Van der Merwe "Estoppel by representation: the ambiguity of an 'unambiguous representation'" 1990 *TSAR* 86; Du Plessis 1991 *SA Merc LJ* 290.

77 Sien par 2 3 *supra*.

handelsdoelmatigheid[78] en is tot die beskikking van *bona fide* derdes.[79] Die derde wat bewus is van die bestaan van die uitdruklike verbod op volmag is *mala fide* en daar bestaan geen ruimte om hierdie billikheidsgerigte handelsdoelmatigheidsreël tot sy beskikking te stel nie.

Die ander eiesoortige billikheidsreël wat op die bevordering van handelsdoelmatigheid gerig is, naamlik die *Turquand*-reël,[80] kan nooit by uitdruklike volmagbeperkinge ter sprake kom nie. Dié reël vind net aanwending waar die verteenwoordiger *potensieel*[81] volmag kan verkry. By die derde wat die vennootskapsooreenkoms in die voorbeeld hierbo onder oë het, kan daar geen twyfel oor vennoot A se volmag bestaan nie – vennoot A mag nooit enige kontrak namens die vennootskap sluit nie.

3 1 3 Die keuse tussen die verskillende gebondenheidsgrondslae

Uit die bespreking in die vorige afdeling is dit duidelik dat daar potensieel vier grondslae is waarop die derde die gebondenheid van die vennootskap kan baseer, naamlik (a) dat, wat die derde betref, die ander vennote inderdaad volmag aan vennoot A verleen het om die kontrak te sluit (dit wil sê uitdruklike of stilswyende *werklike volmag*); of (b) dat die ander vennote *ex post facto* vennoot A se volmaglose optrede uitdruklik of stilswyend *geratifiseer* het; of (c) dat die ander vennote skuldig die skyn van volmag verwek het en dat die derde, handelende op hierdie skyn, benadeel is (dit wil sê *estoppel*); of (d) dat die derde aanvaar het dat die vennoot wat die kontrak in die naam van die vennootskap gesluit het die nodige bevoegdheid gehad het om namens die ander vennote op te tree, aangesien die kontrak in alle opsigte binne die kring van bedrywighede van die vennootskap geval het (dit wil sê *wedersydse verteenwoordigingsbevoegdheid*).

Die derde dra die bewyslas om aan te toon dat die vennootskap aan die kontrak, wat namens 'n vennootskap gesluit is, gebonde is.[82] Die feit dat hy die bewyslas dra, bring hom voor 'n keuse van die verskillende gebondenheidsgrondslae te staan. In gevalle (a), (b) en (d) is dit die gewone siviele bewyslas, naamlik 'n oorwig van waarskynlikheid, waarvan die derde hom sal moet kwyt. Wat (a) en (b) betref, sal dit afhang van die feite van elke saak of daar op die een of die ander gesteun kan word. Stilswyende werklike volmag sal byvoorbeeld vóór of tydens kontraksluiting moet bestaan, terwyl stilswyende ratifikasie *ex post facto* verleen word. Ook wedersydse verteenwoordigingsbevoegdheid (geval (d)) kom net vóór of tydens kontraksluiting ter sprake. Weens die wilsooreenstemmingsvereiste by kontraksluiting sal die derde normaalweg nie *na* kontraksluiting kan sê dat omdat hy nou besef dat dit 'n vennoot was wat namens

78 Henning 1984 *TRW* 163 164; Henning en Delport *Partnership* 315 par 415. Vgl ook Du Plessis 1991 *SA Merc LJ* 283 – 284; Stern "Corporate liability for unauthorised contracts: unification of the rules of corporate representation" 1987 *Univ of Penn Journal of International Business Law* 651: "The survey of these disparate legal systems [Engeland, Duitsland en Amerika] does, however, reveal a common trend in modern legal thought that recognizes the unique relationship between principal and agent in the corporate context and therefore departs from traditional agency law. This trend, it is argued, is fueled by the urgent needs of the business community."

79 Henning 1984 *TRW* 163 164; Henning en Delport *Partnership* 315 par 415.

80 Sien par 2 4 *supra*.

81 Sien par 2 4 3 *supra* en par 3 2 1 *infra*.

82 De Wet en Van Wyk 402.

'n vennootskap opgetree het, hy op die wedersydse verteenwoordigingsbevoegdheid van vennote steun nie. In hierdie geval kan die kontroversiële leerstuk van die versweë prinsipaal[83] egter ter sprake kom ingevolge waarvan die derde 'n keuse het om die verteenwoordiger persoonlik of die prinsipaal (wat tydens kontraksluiting versweë was) gebonde te hou.[84]

Dit is derhalwe duidelik dat die feite van elke saak 'n bepalende rol in die keuse tussen (a), (b) en (d) speel en nie soseer die bewyslasmaatstaf nie. Met die feite soos in die voorbeeld uiteengesit, sal die derde egter meesal verkies om op wedersydse verteenwoordigingsbevoegdheid as gebondenheidsgrondslag te steun.[85] Hoewel die feite uiteraard ook die keuse ten opsigte van estoppel (geval (c)) sal beïnvloed, kan die derde verkies om eerder op die ander gebondenheidsgrondslae te steun omdat daar strenger vereistes gestel word om met estoppel as verweersgrond te slaag.[86] Estoppel sal derhalwe meesal as laaste alternatief dien om die gebondenheid van die vennootskap te bewys. Behalwe vir die feite van die besondere saak word die keuse tussen estoppel en die ander gebondenheidsgrondslae derhalwe ook deur die bewysregtelike vereistes beïnvloed.

3 2 Interne voorvereistes ten opsigte van volmag

3 2 1 Derde onbewus van bestaan van interne voorvereiste

Soos reeds hierbo aangetoon is,[87] is die verteenwoordigingsbevoegdheid 'n *naturale* van die vennootskapsooreenkoms en kan hierdie bevoegdheid gevolglik in die vennootskapsooreenkoms of 'n latere ooreenkoms tussen die vennote ingekort of selfs uitgesluit word. Die voorbeeld wat hierbo gebruik is,[88] het betrekking op die uitdruklike uitsluiting (uitdruklike verbod) van vennoot A se volmag. Vervolgens word stilgestaan by interne voorvereistes ten opsigte van volmag. Veronderstel byvoorbeeld dat die vennootskapsooreenkoms bepaal dat vennoot A eers vennoot B se goedkeuring moet kry alvorens hy (A) kontrakte van meer as R1 000 namens die vennootskap mag sluit. Ondanks hierdie interne voorvereiste sluit A 'n kontrak (wat in alle opsigte binne die kring van bedrywighede van die vennootskap val) van R2 000 in naam van die vennootskap sonder om B se goedkeuring te verkry. Is die vennootskap gebonde en wat is die grondslag van gebondenheid?

Was die derde onbewus van die bestaan van hierdie interne voorvereiste, sal hy allereers op wedersydse verteenwoordigingsbevoegdheid as gebondenheidsgrondslag steun.[89] Kennis van hierdie bepaling word hom immers nie toegereken nie[90] en gevolglik kan die derde aanvaar dat die persoon wat as vennoot die kontrak (wat in alle opsigte binne die kring van bedrywighede van die vennootskap val) in naam van die vennootskap gesluit het, die nodige volmag het.[91] Die interne voorvereiste ten opsigte van volmag (dat vennoot A eers

83 *Idem* 403–404; Henning en Delport *Partnership* 318 par 416 vn 12 13.
84 Henning en Delport *Partnership* 317–318 par 416.
85 Sien par 3 1 2 *supra*.
86 Du Plessis 1991 *SA Merc LJ* 291; Fourie 1992 *TSAR* 3.
87 Sien par 3 1 1 *supra*.
88 *Ibid*.
89 Sien par 2 3 *supra*.
90 Sien par 2 4 3 *supra*.
91 Sien par 2 3 *supra*.

vennoot B se goedkeuring moet kry alvorens hy (A) kontrakte van meer as R1 000 names die vennootskap mag sluit) gaan die derde normaalweg nie *per se* aan nie aangesien dit net teenoor die vennote onderling werking het.

Is die derde egter bewus van die bestaan van die interne voorvereiste, kom ander oorwegings ter sprake.

3 2 2 Derde bewus van bestaan van interne voorvereiste

As die derde daadwerklike kennis van die interne voorvereiste ten opsigte van volmag gehad het, bestaan die moontlikheid dat die tweede billikheidsgerigte handelsdoelmatigheidsreël, naamlik die *Turquand*-reël, ter sprake kan kom.[92]

Dit is moontlik dat die feite van die besondere saak sodanig is dat die derde ook kan steun op byvoorbeeld stilswyende werklike volmag of *ex post facto* ratifikasie of selfs estoppel.[93] Die aangewese grondslag van gebondenheid is egter die *Turquand*-reël. Die derde kan dus aanvaar dat B inderdaad sy goedkeuring aan A verleen het. Die vennootskap sal gevolglik aan die kontrak gebonde wees al het B nie sy goedkeuring verleen nie, behalwe (a) as die derde geweet het dat hy dit nie verleen het nie; of (b) as omstandighede bestaan het waarin dit van die derde verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes en hy nie verdere ondersoek ingestel het nie.[94] Met ander woorde, die vennootskap spring gebondenheid vry as enigeen van die twee kwalifikasies op die *Turquand*-reël op die derde van toepassing is.

3 2 3 Derde bewus van nie-nakoming van interne voorvereiste

Ook die *Turquand*-reël is gebaseer op billikheid en die bevordering van handelsdoelmatigheid[95] en is tot die beskikking van *bona fide* derdes.[96] Die derde wat bewus is van die nie-nakoming van die interne voorvereistes is *mala fide* en daar bestaan geen ruimte om aan hom die voordeel van hierdie billikheidsgerigte handelsdoelmatigheidsreël te verleen nie.

3 3 Transaksie buite die sfeer van die vennootskapsbesigheid

In paragraaf 3 1 en 3 2 is veronderstel dat die kontrak in alle opsigte binne die kring van bedrywighede van die vennootskap val. Kan die vennootskap steeds gebonde wees as die transaksie een is wat buite die sfeer van die vennootskapsbesigheid val? Dit is wel moontlik, maar dan is die enigste twee gebondenheidsgrondslae estoppel of ratifikasie. Die derde sal derhalwe moet bewys dat die vennootskap die skyn verwek het dat die handeling inderdaad binne die werkkring van die vennootskap val of dat die optrede van die betrokke vennoot deur die vennootskap werklik of skynbaar geratifiseer is.[97]

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92 Sien par 3 1 2 *supra*.
93 *Ibid*.
94 Sien par 2 4 3 *supra*.
95 Henning 1984 *TRW* 163 164; Henning en Delport *Partnership* 315 par 415. Vgl ook Du Plessis 1991 *SA Merc LJ* 283 – 284; Stern 651; par 3 1 2 *supra*.
96 Henning 1984 *TRW* 163 – 164; Henning en Delport *Partnership* 315 par 415.
97 Sien par 3 1 2 *supra*; Oosthuizen *Turquand-reël* 336.

4 SAMEVATTING EN GEVOLGTREKKINGS

In die geval van kontraksluiting deur 'n vennoot bestaan daar 'n aantal eiesoortige ondernemingsregtelike beginsels wat in die vennootskapsreg aanwending vind. Dit is naamlik dat daar 'n wedersydse trouverhouding tussen vennote bestaan, dat 'n vennoot wat namens 'n vennootskap kontrakteer as verteenwoordiger én prinsipaal optree en dat die leerstuk van wedersydse verteenwoordigingsbevoegdheid (*mutua praepositio*) en die *Turquand*-reël aanwending vind. Wat die leerstuk van *mutua praepositio* betref, kan die derde wat met 'n vennoot onderhandel, aanvaar dat die vennoot bevoeg is om regshandelinge wat met die vennootskap in verband staan namens die vennootskap te verrig. Al is die vennoot se volmag uitdruklik ingeperk of al is daar nie voldoen aan sekere vereistes wat die vennote onderling bepaal het alvorens die betrokke vennoot volmag mag hê nie, is die vennootskap op grond van die leerstuk van *mutua praepositio* gebonde as die handeling een is wat binne die sfeer van die vennootskapsbesigheid val. Uitdruklike volmagbeperkinge of interne voorvereistes ten opsigte van volmag het normaalweg net werking tussen vennote onderling, aangesien die leerstuk van toegerekende kennis nie in die geval van die vennootskapsreg geld nie. Die rede vir die gebondenheid van die vennootskap op grond van die leerstuk van *mutua praepositio* is geleë in billikheid en die bevordering van handelsdoelmatigheid. Die gevolg hiervan is onder andere dat die derde, wat daadwerklike kennis van die uitdruklike volmagbeperking of die nie-nakoming van die interne voorvereistes ten opsigte van volmag gehad het, nie voordeel mag trek uit hierdie billikheidsgerigte doelmatigheidsreël nie.

Wat die *Turquand*-reël betref, vind dit in die vennootskapsreg slegs toepassing as die derde wat met 'n vennoot onderhandel daadwerklike kennis van die bestaan van die interne voorvereistes het, want kennis van die bestaan van die interne voorvereistes word die derde nie toegereken nie. Ingevolge hierdie reël kan die derde aanvaar dat daar inderdaad aan alle interne voorvereistes voldoen is. Die vennootskap sal gevolglik aan 'n kontrak gebonde wees al is daar nie aan die interne vereistes voldoen nie, behalwe (a) as die derde geweet het dat daar nie aan die interne vereistes voldoen is nie; of (b) as omstandighede bestaan het waarin dit van die derde verwag kon word om verdere ondersoek in te stel na die nakoming al dan nie van die interne voorvereistes en hy nie verdere ondersoek ingestel het nie. Met ander woorde, die vennootskap kan gebondenheid vryspring as enigeen van die twee kwalifikasies op die *Turquand*-reël op die derde van toepassing is. Daadwerklike kennis van die bestaan van die interne voorvereistes ten opsigte van volmag word nie sonder meer as agterdogwekkende omstandigheid beskou nie.

Die vennootskap kan selfs gebonde wees as die transaksie een is wat buite die sfeer van die vennootskapsbesigheid val, maar dan is die enigste twee gebondenheidsgrondslae estoppel of ratifikasie. Die derde sal derhalwe moet bewys dat die vennootskap die skyn verwek het dat die handeling inderdaad binne die werkkring van die vennootskap val of dat die optrede van die betrokke vennoot werklik of skynbaar deur die vennootskap geratifiseer is.

Dit is van besondere belang dat versoening gesoek moet word tussen verskillende beginsels wat potensieel by kontraksluiting namens vennootskappe ter sprake kan kom. Soms is sekere beginsels, leerstukke of reëls nie ter sprake nie omdat die vereistes wat daarvoor gestel word, nie bewys kan word nie. In ander

gevalle weer kan meerdere beginsels, reëls of leerstukke op dieselfde feite van toepassing wees. In hierdie gevalle werk die beginsels, reëls of leerstukke nie noodwendig mededingend nie. Die keuse om van 'n spesifieke gebondenheidsgrondslag gebruik te maak, lê by die eiser. Die feite van elke saak en die bewyslas wat op die eiser rus, sal normaalweg 'n bepalende rol in hierdie keuse speel.

Die appelleerbaarheid van interlokutore hofbeslissings[1]

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SUMMARY

The appealability of interlocutory decisions

The practice of dividing court proceedings for damages into the liability issue and the quantum issue, must be regarded as a well-established way of dealing with claims for certain heads of future damages. Changes to the Rules of Court have enhanced its application. The matter of the appealability of a decision on the liability issue before the quantum issue has been resolved, has, however, remained one of the most canvassed, yet most vexing current problems. It forms part of the wider question of the appealability of interlocutory decisions. The words used in the relevant sections and rules provide no guide; in fact, it has been argued that imprecise, inconsistent and illogical usage and poor translations of the words used have done much to add to the confusion.

The Roman-Dutch criterion for deciding this issue was whether the interlocutory decision *caused irreparable harm to the prospective appellant's case.* In English law the criterion has been expressed in the requirement that the decision *must have brought an end to the dispute between the parties.* After the more stringent "English approach" was "found to be essentially identical" to that of Roman-Dutch law, it was applied in many cases. Thus a choice was made for the view that it was more important to inhibit so-called piece-meal appealing than to allow everyone who was dissatisfied with a decision, to appeal against it to a hierarchically higher court. The approach of Roman-Dutch law was markedly less strict, and in an equally impressive line of cases a more accommodating or pragmatic test was applied. This would tend towards greater leniency in allowing appeals against interlocutory decisions, striving to satisfy the needs of parties feeling dissatisfied with such decisions.

Unfettered interim appealability would undoubtedly create chaos. Therefore a wide array of factors have been used by courts following either of the approaches. Unfortunately this has left our law in a cluttered, confused and uncertain state. Judgments such as those in *Van Streepen v Germs* 1987 4 SA 569 (A) and *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 2 SA 786 (A) have also not brought clarity to this aspect of our law.

In an effort to promote the fundamental right of appeal against a decision with which one feels dissatisfied, it is proposed that the more pragmatic approach of Roman-Dutch law be followed, thus providing a guideline principle that can be used to systematise the multitude of factors that courts now use as reasons for their decisions. It has also been proposed that the provisions be more wisely, concisely and economically worded and translated, in order to promote legal certainty and better service to the parties involved and the whole community.

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1 HL Swanepoel-lesing getitel "'n Punt in limine!", gehou op 1992-08-04.

1 INLEIDING

1 1 Probleemstelling

Die kwessie waaroor dit hier handel, is van belang in die konteks van 'n voorstel wat ek reeds in 1977 in verband met die skadevergoedingsreg sterk gepropageer het.[2] Die moontlikheid om 'n hof te versoek om in gevalle waar skadevergoeding geëis word, slegs oor die kwessie van aanspreeklikheid 'n besluit te neem sonder dat enige getuienis oor die kwantum gelei is – dit wil sê om 'n sogenaamde "aanspreeklikheidsbevinding" te maak – het 'n goeie uitweg gelyk om te ontkom aan van die probleme wat met die verhaal van skadevergoeding vir sekere toekomstige skade ervaar word. Indien die verrigtinge in 'n aanspreeklikheidsbevinding en 'n kwantumbepaling geskei word, kan koste bespaar en skikking aangemoedig word; versekeringsmaatskappye kan dan hulle "boeke gouer afsluit" deurdat daar gouer finaliteit oor die voorwaardes vir die vergoeding van toekomstige skade verkry kan word. Daarby kom nog dat die skeiding van die verrigtinge voor 'n hof in twee dele lank reeds goed in ons regspraktyk gevestig is. Die voorstel wat in 1977 gemaak is, is grootliks begunstig deur die wysiging van die Eenvormige Hofreëls in 1987 toe by Reël 33(4) die voorbehoudsbepaling gevoeg is wat dit veel makliker maak om te slaag met 'n versoek om skeiding van die hofverrigtinge op grond van gerieflikheid. Die invoeging van Reël 34A in dieselfde jaar om tussentydse betalings moontlik te maak, begunstig dit verder. Die probleem wat egter telkens vanuit die prosesreg opduik, is of so 'n aanspreeklikheidsbevinding vir appèl vatbaar is waar nog geen bevinding oor die kwantum gemaak is nie.

1 2 Twee botsende uitgangspunte

Die uitgangspunt wat telkens in die howe geopper word, is die bekende een dat stuksgewyse afhandeling van geskille voorkom moet word. Oor die grense van daardie uitgangspunt sal in hierdie uiteensetting standpunt ingeneem moet word, want daarteenoor staan die beginsel dat iemand wat nie tevrede is met die uitslag van 'n hofgeding nie dieselfde hof moet kan vra om sy uitspraak te wysig, óf dit op hersiening moet kan neem, óf appèl daarteen moet kan aanteken.[3]

In die toepaslike bepalings oor appelleerbaarheid kom 'n groot verskeidenheid terme voor. Daaraan word in paragraaf 2 aandag gegee.

Dit is goed bekend dat nie alle hofuitsprake vir appèl vatbaar is nie. Daarom is dit belangrik dat ingegaan word op die vereistes waaraan voldoen moet word alvorens 'n hofuitspraak wel vir appèl vatbaar is – en daardie vereistes is in sekere woorde in die betrokke wette en hofreëls uitgedruk.[4] Dit gaan dus hier

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2 Kyk Van der Walt *Die sommeskadeleer en die "once and for all"-reël* (LLD-proefskrif Unisa 1977).

3 Gregorowski R het dit al in *Donoghue v Executor of Van der Merwe* (1897) 4 Off Rep 1 in suiwer Romeins-Hollandse terme so gestel.

4 Uiteraard kan nie hier op alle aspekte van appelleerbaarheid ingegaan word nie. Dit is trouens ook nie nodig nie omdat uitgebreide besprekings hiervan in verskeie bronne oor die prosesreg tov ons landdroshowe en hooggeregshof voorkom. In daardie bronne is lyste opgeneem van gevalle waar 'n mens met 'n hofuitspraak te make sal hê wat wel vir appèl vatbaar is, en gevalle waar dit nie die geval is nie. Dit word nie hier herhaal nie: kyk bv Pretorius *Burgerlike prosesreg in die landdroshowe* vol 2 (1986) 902 – 905; Erasmus en Van Loggerenberg *Jones and Buckle: The civil practice of the magistrates' courts in South Africa* (1988); Van Winsen, Eksteen en Cilliers *Herbstein and Van Winsen: The civil practice of the superior courts in South Africa* (1979); Nathan en Barnett *Eenvormige hofreëls* (1984); Harms *Civil procedure in the superior courts* (1990) par T15.

grootliks oor die betekenis van woorde wat reeds vir 'n lang tyd gebruik word, en tog nog elke keer uitgebreide behandeling van die howe ontvang.[5]

2 DIE WOORDE IN DIE BETROKKE WETGEWING

2 1 Algemene opmerkings in die lig van *Holland v Deysel* 1970 1 SA 90 (A)

Die kwessie van vatbaarheid vir appèl word lankal[6] statutêr gereël. Dit is vir my doel nie nodig om op al die vorige wetgewing in te gaan nie. Daar kan volstaan word met 'n ondersoek na die bewoording van die huidige bepalings.[7]

Artikel 83 van die Wet op Landdroshowe 32 van 1944 bepaal dat appèl aangeteken mag word teen 'n vonnis (dit sluit in: vonnis ten gunste van die eiser of verweerder, absolusie van die instansie, 'n kostebevel, 'n bevel wat die werking van 'n vonnis opskort terwyl die ander party reëlings vir voldoening aan die vonnis tref), 'n beskikking of bevel wat die uitwerking van 'n finale vonnis het met inbegrip van enige bevel kragtens Hoofstuk IX en 'n kostebevel, asook 'n beslissing waardeur 'n eksepsie afgewys word, wanneer die partye tot die appèl toestem alvorens 'n aksie verder gevoer word, of wanneer daarteen geappelleer word in verband met die hoofsaak, of wanneer dit 'n kostebevel insluit.

Die funksionele woorde[8] is "vonnis" ("judgment"), "beskikking" ("rule") of "bevel" ("order") wat die uitwerking van 'n finale vonnis ("judgment") het, en, wat eksepsies betref, die "beslissing" ("decision") waardeur die eksepsie afgewys word.

Artikel 20(1) van die Wet op die Hooggeregshof 59 van 1959 bepaal dat 'n appèl teen 'n "uitspraak of bevel" ("judgment or order") van 'n provinsiale of plaaslike afdeling in 'n siviele geding of teen enige "uitspraak of bevel"

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5 Hierdie problematiek veroorsaak elders klaarblyklik ook hoofbrekens: reeds in *Steytler v Fitzgerald* 1911 AD 295 325–326 het Laurence R verwys na die deurmekaarspul hieroor in die Engelse reg – en dit is klaarblyklik steeds waar – want in *Salter Rex & Co v Ghosh* (1971) 2 QB 597 gooi Lord Denning MR eintlik die handdoek in as hy sê: "This question of 'final' or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way" (601C–D).

6 Die eerste *Placaat* daaroor wat vir ons van belang is, was dié van 1458-12-01 (*Groot Placaatboek III* 643). Koloniale wetgewing soos die Order in Council 1870 en wat dit vooraf gegaan het veral sedert 1864, het ook invloed uitgeoefen. Die Zuid-Afrika Wet 1909, Wet 32 van 1917 en Wet 32 van 1944, asook Wet 59 van 1959 en Wet 105 van 1982 is van die belangrikstes.

7 Dat dit nie 'n voor-die-hand-liggende stap is nie, blyk daaruit dat dit vir 'n lang tyd deur die howe as onnodig beskou is om dit te doen as hulle oor die appelleerbaarheid van 'n beslissing moet besluit, soos blyk uit *Bell v Bell* 1908 TS 887; en in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA (A) 867 waar die meerderheid van die hof beklemtoon dat hulle die saak benader vanuit die "accepted practice of the Courts" en hoegenaamd nie deur die woorde van a 83 van die Wet op Landdroshowe 32 van 1944 uit te lê nie. Die minderheid het by monde van Watermeyer HR die eerste keer bewustelik gepoog om die betrokke bepalings van Wet 32 van 1917 en Wet 32 van 1944 uit te lê (859)!

8 Die ekwivalente woorde in die Engelse teks word tussen hakies weergegee. Hierna sal blyk dat dieselfde woord in verskillende stukke wetgewing verskillend vertaal word, wat sake onnodig kan bemoeilik.

("judgment or order") van so 'n hof in appèl gegee, deur die appèlafdeling verhoor word.[9]

In *Holland v Deysel* het die hof kritiese opmerkings gemaak oor die verskeidenheid terme wat gebruik word in die Wet op die Hooggeregshof 59 van 1959, die Reëls van die Appèlafdeling en die Eenvormige Hofreëls en aanknoping gesoek by die uitspraak in *Heyman v Yorkshire Insurance Co Ltd*[10] waar gesê is dat

> "'uitspraak', 'bevel', 'beslissing', en 'vonnis' almal dui op *die uitsluitsel wat 'n hof gee in verband met die bepaalde regshulp wat in gedingvoering deur 'n party aangevra is.* Die presiese formulering van die uitsluitsel sou van die woordkeuse van die Hof afhang, of kan verband hou met die formulering van die aangevraagde regshulp of ook moontlik met die aard van die gedingvoering".

2 2 Verdere hantering van die probleem

Daar sou na talle voorbeelde van inkonsekwente gebruik van terme in die wette, hofreëls en regspraak verwys kon word. Dit sou 'n mens egter te ver van die huidige onderwerp wegvoer en word dus daargelaat.[11]

Die kwessie van appelleerbaarheid is nie altyd eenders benader nie. Daar is vir 'n lang tyd 'n baie streng siening gehuldig waardeur die betrokke woorde in die wetgewing eng uitgelê en die moontlikheid van appèl beperk is. Die streng benadering word in paragraaf 3 uiteengesit. Dit is opgevolg met 'n benadering wat 'n wyer, meer begunstigende uitleg aan die betrokke woorde in die wetgewing gegee het en steeds gee. Die soepel benadering kom in paragraaf 4 aan die orde. Verder word gekyk waar die uitspraak in *SA Eagle Versekeringsmaatskappy Bpk v Harford*[12] inpas. Dit word in paragraaf 5 onderneem voordat in paragraaf 6 'n slotsom aangebied word.

3 DIE STRENG (NATALSE[13]) BENADERING

3 1 Inleiding

Die streng benadering het veral in 'n reeks Natalse uitsprake na vore getree.

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9 Terloops kan net daarop gewys word dat die Engelse woord "judgment" in die twee wette se Afrikaanse tekste onderskeidelik met "vonnis" en "uitspraak" vertaal word. Of dit nodig is om so 'n onderskeid te maak, kan in die lig van die reeds bestaande onsekerheid op hierdie gebied bevraagteken word.

10 1964 1 SA 487 (A) 493A – B (my kursivering).

11 Sien hieroor Van der Walt "Die appelleerbaarheid van interlokutore hofbeslissings steeds verduister deur 'n warboel terme en bedenklike vertalings?" 1992 *THRHR* 624.

12 1992 2 SA 786 (A).

13 Die manier waarop in die Natalse provinsiale afdeling met gevalle omgegaan is waar 'n aksie verdeel is, het tot talle appèlle gelei waarin die kwessie van appelleerbaarheid ondersoek is. Alhoewel sodanige skeiding daar toegelaat is, het die hof eers nadat die kwantum deur ooreenkoms tussen die partye of deur die hof vasgestel is, sy uitspraak gelewer. Eers daarna kon geappelleer word. Hierdie Natalse praktyksreël het verskil van die gevolg in bv die Transvaalse afdeling. Die Natalse benadering het na ander afdelings uitgebrei (Oos-Kaap: *Great Fish River Irrigation Board v Southey* 1928 AD 113; Transvaal: *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA (A) 867; Witwatersrand: *Heyman v Yorkshire Insurance Co Ltd* 1964 1 SA 487 (A); Kaap: *Holland v Deysel* 1970 1 SA 90 (A); die destydse Rhodesië: *Globe and Phoenix GM Company v Rhodesian Corporation* 1932 AD 146, *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 1 SA 339 (A)). Daardeur het die verwarring net groter geword.

3 2 *Dickenson v Fisher's Executors* 1914 AD 424

Die kwessie van die appelleerbaarheid van 'n beslissing in 'n geskeide verhoor was in hierdie saak aan die orde. 'n Aansoek om kondonasie vir die indiening van die stukke met die oog op appèl teen 'n uitspraak van die Natalse provinsiale afdeling is hier geweier. Die feite was die volgende: sekere geskille tussen die partye (wat voorheen vennote was) is deur arbitrasie gehanteer en die respondent het aansoek gedoen om die toekenning van die arbiter 'n bevel van die hof te maak. Daarteenoor het die appellante versoek dat dit tersyde gestel word. Tydens die verrigtinge ontstaan 'n geskil oor die vraag of die partye beperk is tot die bepalings van die vennootskapsooreenkoms as deel van die getuienis wat tydens die arbitrasie voorgelê is, en of ook na die ander getuienis tydens daardie verrigtinge verwys kon word. Oor hierdie bewysregtelike kwessie is toe argumente aangehoor en die hof het met vermelding van redes beslis dat die appellante beperk word tot die vennootskapsooreenkoms. Hierteen word toe dadelik met die toestemming van die hof geappelleer en nie, soos gebruiklik was, eers op grond van daardie beslissing met die beredenering van die meriete van die aansoek voortgegaan en 'n beslissing daaroor verkry nie. Die hof meen dat so 'n stap moontlik is ingevolge die statutêre bepaling dat in geval van "interlocutory order(s)" net met die toestemming van die hof geappelleer kon word.[14] Waarnemende appèlregter Innes meld dat die gevolg die stuksgewyse afhandeling van 'n appèl sou wees wat in die omstandighede nie juis gerieflik sou wees nie; die eintlike vraag was volgens hom egter of die beslissing van die hof oor die beperking van die getuienis 'n "order" kragtens die wet en dus vir appèl vatbaar was (427). Met verwysing na *Onslow v Commissioners of Inland Revenue*[15] sê regter Innes die volgende:

> "If it were necessary to distinguish between a judgment and an order, the difference would probably be found to be this, that the term judgment is used to describe a decision of a court of law upon relief claimed in an action, while by an order is understood a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice . . . but every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be *a distinct application by one of the parties for definite relief*. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but *the court must be duly asked to grant some definite and distinct relief*, before its decision upon the matter can properly be called an order. A trial court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstances lie, apart from the final decision on the merits."

Appèlregter Solomon voeg hieraan toe dat 'n appelleerbare beslissing net bestaan as dit deur die griffier in 'n formele dokument vervat is of waarskynlik so vervat sou word. Volgens hom moet 'n beslissing soos in die onderhawige geval ter sprake is, 'n "ruling" genoem word en nie 'n "order of court" nie, en word so iets eintlik nooit deur die griffier in 'n "formal order" uitgedruk

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14 Interlokutore bevele kom in par 4 2 hieronder pertinent aan die orde.

15 25 QBD 465 427 (my kursivering). Daar word na hoegenaamd geen Romeins-Hollandse gesag verwys nie.

nie. Waar die griffier, soos hier,[16] wel die beslissing in 'n formele hofbevel uitgedruk het, *moet verder vasgestel word of hy dit vrymoedig en redelik maklik gedoen het.*[17] In die onderhawige geval het die griffier wel die beslissing van die hof in 'n formele bevel uitgedruk, maar volgens regter Solomon het hy dit maar net gedoen omdat hy weens die toestemming van die hof om met die appèl voort te gaan, daartoe gedwing is – en in elk geval toon die terme van die bevel vir hom dat die griffier aansienlike moeite ondervind het om die beslissing in die vorm van 'n formele hofbevel uit te druk.[18]

3 3 *Nxaba v Nxaba* 1926 AD 392

In hierdie saak het die Natalse hof op formele versoek waartoe albei die partye ingestem het, 'n regspunt wat uit die pleitstukke voortgekom het, gehanteer en daaroor 'n beslissing bereik nog voordat enige getuienis hoegenaamd in die saak gelei is. Nadat die hof daardie punt met koste ten gunste van die eiser uitgewys het, dog geen beslissing gevel het ten opsigte van die regshulp wat in die eisuiteensetting gevra is nie, het die verweerder appèl aangeteken. Die eerste vraag wat in appèl gehanteer is, was of daardie beslissing vir appèl vatbaar was.[19]

Die appèlafdeling wys die appèl by monde van hoofregter Innes af. Hy verwys na albei die vereistes wat in die *Dickenson*-saak gestel is,[20] en voeg dan self 'n verdere vereiste by, naamlik *dat die hof met die lewering van sy beslissing moet beoog het om daardie beslissing aan te wend ter oplossing van die geskil wat vir beregting voor die betrokke hof geplaas is.*

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16 Die bevel lui: "The Court holds that the objector must be limited in any reference to the evidence before the umpire to the contract of partnership itself" (424).

17 Die moeite wat die griffier dan volgens die hof se waarneming oënskynlik ondervind het om in die onderhawige geval die beslissing in die vorm van 'n formele bevel uit te druk, moet dan seker as getuienis oorweeg word wanneer besluit moet word oor die waarskynlikheid dat die beslissing wel 'n hofbevel is. Dit klink egter subjektief. Sou die griffier moet kom getuig?

18 419–430. Solomon AR verduidelik nie watter terme van die hofbevel hom so laat dink nie. Op die oog af is daar geen rede vir die afleiding dat die griffier gesukkel het om hierdie beslissing in die vorm van 'n bevel uit te druk nie.

19 Die hof verklaar dat dit slegs die geval sou wees indien dit binne die strekwydte van a 104 van die Zuid-Afrika Wet 1909 sou val. Daarin is die bepaling van die Order in Council van Julie 1870 oorgeneem, nl dat "any final judgment, decree, or sentence of the Supreme Court or any rule or order made in a civil action, and having the effect of a final or definitive sentence, might be appealed against" (394).

20 *Supra*. Die hof is verwys na *Corporation of Petersborough v Overseers of Willsthorpe* 12 QBD 1 waarin beslis is dat 'n beslissing oor 'n regspunt wel vir appèl vatbaar is. Omdat daardie geval egter as 'n gestelde saak kragtens 'n wet voor die hof (QBD) gebring is, hangende 'n appèl voor 'n ander hof (Quarter Sessions), en die hof *in casu* nie gevra is om oor 'n regspunt uitspraak te gee met die oog op die beslissing van die geskil voor die betrokke hof nie, so lyk dit, wil die hof nie eens uitmaak of daardie benadering met ons reg ooreenstem nie (394). Hierdie benadering kom baie formalisties voor en vertoon die vroeëre streng hantering van die onderhawige problematiek. Dit laat die gedagte ontstaan dat die aangeleentheid deur die Suid-Afrikaanse howe strenger benader is as wat in die Engelse howe die geval sou wees. Dit sou ironies wees aangesien die streng benadering juis sy grondslag in die Engelse reg eerder as in die Romeins-Hollandse reg het. Hierdie gevolgtrekking word bevestig in *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd* 1956 1 SA 339 (A) waar die hof daarop wys dat ingevolge a 27(1) van 15 en 16 Geo 5C.49, en soos bevestig is in *Re Yates' Settlement Trusts* 1954 1 All ER 619, 'n beslissing van 'n hof van eerste instansie om verrigtinge voor hom uit te stel hangende die beslissing van die House of Lords in 'n ander saak, wel vir appèl voor die Court of Appeal vatbaar is.

3 4 *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A)

Hier is die verskynsel van *interlocutoria sententia* na aanleiding van 'n beslissing van die Transvaalse hof aan die orde gestel. Dit het 'n verdeelde uitspraak tot gevolg gehad.[21]

In die Johannesburgse landdroshof is 'n bedrag geëis, synde die waarde van 'n aantal blikke slaaisous wat gelewer is maar nie geskik was vir menslike gebruik nie. Die respondent het nadere besonderhede gevra ten einde te kon pleit, sommige waarvan geweier is. Die landdros staan toe op versoek 'n bevel, met koste, toe dat die appellant verplig was om die gevraagde besonderhede te verskaf. Hierteen appelleer die appellant na die Transvaalse provinsiale afdeling wat weier om dit te hanteer omdat die landdros se beslissing volgens die hof nie vir appèl vatbaar was nie. Ofskoon die kostebevel wel vir appèl vatbaar was, wys die hof die appèl daarteen van die hand. Teen albei hierdie beslissings is toe na die appèlafdeling geappelleer.

Die meerderheid van die hof beslis by monde van appèlregter Schreiner dat die landdros se bevel ten opsigte van die voorsiening van verdere besonderhede nie vir appèl vatbaar was nie en dat die appèl teen die kostebevel ook van die hand gewys moet word. Die redes hiervoor word vervolgens bekyk.

In die eerste plek lê die hof klem daarop dat hy die saak benader vanuit wat genoem word die "accepted practice of the Courts"[22] en hoegenaamd nie deur die woorde van artikel 83 van die wet uit te lê nie. Die uitgangspunt van die meerderheid is dat aanvaar moet word dat die wetgewer, toe hy bepaal het dat daar 'n "rule or order having the effect of a final order" moet wees, die onderskeid in gedagte gehad het wat in die howe gemaak is tussen "simple interlocutory orders and all other orders".[23] Hy meen dat "comment has overcome construction" sodat dit nie meer moontlik is om die betrokke wetgewing uit te lê op grond van 'n "straightforward application of the ordinary meaning of the words used" nie.[24] So 'n benadering maak die gevaar vir verwarring natuurlik net groter. Waar die grens getrek moet word tussen die twee klasse bevele, is egter nêrens finaal bepaal nie en die hof twyfel ook of so 'n maatstaf gevind sal kan word. Sou die belang van die aangeleentheid met die oog op

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21 Die minderheid se mening hieroor, deur Watermeyer HR geskryf, word in par 4 2 hieronder uiteengesit.

22 867. Vgl *Globe and Phoenix GM Company v Rhodesian Corporation* 1932 AD 146 waar Wessels AR, sonder om hom op gesag te beroep, verklaar dat die wetgewer tov die destydse Rhodesiese wetgewing eenvoudig die "well-known procedure of this Court", oftewel "the universal South African practice" (153) op 'n verkorte wyse op appèlle uit Rhodesië van toepassing wou maak. Dit het gehandel oor die vraag of 'n bevel van die Rhodesiese High Court, ingevolge waarvan die verweerder inspeksie van 'n myn moes toelaat om die applikant se deskundige in staat te stel om hom behoorlik op die hoogte te stel sodat hy getuienis sou kon lewer in die saak, vir appèl vatbaar was. Die kwessie is bekyk vanuit die Engelse uitgangspunt wat klem lê op die vraag of 'n finale bevel oor die gevraagde regshulp gemaak is of nie (153). Wessels AR gebruik ook die Romeins-Hollandse formulering van "irreparable prejudice" (155) en weier om die oorwegings van onkoste en ongerief in ag te neem (155). Watermeyer HR kritiseer hierdie uitspraak sterk waar hy aantoon dat dit gelewer is sonder om te let op die vorige, daarmee strydige uitsprake in die *Myburgh Krone-* en *Blaauwbosch Diamonds*-saak (862). In daardie sake is nl die Romeinsregtelike toets van "the last word spoken", oftewel die Romeins-Hollandse reg se toets van "*gravamen irreparabile*" aangewend (860).

23 867.

24 Sien 867 – 869.

die uitmaak van die hoofgeskil, of die vraag of die hof wat die bevel gemaak het dit nog kon wysig, of oorwegings van geregtigheid byvoorbeeld die antwoord kan bied? Die hof aanvaar dat daar na weerskante gevalle sal wees wat deernis wek, ongeag of 'n meer begunstigende of meer beperkende benadering gevolg sou word. Omdat die bestaande praktyksreël duidelik genoeg is, sien appèlregter Schreiner nie kans om af te wyk daarvan net omdat dit *nie noodwendig logies of in pas met gemeenregtelike gesag is nie*. Ter wille van die mate van "consistency"(*sic*) wat die moderne howe wel bereik het, behoort volgens die meerderheid daarby gehou te word. Die praktyksreël na aanleiding van die *Globe and Phoenix*-saak behels dat

> "a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit'[25] *or, which amounts, I think, to the same thing*, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing' ".[26]

Daarmee is die maatstaf van die Engelse reg gevolg en nie dié van die Romeins-Hollandse reg nie – nie die herstelbaarheid van die ongerief of nadeel van 'n party gee dus die deurslag nie[27] maar die vraag of oor iets beslis is wat in die hoofaksie ter sprake is.[28] Oor die korrektheid van vorige uitsprake in sowel die appèlafdeling as in ander afdelings van die hooggeregshof[29] wil regter Schreiner hom nie uitlaat nie, veral omdat daar reeds navolging van daardie beginsel was. Hy verwys na geen verdere gesag vir sy siening nie.

3 5 *Heyman v Yorkshire Insurance Co Ltd* 1964 1 SA 487 (A)

In hierdie saak het die volgende in die Witwatersrandse afdeling gedien: die respondent het gedagvaar vir die verhaal van 'n bedrag wat hy na bewering aan die spoorwegadministrasie betaal het as borg vir ene Dippenaar wat bouwerk vir die spoorwegadministrasie moes gedoen het maar dit nagelaat het. Respondent se verhaalsreg berus op 'n beweerde onderneming deur die appellant om hom skadeloos te stel indien hy ingevolge die borgkontrak aanspreeklik gehou sou word. Voor die verhoor kom die partye ooreen dat die vraag of daar 'n geldige borgkontrak was, afsonderlik bereg sou word en die ander kwessies gelaat moes word totdat daaroor beslis is; verder dat die appellant dadelik sou kon appelleer as beslis sou word dat die borgkontrak wel geldig was. Die appellant sou ook getuienis kon lei oor al die ander geskilpunte en dit laat bereg, al sou ten opsigte van die geldigheid van die borgkontrak ten gunste van die respondent beslis word. Nadat getuienis oor die geldigheid van die borgkontrak gelei is en albei partye hulle sake daaroor gesluit het, het die hof ten gunste van die respondent beslis dat die borgkontrak wel geldig was. Hierteen is geappelleer.

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25 Die Engelsregtelike toets.

26 870 (my kursivering): die toets van die Romeins-Hollandse reg.

27 So ook in die *Globe and Phoenix*-saak *supra* 155.

28 870. Die gelykstelling van die twee maatstawwe, nl of uitsluitsel gegee is oor iets wat in die hoofaksie toegestaan kon word, en of die beslissing vooruitgegryp het na regshulp wat in die hoofaksie toegestaan sou kon word en dit sodoende uitgesluit het, kom al in die *Globe and Phoenix*-saak *supra* 163 voor, waar Curlewis AR die twee saamgevoeg het in een "test".

29 *Erasmus v Daly* 1912 TPD 465. Schreiner AR gee toe dat hierdie saak moontlik nie so duidelik in pas was met die benadering wat in die *Globe and Phoenix*-saak gevolg is nie, maar wil dit tog nie bevraagteken nie omdat dit toe reeds meer as 30 jaar gegeld het.

Die hof beslis dat die beslissing nie vir appèl vatbaar is nie en later sy redes sal verskaf.

Daar word bevind dat die borgkontrak geldig is. So 'n beslissing is seker wel bindend op die partye en nie vir hersiening deur die hof vatbaar nie, sê hoofregter Steyn, maar dit is nog steeds nie 'n "judgment on the relief claimed" nie, los nie die geskil voor die verhoorhof op nie en is dus nie 'n "final order" nie.[30] Gevolglik is dit volgens regter Steyn nie te vergelyk met 'n verklarende bevel nie en is dit nie vir appèl vatbaar nie.

'n Argument dat die beslissing ooreengekom het met die handhawing van 'n eksepsie teen die pleit op die geskilpunt word afgewys omdat geen eksepsie in die pleitstukke voorgekom het nie.[31] Die *verrigtinge was dus nie van die aard van eksepsie-verrigtinge nie*.[32] Die streng benadering word gevolglik toegepas.

Verder is tevergeefs betoog dat die beslissing van die hof eintlik as 'n "decision" kragtens artikel 21(1) beskou moet word en langs daardie weg vir appèl vatbaar moet wees. Hoofregter Steyn aanvaar dat dit ingevolge reël 45 van die Transvaalse provinsiale afdeling[33] vir 'n hof moontlik is om op aansoek, voordat getuienis gelei of enige feitevraag bereg is, te beslis dat 'n regsvraag as 'n spesiale saak of op enige ander manier waarop die hof besluit, bereg moet word. So 'n beslissing mag dan wel vir appèl vatbaar wees.[34] Die hof neem egter geen besluit hieroor nie.

3 6 *Botha v AA Mutual Insurance Association* 1968 4 SA 485 (A)

In die *Botha*-saak is 'n bedrag geëis weens liggaamlike beserings opgedoen in 'n motorongeluk wat na bewering veroorsaak is deur die bestuurder/-s van 'n voertuig/-uie wat deur die respondente verseker is. Kragtens ooreenkoms tussen die partye is die Natalse hof versoek om slegs oor die aanspreeklikheidskwessie uitsluitsel te gee. Geen getuienis is gevolglik oor die kwantum aangebied nie omdat die partye ooreengekom het dat hulle in geval van 'n aanspreeklikstelling self daaroor 'n ooreenkoms sou probeer bereik, of dat die eiseres by gebrek aan so 'n ooreenkoms met haar aksie daarvoor sou voortgaan. Daar is toe beslis dat die respondente nie vir die skade aanspreeklik gehou kon word nie, waarop die verhoorhof voldoen het aan 'n versoek dat "judgment should be entered for the respondents with costs".[35] Die appèl het gevolg.

Oor die vraag of daardie beslissing vir appèl vatbaar was, wys die hof by monde van appèlregter Holmes op die algemene gebruik om verhore in twee dele te verdeel. Dit gebeur omdat dit gerieflik is al behels dit dat stuksgewys geappelleer kan word.[36] Desondanks waarsku hy in 'n *obiter dictum*[37] teen

30 491 – 492.
31 492A – B.
32 'n Soortgelyke argument is ook in die *Nxaba*-saak verwerp.
33 Nou R 33(4) van die Eenvormige Hofreëls?
34 493C – D.
35 488.
36 489C – D. Hy wys daarop dat dit juis is waarvoor reël 33(4) van die Eenvormige Hofreëls voorsiening maak. Daarbenewens het die appèlafdeling in twee sake appèlle gehanteer waar die verhoorhowe slegs die aanspreeklikheidsvraag beantwoord het en dit onnodig was om op die kwantumvraag in te gaan, tw *Benson v Robinson & Co Ltd* 1967 1 SA 420 (A) en *Van der Linde v Calitz* 1967 2 SA 239 (A).
37 In hierdie geval het die verhoorhof op die aanspreeklikheidsvraag tgv die verweerders beslis, dws 'n uitspraak is gelewer wat die hele saak afgehandel het en dus vir appèl vatbaar was (489 – 490).

hierdie werkswyse. Die appèl het geslaag met koste en die saak is na die verhoorhof terugverwys.

Die voorgaande kom daarop neer dat die *Dickenson*- en *Heyman*-saak en die *obiter*-waarskuwing in die *Botha*-saak as die hoogtepunte van die streng benadering beskou kan word.

3 7 Samevatting van die vereistes vir appelleerbaarheid volgens die streng benadering

(a) Die beslissing van die hof *a quo* moet aan die statutêre omskrywing voldoen het, dit wil sê daar moet gevra word:

- Is die hof pertinent om 'n beslissing gevra? 'n *Formele* mosie of petisie is klaarblyklik nie nodig nie maar daar moet wel 'n aansoek voor die hof gewees het (*Dickenson v Fisher's Executors*; kyk paragraaf 3 2 hierbo). In *Heyman v Yorkshire Insurance Co Ltd* (bedoelende die eksepsie-argument daarin), asook in *Minister of Interior v Moonsamy*[38] is egter, omdat nie *in die pleitstukke* 'n bevel van die betrokke aard gevra is nie, beslis dat die beslissing nie een was waarin uitsluitsel gegee is oor regshulp wat gevra is nie (kyk paragraaf 3 5 hierbo).

- Is die hof gevra om definitiewe regshulp toe te staan? (*Dickenson v Fisher's Executors*; kyk paragraaf 3 2 hierbo; *Umfolozi Co-operative Sugar Planters Ltd v South African Sugar Association.*[39])

- Was die beslissing van die hof sodanig dat die griffier dit waarskynlik in die vorm van 'n formele hofbevel sou uitdruk? (*Dickenson v Fisher's Executors*; kyk paragraaf 3 2 hierbo.)

- Toon die uiteindelike bevel dat die griffier dit maar net gedoen het omdat hy nie anders kon nie, of dat die griffier aansienlike moeite ondervind het om die beslissing in die vorm van 'n formele hofbevel uit te druk? (*Dickenson v Fisher's Executors*; kyk paragraaf 3 2 hierbo.)

(b) Sou die stuksgewyse afhandeling van 'n appèl in die omstandighede gerieflik gewees het? (*Dickenson v Fisher's Executors*; kyk paragraaf 3 2 hierbo.)

(c) Is die beslissing gemaak nadat albei die partye hulle sake in die geheel gesluit het (*Heyman v Yorkshire Insurance Co Ltd*; kyk paragraaf 3 5 hierbo) of het die beslissing van die hof *a quo* gevolg nadat slegs oor 'n gedeelte van die aksie (of verweer, soos in die *Umfolozi Co-operative Sugar Planters*-saak) 'n verhoor plaasgevind het? (*Minister of Interior v Moonsamy supra.*)

(d) Wat was die aard van die gedingvoering: 'n eksepsie, eis vir skadevergoeding, ensovoorts? (*Heyman v Yorkshire Insurance Co Ltd*; kyk paragraaf 3 5 hierbo; *Nxaba v Nxaba*; kyk paragraaf 3 3 hierbo.)

(e) Het die hof met die lewering van sy beslissing beoog om daardie beslissing aan te wend ter oplossing van die geskil wat vir beregting voor die betrokke hof geplaas is? (*Nxaba v Nxaba*; kyk paragraaf 3 3 hierbo.)

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38 1932 NPD 202.
39 1938 AD 87.

(f) Was dit, in die lig van die praktyk om gelyktydig oor die hoofeis en teeneis uitsluitsel te gee, nie 'n geval waar 'n appèl ten opsigte van die teeneis geopper is terwyl die hoofeis nog nie afgehandel was nie? (*Rehman v Bux.*[40])

(g) Volgens die ervaring en universele Suid-Afrikaanse praktyksreëls moet die geleenthede vir appèl beperk word sodat ryk litigante nie hul teenpartye kan uitput met herhaalde vertragings en dwarsboming nie; daarom is die vraag of die betrokke beslissing van 'n bloot voorbereidende of prosessuele aard was (dit was dan 'n egte interlokutore bevel) en nie soseer die regverdige en spoedige beslegting van die substantiewe geskil tussen die partye bevorder het nie (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*; kyk paragraaf 3 4 hierbo).

(h) Was die beslissing nie een waarin ten opsigte van die regte van die partye 'n verklarende bevel gemaak is nie? (*Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra.*)

(i) Het die woordkeuse van die verhoorregter in sy beslissings blyke gegee van 'n bedoeling om nie in die loop van die verrigtinge weer daarheen terug te keer en die finale woord daaroor te spreek nie? (*Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra*; *Ndhlovu v Pietermaritzburg Municipality.*[41])

(j) Was dit nie 'n "judgment or order" waarvoor spesiale toestemming om te appelleer, gegee kon word nie? (*Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra.*)

(k) Watter praktiese effek ten opsigte van die afhandeling van die hele geskil en die oploop van koste sou dit hê as die appèl toegelaat sou word? (*Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra.*)

(l) Was dit 'n geval waar dit, ingevolge die toepaslike hofreëls,[42] vir die hof moontlik was om op aansoek 'n regs- of feitevraag gerieflik uit te maak voordat getuienis gelei is, of dit afsonderlik van enige ander vraag te beslis, en afhandeling daarvan op enige manier waarop die hof besluit, kon voorskryf en alle ander verrigtinge kon opskort tot afhandeling daarvan? So 'n beslissing mag dan wel vir appèl vatbaar wees (*Heyman v Yorkshire Insurance Co Ltd*; kyk paragraaf 3 5 hierbo).

(m) Het die hof *a quo* 'n kostebevel gemaak? (*Ndhlovu v Pietermaritzburg Municipality supra*; *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra.*)

4 DIE SOEPEL BENADERING

4 1 Inleiding

Dit sou grof verkeerd wees om te dink dat die kwessie van appelleerbaarheid altyd so streng benader is. Daar is sterk aanduidings dat die benadering in die Romeins-Hollandse reg hieroor minder formalisties as in die Engelse reg was.[43]

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40 1947 3 SA 187 (N).
41 1964 3 SA 538 (N).
42 Voorheen R 45 van die Transvaalse provinsiale afdeling, nou R 33(4) en (5) van die Eenvormige Hofreëls.
43 *Mylchreest v European Diamond Mining Company Ltd* (1885) 2 Buch AC 78 waarin die regters laat blyk het dat die soepelheid wat toe nog bestaan het, hulle gehinder het.

Daarby was die Engelse reg nie in alle opsigte duidelik nie en is spoedig weer by die Romeins-Hollandse benadering aangeknoop. Daarna het die voorspelbare inderdaad gebeur, naamlik dat die twee benaderings met mekaar "versoen" is. Hier volg nou van die sake waarin 'n soepel benadering gevolg of bepleit is.

4 2 *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A)

Die minderheidsuitspraak[44] in hierdie saak het by monde van hoofregter Watermeyer uitdruklik en met goeie motivering 'n soepel benadering bepleit. Hy stel dit duidelik dat die vraag na sy mening was of die landdros se beslissing een soos bedoel in artikel 83 van Wet 32 van 1944 was, dit wil sê of dit 'n bevel was wat die effek van 'n finale uitspraak gehad het:[45]

> "The characteristic quality of a final judgment is its conclusiveness or definiteness so far as the Court pronouncing it is concerned. *By that I mean that the Court pronounces its ultimate decision upon the point decided by the judgment and that the same point will not in the course of the case again be open for consideration.* Its effect is to determine the rights of the parties as regards the point dealt with and in the absence of an appeal the decision becomes *res judicata* between the parties and they are then entitled to adopt whatever procedure the law lays down for the purpose of enforcing those rights."

Die uitgangspunt is dat elke uitspraak van 'n landdros óf vir appèl óf vir tersydestelling of wysiging vatbaar is. Hoofregter Watermeyer vermy doelbewus die uitdrukking "interlocutory" omdat dit nie in die wetgewing voorkom wat hy moes uitlê nie, omdat dit geen vaste betekenis het nie, verskillende betekenisse dra in verskillende stukke wetgewing en uitsprake in Suid-Afrika, en verskillende betekenisse op verskillende tydstippe in die Romeinse en Romeins-Hollandse reg gehad het. Gevolglik meen hy dat die landdros se beslissing bedoel was om finaal te wees. Normaalweg sou dit nie weer in die loop van die verrigtinge heroorweeg word nie en het dit dus die effek van 'n finale bevel gehad wat syns insiens vir appèl vatbaar was.

Regter Watermeyer ontleed die Suid-Afrikaanse wetgewing[46] en regspraak, sekere Engelse uitsprake en etlike Romeins-Hollandse en 19de eeuse skrywers se standpunte oor die tipe bevele wat vir appèl vatbaar sou wees[47] – dog vind geen duidelikheid by die bronne nie. Die debat daaroor is deels bemoeilik omdat die vraag van vatbaarheid vir appèl[48] vermeng geraak het met die vraag of 'n

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44 Die meerderheidsuitspraak is in par 3 4 hierbo bespreek.

45 846–848 (my kursivering).

46 In vorige uitsprake is nie gepoog om die betrokke wetgewing uit te lê nie maar is sonder meer na ander regspraak gekyk. Hierdie is dus die eerste keer dat doelbewus gepoog is om die betrokke bepalings van Wet 32 van 1917 en Wet 32 van 1944 uit te lê (859).

47 848–864. Hy maak uitvoerig van 'n Amsterdamse verhandeling van 1885 deur ene Johannes Caroli gebruik.

48 Wat die vraag in die Romeins-Hollandse reg was, nl: "Het die bevel 'n *gravamen irreparabile* veroorsaak wat nie by die uiteindelike vonnis reggestel kon word nie?" (861) Reeds in *Donoghue v Executor of Van der Merwe* (1897) 4 Off Rep 1 het die High Court na talle Romeins-Hollandse bronne hieroor verwys. Dit is duidelik dat die algemene reël was dat iemand wat veronreg gevoel het deur 'n vonnis, uitspraak of bevel, daarteen kon appelleer. 'n Uitsondering hierop was interlokutore bevele wat herstelbare nadeel sou veroorsaak. Gregorowski R (bv op 7) se formulering hieroor is suiwer in ooreenstemming met die Romeins-Hollandse bronne.

bevel nog deur dieselfde hof herroepbaar was.[49] Hierdie benadering het reeds in die *Donoghue*-saak en *Bell v Bell*[50] voorgekom, waar hoofregter Innes sê:

> "*[I]t will be convenient in future to . . . hold that the interlocutory orders of our rules correspond with the simple interlocutory orders of the books; while what Dutch lawyers would have styled interlocutory orders having the force of definite decrees are to be classed with all other definite decisions as final judgments.* In that way we shall be giving full effect to *our own terminology*, while at the same time *preserving the principles and spirit of the Roman-Dutch procedure.*"[51]

Die eintlike kwessie is dus nie opgelos deur die vermenging van andersins selfstandige aangeleenthede nie.[52] Dit kon bygevolg die debat nie verder voer nie.[53] Die vermenging van die twee benaderingswyses het egter so algemeen geword dat die onafhanklike aard van die twee kenmerke van interlokutore bevele nie meer genoem word nie. Die gelykskakeling van die Romeinse[54] en Romeins-Hollandse[55] kriteria, gepaard met die Engelse terminologie,[56] het in *Dickenson v Fisher's Executors* die grondslag vir die streng benadering in die Suid-Afrikaanse reg geword. Die agtergrond daarvan was die standpunte in *Standard Discount Co v Otard de la Grange*[57] ("an order is interlocutory which directs how an action is to proceed") en *Salaman v Warner*[58] ("If their decision . . . will . . . finally dispose of the matter in dispute, I think that . . . it is final.").

Hoofregter Watermeyer wys daarop dat die terloopse opmerkings in vroeëre regspraak (veral in *Steytler v Fitzgerald*[59]) later in twee sake *ratio decidendi*

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49 Wat die vraag in die Romeinse reg was, nl: "Het die bevel wat die betrokke hof betref die effek van 'n finale beslissing gehad (in die sin dat dieselfde punt normaalweg nie weer in daardie verrigtinge deur dieselfde hof oorweeg sal word nie)?" (861) dws: "Was die hof wat die beslissing gelewer het *functus officio* tov die betrokke punt?"

50 1908 TS 887 892.

51 892 (my kursivering). Wessels R gaan met hierdie vermenging voort in *Mears v Nederlandsch Zuid Afrikaansche Hypotheek Bank Ltd* 1908 TS 1147 1149 – 1150.

52 In die *Bell*-saak *supra* 893 sê Innes HR duidelik dat die twee kenmerke van 'n interlokutore bevel, nl dat dit deur die hof wat dit toegestaan het, vernietig of gewysig kan word, of dat met die hof se toestemming daarteen geappelleer kan word, aanvullende *dog onafhanklike* kenmerke is. Die antwoord op een van hulle verskaf dus nie noodwendig die antwoord op die ander een ook nie.

53 In die *Bell*-saak *supra* 890 verwys Innes HR na die Romeins-Hollandse bronne oor twee soorte interlokutore bevele en die verskillende toetse wat aan die hand gedoen is om tussen hulle te onderskei (890), en sê: "No comprehensive rule can be laid down . . ." (891).

54 "Sou die geskilpunt normaalweg weer in dieselfde verrigtinge voor dieselfde hof kom?"

55 "Het die beslissing *gravamen irreparabile* veroorsaak?"

56 "'Final judgment' . . . a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established. . . ." (*Ex parte Chinery* (1884) 12 QBD 342 345). Die hof is na geen gesag verwys nie en begin sy aangehaalde stelling sommer met "I think . . ." Hierdie saak is die enigste waarna verwys word in *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465, wat steeds rigtinggewend in die Engelse reg is (kyk bv Halsbury vol 37 par 684 vn 4).

57 (1877) 3 CPD 67 72.

58 (1891) 1 QB 734 735.

59 1911 AD 295. In appèl teen 'n beslissing van die Oos-Kaapse hof verwys De Villiers HR na die twee benaderings, nl of daar "*gravamen irreparabile*" sal ontstaan, en of die beslissing die effek van 'n finale bevel het, en verwys na die *Bell*-saak waarin dié twee "versoen" is (303) (kyk ook Innes R 312 – 313). Hy wys daarop dat die stelling dat slegs interlokutore bevele waarteen in die Romeins-Hollandse reg geappelleer kon word, finale effek het, nog nie die vraag beantwoord watter interlokutore bevele in die Romeins-Hollandse reg appelleerbaar was nie. Laurence R verwys na die deurmekaarspul in die

geword het, te wete in *Blaauwbosch Diamonds Ltd v Union Government*[60] en *Liquidators Myburgh Krone & Co Ltd v Standard Bank of SA*.[61] Gevolglik sou die minderheid van die hof wou beslis dat die landdros se bevel wel vatbaar vir appèl was. Regter Watermeyer meen dat hy daarmee in pas sou wees met die stand van die reg hieroor soos hy dit sien; hy sê dat dit jammer is dat in die wetgewing nie eerder onderskei word tussen substantiewe en prosessuele kwessies nie, met dien verstande dat eersgenoemde sonder meer vatbaar sou wees vir appèl terwyl in laasgenoemde gevalle slegs met die toestemming van die hof geappelleer behoort te kan word.[62]

4 3 *Shacklock v Shacklock* 1949 1 SA 91 (A)

In die *Shacklock*-saak laat hoofregter Centlivres 'n appèl teen 'n beslissing van die Witwatersrandse hof in die volgende omstandighede gedeeltelik slaag: Die partye het 'n ooreenkoms gehad ingevolge waarvan die man aan sy vrou 'n bedrag sou betaal as onderhoud. Toe hulle later geskei is, is 'n verdere ooreenkoms, naamlik dat die man die bedrag in Londen sou betaal, tot hofbevel gemaak. Later ontstaan 'n dispuut tussen hulle oor aspekte van die ooreenkoms en die vrou dagvaar die man omdat hy glo verkeerdelik aftrekkings sou gedoen het van die bedrag wat aan haar oorbetaal is. Verskillende geskilpunte kom aan die lig, en nadat die eiser se getuienislewering afgesluit is, versoek die partye die hof om oor die regspunte tussen hulle uitsluitsel te gee. Die partye se rekenmeesters sou self die onderlinge regstellings hanteer. Die hof beslis op een van die punte ten gunste van die eiser, en op die ander drie punte ten gunste van die verweerder. Wat die koste betref, sê die hof dat dit vir beredenering op die rol geplaas moet word tensy die partye self daaroor ooreenkom. Die eiser appelleer teen die beslissing van drie punte ten gunste van die verweerder en die verweerder, ofskoon hy ontken dat die beslissings vir appèl vatbaar is, kruisappelleer teen die eerste punt. Die verweerder doen aansoek dat die appèl van die rol geskrap word of dat dit nie aangehoor word nie omdat daar nog nie oor die koste 'n ooreenkoms bereik of 'n hofbevel gemaak is nie, of omdat oor die hele bedrag nog nie tussen die partye se rekenmeesters ooreengekom is nie.

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vervolg van vorige bladsy

Engelse regspraak oor die betekenis van "interlocutory" en "final orders", en sê dat dit in die lig daarvan beter sal wees om die Romeins-Hollandse benadering te volg, soos in die *Bell*-saak gedoen is (325 – 326). De Villiers RP sê (nav die eerste *Placaat* hieroor, dié van 1458-12-01 (*Groot Placaatboek III* 643) bevestig in die *Ampliatie* van 1579 (*Groot Placaatboek II* 767), *Ordinantie* van 1622-03-19 (*Groot Placaatboek II* 2289), die *Accoord* van 1670 (*Groot Placaatboek III* 694), asook deur skrywers soos Van der Linden, Damhouder, Van Leeuwen, Voet en Van Zutphen) dat die toets van *gravamen irreparabile* te alle tye die enigste toets in die Romeins-Hollandse reg was om egte interlokutore bevele te identifiseer (338 – 345).

60 1915 AD 599.

61 1924 AD 226.

62 862. Wet 105 van 1982 bring mee dat in alle gevalle toestemming van die hof nou nodig is sodat hierdie onderskeid, behalwe vir appèlle van bv landdroshowe, miskien nie meer so belangrik is nie. Corbett HR sê in *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) dat die effek van toestemming tot appèl deur 'n hof in geval van interlokutore bevele nog nie duidelik is nie.

Namens die verweerder word gesteun op die streng benadering, maar daardie sake is volgens die hof onderskeibaar want die partye het hulle sake gesluit en die hof versoek om oor die regspunte tussen hulle te beslis – hulle het die hof dus om 'n verklaring van regte gevra.[63] Die gerief dat die partye se rekenmeesters in plaas van die hof die kwantum daarna sou kon vasstel, weeg vir die hof swaar. Wat die ooplaat van die kostekwessie betref, sê die hof dat dit irrelevant is met betrekking tot die appelleerbaarheid van daardie gedeelte van die beslissing wat finaal is.[64] Die hof wys op verskeie sake waaruit blyk dat dit vaste praktyk in die appèlafdeling was om *verklarende bevele* as vatbaar vir appèl te beskou en wys gevolglik die aansoek om die appèl van die rol te verwyder met koste van die hand.[65]

Iets wat hier opval, is dat die hof nie formeel om 'n verklarende bevel gevra is nie, maar wel dat die hof die "legal issues between the parties" moes uitmaak. Die hof self bestempel dit as 'n verklarende bevel. Die hof se beslissings het egter nie die vorm van verklarende bevele gehad nie maar is uitgedruk as "judgment for the plaintiff/defendant". In die *Shacklock*-saak is die hof *a quo* se beslissing klaarblyklik geparafraseer, want dit lui: "Roper J came to the following conclusions", en sê dat hy "found in favour of . . ."[66] In die pleitstukke is nie 'n verklarende bevel gevra nie en die bevel het dan ook nie daardie vorm gehad nie. Aan die streng benadering se vereistes sou hierdie geval dus nie voldoen het nie.

4 4 *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A)

In hierdie saak is namens Gentiruco tydens die appèl teen 'n beslissing van die Kommissaris van Patente na die hof *a quo* pertinent aansoek gedoen dat sekere getuienis uit die notule verwyder en die appèl afgewys moes word. Die hof *a quo* beslis toe dat daardie getuienis geskrap moet word maar het in sy uiteindelike bevel nie weer uitdruklik daarna verwys nie. Al wat uitdruklik in die bevel gesê is, was dat Firestone al die koste ten opsigte van die betrokke getuienis en die aansoeke voor die kommissaris en die hof *a quo* om die skrapping daarvan te bewerkstellig, moet betaal.[67] Daarop sê appèlregter Trollip dat daardie beslissing van die hof *a quo* vir appèl vatbaar was.[68] Myns insiens kan gesê word dat die hof nie so streng te werk gegaan het as wat andersins verwag sou kon word nie. Daar is wel spesifiek vir die betrokke regshulp gevra, *maar dit staan nie in die uiteindelike bevel nie*. Desondanks was die hof bereid om uit die ander aspekte van die bevel die afleiding te maak dat die hof *a quo* bedoel het om wel 'n finale bevel te maak. Voorts het dit eintlik oor 'n bewysregtelike kwessie, naamlik die toelaatbaarheid van getuienis, gehandel. Dit was klaarblyklik belangrike getuienis maar dit het gegaan oor 'n voorlopige, prosessuele punt wat, as dit uitgemaak sou word, net die voortgang van die verhoor sou kon raak. Volgens die streng benadering sou geoordeel moes word dat hier nie met 'n appelleerbare bevel te doen gekry is nie.

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63 97.
64 'n Mens kan wel vra of hierdie nie 'n ellips daarstel nie; of beteken dit dat net na die kostebeslissing gekyk sal word waar dit nie reeds vasstaan dat dit oor 'n finale bevel gaan nie? Sal sulke feite dus net in lg gevalle van belang kan wees?
65 98.
66 Sien 96–97; vgl Steyn HR in die *Heyman*-saak *supra* 491G–H.
67 606A–D.
68 606E.

4 5 *Constantia Insurance Co Ltd v Nohamba* 1986 3 SA 27 (A)

Hier is 'n verdere appèl aan die orde gestel nadat reeds teen die uitspraak van 'n enkelregter in die Oos-Kaapse afdeling na die volbank van daardie afdeling geappelleer was. 'n Bedrag is van die appellant as versekeraar van 'n motorvoertuig geëis na 'n botsing waarin die respondent as voetganger beseer is. Nadat aanvanklik erken is dat die eiser aan die vereistes van artikel 25(1) van die MVA-wet 56 van 1972 voldoen het, is dié erkenning later teruggetrek en deur 'n ontkenning vervang. In 'n spesiale pleit is toe beweer dat die eiser nie aan daardie vereistes voldoen het nie en dat die eis dus afgewys moes word. Die partye versoek toe die hof om aanvanklik slegs uit te maak of wel aan die vereistes van artikel 25 voldoen is, en om dit op die basis van sekere ooreengekome feite te doen. Die verhoofhof beslis dat daar wesenlike voldoening aan die vereistes van artikel 25(1) was, en verleen toestemming tot appèl. Die Oos-Kaapse volbank wys 'n appèl hierteen af maar stem ooreenkomstig artikel 20(4) en 21(2) van Wet 59 van 1959 toe tot 'n beroep op die appèlafdeling.

Die meerderheid van die appèlafdeling by monde van appèlregter Galgut beslis dat die beslissing van die verhoorhof en die volbank wel vir appèl vatbaar was.[69] Hy beoordeel die onderhawige feite aan die hand van *die vraag of die verweerder "in sy spesiale pleit 'n afdoende verweer geopper" het, en of die verweerder vir die toepaslike regshulp gevra het, naamlik dat die eiser se eis met koste afgewys word.*[70] Die hof oorweeg aspekte van die notule van die voorverhoor samesprekings en stel dan duidelik dat die beslissing wel vir appèl vatbaar was.

4 6 *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A)

In hierdie saak is die vorige hofuitsprake in oënskou geneem. Die benadering wat deur appèlregter Corbett in die eenparige uitspraak gevolg is, is gevolglik vir hierdie ondersoek van groot belang.

Die geskil het ontstaan uit 'n skriftelike boukontrak tussen die partye waaraan die opdraggewer hom onttrek het nadat 'n hoeveelheid werk reeds gedoen is. Appellant het die respondent se bevoegdheid ontken om die kontrak so te beëindig, meegedeel dat hy die respondent se optrede as repudiëring aanmerk en dat hy verkies om die ooreenkoms te beëindig, en skadevergoeding geëis. Die respondent voer in sy verweerskrif aan dat hy ingevolge die ooreenkoms bevoeg was om die ooreenkoms eensydig te beëindig, en dat die appellant se skadevergoedingseis volgens daardie klousule aan 'n beperking onderworpe sou wees in geval van beëindiging van die ooreenkoms sodat appellant in elk geval nie sy totale skade kon verhaal nie. Na die sluiting van pleitstukke en oënskynlik met die instemming van die respondent, maak die Transvaalse provinsiale afdeling ooreenkomstig reël 33(4) van die Eenvormige Hofreëls 'n bevel ingevolge waarvan die verhoor ten opsigte van sekere geskilpunte uitgestel word hangende 'n beslissing oor die aanspreeklikheidsvraag. Die appellant se smeekbede word ook gewysig om te lui dat 'n bevel gevra word dat die appellant geregtig is op skadevergoeding afgesien van die presiese bedrag daarvan; alternatief, 'n bevel

69 In sy minderheidsuitspraak toon Nicholas WnAR dat hy besef dat sy bepleiting van die streng benadering formalisties is, maar meen hy dat die uitgangspunt teen stuksgewyse afhandeling van geskille desondanks verg dat die streng benadering toegepas moet word.

70 36F.

dat die appellant geregtig is op die skadevergoeding vermeld in sy eisuiteensetting, betaling vir gedane werk en uitgawes soos vermeld in sy eisuiteensetting plus rente. Die verhoorhof moes dus uitmaak: (a) of die respondent die ooreenkoms so kon beëindig; en (b) of die appellant se aanspraak op skadevergoeding deur die ooreenkoms beperk was.[71]

Na die aanhoor van getuienis beslis die verhoorhof by monde van regter Flemming[72] dat die respondent nie bevoeg was om die ooreenkoms so te beëindig nie; dat die respondent die ooreenkoms gerepudieer en die appellant verkies het om die ooreenkoms te beëindig; en dat die appellant se aanspraak op skadevergoeding wel kontraktueel beperk was. 'n Bevel ten opsigte van koste word voorbehou, maar koste weens die verskyning in die verhoorhof word wel toegestaan. Appèlregter Corbett meld dat regter Flemming se beslissing deur die griffier in 'n formele bevel uitgedruk is maar hoe dit gelui het, word nie weergegee nie.[73] Daar word geappelleer teen die hele beslissing en bevel van die verhoorhof. Tydens die appèlverrigtinge opper die respondent die vraag of die verhoorhof se beslissing vir appèl vatbaar was. Appèlregter Corbett sê:[74]

> "So far as I am aware, the correlation between this distinction[75] and the distinction between judgments and orders, which in terms of s 20(1) are appealable, and rulings, which are not, has not hitherto been judicially investigated. I do not propose to do so in any depth.[76] I shall confine myself to a few observations on matters which appear to be relevant in the context of the present case. An interlocutory order which has a final and definitive effect on the main action must, in my view, be regarded as an appealable judgment or order . . . The position in regard to a 'simple interlocutory order', which term would comprehend all orders pronounced by the Court upon matters incidental to the main dispute preparatory to or during the progress of the litigation, other than those having a final and definitive effect on the main action (*South Cape Corporation* case *supra* at 549G), is not so clear. There is much to be said for the view that some such orders would constitute judgments or orders which under s 20(1), read with s 20(2)(b), of the Act before the amendments introduced by the Appeals Amendment Act 105 of 1982 would have been appealable with leave; others would constitute mere rulings, unappealable even with leave (see *Dickenson*'s case *supra*)."

Voorts verwys hy na die redes waarop die streng benadering berus het en kwalifiseer dit soos volg:[77]

> "Where, however, the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed,[78] then a somewhat different position arises, and indeed in that

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71 579E.

72 579F – G. Corbett AR vertolk sy beslissing ("The trial judge held, *in effect* . . . (579F) (my kursivering)). Flemming R se beslissing was egter nie in daardie vorm gegiet nie – en *vorm* was immers volgens die streng benadering juis deurslaggewend. Uit Corbett AR se bereidheid om die beslissing van Flemming R te *vertolk*, blyk sy bereidheid om die kwessie soepel te benader – volgens die streng benadering sou immers geen sweem van vertolking toelaatbaar gewees het nie.

73 580A. Volgens die streng benadering sou dit 'n belangrike vraag wees: immers, selfs die vraag of die griffier moeite ondervind het of kon ondervind het om die beslissing in die vorm van 'n formele bevel uit te druk, sou daarvolgens 'n aanduiding wees dat geen beslissing wat vir appèl vatbaar was, gelewer is nie.

74 583H – 584D.

75 Dws die onderskeid tussen gewone interlokutore bevele en interlokutore bevele wat die effek van finale bevele het.

76 Dit staan gevolglik nog grootliks oop.

77 585E – H.

78 Hier slaan die Engelsregtelike eerder as die Romeinse of Romeins-Hollandse formulering weer deur.

event the advantages of expense and convenience may favour a final determination of the question on appeal, even though the proceedings in the Court *a quo* may not have been concluded."

Appèlregter Corbett besef terdeë dat daar geen direkte gesag is vir sy beslissing oor die punt *in limine* nie, asook dat hy met sy uitspraak meer ruimte vir appèlle skep as wat voorheen die geval was;[79] hy meen egter dat sy beslissing tog met die beginsels in die *Dickenson*-saak gestel, die verdere ontwikkeling van daardie beginsels in uitsprake van die appèlafdeling en geriefsoorwegings in pas is.[80]

Regter Corbett wys op van die faktore waarna gekyk kan word om uit te maak of 'n interlokutore bevel oor 'n regs- of feitevraag, wat 'n finale effek op die gedingvoering het of sal hê, appelleerbaar is. Hy lig die feit uit dat die hof *a quo* se beslissing "*is obviously of fundamental importance in this case*". Afhandeling van die geskilpunt was dus "*eminently desirable*" omdat die teendeel "*could cause inconvenience and unnecessary expense*".[81] In die lig van die vereistes beslis die hof dat die punt *in limine* met koste afgewys word en dat dus met die meriete voortgegaan kan word. Die appèl teen die beslissing dat die appellant se aanspraak op skadevergoeding kontraktueel beperk is, slaag gevolglik met koste; die koste van die aansoek om verlof om te appelleer, word ook aan die appellant toegeken.

Myns insiens sou die streng benadering hier die volgende opgelewer het: dit was 'n skadevergoedingsaksie na aanleiding van kontrakbreuk, in die loop waarvan die hof beslis dat kontrakbreuk gepleeg is en dat die bedrag skadevergoeding ingevolge die kontrak beperk was. Deur daardie beslissings was die verhoorhof nou in staat om die eintlike eis te bereg. Hulle was dus ongetwyfeld beslissings gemaak in die loop van die verrigtinge wat die voortgang daarvan net kon bevorder. So beskou, sou hulle dus nie appelleerbaar wees nie.

Appèlregter Corbett het egter 'n heel ander resultaat bereik want hy merk die beslissing aan as een wat, ofskoon interlokutoor en nie-finaal, tog in belang van die besparing van die onkoste en moeite as appelleerbaar aangemerk kan word. Daarmee is die soepel benadering gevolg maar 'n ingrypende nuwe ontwikkeling het hom myns insiens nie hier voltrek nie. Die hof is juis gevra om oor die gelding van die beperking uitspraak te gee en dit is dan gedoen en deur die griffier in 'n formele hofbevel uitgedruk. Daar is selfs 'n gedeeltelike kostebevel gemaak. Indien bevind was dat die beslissing nie appelleerbaar was nie, sou dit myns insiens eerder 'n groot terugwaartse stap na 'n hiper-streng benadering gewees het.

4 7 Samevatting van toepaslike oorwegings ingevolge die soepel benadering

● Die vraag is nie of die beslissing interlokutoor was of nie, maar of dit ingevolge die toepaslike statutêre bepaling 'n bevel was wat die effek van 'n finale uitspraak gehad het (*Pretoria Garrison Institutes v Danish Variety*

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79 Die beslissing dat die kontraktuele beperking op die appellant se eis van toepassing was, was hoogstens een wat die voortgang van die hofverrigtinge kon beïnvloed – volgens die streng benadering dus beslis nie appelleerbaar nie.

80 587D – E.

81 587E – H.

Products (Pty) Ltd; kyk paragraaf 4 2 hierbo; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*; kyk paragraaf 4 6 hierbo).[82]

- Was die beslissing volgens die hof wat dit gemaak het, konklusief ten opsigte van die kwessies geopper sodat dit in die normale verloop van die verrigtinge nie weer vir oorweging in daardie hof vatbaar sou wees nie; en – as daar nie geappelleer word nie – *res iudicata* sou word en vatbaar sou wees vir tenuitvoerlegging? (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*; kyk paragraaf 4 2 hierbo.)

- Was die beslissing een oor 'n prosessuele of 'n substantiewe aspek van die partye se regsposisies?[83] (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*; kyk paragraaf 4 2 hierbo; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*; kyk paragraaf 4 6 hierbo.)

- Was albei die partye se sake reeds gesluit toe hulle die hof *a quo* gevra het om 'n beslissing oor hulle regsposisies te maak? (*Shacklock v Shacklock*; kyk paragraaf 4 3 hierbo.)

- Die feit dat 'n kostebevel nie gemaak is nie affekteer nie die appelleerbaarheid van 'n beslissing wat in elk geval 'n finale bevel is nie (*Shacklock v Shacklock*; kyk paragraaf 4 3 hierbo).[84]

- Al is 'n verklarende bevel nie uitdruklik in die pleitstukke aangevra nie, maar die beslissing deur die hof van appèl kan as sodanige bevel vertolk word, sal dit appelleerbaar wees (*Shacklock v Shacklock*; kyk paragraaf 4 3 hierbo).

- Wat sou die logiese, koste-effektiewe en gerieflike weg wees om te volg ten einde 'n regs- of feitevraag te bereg, al geskied dit slegs in die loop van die verrigtinge en is die beslissing net interlokutoor van aard? (*Shacklock v Shacklock*; kyk paragraaf 4 3 hierbo; *Irwin v Mather*;[85] *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*; kyk paragraaf 4 6 hierbo.)

- Het die verweerder in 'n spesiale pleit 'n afdoende verweer (heeltemal losstaande van die verwere op die meriete, wat hy voortpleit) geopper en is dit waaroor beslis is? (*Labuschagne v Labuschagne: Labuschagne v Minister van Justisie*.[86])

- Die feit dat die hof *a quo* nie spesifieke tegniese uitdrukkings in die formulering van sy beslissing gebruik het nie, is nie van bepalende belang nie (*Irwin v Mather supra*; *Constantia Insurance Co Ltd v Nohamba*; kyk paragraaf 4 5 hierbo).

- Die hof is bereid om selfs 'n gestelde saak te ontleed en te vertolk om uit te maak of die partye bedoel het dat met die besluit wat gevra is, die laaste woord

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82 Dit is seker ironies dat dit juis die voorstanders van die *soepel* benadering was wat eerste klem gelê het op die noodsaak om die betrokke wetgewing in ag te neem by die oorweging van die appelleerbaarheid van beslissings.

83 Die meerderheid het hulle ook sterk uitgespreek tgv 'n maatstaf wat die indelingskriterium maak.

84 Hieruit lyk of net na die kostebeslissing gekyk sal word waar dit nie reeds vasstaan dat dit oor 'n finale bevel gaan nie. Waar twyfel bestaan, lyk dit dus of die bestaan van 'n kostebevel die knoop tgv appelleerbaarheid kan deurhak.

85 1951 2 SA 552 (N).

86 1967 2 SA 575 (A).

oor die hoofaksie gespreek moes word en nie net aan die verrigtinge voortgang gegee moes word nie (*Constantia Insurance Co Ltd v Nohamba*; kyk paragraaf 4 5 hierbo).

- Die spesifieke uitdrukkings wat die verhoorregter gebruik het in die formulering van sy beslissing, kan ontleed en vertolk word om te bepaal watter bedoeling hy met sy beslissing gehad het (*Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*; kyk paragraaf 4 6 hierbo).

- Het die griffier die beslissing in 'n formele hofbevel uitgedruk, en vertoon dit die kenmerke van 'n finale bevel? (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*; kyk paragraaf 4 2 hierbo; *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*; kyk paragraaf 4 6 hierbo.)

5 *SA EAGLE VERSEKERINGSMAATSKAPPY BPK v HARFORD* 1992 2 SA 786 (A)

Hier was 'n geval waar skadevergoeding van die versekeraar van 'n motorvoertuig geëis is weens die besering van die respondent in 'n botsing tussen die versekerde vragmotor en die motor waarin die respondent 'n passasier was. In die verhoorhof is die eksekutrise van die boedel van die bestuurder van die motor ook aangespreek. Sy het aanspreeklikheid erken maar oor die kwantum verskil, terwyl die appellant oor die aanspreeklikheid en kwantum verskil het. Kragtens 'n ooreenkoms is die verhoorhof ingevolge reël 33(4) versoek om eers net die aanspreeklikheidskwessie te besleg en die kwantumkwessie oor te hou vir latere ooreenkoms of beregting. Nadat die getuienis aangehoor is, het die Transvaalse provinsiale afdeling by monde van regter Heyns beslis dat die bestuurder van die vragmotor nalatig was en soos volg afgesluit:[87]

> "Die eiser is dus suksesvol ten opsigte van die meriete van die saak teen beide verweerders en die Hof se bevinding is dus dat die nalatigheid van die bestuurder van die versekerde voertuig bygedra het tot die veroorsaking van die botsing met die voertuig waarin eiser 'n passasier was.
>
> Eiser se eise teen die eerste en tweede verweerders ten aansien van die meriete word toegestaan met koste teen die verweerders gesamentlik en afsonderlik . . ."

Hiervan het die griffier die volgende hofbevele gemaak:[88]

> "1) Dat die nalatigheid van die bestuurder van die versekerde voertuig bygedra het tot die veroorsaking van die botsing met die voertuig waarin eiser 'n passassier was.
> 2) Dat die eiser se eise teen die eerste en tweede verweerders ten aansien van die meriete toegestaan word met koste teen die verweerders gesamentlik en afsonderlik."

Daar is toe nie oor die kwantum ooreengekom of verder gelitigeer nie. Verlof om te appelleer, is gevra en deur die hof *a quo* toegestaan.[89] Was die beslissing van die Transvaalse provinsiale afdeling vatbaar vir appèl?

Die hof maak dit van meet af duidelik dat die kwessie van die appelleerbaarheid van 'n hofbeslissing 'n *regsvraag* is wat beantwoord moet word ten spyte

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87 789C – D.
88 789F.
89 Sedertdien is glo wel oor 'n deel van die skade, maar nie die "sogenaamde spesiale skade" nie, ooreengekom (789G – H).

van die partye se instemming tot die appèl.[90] Waarnemende appèlregter Harms sê vervolgens dat sedert daardie *caveat* wat appèlregter Holmes in die *Botha*-saak *obiter* uitgespreek het, "vry algemeen aanvaar"[91] is dat 'n beslissing van die aanspreeklikheidskwessie ten gunste van die *eiser*[92] in 'n saak soos die onderhawige nie vir appèl vatbaar sal wees nie.[93] Hy wys daarop dat die stuksgewyse beslegting van geskille somtyds *koste-effektief* kan wees.[94] Die rol wat "gerief" in Hofreël 33(4) speel asook die feit dat die *onus* nie op die applikant rus om die hof te oortuig dat die gevraagde weg wel die gerieflikste een is nie, is belangrik. Verder is met die invoer van die nuwe reël 34A, wat voorsiening maak vir tussentydse betalings beter teelaarde voorberei vir die argument dat so 'n aanspreeklikheidsbevinding wel 'n "uitspraak of bevel" kragtens artikel 20(1) is.[95]

Regter Harms wys voorts daarop dat die vroeëre streng uitleg van die woorde "uitspraak of bevel"[96] deur "'n meer pragmatiese benadering"[97] vervang is. Hy verwys na die *Van Streepen & Germs*-saak waarin talle voorbeelde gegee is van appèlle teen beslissings "wat nie *die saak tussen die partye finaal bereg het nie*".[98] Regter Harms[99] wys daarop dat reeds in *SAR&H v Edwards*[100] met betrekking tot 'n *actio de pauperie* 'n appèl aangehoor is teen 'n verhoorhof se beslissing dat die verweerder aanspreeklik is, alvorens die kwantum van die skade bepaal was – en sonder dat die vraag of die beslissing vir appèl vatbaar was, geopper is. Dat reeds in *Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd supra* gesê is dat dit *'n fout* was, noem regter Harms nie; hy soek eerder 'n verklaring vir daardie geval in sy eie vertolking dat in die *Edwards*-saak "*vermoedelik*" 'n bevel met die effek van 'n verklarende bevel gemaak is, want *'n bevel wat vir eksekusie vatbaar was*, kon dit nie wees nie omdat die kwantum nie bepaal is nie. Afgesien van die vraag of die *Edwards*-saak, in die lig van die feit dat dit reeds as 'n fout bestempel is, só weer in ere herstel kan word, is dit duidelik dat regter Harms daarmee 'n verdere kriterium

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90 "'n Saak is óf appelleerbaar óf nie in die stadium wanneer die appèl aangeteken word en die partye se wense en instemming speel geen rol by die beantwoording van daardie vraag nie" (789I).

91 Dit is nog nie uitdruklik getoets nie hoewel daarna sonder goed- of afkeuring verwys is in *Smit v Oosthuizen* 1979 3 SA 1079 (A) en die *Van Streepen & Germs*-saak *supra* 790G.

92 Die beslissing van die aanspreeklikheidskwessie in die *Botha*-saak was tgv die *verweerder*.

93 790A – G.

94 790G – H.

95 Harms WnAR sê tereg dat die invoer van reël 34A die moontlike nadelige gevolge van vertragings wat deur tussentydse appelle veroorsaak kan word, verklein het (790I).

96 Harms WnAR sê "uitspraak of vonnis" (791B), maar in die lig van wat in die *Heyman*-saak oor die verskillende terme gesê is, maak dit geen verskil nie.

97 791B – C. Hierbo is die nuwe benadering as 'n "soepel" benadering aangedui – die bedoeling is egter dieselfde.

98 791C. Dit val op dat Harms WnAR hier die Engelsregtelike uitdrukking gebruik, nl die ietwat dubbelsinnige maatstaf van "finale beregting van 'n geskil", en nie die Romeins-regtelike maatstaf, nl "sou die punt normaalweg in die loop van dieselfde verrigtinge weer deur die hof oorweeg geword het?", of die Romeins-Hollandse maatstaf, nl "of 'gravamen irreparabile' nog voorkombaar was", nie. Daar is geen aanduiding dat hierdie 'n bewuste keuse van Harms WnAR was nie; hy het seker maar die gebruiklike spreekwyse gevolg.

99 Sien 791E ev.

100 1930 AD 3.

vir appelleerbaarheid na vore gebring het,[101] naamlik: *was die beslissing vir eksekusie vatbaar?* Hierdie kriterium het hom moontlik gehelp om te besluit dat die beslissing wat gelewer is, eintlik 'n verklarende bevel was (waar geen tenuitvoerlegging ter sprake is nie, en nie 'n bevel soos 'n skadevergoedingsbevel wat wel vir eksekusie vatbaar was nie). Hoe dit 'n hof sou kon help om uit te maak of 'n finale uitspraak voor hande is, is egter nie duidelik nie. Sou regter Harms in gedagte gehad het dat alle bevele wat vir eksekusie vatbaar is, dadelik appelleerbaar sal wees, verklaar dit nog nie waarom die beslissing wat hy as 'n verklarende bevel vertolk, ook vir appèl vatbaar was nie. Die sinvolheid van hierdie kriterium staan dus myns insiens nog nie vas nie.

Waarnemende appèlregter Harms se gevolgtrekking is dat die vraag is wat die partye met die geding *beoog het* en wat die hof *bedoel het* om in sy uitspraak te doen.[102]

Om die maatstawwe wat hy gestel het op die onderhawige geval toe te pas, vind regter Harms egter nie so eenvoudig nie omdat die verhoorhof "onvoldoende aandag" aan die formulering van die uitspraak gegee het, en die griffier dit daarna "onbeholpe" en "nie juridies sinvol nie" in die vorm van 'n bevel uitgedruk het.[103] Die griffier moet dus nie net sy taak met vrymoedigheid en sonder groot moeite uitgevoer het nie, maar moet dit ook so gedoen het dat die resultaat juridies sinvol is. Dit is nie duidelik of hiermee nóg 'n kriterium bygevoeg is en of dit bloot as 'n uitdrukking van frustrasie en kritiek op die wyse waarop die betrokke griffier sy taak uitgevoer het, beskou moet word nie. Dit lyk of laasgenoemde eerder die geval is.

Regter Harms bevind dat die verhoorhof wel "'n finale uitsluitsel" oor die appellant se aanspreeklikheid wou gee,[104] want wat daardie hof "*wou doen, en in effek gedoen het*, was om 'n verklarende bevel uit te reik".[105] Prakties is dit vir regter Harms dieselfde as die geval waar 'n interdik toegestaan word sonder dat die kwantum van gelede skade bepaal is, en dit is gevalle waarin nog nooit aan die appelleerbaarheid getwyfel is nie.[106] Met hierdie argument wyk regter Harms reëlreg van die geykte maatstaf ingevolge die streng benadering af, en een wat hy spesifiek uit die *Holland*-saak aangehaal het, naamlik dat nie van een tipe hofverrigtinge na 'n ander geredeneer kan word nie: die onderhawige was immers 'n skadevergoedingsaksie en nie een waarin 'n interdik aangevra is nie.[107] Hy bevind die hofbevel in elk geval appelleerbaar en handhaaf die appèl daarteen met koste.

6 SLOTSOM

(a) Hoe raak dit alles die verdeling van verhore met betrekking tot die verhaal van skadevergoeding vir toekomstige skade? Die mate waarin die howe bereid is om die kwessie van appelleerbaarheid te bereg deur 'n soepel benadering te

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101 Verdere ondersoek sal aan die lig bring in watter mate dit histories verantwoordbaar is maar dit kan nie hier opgevolg word nie.
102 792A – B.
103 792B – E.
104 Hier val weer die ietwat dubbelsinnige Engelsregtelike formulering op.
105 792F.
106 792G.
107 Kyk par 3 7 (d) hierbo, volgens *Nxaba v Nxaba* 1926 AD 392 (par 3 3 hierbo) en *Heyman v Yorkshire Insurance Co Ltd* 1964 1 SA 487 (A) (par 3 5 hierbo).

volg by die uitleg van die woorde in die betrokke bepalings, begunstig uiteraard die soepel metode om eise vir verdere skade te hanteer. Al wat kan hinder, is dat daar weens die kasuïstiese manier waarop die kwessie steeds gehanteer word, té min regsekerheid bestaan oor die werklike maatstaf wat aangewend moet word.

(b) Waar staan ons met die uitgangspunt dat potensiële appellante 'n belang daarin het dat hulle 'n beslissing waarmee hulle ontevrede voel, in beginsel in appèl voor 'n hoër hof moet kan bring? Daarteenoor bestaan die potensiële respondente se belang daarin dat appèlle nie stuksgewys afgehandel moet word nie ten einde onkoste en ongerief te voorkom. Die soepel benadering bevorder eersgenoemde oogmerk natuurlik meer as wat die streng benadering dit sou doen, terwyl die streng benadering weer gunstiger vir laasgenoemde oogmerk is. In die lig van die siening dat 'n reg van appèl as 'n fundamentele prosessuele reg beskou word,[108] kan die onsekerheid wat daar nog heers oor die maatstaf wat deurslaggewend sal wees, nie bekostig word nie. Daar behoort nie telkens twyfel te ontstaan oor die vraag of die korrekte balans tussen die strewe na geregtigheid teenoor die voornemende appellante en die potensiële respondente wel gevind is nie. Dit is ongewens dat die appèlafdeling elke keer hieroor op 'n heel "pragmatiese" wyse uitsluitsel moet gee. 'n Groot behoefte bestaan gevolglik aan 'n duidelike beginselgrondslag vir die appelleerbaarheidskwessie.

(c) Die opvallende verskille in die terminologie wat in hierdie verband gebruik word in die verskillende wetgewing en hofreëls, asook in verskillende bepalings in elke betrokke wet of stel hofreëls, en die verskille wat boonop tussen die weergawes van die terme in die huidige amptelike tale bestaan, moet so spoedig moontlik uit die weg geruim word. In 'n meertalige land waar die betrokke terme ook in ander tale as die huidige vertaal behoort te word, sal 'n spoedige, sinvolle oplossing van die bestaande terminologiese verwarring 'n onontbeerlike eerste stap wees.

(d) Die *SA Eagle Versekeringsmaatskappy Bpk v Harford*-uitspraak van waarnemende appèlregter Harms het nie groter helderheid oor die gewensde beginselgrondslag vir die appelleerbaarheid van beslissings gebring nie, maar eerder verder bygedra tot die kasuïstiek op hierdie terrein.

(e) Myns insiens behoort teruggekeer te word na die benadering van die Romeins-Hollandse reg, te wete deur te vra of die beslissing sodanig was dat die nadelige uitwerking daarvan vir die appellant se saak nie meer in die betrokke hofverrigtinge omgekeer sou kon word nie. Indien wel, is daardie beslissing wel vir appèl vatbaar. Dit behels dus 'n terugkeer na die benadering in *Steytler v Fitzgerald*,[109] *Blaauwbosch Diamonds Ltd v Union Government*[110] en *Liquidators Myburgh Krone & Co Ltd v Standard Bank of SA*,[111] uitsprake wat steeds geld ten spyte van die uiteenlopende aantal ander uitsprake wat tans bestaan.

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108 Dit word meestal onder die idee van 'n regverdige verhoor ("fair trial") gehanteer: kyk a 8(2)(h) van die American Convention of Human Rights 1969; Lagos Conference on the Rule of Law 1961 (vereis 'n hiërargie van howe); International Covenant on Civil and Political Rights 11966 (noem hersiening en hiërargie van howe); a 25(h) van die Konsephandves vir Menseregte, Werkstuk 25, Suid-Afrikaanse Regskommissie; die Interimverslag van Augustus 1991 se gewysigde voorstel in a 25(j), om maar enkele voorbeelde te noem.

109 1911 AD 295.

110 1915 AD 599.

111 1924 AD 226.

Hooftrekke van 'n nuwe Kredietwet
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9 DIE ONDERSKEID TUSSEN VASTESOMKREDIET EN WENTELKREDIET

Een van die belangrikste vernuwende aspekte van die voorgestelde Kredietwet is die onderskeid wat gemaak word tussen wentelkrediet en vastesomkrediet. In die verlede het Suid-Afrikaanse kredietwetgewing transaksies op sterkte van vorm en nie op sterkte van funksie of inhoud gereguleer nie.[107] Dit is nie 'n probleem wat slegs eie aan die Suid-Afrikaanse reg is nie.[108]

Wentelkrediet word soos volg gedefinieer in die voorgestelde Kredietwet:

> "'**wentelkrediet**' krediet
> (a) wat tot en met 'n ooreengekome perk aan die kredietnemer beskikbaar gestel word; en
> (b) die partye van die veronderstelling uitgaan dat die verskafte krediet by meerdere geleenthede aangewend sal word; en
> (c) die kredietgewer van tyd tot tyd finansieringskoste kan verhaal op die uitstaande saldo van die hoofskuld; en
> (d) die bedrag krediet wat tot die kredietnemer se beskikking is, *pro tanto* herstel word waar die kredietnemer betalings op die rekening bewerkstellig."

Alle krediet wat nie as wentelkrediet kwalifiseer nie word as vastesomkrediet beskou.[109] Soos reeds aangedui is, is bogenoemde 'n nuwe woordomskrywing. Die onderskeid tussen wentelkrediet en vastesomkrediet is 'n onderskeid wat dwarsdeur die regstelsels van die Westerse wêreld aangetref word. Die Amerikaanse terminologie hiervoor is "open-end credit" en "close-end credit".[110] In

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* Sien 1993 *THRHR* 196 ev.

107 Grové *Die gemeenregtelike en statutêre beheer oor woekerrente* (LLD-proefskrif RAU 1989) 151.

108 Sien bv die volgende sitaat uit die *Crowther*-verslag in Brittanje par 4 2 2: "The greatest weakness of the present law of credit, and that from which most defects stem, is the failure to look behind the form of the transaction and deal with the substance. This manifests itself in the drawing of distinctions between one type of transaction and another which are based on legal abstractions and are regarded in the commercial world as unrealistic."

109 Sien die woordomskrywing van "vastesomkrediet" in a 1 van die wetsontwerp.

110 Sien 15 USCA par 1602(i).

Groot Brittanje word gepraat van "running-account credit" en "fixed-sum credit".[111] In Nieu-Seeland word gepraat van 'n "credit contract" en 'n "revolving credit contract".[112] Bogenoemde omskrywing is gebaseer op die bepalings van die Amerikaanse *Truth in Lending*-wetgewing.[113] Die essensie van 'n wentelkredietfasiliteit is dat die kredietnemer op sy rekening trekkings kan maak wanneer hy dit nodig ag onderworpe daaraan dat hy nie sy kredietperk mag oorskry nie. Die totale fasiliteit wat tot sy beskikking is, word gewoonlik nie eenmalig aangewend nie. Die klassieke voorbeelde van wentelkredietfasiliteite is oortrokke tjekrekenings en kredietkaarttransaksies. Ingevolge die konsepwet is alle krediet wat nie as wentelkrediet kwalifiseer nie vastesomkrediet. Laasgenoemde sal dus gevalle insluit waar 'n vastebedrag aan die kredietnemer tydens kontraksluiting beskikbaar gestel word en die kredietnemer verplig is om die skuld tot 'n nulsaldo af te los. Betalings skep nie nuwe krediet vir die kredietnemer nie. Voorbeelde van laasgenoemde is huurkoopkontrakte en persoonlike lenings.

Waarom moet 'n onderskeid tussen wentelkrediet en vastesomkrediet gemaak word? Daar is verskeie redes hiervoor: Die onderskeid is belangrik by kontraksluiting. So is dit nie moontlik om in die geval van wentelkrediet die bedrag in rand en sent wat in finansieringskoste betaal gaan word, vooraf te bereken en te openbaar nie omdat die bedrag finansieringskoste wat in laasgenoemde geval betaal moet word, sal afhang van die wyse waarop die kredietnemer sy rekening bestuur. Derhalwe word daar in dié gevalle slegs vereis dat die finansieringskostekoers per periode en die ekwivalente effektiewe finansieringskostekoers per jaar geopenbaar word. In geval van wentelkrediet moet state ook veel meer gereeld verskaf word as in die geval van vastesomkrediet.

10 WYSE WAAROP FINANSIERINGSKOSTE BEREKEN MOET WORD

10 1 Algemeen

Die vraag ontstaan hoe finansieringskoste bereken en bekend gemaak moet word. Die eerste beginsel wat behoort te geld, is dat finansieringskoste op 'n *eenvormige basis* geopenbaar moet word.[114] Die redes hiervoor is: In die eerste plek stel dit kredietnemers in staat om vergelykings tussen die aanbiedinge van verskillende kredietgewers te trek. Tweedens behoort dit 'n kredietnemer in staat te stel om te oordeel of dit in sy belang is om met sy spaargeld goedere of dienste te bekom of om dieselfde goedere of dienste op krediet te bekom. Eenvormige bekendmakingsvereistes behoort ook tot meer effektiewe kompetisie te lei.[115]

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111 Sien a 10(1) van die Consumer Credit Act van 1974.

112 Sien a 1 en a 18 van die Credit Contracts Act 27 van 1981.

113 Par 226.2(a)(20) Regulation Z 12 CFR Deel 226. Sien in die algemeen Brandell, Terraciano en Abott *Truth in lending: a comprehensive guide* (1985) xxxix; Replansky *Truth in lending and regulation Z: a practical guide to close-end credit* (1985) 20.

114 *Crowther-verslag* 146; Woods "Ethics, ignorance and the true cost of hire-purchase" Desember 1975 *BML* 74 ev; Rasor *Consumer finance law* (1985) 165.

115 Sien in die algemeen Diemont en Aronstam *The law of credit agreements and hire-purchase in South Africa* (1982) 289. Sommige skrywers bevraagteken of bestaande kredietwetgewing dié regspolitieke doelstellings verwesenlik. Sien Kripke "Consumer credit regulation: a creditor-oriented viewpoint" 1968 *Col LR* 445; Kripke "Gesture and reality in consumer credit reform" 1969 *New York ULR* 1; Landers en Rohner "A functional analysis of truth in lending" 1979 *U Cal LR* 752.

Die basiese doelstelling met die bekendmaking van finansieringskoste tydens kontraksluiting is dus om die kredietnemer in die posisie te plaas om te kan oordeel watter waarde hy vir sy geld ontvang. Dit is 'n aanwending van die sogenaamde "best buy"-beginsel. Dit beteken dat 'n kredietnemer ingelig moet word omtrent die tipe rentekoers wat aan hom verskaf word, of alternatief moet kredietgewers dieselfde tipe rentekoerse kwoteer.

10 2 Die voorstelle van die eerste Franzsen-verslag

Die Franzsen-komitee het in 1968 aanbeveel dat die koerse wat ingevolge die Wet op die Beperking en Bekendmaking van Finansieringskoste neergelê word, nominale jaarkoerse[116] moet wees, berekenbaar volgens die aktuariële berekeningsmetode.[117]

Om die wet se administrasie en praktiese aanwending volgens die komitee te vergemaklik, moet die berekeningsmetode wat statutêr neergelê word aan die volgende vier vereistes voldoen: (a) verskillende rentekoerse moet met mekaar vergelykbaar wees ongeag die periode van afbetaling en wyse van finansiering; (b) rente moet maklik bereken kan word; (c) die proses waarvolgens rente

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116 Ipv effektiewe jaarkoerse. Wat is kortliks die verskil tussen effektiewe en nominale jaarkoerse? Kredietgewers hef gewoonlik meer as een keer per jaar rente. So kan 'n kredietgewer aan die einde van elke maand 2% hef op die uitstaande saldo van die skuld welke bedrag deur die kredietnemer betaal moet word. 'n Ander weer kan 12% halfjaarliks hef. 'n Ander weer hef 24% aan die einde van die jaar. Om genoemde koerse onderling vergelykbaar te maak, moet dit na 'n eenvormige termyn (gewoonlik jaarliks) omgeskakel word. Die maklikste wyse om dit te bewerkstellig, is om die koers per periode te vermenigvuldig met die aantal periodes per jaar (2% per maand is 24% per jaar; 12% per halfjaar is 24% per jaar; 24% per jaar is 24% per jaar). 'n Koers wat op dié wyse bereken word, staan as 'n nominale jaarkoers bekend. In al drie voorbeelde hierbo is die nominale jaarkoers 24% per jaar. Dit is egter duidelik dat 'n transaksie waar 'n kredietnemer 2% per maand moet betaal, veel duurder is as 'n transaksie waar 24% eenmalig aan die einde van die jaar betaal moet word. In die eerste geval is die kredietnemer vanaf die einde van die eerste maand 'n gedeelte van sy geld kwyt. Wat verloor die kredietnemer? Teoreties verloor hy die geleentheid om die 2% wat hy per maand betaal, te belê. Teen watter koers kon hy dit belê het? Teoreties kon hy dit belê het teen dieselfde koers as wat hy betaal, te wete 2% per maand. Vir hoe lank? Vanaf datum van betaling vir die res van die jaar. Wat sou die posisie wees as die rente gehef word maar nie betaal hoef te word nie? Dieselfde rekeningkundige beginsels sou geld as die kredietnemer nie maandeliks die 2% betaal nie, maar dit gekapitaliseer word.

'n Koers wat bepaal word met inagneming van bogenoemde feit staan as 'n effektiewe jaarkoers bekend. Die Franzsen-komitee formuleer dit soos volg (*Verslag van die komitee van ondersoek na die Woekerwet* voorsitter DG Franzsen (1967), verwys na as die *Franzsen-verslag 1*) 18 par 161: "The difference between 'nominal' and 'effective' relates to the interest-on-interest principle, according to which it is assumed that finance charges earned are reinvested at the same nominal rate as was charged in respect of the original transaction." Die volgende formule kan gebruik word om 'n koers per periode na 'n effektiewe jaarkoers om te skakel: As i die koers per periode (in desimale vorm) verteenwoordig, betaalbaar m keer per jaar, dan kan die effektiewe jaarkoers met behulp van die volgende formule bepaal word:

$100[(1+i)^m - 1]$

Om terug te keer na die voorbeeld hierbo:

2% per maand is $100[(1+.02)^{12} - 1] = .2682 = 26{,}82\%$ per jaar effektief (24% per jaar nominaal);

12% per halfjaar is $100[(1+.12)^2 - 1] = .2544 = 25{,}44\%$ per jaar effektief (24% per jaar nominaal).

117 *Franzsen-verslag 1* 17 par 160; 18 par 167.

bereken word, moet maklik verstaanbaar wees; en (d) interpretasieprobleme moet sover moontlik uitgeskakel word.[118]

Die Franzsen-komitee het tot die gevolgtrekking gekom dat effektiewe koerse slegs in een geval meer voordele as nominalekoerse bied en dit is waar koerse met mekaar vergelyk word in gevalle waar finansieringskoste meer as een keer per jaar gehef word. So sal 'n transaksie wat teen 'n nominale koers van 20% per jaar gefinansier word, terugbetaalbaar in gelyke maandelikse paaiemente, 'n laer effektiewe koers lewer as 'n transaksie wat teen dieselfde nominale koers gefinansier word, waar die skuld in gelyke weeklikse paaiemente terugbetaal word.[119] Andersins word 'n nominale koers deur die Franzsen-komitee verkies omdat dit volgens hulle moeiliker is om effektiewe koerse te bereken as wat dit is om nominale koerse te bereken. Hulle skryf dit daaraan toe dat dit moeilik is om die werking van effektiewe koerse te verstaan.

Ander oorwegings wat in nominale koerse se guns getel het, is die feit dat nominale koerse meer algemeen in die praktyk gebruik word en dat die handelspraktyk die koerse wat ingevolge die 1926-Woekerwet neergelê is, as nominale koerse beskou het.[120] Die Franzsen-komitee se voorstelle is mettertyd in die Wet op die Beperking en Bekendmaking van Finansieringskoste 73 van 1968 beliggaam.

10 3 Voorstelle vir die berekening en openbaarmaking van finansieringskoste

10 3 1 Algemeen: Die aktuariële berekeningsmetode

Die navorsingskomitee het, wat die berekening en openbaarmaking van finansieringskoste betref, by verskillende deskundiges kers opgesteek. Die komitee het tot die gevolgtrekking gekom dat finansieringskoste volgens die aktuariële metode bereken moet word en dat 'n koers per periode omgeskakel behoort te word na 'n effektiewe jaarkoers. Dié voorstelle word kortliks bespreek.

Die Franzsen-komitee het in 1967 voorgestel dat finansieringskoste ingevolge die aktuariële metode bereken moet word. Die Wet op die Beperking en Bekendmaking van Finansieringskoste 73 van 1968 (tans die Woekerwet) is destyds op die voorstelle van die Franzsen-komitee gebaseer. Daar is geen aanduiding dat die regering dié voorstel van die komitee destyds verwerp het nie.

Thorndike definieer die aktuariële berekeningsmetode soos volg:[121]

> "The actuarial method as to interest is that the creditor shall calculate the interest for the period and add the interest to the balance outstanding at the beginning of the period. This greater balance then becomes the new outstanding balance. When payment is made, it is applied to diminish the outstanding balance."

Vir doeleindes van 'n woordomskrywing kan dié berekeningsmetode soos volg gedefinieer word:[122]

> "'**aktuariële berekeningsmetode**' die berekeningsmetode waar
> (a) veronderstel word dat alle bedrae verskuldig deur die kredietgewer aan die kredietnemer stiptelik beskikbaar gestel word ooreenkomstig die kontrak; en

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118 *Franzsen-verslag 1* 17 par 159.
119 *Idem* 17 par 161.
120 *Idem* 18 par 165.
121 *Consumer credit computation and compliance guide with annual percentage rate tables* (1982) xx.
122 Sien in dié verband die woordomskrywings in a 5 van Nieu-Suid-Wallis se Credit Act 94 van 1984 en par 1.303 (1) van die Amerikaanse Uniform Consumer Credit Code (Uniform Laws Annotated) vol 7A "Businesses and Financial Laws" (1985) 41.

(b) veronderstel word dat die kredietnemer ooreenkomstig die bepalings van die kontrak betaal; en
(c) finansieringskoste van tyd tot tyd gehef word; en
(d) 'n betaling ooreenkomstig paragraaf (b) gemaak word op 'n datum waarop finansieringskoste gehef word ooreenkomstig paragraaf (c) genoemde betaling toegedeel word aan finansieringskoste en aan die hoofskuld op so 'n wyse dat betaling eers aangewend word ter delging van finansieringskoste en waar die betaling wat gemaak word groter is as die opgeloopte finansieringskoste, die balans daarna aangewend word ter delging van die hoofskuld; of
(e) 'n betaling ooreenkomstig paragraaf (b) gemaak word op 'n datum waarop finansieringskoste gehef word ooreenkomstig paragraaf (c) en genoemde betaling kleiner is as die opgeloopte finansieringskoste, of waar geen betaling op genoemde datum gemaak moet word nie, die verskil tussen die bedrag betaal, indien daar is, en die finansieringskoste bygetel word by die onbetaalde balans van die hoofskuld."

Met inagneming van die inhoud van bogenoemde definisie, is dit duidelik dat die bestaande Woekerwet nie die volle konsekwensies van die aktuariële berekeningsmetode akkommodeer nie.[123] Die betrokke feit gee tot baie probleme aanleiding. Die Woekerwet maak nie daarvoor voorsiening dat onbetaalde finansieringskoste (wat nie te wyte is aan kontrakbreuk nie) toegevoeg mag word tot die balans van die hoofskuld nie. Dit is een van die ernstigste tekortkominge van die bestaande Woekerwet. Dit skep veral by wentelkrediet bykans onoorkomelike probleme.

Die navorsingskomitee het tot die gevolgtrekking gekom dat die aktuariële metode steeds die geskikste is om finansieringskoste te bereken. Die voorgestelde Kredietwet moet egter die volle konsekwensies van die aktuariële berekeningsmetode akkommodeer. Derhalwe word in die woordomskrywing van "hoofskuld" daarvoor voorsiening gemaak dat in drie gevalle onbetaalde finansieringskoste (wat nie vanweë kontrakbreuk onbetaald is nie) tot die balans van die hoofskuld toegevoeg kan word, naamlik in geval van

(a) wentelkrediet (met betrekking tot alle kredietkontrakte);

(b) sekere behuisingslenings (die sogenaamde "slow start bonds"); en

(c) geldleningskontrakte soos bedoel in artikel 9(2) van die konsepwet (byvoorbeeld 'n geldleningskontrak waar rente maandeliks gehef word maar die geldlener ses-maandeliks betaal).

Teoreties gesproke behoort bogenoemde reëling vir alle kredietkontrakte te geld. Daar word egter aan die hand gedoen dat daar goeie regspolitieke redes is waarom bogenoemde nie toepassing moet vind by gewone huurkope, kredietkoopkontrakte en so meer nie. In dié gevalle behoort die paaiementskedule so gestruktureer te word dat daar (in die afwesigheid van kontrakbreuk) nooit onbetaalde finansieringskoste is wat tot die balans van die hoofskuld toegevoeg kan word nie.

Wat wentelkrediet betref, sal die nuwe bepalings hopelik tot gevolg hê dat dit nie meer vir die howe nodig sal wees om op 'n geforseerde basis kredietwetgewing en die finansiële praktyk te probeer versoen nie.[124]

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123 Waarskynlik omdat die bestaande Woekerwet grotendeels ontwerp is met die oog op vastesomkrediet (dws par (a), (b) en (c) van die woordomskrywing).

124 Soos wat tans die geval met die Woekerwet is: sien *Trust Bank of Africa Ltd v Senekal* 1978 3 SA 375 (A).

10 3 2 Effektiewe teenoor nominale jaarkoerse

Die huidige hoë vlakke finansieringskostekoerse beteken dat die verskil tussen effektiewe en nominale jaarkoerse tans betekenisvol groter is as toe die Woekerwet in 1968 aanvaar is. Die bestaande Woekerwet vereis dat finansieringskoste by wyse van nominale jaarkoerse geopenbaar moet word. Die beteken dat voornemende kredietopnemers onder 'n wanindruk omtrent die werklike koste van 'n transaksie gebring word.

Die koerse waarteen deposante geld kan belê, kan (en word gewoonlik) as effektiewe jaarkoerse geadverteer. Daar word aan die hand gedoen dat dit ongewens is dat kredietgewers beleggingskoerse as effektiewe jaarkoerse aandui maar uitleenkoerse as nominale jaarkoerse.

Daar word toegegee dat dit moeiliker is om 'n koers per periode na 'n effektiewe jaarkoers as na 'n nominale jaarkoers om te skakel. Enige probleme wat met die berekening van effektiewe jaarkoerse ondervind word, kan opgelos word op die wyse voorgestel in artikels 4 en 7 van die wetsontwerp, naamlik dat die nodige formules en tabelle hiervoor in die *Staatskoerant* gepubliseer moet word.

Die navorsingskomitee het getuienis oor dié betrokke aspek ingewin. 'n Groot aantal vraelyste is aan belangstellendes beskikbaar gestel. Daar kan vermeld word dat 22% van die respondente wat die vraelyste beantwoord het, van mening is dat 'n koers per periode vir openbaarmakingsdoeleindes na 'n nominale jaarkoers omgeskakel moet word. Daarenteen is 66% van die respondente ten gunste daarvan dat openbaarmaking by wyse van effektiewe jaarkoerse moet geskied. 'n Derde groep (2%) is van mening dat finansieringskoste by wyse van sowel effektiewe as nominale jaarkoerse geopenbaar moet word. 'n Aantal respondente het nie die vraag beantwoord nie (10%). Meer as 70% van die finansiële instellings wat op vraelyste gereageer het, is van mening dat finansieringskoste by wyse van effektiewe jaarkoerse geopenbaar moet word.

Wat regsvergelykende materiaal betref, kan vermeld word dat die aangeleentheid internasionaal nie op 'n eenvormige basis hanteer word nie. Op sterkte van die Crowther-komitee se verslag vereis die Britse Consumer Credit Act van 1974 dat openbaarmaking by wyse van effektiewe koerse moet geskied.

Die volgende regstelsels vereis egter openbaarmaking by wyse van nominale koerse: Australië;[125] die Amerikaanse Federale Truth in Lending Act;[126] die Amerikaanse Uniform Consumer Credit Code;[127] en die Nieu-Seelandse Credit Contracts Act 1981. Daarteenoor is die tendens in Europa om effektiewe koerse te vereis soos wat die geval is in die nuwe Duitse Verbraucherkreditgesetz van 1991.

10 3 3 Gevolgtrekking

Die navorsingskomitee het met al die getuienis tot hulle beskikking tot die gevolgtrekking gekom dat finansieringskostekoerse by wyse van effektiewe jaarkoerse geopenbaar behoort te word.

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125 Credit Act 1984 (NSW); Credit Act 1984 (Vic); Credit Act 1984 (WA) en Credit Ordinance 1985 (ACT).

126 A 107; reg 226.5(b) Supplement 1 van Regulation Z uitgevaardig ingevolge genoemde wet.

127 Par 2.304 3.304.

10 3 4 Hulpmiddele

Indien 'n persoon van 'n rentekoers praat, is dit onteenseglik so dat 'n nievakkundige gewoonlik eerste aan 'n bytelkoers dink. In 'n sekere sin is die begrippe "nominale rentekoers per jaar" en "effektiewe rentekoers per jaar" vir 'n nie-vakkundige ewe vreemd. Hierdie feit moes deeglik in oorweging geneem word toe hulpmiddele voorberei is om gebruikers van die bestaande Woekerwet by te staan om die nodige renteberekeninge te doen. Hierdie hulpmiddele bestaan gewoonlik uit finansiële tabelle.

Die tabelle wat in die *Staatskoerant* gepubliseer is, kan vir twee doeleindes gebruik word, naamlik om 'n jaarlikse bytelkoers om te skakel na 'n jaarlikse finansieringskostekoers en omgekeerd.

Hoe word 'n bytelkoers per jaar bepaal? Ons kan die vraag beantwoord met behulp van 'n voorbeeld: K koop 'n saak vir R400. Die prys tesame met finansieringskoste (wat R100 beloop) moet in 36 gelyke maandelikse paaiemente betaal word. Die jaarlikse bytelkoers kan soos volg bepaal word:

$$\frac{\text{R100}}{\text{3 jaar} \times \text{R400}} \times \frac{100}{1} = 8{,}33\%$$

Om die tabelle wat gepubliseer is, te kan gebruik, moet die bytelkoers tot een desimaal benader word. Tabelle vir weeklikse, maandelikse, kwartaallikse, halfjaarlikse en jaarlikse betalings is gepubliseer. Hieronder is 'n uittreksel uit een van die tabelle:

	Maandelikse Betalings Bytelkoers per jaar					
Getal Betalings	8,0	8,1	8,2	8,3	8,4	8,5
1	8,0	8,1	8,2	8,3	8,4	8,5
6	13,6	13,8	13,9	14,1	14,3	14,4
12	14,5	14,6	14,8	15,0	15,2	15,3
24	14,7	14,9	15,0	15,2	15,4	15,6
36	14,5	14,7	14,9	15,1	15,2	15,4

'n Bytelkoers van 8,3% per jaar betaalbaar in 36 gelyke maandelikse paaiemente verteenwoordig 'n nominale koers van 15,1% per jaar. Die tabelle kan ook gebruik word om 'n nominale koers per jaar om te skakel na 'n bytelkoers per jaar. Indien laasgenoemde bekend is, kan 'n kredietnemer se maandelikse paaiement bereken word. Ons kan die volgende as voorbeeld neem: L leen R10 000 by G. Hy moet die bedrag in gelyke maandelikse paaiemente oor 'n termyn van 24 maande terugbetaal. Die transaksie word gefinansier teen 'n nominale koers van 15,6% per jaar. Die bytelkoers (soos bepaal met behulp van die tabelle) is 8,5% per jaar. Die totale bedrag finansieringskoste word soos volg bereken:

$$\frac{8{,}5}{100} \times 2 \text{ jaar} \times \frac{10\,000}{1} = \text{R1 700}$$

Die maandelikse paaiement word eenvoudig bereken deur die kapitaal (R10 000) en finansieringskoste (R1 700) bymekaar te tel en deur die aantal maande (24) te deel. Artikel 2(4)(a) van die Woekerwet is gewysig deur artikel 2(1)(c) van die Wysigingswet op die Beperking en Bekendmaking van Finansieringskoste 42 van 1986. Die wysiging is egter nooit in werking gestel nie. Dit maak daarvoor voorsiening dat die bestaande tabelle ingevolge waarvan 'n bytelkoers per jaar in 'n finansieringskostekoers per jaar omgeskakel kan word en *vice versa*,

vervang word deur tabelle waaruit, in geval van reëlmatige betalings, die *bedrag* finansieringskoste betaalbaar, afgelees kan word. Van die amptenare in die Registrateur van Finansiële Instellings se kantoor, wat destyds die Woekerwet geadministreer het, het voor die navorsingskomitee getuig dat "hulle dit nie nodig geag het om die wysiging in werking te stel nie".

Die hoofrede waarom die Franzsen-komitee nominale jaarkoerse bo effektiewe jaarkoerse vir openbaarmakingsdoeleindes vereis het, is dat dit moeilik is om die werking van effektiewe koerse te verstaan. Die Franzsen-komitee se uitgangspunt is dat hier 'n keuse gemaak moet word tussen 'n eenvoudige (dog nie heeltemal akkurate) berekeningsproses aan die een kant en 'n akkurate (dog ingewikkelder) berekeningsproses aan die ander kant. Daar word aan die hand gedoen dat daar nie noodwendig 'n spanning tussen eenvoud en akkuraatheid hoef te wees nie.

Die regstelsels wat die bekendmaking van effektiewe jaarkoerse verlang, het by wyse van finansiële tabelle dit vir kredietgewers en kredietnemers moontlik gemaak om die berekenings wat vereis word met redelike gemak te maak.[128]

Soos hierbo aangedui is, is daar reeds ingevolge die bestaande Woekerwet finansiële tabelle voorsien waarvolgens 'n jaarlikse bytelkoers na 'n nominale jaarkoers omgeskakel kan word en omgekeerd. Om 'n jaarlikse bytelkoers by wyse van 'n tabel na 'n nominale jaarkoers om te skakel, is niks makliker of moeiliker as om daardie selfde bytelkoers met behulp van 'n tabel na 'n effektiewe jaarkoers om te skakel nie. So gesien, behoort daar op 'n praktiese vlak nie te veel probleme te wees om effektiewe jaarkoerse te vereis vir bekendmakingsdoeleindes nie.

In die wetsontwerp word voorgestel dat amptelike tabelle gepubliseer word wat dit vir 'n persoon moontlik maak om:

(a) 'n bytelkoers per jaar na 'n effektiewe finansieringskostekoers per jaar om te skakel en omgekeerd;

(b) 'n finansieringskostekoers per periode na 'n effektiewe finansieringskostekoers per jaar om te skakel en omgekeerd; en

(c) 'n effektiewe finansieringskostekoers per jaar na 'n nominale finansieringskostekoers per jaar om te skakel en omgekeerd.

Omdat nie alle transaksies by wyse van reëlmatige betalings afgelos word nie, is dit noodsaaklik dat rekeningkundige formules beskikbaar gestel word waarvolgens genoemde berekenings gedoen kan word.

11 BEPERKING VAN FINANSIERINGSKOSTE

11 1 Algemeen

Die vraag of finansieringskostekoerse aan owerheidsbeheer onderworpe moet wees al dan nie, is nie maklik om te beantwoord nie. Daar is ongelukkig nie

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128 Sien a 20(1) van die Engelse Consumer Credit Act van 1974 saamgelees met die Consumer Credit Tables (gepubliseer deur *HMSO* (1977)) soos gewysig. Sien Bennion *Consumer credit control* (1982) (bd 4) "Consumer credit tables" vir volledige tabelle en die wyse waarop hulle gebruik moet word.

'n "regte" of "maklike" antwoord nie. Alle "antwoorde" is al iewers op die proef gestel. Die historiese verbod op die hef van rente is oorspronklik gebaseer op morele en godsdienstige gronde gekoppel aan die idee dat geld (synde 'n nie-natuurproduk) "onvrugbaar" is en derhalwe nageslagloos (renteloos) moet wees.[129] Met verloop van tyd is aanpassings gemaak na gelang 'n herevaluering plaasgevind het van die gronde waarop die verbod gebaseer is. In resente tye word die stryd op ander strydperke gevoer. Dit handel nou oor "ekonomiese beginsels" aan die een kant teenoor "gewetenlose optrede en ongelyke bedingingsposisies tydens kontraksluiting" aan die ander kant.[130] Alhoewel die retoriek dus verander het, bly die basiese vraag steeds: Wanneer kan gesê word dat die koste van krediet so hoog is dat die openbare belang vereis dat individue eerder toegang tot krediet ontsê moet word as om regtens verplig te word om te presteer?

Oor dié onderwerp bestaan 'n geweldige hoeveelheid literatuur. Soos Goode tereg opmerk, is die stryd wat gevoer word tussen die voor- en teenstanders van beheer oor verbruikersrentekoerse 'n stryd waar beide groepe hulle daarop beroep dat hulle in die beste belang van kredietnemers optree.[131] Die een groep beweer dat rentekoersbeheer ten doel het om kredietnemers teen uitbuiting te beskerm wat voortvloei uit die feit dat kredietnemers en kredietgewers in ongelyke bedingingsposisies verkeer. Sodoende word klaarblyklik verhoed dat kredietnemers te veel skuld maak. Die ander groep beweer dat rentekoersbeheer mededinging tussen kredietgewers verminder en die kredietmark verwring. Dit het tot gevolg dat die kredietnemers, as groep, op die lang termyn meer skade as goed aangedoen word.[132]

11 2 Die posisie in Suid-Afrika: probleme veroorsaak deur maksimumkoersplafonne

Die bestaande reëlings in Suid-Afrika met betrekking tot maksimum finansieringskostekoerse funksioneer nie na wense nie. Die volgende probleemsituasies is deur die ondersoekspan geïdentifiseer:

(a) *Die formule* Die formule waarvolgens bepaal moet word wat die maksimum finansieringskostekoers moet wees, is nooit openbaar gemaak nie. Daar is 'n wydverspreide persepsie onder kredietgewers dat die maksimumkoerse van tyd tot tyd, in stryd met die voorskrifte van die formule, kunsmatig laag gehou word. Die betrokke feit word gestaaf deur die bevindinge van die Franzsen-komitee in 1983:[133]

> "Die huidige prosedure waarvolgens die Minister van Finansies die maksimum finansieringskostekoers by wyse van regulasie voorskryf, veroorsaak probleme omdat daar sterk politieke weerstand teen die opwaartse aanpassing van die maksimum koerse is wanneer markkoersbewegings die noodsaaklikheid van so 'n aanpassing aandui. Dit kan daartoe lei, soos in 1982, dat die maksimum koerse ook die minimum koerse word en dat daar dus geen marge vir die verskillende grade van risiko's toegelaat word nie. Wanneer markkoerse weer afwaarts neig, word die Minister dikwels onder politieke druk geplaas om die maksimum koers afwaarts aan te pas."

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129 Aristoteles *The works of Aristotle: Politica* (red Ross (1921)) vol 1 en 10.
130 Oeltjen "Usury: utilitarian or useless?" 1975 *Florida State Univ LR.*
131 Goode "Introductory survey" in *Consumer credit* (red Goode) (1978) 48.
132 Sien Wheatley en Gordon "Regulating the price of consumer credit" 1971 *Journal of Marketing* 21.
133 *Franzsen-verslag 3* 3.

(b) *Klein lenings* Die Woekerwet het tot en met Desember 1992 tot gevolg gehad dat die meeste persone wat 'n besigheid as 'n pandhuishouer of uitlener van klein bedrae bedryf, bykans noodwendig die bepalings van genoemde wet moes oortree om 'n bestaan te kon maak. Die Vereniging van Tweedehandse Handelaars het in 'n voorlegging aan die navorsingskomitee dit onomwonde gestel:

> "[Dit is onmoontlik] vir enige besigheid wat as 'n 'pandjieshouer' wil optree . . . om 'n lewensvatbare bestaan te voer binne die beperkinge neergelê deur die Woekerwet . . ."

Hierdie probleme is grotendeels reggestel in 'n artikel 15A-vrystelling wat op 31 Desember 1992 gepubliseer is ingevolge waarvan sekere geldleningskontrakte van R6 000 en minder vrygestel is van die bepalings van die Woekerwet.[134] Die konsepwet bevat egter ook bepalings oor dié aangeleentheid soos wat reeds in paragraaf 4 gemeld is.

(c) *Toepassingsgebied van die wet* Daar is tans nie klarigheid oor wat die wetgewer se regspolitieke oogmerke met die Woekerwet is nie. Die Woekerwet is van toepassing op *alle persone* wat geldlenings-, krediet- en huurtransaksies aangaan; óók transaksies waar besigheidskrediet verskaf word. Die wet maak nie 'n onderskeid tussen natuurlike en regspersone nie. In 1983 het die Franzsen-komitee[135] van die veronderstelling uitgegaan dat beskerming verleen moet word met verwysing na die grootte van die hoofskuld. Hulle was van mening dat die wet slegs moet geld waar die hoofskuld minder as R50 000 beloop om sodoende die "ongesofistikeerde deel van die gemeenskap" te beskerm.[136] Dit sou onder andere beteken dat

> "vir 'n groter onderneming met redelike kredietwaardigheid daar in die praktyk geen beheer oor die finansieringskostekoers wat hy betaal, sal wees nie".[137]

'n Hele statutêre struktuur is dus opgerig in die veronderstelling dat die wet slegs sal geld vir transaksies waar die hoofskuld kleiner as R50 000 is. Kort daarna is die Woekerwet se toepassingsgebied egter na R500 000 opgeskuif.

Die Woekerwet is 'n maatreël wat gegroepeer kan word onder daardie wette wat "verbruikersbeskerming" ten doel het. Die vraag kan tereg gevra word of die wet derhalwe ook op kontrakte van toepassing moet wees wat nie as "verbruikerstransaksies" kwalifiseer nie.

11 3 Oplossings aangebied in die konsepwet

Maksimumkoerse is reeds die afgelope ongeveer 70 jaar deel van die Suid-Afrikaanse regstradisie. Die navorsingskomitee het tot die gevolgtrekking gekom dat die huidige posisie met betrekking tot maksimumkoerse gewysig behoort te word waar die bestaande maatreëls probleme veroorsaak. Aan die ander kant was die ondersoekspan van mening dat veral verbruikerskoerse nie geheel en al ongereguleerd gelaat kan word nie.

Die navorsingskomitee het voorgestel dat maksimumkoersplafonne vir sekere *verbruikerskontrakte* in die nuwe voorgestelde wet *behoue* bly.

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134 Sien GK R3451 in *SK* 14498 van 1992-12-31.

135 *Die Registrateur van Finansiële Instellings: Ondersoek na die Wet op Beperking en Bekendmaking van Finansieringskoste deur die Tegniese Komitee oor Bank en Bouvereniging-wetgewing* (voorsitter DG Franzsen) (1983) (verwys na as die *Franzsen-verslag 3*).

136 *Franzsen-verslag 3* 6.

137 *Franzsen-verslag 3* 7.

Wat *verbruikerskontrakte* in die algemeen betref, sou dit onverantwoordelik wees om in hierdie stadium van die Suid-Afrikaanse politieke en ekonomiese ontwikkeling met maksimumkoersplafonne vir alle verbruikerskontrakte weg te doen. Die getal persone wat daagliks vir die eerste keer van kredietfasiliteite gebruik maak, groei steeds. Dit is van die uiterste belang dat dié betrokke ondervinding sover moontlik positief moet wees. Dit is en bly die funksie van die staat om beskerming te verleen waar beskerming nodig is.

Dit moet egter ook duidelik wees dat die oogmerk met maatreëls van dié aard *nie is om markkoerse te beheer* nie. Dit handel hier oor 'n beskermingsmaatreël, 'n veiligheidsnet, 'n beskermingskoers. Die enigste regverdiging vir koersplafonne is om die publiek teen oormatige hoë koerse, wat op uitbuiting neerkom, te beskerm.

Die probleme wat tans met koersbeheer ondervind word, moet egter terselfdertyd aangespreek word. Bogenoemde voorstelle word dus met vier voorbehoude gemaak (welke voorbehoude hopelik van die belangrikste probleme wat bestaan, aanspreek):

(a) *Voorbehoud 1* Sekere kredietkontrakte moet nie aan maksimumkoersplafonne onderworpe wees nie. Die navorsingskomitee is van mening dat net kontrakte wat as *verbruikerskontrakte* geklassifiseer word aan sodanige beheer onderworpe moet wees. Die probleem wat dadelik ontstaan, is om 'n "verbruiker" te definieer. Die 1968-wet het onder andere bepaal dat transaksies gereguleer word waar roerende goed of dienste vir hoofsaaklik persoonlike, familie-, huishoudelike of boerderydoeleindes bedoel is. Soos die Franzsen-komitee in 1983 opgemerk het, is dit in die praktyk moeilik om te onderskei of 'n "geldlening of . . . goedere of dienste . . . vir persoonlike of besigheidsdoeleindes aangewend is".[138]

Die navorsingskomitee was van mening dat die enigste werkbare onderskeid wat gemaak kan word dié tussen regspersone en natuurlike persone is. In ooreenstemming met die regspolitieke doelstellings wat by verbruikerswetgewing behoort te geld, was die ondersoekspan van mening dat statutêre maksimumkoerse in die voorgestelde wet slegs moet geld waar die kredietnemer 'n natuurlike persoon is; en waar die hoofskuld minder as R200 000 beloop.

Wat *klein lenings* betref: indien maksimumkoersplafonne behoue bly, moet daar 'n oplossing gevind word vir die probleme wat met klein lenings ondervind word. In dié verband sou dit teoreties moontlik wees om spesifieke wetgewing te promulgeer wat net met klein lenings handel. Ons is egter van mening dat *vastesomgeldleningskontrakte* met 'n hoofskuld van R2 000 en kleiner nie aan statutêre maksimumkoersplafonne onderworpe gestel moet word nie. Waarom slegs vastesomgeldlenings met 'n hoofskuld van R2 000 en kleiner? Dié bedrag is gekoppel aan die jurisdiksieplafon van die howe vir klein eise. Dit hang ook saam met die beskerming wat aan geldleners wat lenings van dié aard aangaan, verskaf word deur die algemene woekerbepaling in die konsepwet.[139]

(b) *Voorbehoud 2* 'n Hof moet oor die bevoegdheid beskik om buitensporige koerse in die afwesigheid van koersplafonne afwaarts aan te pas. Indien die

138 *Franzsen-verslag 3* 7.
139 Sien par (b) onmiddellik hieronder.

voorstelle in paragraaf (a) hierbo aanvaar word, sou dit beteken dat waar die kredietnemer 'n regspersoon of 'n natuurlike persoon is wat *meer* as R200 000 of *minder* as R2 000 leen, die partye gemagtig word om self die koste van die krediet te bepaal. Geen maksimumkoersplafonne sal dus geld nie. Beteken dit dat hierdie kredietnemers geheel en al onbeskermd gelaat word? Die antwoord is nee. In ooreenstemming met die beginsels van die gemenereg behoort 'n hof oor die bevoegdheid te beskik om 'n ooreengekome koers afwaarts aan te pas waar die koers, met inagneming van alle omstandighede, buitensporig bevind word. 'n Algemene woekerbepaling is opgeneem wat 'n hof uitdruklik magtig om in te gryp waar buitensporige rente gevorder word by kontrakte wat andersins vrygestel is van die wet.

(c) *Voorbehoud 3* Die formule waarvolgens die maksimumkoerse bepaal word, moet gepubliseer word. Die navorsingskomitee was van mening dat die formule nie in wetgewing vervat hoef te word nie. Die volgende voorstel van meneer R Rudolph van AMG Classic Investments (Pty) Ltd behoort ernstige oorweging te geniet:

> "Rates [should] be determined and gazetted automatically pursuant to any increase in the official Bank Rate by way of a constant differential between the abovementioned Bank Rate and the Maximum Finance Charge Rate. In this way, one eliminates the distortion of interest rate patterns in the market following increases in the Bank Rate, (and consequently, increases in the commercial banks' prime overdraft rates) which are not matched by corresponding increases in the Maximum Finance Charges Rate."

Die navorsingskomitee het hom nie verder uitgelaat oor die formule en die wyse waarop dit saamgestel moet word nie. In dié verband het ons egter een opmerking gemaak, naamlik dat die koste vir die addisionele verbruikersbeskermende maatreëls wat in die konsepwet ingebou is, in die bedryfskostes van kredietgewers gereflekteer gaan word. Dié feit moet in gedagte gehou word as maksimumkoersplafonne neergelê word, anders kan kredietnemers wat tans finansiering kan bekom, "uit die mark beskerm word".

(d) *Voorbehoud 4* Die voorgestelde wet se toepassingsgebied moet beperk word soos bedoel in hoofstuk 2 van die konsepwet. Hierbo is aangedui dat die voorgestelde Kredietwet in wese met verbruikersbeskerming handel. Dié feit word gereflekteer in die wet se voorgestelde toepassingsgebied. Indien die toepassingsgebied verander word, moet sorg gedra word dat verandering met die wet se gees en algemene aanslag versoenbaar is.[140]

12 ALGEMEEN

Bogenoemde is maar enkele van die hooftrekke van die voorgestelde Kredietwet. 'n Volledige kopie van die konsepwet en kommentaar kan verkry word by:

Die Sekretaris
Suid-Afrikaanse Regskommissie
Privaatsak X668
PRETORIA
0001.

Die konsepwet en kommentaar is in sowel Engels as Afrikaans beskikbaar.

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140 Vgl die probleme wat ontstaan het toe die Franzsen-komitee 'n hele statutêre struktuur opgerig het op die veronderstelling dat dit wat hulle voorstel, slegs sal geld vir kontrakte waar die hoofskuld kleiner as R50 000 is en die Woekerwet se toepassingsgebied kort daarna na R500 000 opgeskuif is.

Citizenship, Muslim family law and a future South African constitution: a preliminary enquiry

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OPSOMMING

Burgerskap, Moslemse familiereg en 'n toekomstige Suid-Afrikaanse grondwet: 'n voorlopige verkenning

Die bydrae ondersoek die verwantskap tussen universele wyses van politieke inlywing en die eise van kulturele spesiwiteit. Die vraag word geopper of 'n kleur-neutrale grondwet die waarde van kulturele bande genoegsaam kan erken. Die ondersoek in hierdie verband vind plaas deur moontlike wyses van grondwetlike tegemoetkoming van 'n verskeidenheid familieregtelike regimes in oënskou te neem – veral Moslemse familiereg (*sharia*). Drie moontlike "modelle" word bespreek. Die eerste behels 'n enkelvoudige begrip van die huwelik. Die basis hiervan is 'n onderskeiding tussen "openbare" en "private" sfere en formele en informele regstelsels. 'n Mate van private ordening word in dié model veroorloof – en dus ook 'n mate van outonomie buite die staats- en grondwetlike kring. Die *sharia*-reëls sou in effek buite die grondwet fungeer as 'n "private regstelsel". Die tweede model wys op 'n gedeeltelike integrasie van die beginsels van die verskillende regstelsels. Anders as die eenheidstelsel wat 'n eenheidsregsvorm afdwing, skep integrasie 'n stelsel wat regsvorme uit verskillende bronne saambring sonder om hulle uit te wis. Die integrasie is net gedeeltelik omdat dit slegs reëls behels wat versoenbaar is met die beginsel van gelykheid. Die derde model is dié van regspluralisme. Dit beteken die formele inlywing van verskillende stelsels van personereg binne 'n enkele regstelsel. Regspluralisme in hierdie gedaante vereis reëls vir die beslegting van regsbotsings wat onvermydelik sal voorkom. Die stelsel is waarskynlik onversoenbaar met die grondwetlike verskansing van gelykheid tussen die geslagte. Die uiteindelike slotsom is dat terwyl die derde model 'n keuse afdwing tussen twee grondwetlike doelwitte van gelyke belang – die waarborg van gelykheid en die beskerming van verskeidenheid – die eerste en tweede modelle aandui dat dit binne perke moontlik is om gelyke burgerregte met die Moslemse personereg te vereenselwig.

One of the central issues that will have to be addressed in the process of refashioning our legal institutions is how best to accommodate the plurality of personal-law regimes South Africans are accustomed to live by with a national regime of common citizenship rights. This article, which addresses a specific case – that of Muslim South Africans – is written in three parts. The first places the issue, which is the central concern, within the individual/group rights debate; the second introduces the reader to Muslim South Africans and their family laws; and the third outlines three "models" for accommodating a diversity of family laws and their constitutional implications.

I

Apartheid, as a *juridical* ideology, reifies[1] group membership and establishes racial groups as the source of differential rights claims; it defines the legal nation in racially exclusive terms and limits membership of the political community to whites.[2] Apartheid's nemesis has therefore taken the form of a popular struggle for a non-racial nation and an inclusive political community which eliminates political distinctions based on race, property, rank, religious affiliation or ethnic origin,[3] for a new expanded "public" sphere composed of equal "citizens".[4] This conception of the "citizen" is essentially abstract as it disregards *membership* of class, race or ethnic group. These distinctions are considered irrelevant for the purpose of distributing political rights. This purely formal conception of political emancipation is limited in the sense that it does not require the abolition of distinctions of class, colour or culture in the non-political, private sphere of civil society.[5] But it does not necessarily exclude recognition of the value of *cultural membership*, where the political community, or "nation-state" is not co-extensive with a single cultural community.[6] Put differently, the struggle for political liberation in the South African context has at the same time been a struggle for the consolidation of a single South African nation embracing a diversity of linguistic, cultural and religious communities.

Translated into the terms of the current constitutional debate, these political values are expressed in a preference for a "colour-blind" constitution, without entrenched group differentiation. Within this *ethnically-neutral* framework, cultural diversity can be protected through the guarantee of *individual equal rights*, the *guarantee of non-discrimination*,[7] and a *constitutionally guaranteed right to associate*.[8] This "model" restricts the expression of cultural *difference* to the "private" sphere. Its particular strength is that it protects cultural uniqueness without legally differentiating between individuals and without conscripting individuals to groups against their will.[9]

In contrast to the *universalist* mode of political incorporation suggested above (so that each individual stands in the same direct relationship to the state),[10] some constitutional theorists have advocated a *consociational* mode of incorporation[11] (that is through membership of a cultural community) as the

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1 A philosophical concept describing the effect of ideas which treat social relations as "things" in themselves.

2 This, throughout its various mutations and despite the policy of ethnic co-option, remained the essence of apartheid as a political system.

3 See Jordan "The South African liberation movement and the making of a new nation" in Van Diepen (ed) *The national question in South Africa* (1988).

4 See Keat "Liberal rights and socialism" in Graham (ed) *Contemporary political philosophy* (1982).

5 Of course, the objections that may be made against social inequality do not apply to cultural diversity. The maintenance and development of cultural diversity is a widely recognised political good.

6 Where the political community and the cultural community coincide, recognition of cultural membership will not be an issue. It only becomes an issue when the political community is culturally diverse (see Kymlicka *Liberalism, community and culture* (1989) 135).

7 Sachs "Towards a bill of rights" 1990 *SAJHR* 18.

8 A 5 ANC's Draft Bill of Rights.

9 Jordan 119.

10 Kymlicka 137.

11 *Ibid.*

appropriate mode in "deeply divided societies",[12] and a form of *cultural autonomy*.[13] The rationale for consociationalism in this context would be that the *capacity* of minority cultures to develop their distinct characteristics is insufficiently protected by "universalist modes of incorporation"[14] and that such groups therefore require special *institutional protection* in the *public sphere*.

Are there circumstances in which it would be justifiable to depart from the norm of political equality and to accord special rights to specified groups?[15] And, more specifically, should a "group's rights" include the right to use a *personal legal system*, and to have it enforced by the state? Sachs[16] has acknowledged this possibility without making specific proposals or arguing in its favour:

> "[T]he Constitution could manifest a special tolerance . . . in relation to certain areas of traditional law and custom . . . so that all that is rich and meaningful to people can be retained and progressively developed, while that which is divisive and exploitative and out of keeping with the time – specially that which has been distorted by apartheid – can be eliminated."

Liberation movements have generally been in favour of a *uniform* civil code applicable to all citizens as a way of guaranteeing equality to all citizens before the law and consolidating national unity. The struggle for

> "independence, for a national culture and for a national legal system therefore inevitably involved a struggle against legal pluralism. The basing of rights and duties on *colour, origin, life-style or ethnicity* was so bound up with divisiveness and humiliation imposed by colonialism, that legal pluralism came to be identified with colonialism itself and as a barrier to independence and nationhood".[17]

On the other hand, though many African countries made moves towards judicial and legal integration after achieving independence,[18] few have been able to abolish African customary laws completely, especially in the sphere of family law and succession. In Zimbabwe, for instance, while important changes[19] have been introduced since independence in 1980, particularly in the application of the country's choice of law rules, the dual-legal structure inherited from the colonial era in terms of which the general law (Roman-Dutch common law and

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12 Eg Lijphart "Federal, confederal and constitutional options for the South African plural society" in Rotberg and Barratt (eds) *Conflict and compromise in South Africa* (1978).

13 See eg De Villiers *Groepe: meulsteen of bousteen?* HSRC Centre for Constitutional Analysis (1990).

14 Kamlicka 137.

15 The onus would clearly be on those seeking to justify such a departure. One of the widely accepted exceptions to the equality principle is the policy of affirmative action in terms of which special measures are enacted in favour of specified groups in order to address the results of past discrimination.

16 19.

17 Sachs and Welch *Liberating the law: creating popular justice in Mocambique* (1990) 127.

18 In Tanzania, efforts to unify their personal laws culminated in the enactment of a new marriage law, The Law of Marriage Act, 1971.

19 In 1981 the African Law and Tribal Courts Act was replaced by the Customary Law and Primary Courts Act 6 of 1981. This act sets out choice of law rules and abolishes race as a criterion for determining the applicable law. The Legal Age of Majority Act 15 of 1982, which established 18 as the age of majority, applies for the purposes of any law, including customary law. Previously, the status of African women was determined by customary law (see Armstrong "Zimbabwe: away from customary law" 1988/89 *Journal of Family Law* 339).

statute) applies to some family disputes, and African customary law to others, is constitutionally protected.[20]

African customary law, and other "group laws", which continue to have relevance for the people, could in a future non-racial South African legal system either be *recognised* as part of the legal order, or be *tolerated* through the constitutional protection of a "free" civil society. In either case, however, culturally determined sexual stereotypes will continue to govern the relationships between men and women. Gender oppression may be rooted in a "material base" but it is also expressed

> "in socio-cultural traditions and attitudes all of which are supported and perpetuated by an ideology which subordinates women. In South Africa it is institutionalised in the laws *as well as in the customs and practices of all our people*. Within our racially and ethnically divided society, all women have a lower status than men of the same groups in both *law and practice*. And, as with racism, the disadvantages imposed on them ranges across the political, economic, social, *domestic*, *cultural* and civil spheres"[21] (my emphasis).

The "feminist" literature that has accompanied the growth of the Women's Movement has focused our attention on the *specificity* of women's oppression and patriarchal relations within the family and society. This literature has called into question ideologies which assume that the relationship between the sexes is part of an immutable natural order, and by locating this apparently timeless relationship in the historical process, has demonstrated that it is subject to change and development.[22]

On the eve of the adoption of a new *non-racial* constitution in South Africa, women are staking their claim to a *non-sexist* constitution.[23] They insist that gender equality be unambiguously entrenched in the constitution as a basic human right.[24] But the constitutional protection of cultural diversity and religious belief and practice is also an important aim of democratic transformation, and because "culture" and "tradition" sometimes place their *imprimatur* on patriarchy, the constitutional recognition of cultural norms and personal legal systems could be inconsistent with the constitutional guarantee of equality between the sexes.

The question whether and how the personal legal systems of groups should be afforded recognition, should also be considered against the backdrop of reforms introduced in South African family law over the last decade. The enactment of the Matrimonial Property Act 88 of 1984 effected radical changes in the nature of the marriage relationship and to its proprietary consequences. Chapter I introduced a deferred system of sharing, Chapter II abolished the marital power and section 36(b) introduced a judicial discretion to redistribute property on divorce.[25] Five years earlier, section 4 of the Divorce Act 70 of 1979

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20 S 23 of the Zimbabwe Constitution read with s 89.

21 ANC, National Executive Committee Statement on the Emancipation of Women of 1990-03-02, quoted in Ginwala, Mackintosh and Massey "Gender and economic policy in a democratic South Africa" (unpublished) 3 (my emphasis).

22 See eg Alexander "Women, class and sexual difference" ch 8.

23 Mabandla "Protecting women's rights and promoting gender equality in a democratic non-racial and non-sexist South Africa" *Lawyers for Human Rights International Conference* 1990-11-23/25.

24 *Idem* 3.

25 See Sinclair *An introduction to the Matrimonial Property Act, 1984* (1984).

replaced the concept of matrimonial fault with the notion of *irretrievable breakdown* as the ground of divorce. These reforms reflect the modern idea of marriage as a partnership of equals from which either party may withdraw when the marriage has broken down. They also accord recognition to the "unpaid" contribution of wives to the accumulation of family assets and thus represent a considerable improvement in the position of the non-earning spouse.[26] There have also been important reforms expanding the rights of children. Section 6 of the Divorce Act requires the court in the exercise of its power to award custody on divorce, to have regard to the *interests of the minor child* as the paramount consideration. Section 2 of the Intestate Succession Act 81 of 1987 places illegitimate children in the same position as legitimate ones on intestacy. This may be considered a step towards the abolition of the status of illegitimacy.

These developments reflect trends in family law the world over. Over the last two decades, a certain universalisation of norms relating to the rights of family members has occurred across cultures and socio-economic systems. It is submitted that any attempt to give expression to the cultural diversity of the emerging South African nation through the recognition of personal family laws should not diminish rights which have already accrued in terms of the existing law, or depart from internationally accepted family law norms.

II

In 1987[27] the South African Law Commission (SALC) solicited the opinion of several Muslim organisations and individuals[28] on the question whether recognition should be accorded to Muslim personal laws as part of the law of the land. The ULEMA bodies[29] as well as the Islamic Council of South Africa (ICSA) expressed themselves in favour.[30] "Extra-Parliamentary" organisations like the Muslim Youth Movement (MYM) and the Call of Islam expressed reservations about the desirability of co-operating with a statutory body, and argued that the apparent readiness of the authorities to consider recognition was part

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26 Sachs and Wilson *Sexism and the law, a study of male beliefs and judicial bias* (1978) 143.

27 A questionnaire was circulated, inviting Muslim organisations to submit representations.

28 Professor Nadvi, head of the Department of Arabic at the University of Durban Westville and Advocate Mohamed of the Durban Bar submitted well-researched representations in their personal capacities. They have been prominent advocates of the view that the South African government should be encouraged to extend recognition to Muslim personal laws. Nadvi believes that the difficulties experienced by Muslims in South Africa can only be overcome through official recognition of Muslim personal law. Mohamed advocates the establishment of family courts, the nomination of *qadis* (judges) by the judicial committee of the Islamic Council of South Africa and the confirmation of their appointments as judges and magistrates by the State President.

29 The ULEMA bodies are Councils of Theologians. They include the Muslim Judicial Council (MJC) (Cape), the Jamiat-U-Lama (Tvl), the Jamiat-U-Lama (Natal) and the Mujlisul-U-Lama (South Africa).

30 The ULEMA bodies issued a joint pamphlet which read: "For many years since the arrival of Islam in South Africa, Muslims have been yearning for the introduction of Islamic law in some form or another to govern their affairs. Various approaches have been made to the relevant authorities in the past but without any measure of success. We pray and hope for the co-operation of all Muslims in this endeavour, and hope that it will not be long before we shall see Muslim Personal Law as part of a legal system of the Republic of South Africa."

of a political strategy aimed at ethnic co-option.[31] The SALC has not yet published its findings.

The issue now needs a fresh airing in the light of the process of negotiating a new constitution, which will, it is hoped, extend to all South Africans what Rawls has called "the equal liberties of citizenship"[32] while acknowledging cultural diversity and protecting religious freedom. In determining the content of the relevant constitutional provisions, the views of the Muslim community should be of decisive importance. What follows is an attempt to place the historic claims of the South African Muslim community within the context of the emerging democratic order. Before considering the concrete options available and their constitutional implications, it is necessary to introduce the reader to the South African Muslim community, its values and aspirations, and its system of law.

South African Muslims

The first Muslims to arrive in South Africa were not, as is sometimes assumed to have been the case, among the indentured labourers who arrived in Natal from the south of India on the ship *Truro*, on 16 November 1860. The indentured labourers who had come to work on Natal's sugar cane plantations were in fact preceded by slaves, who were imported into the Cape colony from the Malayan Archipelagos.[33] Despite

> "harassment from their white Christian owners, the early Muslims clung tenaciously to their faith and to their cultural heritage. They gathered in their houses to perform *Salaat*,[34] to learn and memorise the Holy Quran, and to observe their Islamic traditions".[35]

The indentured labourers were followed by Muslim and Hindu merchants from Gugerat, Surat and Porbander.[36]

Today there are approximately 500 000[37] Muslims in South Africa. Many of these are of Indian origin, but the majority are classified "coloured" under the apartheid laws. There are also relatively small numbers of African and white adherents.[38] Muslims are a largely urbanised community of artisans, professionals and merchants. In most Muslim households the husband still has the primary duty of support but the number of Muslim women in wage employment and at universities is expanding and increasingly middle-class families rely on the income of both spouses. Working class women have for a long time now been forced out of the home by economic necessity.[39]

Muslims have established a dense network of autonomous organisations, mosques, educational institutions (*Madressas*) and judicial structures within

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31 The attitude of the Muslim Youth Movement is reflected in the February 1988 issue of *Al Qalam*, the Movement's newspaper.
32 Graham 67.
33 Islamic Council of South Africa (ICSA) "Meet the Muslims" 14.
34 An obligation performed five times every day.
35 Islamic Council of South Africa (ICSA) 14.
36 *Idem* 15.
37 *Idem* 32.
38 *Idem* 13.
39 Jithoo "The dynamics of Indian family firms in Durban" in *Aspects of Family Life in the South African Indian Community*, proceedings of a conference arranged by the Department of Social Work at the University of Durban-Westville 1985-03-25/26.

"civil society". The ULEMA (Muslim theologians) have established provincial councils or *jamiats* which regulate religious practice and ritual and issue *fatawa* (edicts) on the interpretation of Islamic law, including family law. Their decisions are widely respected by Muslims and are considered binding.

Legal status of Muslims

Since the great majority of Muslims are members of the "non-white races" they suffer the same civil and political disabilities as the black majority. Muslims have never enjoyed equal rights of citizenship and have been discriminated against on the grounds of race. Under Group Areas legislation, entire Muslim *jamaats* (communities) were forcibly removed and had to re-establish mosques out of resources accumulated within the community.[40] Though the Muslim community exhibits a great variety of political viewpoints, the majority of Muslims have participated in the anti-apartheid struggle for *equality, democracy and national unity*.[41]

However, Muslims have also been involved in a discrete struggle for the assertion of the *Muslim identity*. This is a struggle which emphasises the integrity and validity of Islamic concepts. The non-recognition of Muslim personal laws by the South African law has long been a source of grievance. Thus two potentially, but not necessarily, conflicting strands of political thought have arisen within the Muslim community: one emphasises the struggle for the rights of all citizens, and denounces separate rights; and the other asserts the rights of the Muslim, *qua* Muslim.

Legal status of Muslim marriages

South African courts have followed the celebrated definition of a marriage enunciated by Lord Penzance in *Hyde v Hyde and Woodmanse*.[42] He said:

> "[M]arriage, as understood in *Christendom*, may . . . be defined as a *voluntary* union for life of *one man and one woman*, to the exclusion of all others."

Thus the monogamous marriage of Roman-Dutch law is the only form of marriage recognised under our law. It may be contracted by all, irrespective of *race or religion*. A marriage which does not possess the element of exclusiveness is not recognised as a legal marriage under South African law. Marriages in accordance with Muslim (or Hindu) rites are denied recognition on the basis that they are "potentially polygamous"[43] unless solemnised by a marriage officer[44] in terms of section 3 of the Marriage Act 25 of 1961, in which event

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40 *Idem* 26.
41 *Idem* 31.
42 (1886) LR IP AD 130 (my emphasis).
43 *Seedats Executors v The Master (Natal)* 1917 AD 302.
44 S 3 of the Marriage Act 25 of 1961 provides for the appointment of priests of any Indian religion as marriage officers. It would appear that very few *Gors* (Hindu priests) and *Maulvis* (Muslim priests) have registered under the act. This means that the great majority of marriages in the Indian community which have been contracted in accordance with Muslim or Hindu rights, are not legally binding unions. The "wives" of such unions are hardly better off than concubines. The reasons for this reluctance are not entirely clear. When the authorities introduced a similar provision in the Indian Relief Act 22 of 1914, Ghandi advised against the appointment of marriage officers on the ground that such

a valid *civil* marriage comes into being. The South African law is, of course, not consistent in this regard since African customary marriages, even if actually polygamous, are accorded limited legislative recognition.[45]

The consequences of non-recognition are serious, particularly for the wife. Although a couple may regard themselves as married according to the tenets of their religion, the law treats them as strangers. There is therefore no legal nexus between them: there is no joint estate and any nuptial agreement is void; there are no financial obligations between the spouses *inter se* and no claim for loss of support accrues to the dependent spouse on the death of her "husband"; she has no claim for maintenance on divorce or against her husband's deceased estate; she is effectively disinherited if her husband dies intestate; she may be compelled to give evidence against her spouse in criminal proceedings; and the law attaches the stigma of illegitimacy to her children.[46]

Muslims, however, continue to regulate their domestic affairs in accordance with Islamic law. All Muslims are married by a representative of the Muslim clergy, who performs the *niqah* (marriage ceremony) usually in a mosque, and their marriages are effectively dissolved by the *talaq* (repudiation) procedure. So the law of the land and the law of the South African Muslim community exist side by side in mutual disregard. This leads to all sorts of anomalies. Muslims who regard themselves as married, are regarded as unmarried by the law; Muslims who have annulled their marriage are, in the absence of a court order, considered married.

The long struggle of Muslims for the recognition of their marriages and legal system is much more than a struggle to overcome these disabilities and anomalies; it is an expression of the assertion of the Muslim identity, of which Islamic law is an integral component.

Muslim law, Muslim culture and the Muslim identity

As modern Europe emerged from feudalism, it discarded theocracy; new ideologies of state and law based on social contract and natural law doctrines accompanied the consolidation of absolute monarchies. Thus secularisation was the

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appointments would "lead to dishonesty in the community and expose the priest to temptations" (Indian Opinion 1914-07-08). In their representations to the SALC, dated 1988-03-29, the Islamic Council explained their attitudes to s 3 of the Marriage Act in the following terms: "Muslims are reluctant to accept appointments as a result of statutory impediments such as the Immorality and Mixed Marriages Acts. This reluctance will continue to exist as long as the morality of Muslim Marriages are judged according to Christian values." It may also be that the Muslim clergy consciously chose not to register as marriage officers because Muslim marriages solemnised in that capacity would have the consequences of an ordinary civil marriage and be dissoluble only by an order of court.

45 S 11 of the Black Administration Act 1927.

46 The courts have, however, found ways to mitigate the inequitable consequences of non-recognition. Thus in *Isaacs v Isaacs* 1949 1 SA 952 (C), where the parties had pooled their resources and collaborated in a joint enterprise, the court found that a tacit universal partnership existed between them. In *S v Vengetsamy* 1972 4 SA 351 (D) the court held that as the evidence had established that the marriage of the accused and his spouse in accordance with Hindu rights had all the attributes of a Christian marriage, the common-law rule that the spouse of an accused is not a compellable witness for the prosecution should be observed and that the accused was entitled to object to the evidence.

reverse side of the centralisation of political power independent of the church. Islamic law and civilisation evolved along a different path.[47] The Prophet of Islam, Mohamed (Peace be Upon Him) established a system of law and judicial order; no Reformation occurred in Islamic history to separate church and state, religion and law.

The Arabic term for Islamic law is *fiqh* and "it connotes not only a system of binding rules, but also all that is spiritually profitable and injurious to man".[48] The Holy Quran is the fundamental source of Islamic law, and in the Muslim belief system, it constitutes the *ipsissima verba* of Almighty God. The Quran contains both secular and religious injunctions, and

> "it prescribes moral standards for a wide range of personal, social and economic and political relationships, embracing both civil and criminal law".[49]

The Holy Quran, together with compilations of the practices and traditions of the Prophet Mohammed form a body of commandments (*sharia*) which govern all aspects of a Muslim's life, including marriage, divorce and devolution of property on death.

Thus Islam is a "revelational culture",[50] which does not differentiate between law and religion, positive legal rules and moral prescripts, the religious and the profane, and the public and the private. This religious world-view guides the individual through the life-cycle of birth, life and death; and it gives meaning to existence. Islamic culture provides the Muslim *umma* (community), in the words of Ali Mazrui,[51] with *criteria for evaluation, lenses of perception and cognition and a basis for identity*. It is crucial, therefore, in any discussion of the possible accommodation of Muslim personal laws in a future non-racial legal order, to grasp this continuity of Muslim law, religion, culture and identity.[52]

The Muslim law of marriage and succession

Islam considerably ameliorated the hardships attendant on the status of women. In pre-Islamic Arabia women were little more than chattels subject to the arbitrary power of their husbands.[53] Islam abolished the practice of female

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47 Smith "The sociological framework of law" in Kuper and Kuper (eds) *African law: adaptation and development* (1965) 34. There is also, however, a secular tradition in Islam which sees the state as a social organisation "with a material base rooted in economic and political structures", rather than as a divinely ordained institution (see Khan "Political and economic aspects of Islamitization" in Kahn (ed) *Islam politics and the state: the Pakistan experience* (1985).

48 Bulbulyia "The ethical foundations and distinctive features of Islamic law" 1985 *CILSA* 219.

49 *Idem* 216.

50 Nadvi "Islamic legal philosophy and the Quranic origins of the sharia law" 1989 *Journal of Juridical Science* 89.

51 Mazrui *Cultural forces in world politics* (1990) 7.

52 It follows that it would not be correct to view legal pluralism in this context simply as a reflection of uneven economic development. Islamic law does not represent a "traditional" order in a process of modernisation; it is constitutive of the Muslim identity (see Suttner "Legal pluralism in South Africa" 1970 *ICLQ* 134 for a discussion of the impact of social and economic processes on African customary law).

53 Shakarchi "The legal status of women in Islam" in *Human rights in Islam* (Report of seminar held by International Commission of Jurists, Kuwait, December 1980) 18.

infanticide,[54] recognised women as persons[55] capable of bearing rights,[56] and accorded them special matrimonial rights and privileges.[57]

The marriage relationship in Islam

Marriage, according to the *sharia*, is a civil contract. It is not in the nature of a sacrament and therefore can be dissolved if the relationship ends in failure.[58] The marriage relationship creates reciprocal rights and obligations between the spouses, although the husband remains the party primarily responsible for supporting the family.[59]

Muslim marriages, in contrast with the common-law rule, are automatically out of community of property. Marriage therefore does not create a joint estate and the wife retains full ownership of all property acquired before the marriage. She also retains full legal capacity to acquire, alienate, hypothecate or otherwise deal with any property, whether movable or immovable, corporeal or incorporeal, to conclude contracts and to litigate without the assistance of her husband.[60] The Roman-Dutch concept of the marital power is completely alien to Islamic law.[61] Islamic law also differs from South African law in that it permits a husband a plurality of spouses.

Divorce (*talaq*) and ancillary issues

In Islamic law, the parties may proceed to dissolve their marriage when the marriage relationship has broken down irretrievably,[62] and there is accordingly no reasonable prospect for a restoration or a normal marriage relationship between them through mediation.

Divorce may be given orally or in writing, but it must take place in the presence of witnesses. The husband must exercise his right of repudiation (*talaq*) on three successive occasions before the divorce becomes irrevocable. In effect, the marriage relationship continues to subsist before pronouncement of the third and final *talaq*.

Islam does recognise divorce at the instance of the wife (*khule*).[63] The wife may stipulate this right in her marriage contract[64] and even where she has not

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54 Rahman "The status of women in Islam: a modernist interpretation" 286; see also Sura 81 8 9, Sura 16 57–59 and Sura 17 31.

55 Hassan "Women in the context of change and confrontation within Muslim communities" in Papaneck and Minault (eds) *Separate worlds: Studies of Purdah in South-East Asia* ch 9 108.

56 Bulbulyia "Women's rights and marital status: are we moving closer to Islamic law?" 1983 *De Rebus* 430.

57 *Idem* 431.

58 *Idem* 430.

59 The idea that Islam sanctifies the division of labour and responsibility within the family, is based on a reading of Sura 4 34. In this passage men are referred to as the "protectors and maintainers of women". See Hassam 108 for an interesting "textual" analysis aimed at reconciling this passage with gender equality.

60 Bulbulyia 430.

61 Nadvi "Towards the recognition of Islamic personal law" in Sanders (ed) *The internal conflict of laws in South Africa* (1990) 16.

62 Bulbulyia 432.

63 Doi *Shariah: the Islamic law* (1984) 192.

64 Nadvi 432.

done so, she may demand the divorce on specified grounds[65] but she may then be required to surrender her dower to her husband as compensation.[66]

The consequences of divorce

Guardianship and custody The mother, as of right, is entitled to custody of male children up to the age of seven and in the case of female children, until they reach the age of puberty. Thereafter custody and guardianship devolve upon the father.[67]

Maintenance (nafqah) After dissolution of the marriage, the husband is obliged to support his former wife for the period of her *eddah*, that is for three months, or if she is pregnant, until delivery of the child. He remains obliged to support his sons born of the marriage until their majority and his daughters until their marriage.[68]

Children: legitimacy Legitimacy is dependent on a valid marriage. Illegitimacy is a permanent condition because the *sharia* does not recognise the doctrine of legitimation *per subsequens matrimonium*.[69] An illegitimate child does not inherit from the father on intestacy.[70] In other respects illegitimate children are acknowledged as "full members of the community"[71] entitled to "grow up free from prejudice or stigmas of any kind".[72]

Adoption The Holy Quran forbids adoption as an artificial mode of creating family ties. It recognises only those family relationships based on consanguinity and affinity. Islam accordingly refuses to extend rights reserved for family members to outsiders.[73]

The muslim law of succession (*Miraath*)

The Holy Quran contains detailed provisions dealing with the devolution of the estates of deceased persons.[74] These provisions are peremptory and cannot be departed from. A testamentary disposition which purports to vary the order of succession prescribed by the Quran is invalid unless the heirs consent.[75] Accordingly, Islamic law does not allow freedom of testation.[76]

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65 Doi 195.
66 *Ibid* 195.
67 Nadvi 433.
68 Memorandum of Islamic Council of South Africa, submitted to SALC 1988-03-29.
69 Memorandum submitted to SALC by Advocates AB Mohammed and IM Bawa on the subject of the status of illegitimate children in Islam.
70 *Idem* 27. The tendency in modern South African law is to eliminate the legal disabilities attaching to the status of illegitimacy. S 2 of the Intestate Succession Act of 1987 provides that illegitimacy does not affect the capacity of one blood relation to inherit from the estate of another.
71 *Idem* 17.
72 *Idem* 18.
73 *Idem* 26. Fatima Meer and Moulana Ebrahim Moosa, in their comments on a draft version of this paper, both made the point that it is not adoption *per se*, but the functional attribution of the adoptee parents' genealogy to the child, which is forbidden in Islam.
74 *Idem* 271.
75 Moosa.
76 A Muslim testator can bequeath up to one third of the net estate to persons or causes other than the Quranic heirs.

The Muslim wife has an entrenched, "non-derogable" right to inherit from her husband's deceased estate. If there are no children born of the marriage at the time of the husband's death, she is entitled to receive one quarter; if there are children, she receives one eighth.

Three aspects of the Islamic law of succession could be considered *prima facie* not to accord with contemporary expectations. These are, that the distribution incorporates the "extended family",[77] is always *per capita*[78] and as a general rule male heirs receive twice as much as female heirs of the same degree.[79]

Muslim law and sex discrimination

It is clear that some Islamic family laws are based on a traditional, sex-based distribution of rights and obligations within the family. It would be wrong, however, to conclude that Islam and gender equality are necessarily in conflict.

It is true that there are passages in the Holy Quran which entrench the husband's "leadership" within the family. But this concept is *legally irrelevant* because it does not affect the distribution of rights between the spouses *inter se* or in relation to third parties. There is no legal hierarchy within the Muslim family. Muslim husbands are denied the marital power both by the *sharia* and the modern South African law. Secondly, although Islam appears to endorse patriarchy and a division of functions within the family based on sex-roles, these are features of the social structure which do not distinguish Islam as a culture or legal system. It is arguable that these social structures are part of the *context* of Islam's revelation and are not ordained by its *normative* structure.[80] Finally, the *sharia*, described by Mazrui as "one of the glories of Islam", as well as "one of its shackles"[81] has not precluded family law reforms in Muslim countries aimed at ameliorating the status of women. From the 1950s onwards in various countries, procedural and substantive innovations have been introduced in the principles of Islamic family law relating to maintenance of a divorced wife, unilateral divorce by a husband, polygamy and the custody

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77 Succession rules based on tribal relationships are arguably not appropriate in a modern context, as they act as a disincentive for "nuclear families" to save and accumulate.

78 The principle of representation has been incorporated into the law of many Muslim countries. In Pakistan, the Muslim Family Laws' Ordinance of 1961 introduced the principles of representation and thereby effectively reformed the classical *sunni* law of inheritance to enable grandchildren to inherit in the place of their deceased parents.

79 Omar "Islamic personal law and South African law: some problems highlighted" 1981 *De Rebus* 486.

80 Rahman 301 makes this "sociological" argument in relation to polygamy: "One must completely accept our general contention that the specific legal rules of the Quran are conditioned by the socio-historical background of their enactment and what is eternal therein is the social objectives or moral principles explicitly stated or strongly implied in that legislation"; and in relation to the unequal shares of female heirs (297): "[I]nheritance shares like other economic values and obligations assigned to the sexes . . . are a function of their actual roles in traditional society . . . there is nothing inherently unchangeable about these roles – indeed when justice so demands, change is Islamically imperative." See also Iqbal *The reconstruction of religious thought in Islam* (1985) 170.

81 15.

of children. Countries implementing these reforms include Tunisia, Morocco, Egypt, Algeria, Pakistan and Malaysia.[82]

III

In this section, three "models" which suggest ways of dealing with the tension between the concept of a common citizenship and the right of Muslims to organise their family life in accordance with their beliefs are outlined. The first, *legal unity*, is aimed at overcoming the consequences of the non-recognition of Muslim marriages. The second, *legal integration*, proposes a unification of personal laws, and the third, *legal pluralism*, constitutionally entrenches a plurality of family laws.

Legal unity

This "model" is based on the *single concept of marriage*, but would at the same time accord recognition to Muslim marriage rites (*niqah*). A marriage which complies with both the requisites of a civil marriage (minimum age, capacity, consent and monogamy) and the essential elements of a Muslim marriage[83] would give rise to a marriage relationship with the ordinary civil consequences (for example it would be in community of property, create a reciprocal duty of support etcetera). The incidence of a Muslim marriage *contract* (as opposed to its *consequences*) such as the dowry agreed to at the time of the marriage, would also be enforeceable in a South African court.[84] There will still be a need for a centralised system of administration. As an alternative to the present system which allows for the licensing of Muslim priests (*alims*) as marriage officers, the parties could be placed under a legal duty to register their marriage within a specific time. Registration would be for administrative purposes only and would not be a condition precedent to the validity of the marriage.[85]

As pointed out earlier, South African courts have refused to recognise Muslim marriages on the ground that they are potentially polygamous.[86] There is no

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82 See Doi 149; Mahmood "Islamic world: developments in the 1985 – 86 period" 1987 – 1988 *Columbia Journal of Family Law* 137; Benardi "Iran: family law after the Islamic revolution" 1986 – 1987 *Columbia Journal of Family Law* 151; Connors "Malaysia responding to religious and cultural pluralism" 1988 *Columbia Journal of Family Law* 195.

83 The essentials of a valid Muslim marriage are: (a) *consent of guardians: Shafii* and *Maliki* jurists consider the approval of guardians as the essential element of a valid Muslim marriage; (b) *dower* (*maher*): A women is entitled to receive from her prospective husband, as an essential incident of her marriage, a sum of money known as *maher*. The *maher* belongs to the wife absolutely and is not in the nature of a consideration for the wife's consent to the marriage; (c) *consent*: There must be a proposal and an acceptance (*ijab* and *qubul*); (d) *two witnesses*.

84 In 1983 the Appellate Division in *Ismail v Ismail* 1983 1 SA 1006 (A) refused to enforce payment of the dowry, on the basis that it was intimately connected with a potentially polygamous union not recognised by South African law.

85 This proposal is aimed at overcoming the problems associated with the present system (see fn 43 *supra*). It is not without its difficulties, however. Those who wish their marriage relationship to be governed exclusively by Islamic law, may object that if the consequences of a civil union are applied automatically to their marriage relationship, they will be deprived of the freedom to make a choice between an Islamic and a civil marriage.

86 See fn 16 *supra*.

justification, as Bulbulyia pointed out,[87] for continuing to withhold recognition from Muslim marriages which are in fact monogamous and which in *all other respects conform to the requirements of the civil law.*

The parties to a Muslim marriage, accorded recognition by the law of the land, will remain free to incorporate the rules of their faith, either informally, or *contractually* before and after the marriage and on divorce. The matters that could be dealt with in such a manner include the proprietary consequences of the marriage and maintenance,[88] division of property, custody and guardianship on divorce.[89] Where a court of general jurisdiction is seized of a matter upon which Muslim litigants have agreed, the court will in effect treat a *religious obligation* as a *private contractual duty*, and enforce the obligation as such.

This model provides for a degree of *private ordering* and hence a degree of autonomy from the constitutional state legal order. *Sharia* rules would in effect function as a "private legal system",[90] outside the purview of the constitution.[91]

Religious freedom in this "model" would be protected through *constitutionally guaranteed* rights of *conscience, association and of privacy* and thus through a separation of religious organisations and state.

This model, first suggested as a possible option by Sachs,[92] is based on a distinction between the "public" and the "private" domains and formal and informal systems of justice. Its particular strength is that it allows individuals and communities to adjust to wider processes of social change by institutionalising *choice, personal freedom* and *private autonomy*. The social conditions in which change occurs, as Ocran has pointed out, are usually

> "complex and plurally determined. Participant individuals and affected groups hold different interests, different perceptions of the problems, and hence, different ideas about resolving problems. Collective action requires a delicate balancing of interests".[93]

This "two-tier" system of marriage has been criticised on the basis that its flexibility and sensitivity to cultural and traditional practices would

> "enable individuals and families to adhere to cultural practices which deny individual liberties and foster oppressive relationships",[94]

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87 1983 *De Rebus* 432.

88 It will be important to explore whether "clean break" divorce settlements would be regarded as consistent with Islamic law. The *sharia* rule, which allows a divorced wife maintenance for three months only, does not adequately protect long serving, non-earning spouses who do not accumulate assets during the marriage but who nevertheless contribute services which have an economic value. Of course, the "clean break" option is only available where the husband is a man of means.

89 Subject, of course, to the courts' overriding discretion in respect of these matters.

90 Cotterrell "The sociological concept of law" 1983 *Journal of Law and Society* 247.

91 The debate about the scope of a future bill of rights and in particular whether and to what extent it will apply to private law relations, is at an early stage. The SALC has taken the view that the bill of rights should regulate "vertical" relations between the state and individuals, subject to a rule of interpretation requiring the courts to have regard to the provisions of the bill of rights in interpreting all legislation, including private law legislation (*Interim Report on Group and Human Rights* Project 58 (1991) 494).

92 Sachs *Protecting human rights in a new South Africa* (1990) 172.

93 Ocran "Law, African economic development and social engineering: a theoretical nexus" 1972 *Zambia LJ* 24.

94 Charman "A response to Albie Sachs: what is the family?" 1990 no 8 *Agenda*.

and that it would

> "exclude men and women from recourse to the state machinery in their struggles for a family structure free from gender oppression".[95]

This critique assumes that culture and tradition are necessarily static and oppressive, is based on a mechanical understanding of the relationship of law and culture with social change, and implies a policy of legal coercion of the "traditional" family. The efficacy of law as an instrument of change in culturally sensitive areas is limited for, as Ocran reminds us, law has more impact

> "in areas of social life that are relatively neutral, emotionally speaking, than on expressive and evaluative areas. In other words, the family resists but the market place complies".[96]

Legal integration[97]

This model seeks to *integrate* the legal principles of different legal systems. Unlike *unification*, which imposes a uniform law, integration "creates a law which brings together, without totally obliterating, laws of different origins".[98] By incorporating substantive rights recognised by a *religious* system of law into the *secular* law, their effects may be standardised and conflicts between them removed. This will mean that the principles of both the *sharia* laws and the civil law will, as a result of legislative innovation, apply to Muslim marriages and the devolution of property on death. It is submitted that there are sufficient points of identity between the two legal systems to make this a possible option. Marriage in both systems is contractual in nature, giving spouses some latitude to regulate their relationship by *agreement*, and the grounds for divorce coincide. Separate property, the matrimonial proprietary regime preferred by Islam, may be chosen by the parties in modern South African law, and both systems are consistent with the idea of marriage as a partnership of equals. The rules of standing and contractual capacity are also the same since the abolition of marital power in South African law.

But there are of course clearly fundamental differences between the modern South African law and the *sharia* law. Chief among these are Islam's tolerance of polygamy, the husband's unilateral right to repudiate his wife, the *sharia* rules regulating the status of children and the succession rule according preference to male heirs. Therefore, and since the aim of integration is to harmonise the effects of different legal systems, only a partial form of integration is feasible. Only those *sharia* rules which are *consistent with the modern South African law* may be integrated without institutionalising conflicts of law.

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95 *Ibid.*

96 Ocran 29.

97 Over the last five years, there have been significant moves towards the judicial and legal integration of African customary laws in South Africa: (a) The Special Courts for Blacks Abolition Act 34 of 1986 abolished separate courts for blacks; (b) the Law of Evidence Amendment Act 45 of 1988 conferred jurisdiction on magistrates' courts to apply African customary law; (c) the Marriage and Matrimonial Property Amendment Act 3 of 1988 gave the status of a civil marriage to a customary union, and effectively extended the provisions of the Matrimonial Property Act 88 of 1984 to civil marriages contracted by Africans.

98 Allott "What is to be done with African customary law? The experience of problems in reforms in Anglo-Africa from 1950" 1984 *Journal of African Law* 65.

In addition to the measures provided for by the first model, limited legal integration would establish parity between different *forms* of marriage, and provide for uniform procedures for contracting a marriage as well as for divorce.[99]

(a) *Parity between different forms of marriage* Under the present South African law, Islamic and customary marriages are considered inferior to "Christian" monogamous marriages and therefore are not accorded equal protection under the law. This distinction is discriminatory and should end. All married women would then enjoy equal satus.[100]

(b) *Uniform procedures for contracting a marriage* An integrated marriage law would accord recognition to a multiplicity of *marriage rites* and establish a *uniform* system of administration.[101]

(c) *Uniform procedures on divorce* No marriage would be dissolved except by decree of a court of competent jurisdiction. Parties married under Islamic law wishing to dissolve their marriage would also require a judicial decree.

Further recommendations

Marriage It should be provided, either by way of a suitable amendment to the Matrimonial Property Act of 1984 or by way of special legislation applicable to Muslim marriages, that such marriages would automatically be out of community of property. The accrual system should, however, be applicable to such marriages in order to protect the non-earning spouse, unless contractually excluded.[102]

Divorce Muslim plaintiffs seeking a divorce decree should be required to satisfy the court that the matter was referred to a Muslim Conciliation Board,[103] and that attempts at reconciliation had failed. A certificate issued by the Board, to the effect that the *talaq* has been validly pronounced, and annexed to the pleadings, should be regarded as *conclusive* proof that the *marriage has irretrievably broken down*. Where conciliation has failed, the board should assist the

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99 Rwezaura "The integration of personal laws: Tanzania's experience" 1983 – 1984 *Zimbabwean LR* 85.

100 Islamic law recognises polygamy. But most Muslim countries have either abolished polygamy or subjected this institution to strict controls (eg s 4 of the Code of Personal Status of Iraq 1959; a 17 of the Syrian Code of Personal Status; the Tunisian Code of Personal Status 1957; the Moroccan Code of Personal Status). The juristic basis for these reforms is found in a verse in the Quran which lays down that "*ye* will not be able to deal equally between (your) wives however much you wish to do so" (Sura 4 129).
One way to control polygamy would be to subject Islamic marriages to a standard form contract prohibiting a second marriage during the subsistence of the first one and entrenching the wife's reciprocal right of divorce.

101 See fn 57.

102 Nadvi's view is that the accrual system is inconsistent with Islamic principles. Nevertheless, it is submitted that the system of deferred sharing of gains introduced by the South African legislature in 1984 is an important reform measure. It affords some recognition to the contribution of non-earning spouses to the accumulation of family assets and protects them against possible penury in the event of divorce. Any change aimed at affording greater recognition to Islamic principles should not be implemented in a way which effectively deprives Muslim women of the benefits of this important ameliorative innovation in our family law.

103 The Board should be constituted by the Ulema Bodies and the Judicial Committee of the Islamic Council of South Africa. The Board should also be staffed by suitably trained personnel.

parties to reach agreement on the ancillary issues (custody, maintenance etcetera), to be incorporated in the court order dissolving the marriage. The supreme court will, of course, retain its power to make custody orders, order periodic maintenance payments and redistribute property on divorce.

Succession The Intestate Succession Act of 1987 should be amended to provide that the estate of a Muslim who dies intestate will devolve according to Islamic law, unless a declaration is filed with the Master indicating a contrary intention.

A Muslim's freedom of testation should not be limited by this change in the law. The deceased estates of Muslims will continue to be administered in terms of the Administration of Estates Act 66 of 1965.

Wakf This is a foundation in perpetuity which has a sacred nature. In Islam, land and buildings dedicated to public worship (such as mosques) or for the benefit of humanity, acquire a sacred character.[104] There is a need for the recognition of *wakf* endowments under the general law of the land.[105]

This model suggests enactment of special measures to regulate Muslim marriages, as distinct from proposals to incorporate *sharia* law as a separate *system* in the law.

These measures will clearly *differentiate* between different *forms* of marriage but will not be *discriminatory* as all married persons will still have the same rights. All married people will effectively have the same choices regarding the proprietary consequences of their marriage, husbands and wives will have equal rights during and on the dissolution of the marriage, and on divorce the courts will have the same powers, regardless of the form of the marriage.

Legal pluralism

A pluralism of laws, as the two previous models have shown, can be accommodated in a variety of ways. The concept of "legal pluralism" is used here to denote the *formal* incorporation of different systems of personal law within a single jurisdiction.

Internal conflicts of law

Legal pluralism in this sense inevitably leads to conflicts of law problems.[106] Before deciding the substantive issue before the court, it must be determined *in limine* which system of law to apply to a particular dispute between the parties. Pluralistic legal systems therefore require rules of recognition[107] which incorporate internal conflicts of law rules for selecting the applicable personal law. Personal laws are laws which attach to individuals by virtue of their affiliation to a particular group of people, rather than their attachment to a particular place.[108] Therefore, whereas private international law is concerned with

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104 Bulbulyia "Application of the concept of wakf in South Africa" 1982 *De Rebus* 155.
105 Nadvi 19.
106 If *sharia* family laws are accorded recognition by the state law, the conflicts problem will not be too complex because the process of classification (of causes of action) will be simple and the conflicts limited and easily definable.
107 To use HLA Hart's terminology.
108 Bennett *Application of personal laws in Southern Africa* (1985) 1.

conflicts between state laws, which are territorially based, the rules of internal conflicts of laws regulate conflicts of group laws within a state.[109] The recognition and enforcement of a group's legal system is a corollary of its right to foster its *identity*. Where the internal conflict of group laws reflect different economic relationships, "profound issues of socio-economic change"[110] are also involved in the selection process.

The recognition of a personal system of law depends on the extent to which a state, having regard to a wide range of policy issues and conflicting claims,[111] is prepared to give effect to personal laws that are at variance with its own within its borders. Group laws always exist "within the matrix of the general law of the state . . . hence it is the general law which determines the recognition of group laws".[112] Therefore, where the group law is also a religious law, the incorporation of personal laws as part of the positive law raises the issue of religious freedom and the proper parameters of state action.

Nadvi is a strong advocate of the view that official recognition should be extended to *sharia* laws.[113] This proposal, intended to guarantee religious freedom, could also have the unintended effect of curtailing group autonomy. Where a group law is recognised, the state acquires authority over its doctrinal development, interpretation, application and enforcement.

The group law is made subject to an *external* standard and external law maker. The rules of a legal system, once chosen, are applied subject to the exclusionary rule of the forum's public policy.[114] Under colonialism, for instance, the application of African customary law was made subject to a "repugnancy clause", which effectively empowered the colonial courts to make moral judgments on the contents of customary laws. Independent African countries have abolished the repugnancy clause, but the courts retain a discretion to exclude customary law on the grounds of public policy or equity.[115]

Even where courts are not empowered to exercise a discretion, the process of adjudication (which includes the so-called choice of law problem) is not a simple, mechanical process of discovering the "true" rule. When there is no clearly applicable rule the courts make policy choices and exercise a creative law-making role.[116] Ordinarily, this role rarely attracts any attention, let alone controversy. But secular courts of general jurisdiction do not have the experience

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109 Sanders "The role of comparative law in the internal conflict of laws" in *The internal conflicts of laws in South Africa* (1990) 58.

110 Bennett 13.

111 Eg, women's rights and gender discrimination.

112 Sanders 58.

113 Nadvi 13.

114 The concept "public policy", which controls the exercise of a judicial discretion, has a notoriously indeterminate content. The South African courts have arguably not been sufficiently sensitive to the heterogeneity of the population in determining their public policy doctrine (see Kerr "Back to the problems of 100 or more years ago: public policy concerning contracts relating to marriages that are potentially or actually polygamous" 1984 *SALJ* 445).

115 The Customary Law and Primary Courts Act in Zimbabwe now provides that customary law will apply in specified circumstances "unless the justice of the case otherwise requires".

116 See Seidman "Rules of recognition in the primary courts of Zimbabwe: on lawyers reasoning and customary law" 1983 – 1984 *Zimbabwe LR* 43.

or legitimacy to interpret religious laws.[117] Proposals which will in effect require the ordinary courts to apply *sharia* rules therefore need to be thought through more carefully. Clearly, it will be necessary to improve the representivity of the judiciary by the appointment of Muslim jurists as assessors.[118] *Codification* will be necessary to unify different sources of Muslim family law and curtail the court's interpretive powers.

The process then of selecting the applicable rule from different legal systems in a particular case is policy-orientated. The prior process of selecting a legal system's choice of law rules (rules of recognition) also has policy implications. It will have to be decided, for instance, which family law issues (marriage, divorce, maintenance, custody, guardianship, division of property on divorce, succession) will be governed by the sub-legal system, because the policy considerations may not be the same in each case. It will also have to be decided whether our choice of law rules will accord primacy to ascriptive group membership[119] or to the conscious or implied choice of the parties. Conflicts rules which involve litigants in choice of law decisions[120] empower the courts to apply rules recognised by a legal system in a flexible manner to litigants in transition from one socio-economic order to another. On the other hand, they may not be entirely appropriate where the object is to accord recognition to group cultural identities.

Conflicts of rights

In addition to the conflicts of law problems that the courts will have to decide on in the exercise of their ordinary jurisdiction, the courts will, in a future constitutionally based legal order, have to resolve "conflicts of rights" in the exercise of their constitutional jurisdiction. Some of these potential conflicts between gender equality and religious freedom could be resolved in the process of drafting and adopting a new constitution.

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117 The *Shah Bano* case in India (1985 3 SCR 844 (SC 1985)) demonstrates the problems that can arise when secular courts are required to interpret religious laws. In this case the Indian Supreme Court upheld the right of sixty-eight women, who had been married for forty-three years, to claim maintenance in terms of s 125 of the Code of Criminal Procedure which applies to all Indian citizens regardless of religious affiliations. This decision expanded a Muslim divorcee's maintenance rights, which under Islamic law are limited to the period of her *Iddah* (three months). The judge held, firstly, that under Islamic law Muslim husbands are required to provide their divorced wives with maintenance beyond the *Iddah* period and secondly, that even if this interpretation of the Holy Quran was not correct, the respondent's claim for maintenance had to succeed because the provisions of the code prevailed in the event of a conflict with the personal law of any religious group. This decision provoked large demonstrations in India. Eventually the government was forced to enact legislation to undo the effect of the court's decision.

118 As recommended by Nadvi and the Islamic Council of South Africa.

119 Sanders 59. He suggests that the overriding connecting factor should be membership of a legal cultural group; but he goes on to suggest that group membership should be based on voluntary association rather than ascription.

120 Bennett 105. Bennett's view is that effect must be given to the expectations of the parties. But in the absence of express agreement, he suggests the use of a number of "objective" connecting factors.

The concept of the equality of the sexes is no longer "a special characteristic of a particular society, it is a universally cherished ideal and has been recognised as a human right".[121] The new South African constitution will also probably contain provisions guaranteeing the equality of the sexes within the family and society.[122]

The constitutional entrenchment of the equality of the sexes is likely to stimulate family law reforms to equalise the rights and duties of wives and husbands, and of mothers and fathers and to encourage the independent personal development of women both inside and outside the family.[123] At the same time, legal rules, whether of the common or statute law, or of the *sharia*, which are based on traditional "gender-based" distinctions between the sexes within the family context, could be at risk in litigation challenging their constitutional validity.[124] The rule of our common law requiring the wife to follow the husband's domicile,[125] the "presumption" favouring wives in custody disputes, and the *sharia* rule conferring unequal rights on divorce, are examples of family laws which may not survive a new constitutional litmus test of gender equality.[126]

A legal system which recognises a plurality of personal laws therefore implies a particular kind of constitution, one which protects these laws through special savings clauses and an entrenched hierarchy of rights. Section 23(1)(a) of the Zimbabwean Constitution, for instance, forbids discrimination of the grounds of race, tribe, place of origin, political option, colour or creed.[127] This section

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121 A 1 of the Universal Declaration of Human Rights of 1948 reads: "[A]ll human beings are born free in dignity and rights." See Hussein "Inequality and sex discrimination in family law in India" 1979 *Zambia LJ* 70. The Convention on the Elimination of all Forms of Discrimination against Women is an international bill of rights for women. A 1 defines gender discrimination as follows: "For the purposes of the present convention, the term discrimination against women shall deem any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." This definition is substantially the same as the definition of racial discrimination contained in a 1 of the International Covenant on the Elimination of all forms of Racial Discrimination. A 16(1) of the convention bestows equal rights and responsibilities on spouses during the marriage and at its dissolution. A 5 imposes obligations on states to modify social and *cultural* patterns with a view to achieving the elimination of customary and other *practices based on the idea* of the inferiority or superiority of the sexes. (See also the preamble and a 1(3) of the UN Charter; a 16 of the Universal Declaration of Rights; a 3 26 and 23(4) of the International Covenant of Civil and Political Rights.)

122 The ANC's draft bill of rights reflects a strong commitment to gender equality. Gender-neutral language is used throughout the document. A 1(3) reads: "All men and women shall have equal protection under the law." A 28 constitutionally entrenches the concept of marriage as a partnership of equals.

123 Wardle "The impact of the proposed equal rights amendment upon family law" 1984–1985 *Journal of Family Law* 477.

124 *Idem* 478.

125 Boberg *The law of persons and the family* (1977) 66.

126 This will depend on the standard of judicial scrutiny adopted by the courts. Distinctions between the sexes which are based on a "reasonable" classification have been upheld in India (see Hussein fn 29 *supra*) 81.

127 Sex is not specifically mentioned in this section.

is followed by a special proviso which excludes family laws from its ambit. Section 23(3) reads:

> "Nothing contained in any law shall be held to be in contravention of sub-section 1(a) [the section prohibiting discrimination] to the extent that the law in question relates to any of the following matters: a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law . . ."

This provision preserves the duality of the Zimbabwean legal system which protects customary laws which discriminate against women.[128] Similarly, those Arab countries which have constitutions guaranteeing equality to all citizens, have had to incorporate special provisions protecting their personal status codes.[129]

Religious freedom and personal laws

In secular states, religious freedom is usually protected through the guarantee of equality, the guarantee of non-discrimination[130] and through privacy and associational rights.[131] A strict separation is maintained between, on the one hand, laws enforceable by the state, and, on the other, religious injunctions which do not have the force of law. The law treats believers and non-believers uniformly; it allows believers to manifest their belief in public and in private[132] but it does not oblige non-believers to believe. This conception of religious freedom is compatible with a constitutional guarantee of equality between the sexes. Both these human rights (gender equality and religious freedom) can co-exist in the same constitution without any hierarchy between them, each subject only to the limits of its own inherent nature and any express derogations provided for.

But does religious freedom necessarily include the right of Muslims to be governed by a personal system of religious law in respect of marriage, divorce and the devolution of property? It can be argued that family laws applied uniformly to all citizens, which have the effect of preventing Muslims from living in accordance with the tenets of their faith, without legal disability, are discriminatory because they impose a disproportionate burden on Muslims.[133] This argument suggests that a constitutional entrenchment of a plurality of family laws is necessary to guarantee religious freedom to Muslims.[134]

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128 Maboreke "Women under Zimbabwean law" 1988 *Zimbabwe LR* 69.

129 See Hijab *Women power: the Arab debate on women and work* (1988) 14. Muslim countries which have ratified the Convention on the Elimination of all Forms of Discrimination against Women, like Bangladesh, Egypt, Iraq, Libya and Tunisia, have reserved their obligations to implement the convention where they are in conflict with Islamic law (see Cook "Taking women's rights seriously" 1990 *Law Monthly* 27).

130 The Declaration of the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief was adopted by the United Nations in November 1981.

131 Waite J in *Reynolds v US* 98 US 145 (1879) distinguished *belief* from the *practice* of religion, and held that the latter was subject to state control.

132 See Van der Vyver "Seven lectures on human rights" (1976) ch 3.

133 Rahman "Religious rights v women's rights in India: test case for interpreting human rights law" 1980 *Columbia Journal of Transitional Law* 488.

134 A recent decision of the Mauritian Supreme Court took a contrary view. In the course of his judgment in *Bhewa v Government of Mauritius* 1991, Lallah J said the following: "The reasoning of the plaintiffs is, in our judgment, based on an insufficient understanding of the duality of religion and state in a secular system. The secular state is not

Conclusion

The third model brings the potential conflicts between women's rights and religious rights into focus. While it appears to force a choice between two equally important constitutional goals – the guarantee of equality and the protection of diversity, the first and second models suggest that it is possible to reconcile equal citizenship rights with Muslim personal law. The challenge we face as we negotiate a new constitution is to guarantee equality to husbands and wives, men and women, Muslim women and other women, without forcing Muslims to choose between their religion and the constitution. Clearly, comprehensive consultations with Muslim and womens' organisations are necessary. It is better to resolve such potential conflicts now, through an inclusive process of constitution-making, than later through potentially divisive constitutional litigation.

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anti-religious but recognises freedom of religion in the sphere that belongs to it. As between the state and religion each has its own sphere, the former that of law-making for the public good and the latter that of religious teaching, observance and practice. To the extent that it is sought to give to religious principles and commandments the force and character of law, religion steps out of its own sphere and encroaches on that of law-making in the sense that it is made to coerce the state into enacting religious principles and commandments into law. That would indeed be constitutionally possible where not only one particular religion is the state religion but also the holy book of that religion is the supreme law."

While it is true that different motives may exist for laying false charges, this surely applies to any offence and not only to offences of a sexual nature. Of what relevance is the reference to the Biblical story of Potiphar's wife except to indicate male bias? If the wife laid a false charge against Joseph, so what? False charges are laid in respect of all types of offences. I would have thought that the moral of this particular story was that one should stand by one's principles irrespective of the consequences. It would appear, however, that the reasoning in this regard is as follows. As the story appears in the Bible it is the truth. As it is the gospel truth it does not relate to a single incident but is of universal application. Thus all women are prima facie *deceitful and act with hidden motives and all men are* prima facie *incorruptible and act without hidden motives. Hence one can speculate about motives of complainants in cases such as rape even without any evidence to suggest hidden motives. The question whether such hidden motive will be found by the trial court would depend, it seems to me, to a very large extent upon the fecundity of the presiding officer's imagination (per* Frank J in *S v D* 1992 1 SA 513 (Nm HC) 516).

Persoonlikheidsgoedere van 'n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind

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SUMMARY

Personality interests of another as object of a right: remarks on the rights of the unmarried father to develop the personality and values of his illegitimate child

In this article the rights of a putative father in respect of his illegitimate child are scrutinised. It is pointed out that the unfavourable position of a putative father in respect of his illegitimate child is founded first of all, on the anachronistic inferior status of females. Secondly, it is founded on barbaric discriminatory rules against illegitimate children. Thirdly, it serves as a form of moral punishment of the father and, by implication, the child. It is recommended that a putative father who accepts responsibilities towards his illegitimate child should be granted a right of access to his child, unless it can be proved that it is not in the best interests of the child. The distinctions drawn in law between legitimate and illegitimate children should be abolished. Concubinage should be equated with legal marriage.

1 INLEIDING

Die steeds veranderende regsposisie van die ongehude vader kan slegs na behore begryp en beoordeel word indien dit gesien word in die lig van die sosio-psigologiese (en voortvloeiende juridiese) ontwikkelinge wat in die organisasie van die menslike samelewing plaasvind. In dié verband kan die volgende (samehangende) faktore onderskei word:

1 1 Individualiseringsproses en die opkoms van menslike outonomie

Freud[1] het reeds, en tereg ook, aangetoon dat die mens uit die groep evolueer en dat daar 'n ontwikkeling vanaf groepspsigologie na individupsigologie is.[2] Wat die huweliksreg betref, bestaan daar, soos elders aangetoon is,[3] 'n hieruit voortvloeiende ontwikkeling vanuit "groepstirannie", in die vorm van een

1 *Complete psychological works* vol 18 (vertaal onder redaksie van Strachey 1971) 123 135.
2 Sien ook Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 34.
3 Labuschagne "Nietige en vernietigbare huwelike: opmerkinge oor die deregulering van die huwelik" 1989 *TSAR* 378 – 381.

of ander wyse van paternalisme, na menslike outonomie. Individue bepaal hiervolgens in 'n toenemende mate deur ooreenkoms of verstandhouding self die inhoud van hulle huweliksverhouding (intieme assosiasie).[4]

1 2 Die deregulering of dejuridifisering van die huwelik

Daar is wêreldwyd 'n toenemende tendens van samewoning (konkubinaat of sosiologiese huweliksluiting) buite die juridiese huweliksverband.[5] 'n Insiggewende beslissing in dié verband is dié van die Nederlandse Hoge Raad van 22 Februarie 1958.[6] Daar is naamlik beslis dat 'n vader uit 'n gebroke konkubinaat tot 'n kind uit so 'n konkubinaat in so 'n verhouding staan dat dit 'n gesinslewe kragtens artikel 8 van die Europese Verdrag vir die Regte van die Mens daarstel. Artikels 16(5), 170(4) en 170(4) *BW* reël omgangsregte na egskeiding en skeiding tussen tafel en bed in Nederland. Die Hoge Raad het genoemde artikels analogies geïnterpreteer en na 'n konkubinaat uitgebrei, hoewel met sekere voorwaardes.

Die rol wat die staat by die huwelikslewe van burgers speel, word al hoe geringer.[7] Veral beroepslui vind die "beskerming" en "sekuriteit" van die tradisionele juridiese huwelik, veral in die lig van die verbeterde sosiale, ekonomiese en juridiese posisie van die vrou, nie meer nodig nie.[8] In Suid-Afrika bestaan verder die komiese situasie dat Hindu- en Moslemhuwelike, as gevolg van die poligamiese aard daarvan, nie as juridies geldig beskou word nie.[9]

Aangesien wetenskaplike inligting daarop dui dat die vader 'n belangriker rol as net 'n biologiese en ekonomiese in die kind se lewe speel,[10] is daar in ieder geval wêreldwyd 'n prinsipiële beweging in die rigting van medeouerskap.[11]

1 3 Gelyke status van kinders

'n Gevolg van die toename in buite-egtelike huweliksverhoudings is 'n toename in buite-egtelike kinders wat weer die juridies-ongelyke status van binne- en buite-egtelike kinders voortdurend beklemtoon. Dit het weer 'n proses in werking

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4 Sien ook Atwater "A modern-day Solomon's dilemma: what of the unwed father's rights?" 1989 *Univ of Detroit LR* 268.

5 Labuschagne 1989 *TSAR* 370; Schopp "Nichteheliche Gemeinschaft und Moral" 1990 *MDR* 99; Lakies "Umgang zwischen Vater und nichtehelichem Kind" 1990 *ZRP* 232; Diederichsen "Die nichteheliche Lebensgemeinschaft in Zivilrecht" 1983 *NJW* 1018; Heida "Omgangsrecht na verbroken concubinaat" 1985 *NJB* 647; Bradley "Equality for children of unmarried parents in Swedish law" 1990 *Journal of Social Welfare Law* 352; Sinclair "South Africa: children, race, divorce" 1989 – 1990 *Journal of Family Law* 605 – 606.

6 Heida 647.

7 Kehl "Noch mehr Staat im Eherecht" 1985 *SJZ* 211; Richards "Behind the best interests of the child: an examination of the arguments of Goldstein, Freud and Solnit concerning custody and access on divorce" 1986 *Journal of Social Welfare Law* 80.

8 Weimar "Zur Kritik des neuen Eherechts" 1985 *SJZ* 209.

9 Ohannessian en Steyn "To see or not to see – that is the question" 1991 *THRHR* 259; Labuschagne "Dekriminalisasie van bigamie" 1986 *De Jure* 83 – 85.

10 Atwater 267.

11 Gerlo en Wylleman "Naar een juridische erkenning van co-ouderschap" 1988 *Rechtskundig Weekblad* 117; Rauscher "Gemeinsames Sorgerecht nach Scheidung" 1991 *NJW* 1087.

gestel wat in finale sin ten doel het om aan buite-egtelike kinders dieselfde status as aan binne-egtelike kinders te gee.[12]

In die onderhawige artikel word ingegaan op die regte wat 'n ongehude vader ten aansien van sy buite-egtelike kind het. Die bespreking wat volg, moet deurgaans teen die agtergrond van bogenoemde faktore gesien word.

2 TERMINOLOGIE

In Afrikaans word die begrip "toegangsreg"[13] gebruik om (onder andere) die reg of moontlike reg van die ongehude vader ten aansien van sy buite-egtelike kind aan te dui. In die Engelse en Amerikaanse reg word die begrip "right of access" of soms "visitation right" gebruik.[14] Hierdie terminologie is nie 'n behoorlike beskrywing van dit waarom dit werklik gaan nie. Dit het naamlik 'n te oorwegend ruimtelike konnotasie. In Duitsland word "Umgangsrecht"[15] en in Nederland "Omgangsrecht"[16] gebruik. Hierdie terminologie is vir my meer aanvaarbaar omdat dit elemente van interaksie en die potensiaal tot konstruktiewe beïnvloeding omvat. Soos uit die verdere bespreking blyk, is dit meer beskrywend van dit waarop dit werklik aankom.

3 DIE BUITE-EGTELIKE KIND EN DIE POSISIE VAN DIE MOEDER: 'N SOSIO-EMOSIONELE ANACHRONISME?

In Suid-Afrika is die moeder die alleenvoog van haar buite-egtelike kind.[17] Dit is ook die posisie in byvoorbeeld Engeland,[18] Swede[19] en al die jurisdiksies in die VSA.[20] In Swede kan ongetroude ouers sedert 1983 gesamentlike voogdy verkry bloot deur by registrasie van die geboorte 'n aansoek tot die owerheid te rig. Daar is regswysiging hangende wat ongetroude ouers outomaties medevoogde maak behalwe in gespesifiseerde omstandighede, soos wanneer die vader nie geïdentifiseer kan word nie of as dit in die beste belang van die kind is dat aan 'n enkele ouer voogdy toevertrou word.[21] Kragtens artikel 1705 *BGB* staan 'n buite-egtelike kind in Duitsland onder die sorg van sy moeder.[22]

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12 Labuschagne "Biogenetiese vaderskap: bewysregtelike en regspluralistiese problematiek" 1984 *De Jure* 58 332; Eekelaar "Reforming the English law concerning illegitimate persons" 1980 *Family LQ* 42; Zanolli "The unwed father and adoption in Utah: a proposal for statutory reform" 1989 *Utah LR* 115; Thompson "McGuire v Farley: The West Virginia Supreme Court of Appeals takes a step toward equal protection for the unwed father" 1989 *West Virginia LR* 617.

13 Sien bv Eckard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 122; Sonnekus en Van Westing "Faktore vir erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232.

14 Sien bv Bronfin "Louisiana family law – the visitation rights of a noncustodial parent" 1984 *Tulane LR* 487.

15 Sien bv Lakies 229.

16 Sien bv Heida 647.

17 *Dhanabakium v Subramanian* 1943 AD 160 166; Sonnekus en Van Westing 232–233; Spiro "Custody orders in respect of minors with one parent" 1958 *THRHR* 18.

18 Cretney en Masson *Principles of family law* (1990) 503–504: die vader kan dit egter bekom deur 'n hofbevel of deur 'n formele ooreenkoms met die moeder.

19 Bradley 349.

20 Goger "Right of putative father to custody of illegitimate child" 45 *ALR* 3d 220.

21 Bradley 349.

22 Lakies 229–230; Diederichsen 108.

In *F v L*[23] word daarop gewys dat 'n vader op drie wyses voogdy oor sy natuurlike kind kan verkry, naamlik (i) deur geboorte uit 'n geldige huwelik, (ii) deur wettiging ("legitimation") en (iii) deur aanneming. 'n Moeder daarenteen verkry voogdy bloot deur geboorte omdat "[s]he cannot make a bastard". Trouens, die posisie van die moeder is so sterk dat sy in sekere omstandighede die vader kan "aanstel": indien sy naamlik getroud is en geslagsomgang met 'n ander man (gedurende die konsepsie-periode) het en hy dit erken, ontstaan daar 'n vermoede dat haar eggenoot (kragtens die stelreël *pater est quem nuptiae demonstrant*) die vader van die kind is, maar daar bestaan ook 'n vermoede dat die man met wie sy oorspel gepleeg het die vader is. Volgens die hof het die moeder in so 'n geval die reg om die vader te kies of aan te wys en haar keuse of aanwysing is blykbaar onherroepbaar. Daar moet verder in gedagte gehou word dat die hof as oppervoog die voogdy oor 'n kind slegs in spesiale omstandighede kan beëindig.[24] In *Short v Naisby*[25] word dit soos volg verduidelik:

> "It seems to me, however, that the Court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but those are not the only grounds on which a Court will interfere. Good cause must be shown before a Court will interfere, but good cause is not capable of precise definition. Each case must, therefore, be considered on its merits."

Wat duidelik uit die geskiedenis blyk, is dat teen 'n buite-egtelike kind, ook ten aansien van sy verhouding tot sy biogenetiese vader, gediskrimineer is en nog steeds word. So verklaar Davis:[26]

> "The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured . . . [The birth of a bastard] has been viewed as an evil occurence."

'n Mens kan vra: waarom word teen sulke kinders gediskrimineer? Die antwoord op dié vraag hou myns insiens nou verband met die tradisionele ondergeskikte posisie van die vrou. In rudimentêre gemeenskappe het die vrou in eerste instansie 'n voortplantingsrol vervul. Die voortplantingsvermoë van die vrou het aan 'n ander persoon, naamlik haar vader of voog (se familie) en na huweliksluiting aan haar man (se familie) behoort.[27] Dit het ook bepaal aan wie die kinders behoort wat uit haar gebore word. Tot vandag toe behoort kinders wat uit 'n ongetroude vrou gebore word volgens die inheemse gewoontereg aan haar vader of voog.[28] Wie die verwekker van die kind was, is nie van wesenlike belang nie.

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23 1987 4 SA 525 (W) 527; sien ook *D v L* 1990 1 SA 894 (W) 897.

24 Sien bv *Calitz v Calitz* 1939 AD 56 64; *Bam v Bhabha* 1947 4 SA 798 (A) 806.

25 1955 3 SA 572 (D) 575; sien ook *September v Kariem* 1959 3 SA 687 (K) 689.

26 "Illegitimacy and the social structure" 1939 *American Journal of Sociology* 215; sien ook Marcus "Equal protection: the custody of the illegitimate child" 1971 *Journal of Family Law* 3.

27 Sien Labuschagne "Verkragtingsfantasieë en toestemming in die strafreg" 1992 *SASK* 73–75; Ligthelm en Labuschagne "Die vroulike reproduksievermoë as regsobjek in die Bantoereg" 1976 *De Jure* 318.

28 Bekker *Customary law in Southern Africa* (1989) 230–231. By die Kaapse Nguni kan die natuurlike vader die voogdy oor sy kind bekom deur die gewoonteregtelike kompensasie vir die beswangering van die meisie asook die *isondlo*- of onderhoudsbees aan die meisie se vader of voog te betaal (*Mayeki v Qutu* 1961 NAC (S) 10; *Cheche v Nondabula* 1962 NAC (S) 23 27).

Getalle was in rudimentêre gemeenskappe vir oorlewing noodsaaklik; daarom het die ongetroude vrou se vader of voog die kind sonder teenspraak onder sy beskerming geneem. Intussen het omstandighede as gevolg van veral verstedeliking en industrialisasie so verander dat getalle in die meeste gevalle nadelig vir oorlewing geword het. Die vader of voog van die ongetroude moeder het sy oorspronklike primêre belangstelling in die kind verloor. Vandaar dat die biogenetiese vader hedendaags vir onderhoud aangespreek kan word[29] en die voogdy op die moeder oorgegaan het. In die Christelike fase word die vrou, in die vorm van die hoer, as die simbool van die slegte voorgehou. Die skande van 'n buite-egtelike kind het haar toegekom aangesien sy haar voortplantingsfunksie buite die aanvaarde struktuur van die huwelik uitgeoefen het. Die ontneming van omgangsregte, as uitgangspunt, van die biogenetiese of natuurlike vader kom in 'n sekere sin op 'n (morele) bestraffing van die buite-egtelike daad van geslagsomgang neer. Die toekenning van alleenvoogdy en -toesig van 'n buite-egtelike kind, as uitgangspunt, aan die moeder het sy oorsprong in die sosio-emosionele[30] fase van die menslike geskiedenis, soos hierbo verduidelik, toe die vrou hoofsaaklik 'n ondergeskikte voortplantingsrol vervul het. Dit is hedendaags 'n anachronisme in 'n tydvak waarin gelyke regte beklemtoon word.

4 DIE BEKLEMTONING VAN DIE BELANGE EN REGTE VAN DIE KIND

Kinders het aanvanklik geen status nie en weinig regte gehad. So verklaar De Mause:[31]

> "The history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized, and sexually abused."

Die posisie van binne-egtelike kinders het geleidelik verbeter maar daar word nog steeds teen buite-egtelike kinders gediskrimineer.[32] Daar het egter ook in die algemeen 'n evolusieproses vanaf beklemtoning van vaderlike gesag of mag (oorspronklik: die *patriapotestas*) tot die beklemtoning van die behoeftes van kinders en ook hul ouers plaasgevind.[33] Die posisie van buite-egtelike kinders het in die lig hiervan veral in die onlangse verlede skerp in die soeklig gekom. In Swede, wat dikwels 'n voorloper op die terrein van sosio-morele ontwikkeling is, is die Kode vir Ouerskap en Voogdy op alle kinders van toepassing ongeag of hulle binne- of buite-egtelik is. Onlangse hervorming is daarop afgestem om die verskille tussen binne- en buite-egtelike kinders nog verder te verminder.[34]

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29 Sien Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 297–298.

30 Sien Jung *The archetypes and the collective unconscious* (1959-vertaling deur Hull) 3–4; Durkheim *The division of labor in society* (1947-vertaling deur Simpson) 80. Die begrip "sosio-emosionele" verwys in dié verband na die sosiale en emosionele omstandighede waarin die vrou grootgeword en gelewe het.

31 *The history of childhood* (1974) 1.

32 Batty "Michael H v Gerald D: the constitutional rights of putative fathers and a proposal for reform" 1991 *Boston College LR* 1176.

33 Buchanan "The constitutional rights of unwed fathers before and after Lehr v Robertson" 1989 *Ohio State LJ* 320.

34 Bradley 343.

Die algemene reël in die Suid-Afrikaanse reg is dat die welsyn van die kind by voogdy- en toesigreëlings deurslaggewend is.[35] Ook die howe wat spesifiek daargestel is om geskille tussen swartes te bereg, het hierby aangepas en aan die belange van die kind primêre status toegeken.[36] In die tradisionele stamhowe word die beheer oor kinders hedendaags egter dikwels gebruik om 'n skuldige ouer te straf.[37]

In die Engelse reg is 'n kind wat nie uit 'n huwelik gebore is nie aanvanklik as 'n *filius nulius* beskou, dit wil sê as iemand wat aan niemand behoort het nie en teen hom is op bykans alle denkbare wyses gediskrimineer.[38] Ook in die Engelse reg staan die welsyn van die kind tans voorop.[39]

Hedendaags word aan die welsyn van die kind ook in die VSA primêre status toegeken.[40] So verklaar Doyle ten aansien van die posisie in Texas:[41]

> "A number of important and diverse interests are at stake when an unwed father seeks to legitimate his illegitimate offspring: the state's interest in promoting stable homes and supportive families for children; the parental interests of the mother who carried, gave birth, and nurtured the child; the unwed father's interest in the care, custody, and management of his child; and the interests of potential adoptive parents in the integration of the child into adoptive homes at an early age. However, under the Texas Family Code the paramount concern is that of providing for the moral, emotional, mental, and physical welfare of the child. In voluntary legitimation proceedings, when the mother does not consent to giving the unwed father parental rights, the responsibility of deciding what is in the child's best interest falls upon the court. When the father has not manifested a paternal commitment to the welfare of his child, the court should be allowed broad discretionary powers in determining which available alternative is in the best interest of the child. However, when the unwed father has demonstrated substantial parental concern for his illegitimate offspring, the court's inquiry under the best interest of the child standard should be limited to the parental fitness of the father. Only then is the integrity of familial relationships, though unlegitimized by marriage, protected from arbitrary and discriminatory interference by the state."

Kragtens artikel 1711 *BGB* kan aan die buite-egtelike vader in Duitsland 'n omgangsreg met sy kind toegeken word as dit die welsyn van die kind dien.[42] Hierdie benadering is ook volgens die regspraak met die Duitse Grondwet (*Grundgesetz*) versoenbaar.[43]

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35 Sien bv *Bam v Bhabha* 1947 4 SA 798 (A) 806; *Segal v Segal* 1971 4 SA 317 (K) 324; *Bailey v Bailey* 1979 3 SA 128 (A) 135.

36 *Ciya v Malanda* 1949 NAC (S) 154; *Mbuli v Mehlomakulu* 1961 BAC (S) 68; *Mxokozele v Basela* 1978 ACCC (S) 114; *Lekwakwe v Diale* 1979 ACCC (C) 20.

37 Labuschagne "Beheer en voogdy oor kinders na egskeiding in die inheemse reg: twee vorme van regsakkulturasie" 1991 – 1992 *Obiter* 116. Vgl Zaal "Child removal procedures under the Child Care Act: some new changes to contend with" 1988 *SALJ* 224; Eckard 131.

38 Zanolli 115.

39 Sien a (1) van die Children Act 1989 C 41. Sien ook tov Australië, Finlay en Bailey-Harris *Family law in Australia* (1989) 225.

40 Sien bv Richards 79; Hamilton "The unwed father and the right to know of his child's existence" 1987 – 1988 *Kentucky LJ* 994; Peach "Ending discrimination against unwed fathers and their illegitimate children under the immigration laws" 1981 *New York LR* 146.

41 "Voluntary legitimation rights of unwed fathers in Texas" 1983 *Houston LR* 1177 – 1178.

42 Sien bv Lakies 229; Knöpfel "Erforderliche Änderungen im Nichtehelichenrecht" 1990 *ZRP* 234.

43 BVerfG 56 390 gelees met BVerfG 31 205; Leibholz, Rinck en Hesselberger *Grundgesetz* (1991) 51.

Die vraag wat met die frase "beste belang van die kind" of analogiese frases bedoel word, het al tot omvattende studies aanleiding gegee.[44] In die onderhawige artikel kan uiteraard nie in besonderhede daarop ingegaan word nie. Die Suid-Afrikaanse howe gaan van die standpunt uit dat slegs met die ouerlike reg van voogdy en toesig oor 'n kind ingemeng sal word waar die uitoefening van sodanige reg die lewe, gesondheid of sedes van die kind in gevaar sou stel.[45] In *Dunscombe v Willies*[46] was die respondent 'n Jehovasgetuie en applikant, sy eggenote van wie hy geskei was, 'n lid van die Metodiste kerk. Laasgenoemde het aansoek gedoen om respondent van toegang tot sy kinders te ontneem op grond van die feit dat respondent die kinders met sy geloofsoortuiging sou indoktrineer. Daar is aangevoer dat die beginsels van sy geloof in stryd is met dié van die Metodiste kerk waarop sy, as beheerhebbende ouer, vir die kinders besluit het. Indoktrinasie met die beginsels van die Jehovasgetuies, is verder aangevoer, sou die kinders onderwerp aan bespotting en ander vorme van diskriminasie in die gemeenskap waarin hulle beweeg. Die applikant se aansoek is toegestaan. Selfs indien aansoek gedoen word vir die verandering van die naam van die kind na dié van die ongehude vader, moet aangetoon word dat dit in die beste belang van die kind is.[47]

Oor die onderwerp van die beste belang van die kind verklaar die Nederlander Dijkers:[48]

> "Waar geschreven wordt over het belang van het kind (in literatuur in abstracto, in jurisprudentie en rapporten van de Raad voor de Kinderbescherming in concreto) valt te lezen dat nagegaan moet worden in hoeverre de ouders kinderen in hun ontwikkeling ruimte geven, begeleiden en stimuleren, alsmede dat kinderen gebaat zijn bij een stabiele en continue opvoeding en verzorging en de mogelijkheid zich te hechten. Nader uitgewerkt leidt een en ander tot overwegingen dat verhuizingen van de ene ouder naar de ander en schoolwisselingen zoveel mogelijk vermeden dienen te worden, dat kinderen uit één gezin bij elkaar moeten blijven, dat een kind recht heeft op een relatie met beide ouders, dat ouders hun kinderen niet moeten belasten met hun onderlinge conflicten, enz."

By bepaling van die beste belang van die kind in 'n spesifieke geval is dit ook wenslik dat die advies van psigoloë en verwante wetenskaplikes ingewin word.[49] Dit is soms in die beste belang van die kind om sy verhouding met een of albei sy ouers te beëindig.[50] Die howe moet ook met groot omsigtigheid 'n omgangsreg toeken waar dit teen die wil van die beheerhebbende ouer, gewoonlik die moeder, is aangesien dit die kind aan onnodige konflik en verwarring kan blootstel.[51]

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44 Sien bv Heaton *The meaning of the concept "best interests of the child" as applied in adoption applications in South African law* (LLM-verhandeling Unisa 1988).

45 Sien bv *Calitz v Calitz* 1939 AD 56 64; *Petersen v Kruger* 1975 4 SA 171 (K) 173 – 174.

46 1982 3 SA 311 (D).

47 *W v S* 1988 1 SA 475 (N) 492.

48 "Toewijzing van kinderen" 1991 *NJB* 281 282.

49 Vgl Lambiase en Cumes "Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?" 1987 *SALJ* 704; Mudie "Custody and access determination in divorce: a family and developmental approach" 1989 *De Rebus* 686.

50 Sien bv Schwab "Zum Entwurf eines Gesetzes über die rechtliche Möglichkeit des Umgangs zwischen Vater und nichtehelichem Kind" 1990 *Zeitschrift für das gesamte Familienrecht* 933; Hahne "Überlegungen zur Verbesserung der Rechtsstellung des nichtehelichen Kindes" 1990 *Zeitschrift für das gesamte Familienrecht* 930; Knöpfel "Zur Neuregelung des elterlichen Umgangsrechts" 1989 *Zeitschrift für das gesamte Familienrecht* 1020 – 1021.

51 Dörr "Die Entwicklung des Familienrechts seit Ende 1990" 1992 *NJW* 529 533; Richards 87; Lempp "Zum Umgangsbefugnis des nichtehelichen Vaters" 1989 *Zeitschrift für das gesamte Familienrecht* 17.

Die kind het egter ook, as uitgangspunt, 'n belang in sy vader. Dit is vir die gesonde emosionele en geestelike ontplooiing van die kind belangrik dat hy 'n vaderfiguur moet hê. Dit kan ook sosiale ostrasime uitskakel. Buite-egtelike kinders soek in elk geval een of ander tyd hulle biologiese vader op.[52] 'n Nederlandse hof[53] het dan ook voorgestel dat die omgang tussen ouer en kind as 'n basiese reg wat voortspruit "uit de wezensgebondenheid van ouder en kind" erken word en dat die omgangsreg bloot op die biologiese band tussen ouer en kind gefundeer word. Volgens die hof ly 'n kind die minste skade in sy persoonlikheidsontwikkeling as die biologiese band waarop sy psigologiese verhouding met sy vaderfiguur kan ontwikkel, erken word.[54] Aansluitend hierby het die Duitse konstitusionele hof beslis dat die konstitusioneelbeskermde algemene persoonlikheidsreg (beliggaam in artikel 2(1) gelees met artikel 1(1) *GG*) ook die reg insluit om oor jou afkoms ingelig te word.[55]

Kragtens artikel 2 van die Wet op Intestate Erfopvolging 81 van 1987 raak buite-egtelikheid in Suid-Afrika in beginsel nie meer intestate erfregte nie. Met dié vorm van diskriminasie is ook in ander lande weggedoen.[56] Die Amerikaanse Supreme Court het in twee uitsprake beslis dat wetgewing van Louisiana wat 'n eis weens die dood van 'n broodwinner op grond van buite-egtelikheid verbied, in stryd is met die gelykheidsbeginsel beliggaam in die 14de wysiging van die konstitusie.[57] In Suid-Afrika het 'n ongehude vader 'n plig om sy buite-egtelike kind te onderhou. Uit hoofde hiervan het so 'n kind 'n reg om skadevergoeding te eis indien sy vader onregmatig en skuldig gedood word.[58]

Wat duidelik blyk, is dat die belange en regte van die buite-egtelike kind op 'n al wyer grond wêreldwyd erkenning geniet. Dit sluit in gepaste omstandighede 'n reg tot omgang met sy nie-beheerhebbende ouer in.[59]

5 DIE OPKOMS VAN DIE BELANGE EN REGTE VAN DIE ONGEHUDE VADER

5 1 Aanvanklik bloot 'n ekonomiese verpligting

In rudimentêre gemeenskappe het daar aanvanklik geen onderhoudsplig op die ongehude vader gerus nie.[60] Dit is tot vandag toe die posisie in die tradisionele

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52 Eckard 125; Marcus 3; Steward "Constitutional rights of unwed fathers: is equal protection equal for unwed fathers?" 1990 *Southwestern University LR* 1111.
53 Rb Zwolle van Maart 1984 (ongerapporteer) bespreek deur Heida 648.
54 Vgl ook LG Bonn (4-8-89) 1990 *NJW* 128.
55 BVerfG (31-1-1989) 1989 *NJW* 891. Vgl Thomas "Paternity: legal or biological concept?" 1988 *SALJ* 247.
56 Sien Bradley 344–345.
57 *Levy v Louisiana* 391 US 68 (1968); *Glona v American Guarantee and Liability Insurance Co* 391 US 73 (1968); sien ook *Jordan v Delta Drilling Company* (1975) 78 ALR 3d (SC Wyoming) 1225; Zupanec "Right of illegitimate child, after Levy v Louisiana, to recover under wrongful death statute for death of putative father" 78 ALR 3d 1230; Hurst "The sins of the fathers: from filius nullus to the sixth circuit's liberal interpretation of social security child survivorship provisions" 1983 *Toledo LR* 1021.
58 *Santam Bpk v Fondo* 1960 2 SA 467 (A) 473; Davel *Die dood van 'n broodwinner as skadevergoedingsoorsaak* (LLD-proefskrif UP 1984) 140–149 452.
59 Sien Eckard 124.
60 Sien Steward 1087.

inheemse reg.[61] Die eerste regsband wat 'n ongehude vader met sy buite-egtelike kind gehad het, was ekonomies van aard, naamlik 'n onderhoudsplig.[62] So sterk is laasgenoemde plig dat 'n Duitse hof in 1961 beslis het dat selfs die aanneming van die kind geen effek daarop het nie.[63]

Volgens die Suid-Afrikaanse howe[64] is 'n omgangsreg van die ongehude vader nie 'n *quid pro quo* vir die feit dat hy onderhoud vir sy buite-egtelike kind betaal nie. Amerikaanse howe neem 'n ander standpunt in. So verklaar regter Callister van die Utah Supreme Court:[65]

> "Since the father's duty to support and educate the child is to the same extent as if the child was born in lawful wedlock, it should follow that the father's right to custody should be almost as co-extensive. Thus, while his right is not as great as that of the mother, it is certainly far greater than that of a stranger."

Hoe dit ook al sy, die geleidelike ontwikkeling van die regsband tussen die ongehude vader en sy buite-egtelike kind het by die (ekonomiese) verpligting tot onderhoud begin.

5 2 *Locus standi* van die vader

Die volgende stap was om aan die ongehude vader 'n prosesregtelike belang in die welsyn van sy buite-egtelike kind te gee. Reeds sedert 1914 het die Suid-Afrikaanse howe aan die ongehude vader die reg gegee om die hof te nader indien hy van mening is dat nie behoorlik na sy buite-egtelike kind deur die beheerhebber (die moeder) omgesien word nie.[66] Hierdeur is aan die buite-egtelike vader nie slegs 'n ekonomiese en sosio-psigiese nie, maar ook 'n juridiese belang in die welsyn van sy buite-egtelike kind gegee.

5 3 Die vader se belang by 'n aannemingsproses

Kragtens artikel 18(4)(d) van die Wet op Kindersorg 74 van 1983 is slegs die moeder se toestemming by die aanneming van 'n buite-egtelike kind nodig. Verskeie skrywers het hierdie toedrag van sake al gekritiseer.[67]

In *In re Baby Girl M*[68] het die California Supreme Court beslis dat waar 'n ongehude vader "pursue(s) custodial responsibility" en vreemdelinge poog om die kind aan te neem, die vader nie voogdyskap ontsê kan word nie behalwe

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61 Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 294–295.

62 Sien Hurst 1022–1029; Bradley 346.

63 LG Braunschweig (18-4-1961) 1961 *NJW* 1727.

64 *F v L* 1987 4 SA 525 (W) 527; *Douglas v Mayers* 1987 1 SA 910 (ZHC) 914.

65 *Re State in Interest of M* (1970) 45 ALR 3d 207 (Utah SC) 211; sien ook *Van Erk v Holmer* 1992 2 SA 636 (W) 649. Lg uitspraak is egter 'n *obiter dictum*.

66 *Wilson v Ely* (1914) WR 34; *Davids v Davids* (1914) WR 142; *Mathews v Haswari* 1937 WLD 110 112; *Rowan v Faifer* 1953 2 SA 705 (EDL) 711.

67 Nathan "A father and his illegitimate child: towards a permanent relationship" 1980 *THRHR* 298; Ohannessian en Steyn 263; Heaton "Should the consent of the father of an illegitimate child be required for the child's adoption? A suggestion for the reform of South African law" 1989 *CILSA* 346 353; vgl ook Eekelaar 49.

68 37 Cal 3d 65, 688 P 2d 918, 207 Cal Rptr 309 (1984) bespreek deur Phelps "Protecting the opportunity interest of the unwed fathers of newborn infants placed for adoption: does California's statute go far enough?" 1988 *California Western LR* 123 en Steward 1088.

as bewys kan word dat dit tot nadeel van die kind sal wees om hom/haar in sy sorg te plaas.[69]

In *Lehr v Robertson*[70] het die natuurlike vader nooit sy kind onderhou nie of sy naam in die register vir putatiewe vaders opgeteken nie. Voldoening aan dié vereistes sou hom geregtig gemaak het om kennis van die aannemingsproses ten aansien van sy kind te ontvang. Nadat 'n aannemingsproses begin is, het die vader 'n petisie om hom tot vader te verklaar aan die hof gerig, onbewus van die hangende aannemingsproses. Die Supreme Court van die VSA het in finale instansie beslis dat 'n natuurlike vader se konstitusionele regte, beliggaam in die behoorlike proses- en gelykheidsklousules van die 14de wysiging van die konstitusie, nie geskend is omdat hy nie kennis gekry en 'n geleentheid gegun is om aangehoor te word voordat die kind aangeneem is nie, aangesien hy nooit in enige toesighoudende, persoonlike of finansiële verhouding tot die kind gestaan het nie.[71] In 'n afwykende uitspraak verklaar regter White,[72] met wie twee ander regters saamgestem het, dat 'n ongehude vader 'n reg behoort te hê om ingelig te word as 'n aannemingsproses ten aansien van sy kind ingestel is indien die staat kennis van sy bestaan het en waar hy hom bevind, asook bewus is van die belange van die kind. Hiermee gaan ek akkoord.[73]

In *In re Raquel Marie X*[74] het die New York Court of Appeals 'n vetoreg aan die ongehude vader in 'n aannemingsgeding van sy pasgebore baba gegee waar hy voorheen getoon het dat hy bereid is om sy ouerlike verantwoordelikhede te aanvaar. 'n Soortgelyke benadering blyk uit die beslissing van die Georgia Supreme Court in *In re Baby Girl Eason*.[75] Na aanleiding van laasgenoemde saak verduidelik Haney:[76]

> "Based on the biological link alone, an unwed father has an opportunity interest to develop a relationship with his child. If he exercises that opportunity interest, he establishes constitutional rights protected by due process of law. However, these rights are not absolute and can be abandoned if not 'timely pursued', but the state cannot deny the father a 'reasonable' opportunity to exercise his interest. The adoption of the opportunity interest test is a significant clarification for those involved in adjudicating the rights of unwed fathers. More importantly, the adoption of the test necessitated the creation of a new standard by which to judge the unwed father."

Hy stel voor dat 'n tydsgrens gestel behoort te word waarbinne die ongehude vader sy begeerte moet demonstreer om te beweeg vanaf 'n blote biologiesgefundeerde verhouding met sy kind tot 'n ontwikkelde konstitusioneelbeskermde belang in die welsyn van sy kind.[77]

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69 Hierdie beslissing is gebaseer op wetgewing wat intussen deur die Kaliforniese wetgewer gewysig is (Phelps 124).

70 (1983) 463 US 248, 77 L Ed 2d 614.

71 Sien ook *Caban v Mohammed* (1979) 441 US 380, 60 L Ed 2d 297; *Quilloin v Walcott* (1978) 434 US 246, 54 L Ed 2d 511.

72 636.

73 Sien ook De Moss "Adoption: the rights of the putative father" 1984 *Oklahoma LR* 583; Matts "Unwed fathers: is Arizona denying their right to recognition as parents?" 1984 *Arizona LR* 143; Daskow "The constitution, notice, and the sins of the fathers" 1984 *Journal of Juvenile Law* 12.

74 76 NY 2d 387, 559 NE 2d 418, 559 NYS 2d 855 (1990) bespreek in 1991 *Harv LR* 800.

75 257 Ga 292, 358 SE 2d 459 (1987) bespreek deur Beatty en Miranda "In re Baby Girl Eason: expanding the constitutional rights of unwed fathers" 1988 *Mercer LR* 997 en Haney "The constitutional rights of unwed fathers in Georgia: in re Baby Girl Eason" 1989 *Georgia State Univ LR* 591.

76 609–610.

77 616.

In 1984 het die National Conference of Commissioners on Uniform State Laws begin om ondersoek na dié problematiek in te stel en later die Uniform Putative and Unknown Fathers Act (UPUFA) opgestel. In laasgenoemde word voorgestel dat die howe onder andere die volgende faktore in aanmerking moet neem:[78]

> "[T]he nature and quality of any relationship between the man and the child; the reasons for any lack of a relationship between the man and the child . . . whether the man visits the child, has shown any interest in visitation, or, desiring visitation, has been effectively denied an opportunity to visit the child . . . the circumstances of the child's conception, including whether the child was conceived as a result of incest or forcible rape; whether the man has formally or informally acknowledged or declared his possible paternity of the child . . ."

Die voogdy oor die kind kan in gepaste omstandighede aan die ongehude vader self toegeken word.[79]

5 4 Die reg om van vaderskap te weet

Bogenoemde ontwikkelinge sou weinig betekenis hê as die ongehude vader nie van sy vaderskap bewus is nie. In die woorde van Hamilton:[80]

> "Despite our progressiveness, however, one major obstacle – whether its foundation lies in nature, sociology, or the law – prevents unwed fathers from ever achieving a parental status comparable to that of their female counterparts: the knowledge of their parenthood. Nowhere is the protection of this right more critical than in cases in which a newborn infant, whose very existence is unknown to his or her father, is surrendered for adoption by the child's mother. The unknowing father forever loses every opportunity to experience the joys and heartaches of accompanying his son or daughter through his or her life – being there and watching as the child grows from infancy to adulthood."

Die Pennsylvania Superior Court[81] het beslis dat 'n ongehude vader *locus standi* het om aansoek te doen vir 'n verklarende bevel dat hy die vader van 'n buite-egtelike kind is met die doel om sy regte ten aansien van die kind te bepaal. Die UPUFA gee dan ook aan die ongehude vader 'n reg om 'n aksie in te stel sodat bepaal kan word of hy die vader van 'n spesifieke kind is.[82]

Daar is Suid-Afrikaanse skrywers wat te kenne gee dat die waarheid ten aansien van vaderskap (soms) in belang van die kind kan wees.[83] Die ontwikkelinge wat in die VSA plaasvind, is in die lig van die individualiseringsproses

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78 Aangehaal deur Batty 1193 – 1194.

79 Sien Goger 220. In *Re State in Interest of M supra* 212, verklaar Callister R van die Utah Supreme Court soos volg: "The putative father of an illegitimate child is entitled to its custody and control as against all but the mother, if he is competent to care for and suitable to take charge of the child and if it appears that the best interest of the child will be thereby secured."

80 "The unwed father and the right to know of his child's existence" 1987 – 1988 *Kentucky LJ* 1008 – 1009.

81 *In re Mengsel* 287 Pa Super 186, 429 A 2d 1162 (1981) bespreek deur Mayercheck 1982 *Duquesne LR* 701.

82 Batty 1194.

83 Vgl Labuschagne "Toegangsregte van die natuurlike vader tot sy buite-egtelike kind" 1990 *TSAR* 785; Jordaan "Biologiese vaderskap: moet dit altyd seëvier?" 1985 *THRHR* 392.

en die opkoms van menslike outonomie, soos hierbo genoem,[84] onvermydelik en gevolglik onderskryfbaar.

5 5 Die omgangsreg as 'n basiese reg

Volgens die Suid-Afrikaanse gewysdereg het die ongehude vader nie *ex lege* 'n omgangsreg ten aansien van sy buite-egtelike kind nie.[85] In *B v P*[86] verduidelik regter Kirk-Cohen soos volg:

> "[A]n applicant must prove on a preponderance of probability that the relief sought, ie access, is in the best interests of the illegitimate child (the paramount consideration) and that such relief will not unduly interfere with the mother's right of custody. The Court's decision in any particular case will depend upon the facts thereof."

In 'n onlangse saak *Van Erk v Holmer*[87] ken regter Van Zyl in 'n *obiter dictum* aan die ongehude vader 'n omgangsreg *ex lege* toe:

> "In my view public policy dictates that, just as there should be no distinction between a legitimate and an illegitimate child, just so there is no justification for distinguishing between the fathers of such children. By this I do not propose that they should be equated with each other in one fell swoop. Certain parental rights have been legislatively enacted and will require amendments to such legislation to provide for more extended rights. It is the least of these rights – the 'booby prize' as *Boberg* calls it . . . namely the right of access, which public policy requires should be inherently available to all fathers. In time to come further extensions may be acquired and public policy will no doubt play a role in regard thereto. At this stage, however, it is unnecessary to speculate on the nature and extent of the further rights which may call for consideration.
>
> Perhaps one of the strongest motivations for an improvement in the legal position of the unmarried father is what is perceived as the gross injustice which occurs when a father is compelled to pay maintenance for a child whom he may never be able to see or visit, despite his being prepared to commit and devote himself entirely to the interests of the child. This is not simply a plea for a *quid pro quo* but a proper recognition of a biological father's need to bind and form a relationship with his own child and the child's interest that he or she should have the unfettered opportunity to develop as normal and happy a relationship as possible with both parents. This is not only in the interest of the child but it is in fact a right which should not be denied unless it is clearly not in the best interests of the child."

Verskeie plaaslike skrywers het hulle al ten gunste van so 'n benadering uitgespreek.[88] Dit blyk dat die Suid-Afrikaanse Regskommissie daarmee genoeë sou neem.[89] Die Engelse Regskommissie het dit inderdaad aanbeveel.[90]

Kragtens artikel 6(2) *GG* is die versorging en opvoeding van kinders in Duitsland 'n natuurlike reg wat die ouers toekom en ook hulle plig is. As die vader, moeder en kind saamwoon, kan hierdie reg die vader nie ontneem word nie.[91]

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84 Hierbo 414 – 415.

85 Sien bv *Segal v Segal* 1971 4 SA 317 (K) 323; *Ex Parte van Dam* 1973 2 SA 182 (W) 185; *W v S* 1988 1 SA 475 (N) 492; *Qudenhove v Gruber* 1981 1 4 SA 857 (A) 867.

86 1991 4 SA 113 (T) 117.

87 1992 2 SA 636 (W) 649; sien egter *S v S* 1993 2 SA 200 (W) en *B v S* 1993 2 SA 211 (W) waarin Van Zyl R se uitspraak fel gekritiseer en verwerp word (redakteur).

88 Sien bv Ohannessian en Steyn 263; Boberg "The would-be father" 1988 *BML* 112 115; Jordaan 394; Thomas "Investigation into the legal position of illegitimate children" 1985 *De Rebus* 338; Van Onselen "TUFF – the unmarried father's fight" 1991 *De Rebus* 449.

89 *Ondersoek na die regsposisie van buite-egtelike kinders* (Werkstuk 7, Projek 38, 1984) 69.

90 Eekelaar 49.

91 Leibholz, Rinck en Hesselberger 48.

Behoorlike proses ("due process") en die gelykheid-voor-die-reg-beginsel beliggaam in die 14de wysiging van die Amerikaanse konstitusie, waarborg aan die ongehude vader in sekere omstandighede inspraak- en omgangsregte ten aansien van sy buite-egtelike kind.[92] So verduidelik Buchanan:[93]

> "As can be seen from the discussion of the unwed father's protections against state-decreed adoptions by strangers, the unwed father's claim frequently will be for an opportunity to perform the acts that give rise to a parent-child relationship of the highest constitutional significance. Recognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility, the state may not deny biological parents the opportunity to establish a protected custodial relationship . . . In constitutional terms, if it is the custodial relationship between a biological parent and a child that is critical, the state may not prevent the development of a custodial relationship by denying an unwed father an opportunity to have custody, unless the state provides justifications that would validate state denials of custody to parents in general. Given the probable strength of state interests in adoption, the state must at least give all biological parents equal opportunities to establish and maintain protected relationships with their children."[94]

Ek gaan met die Amerikaanse benadering[95] akkoord. Die ou sosiale vermoede dat ongehude vaders onverantwoordelike en ongevoelige persone is, het (ten minste) nie in die moderne tyd meer gelding nie, veral ook gesien in die lig van die dereguleringsproses wat in die huweliksreg plaasvind.[96]

5 6 Effek van die deregulering van die huwelik

In 'n Nederlandse saak van 1977[97] was die feite kortliks soos volg: Uit 'n huwelik is 'n kind gebore. Na ontbinding van die huwelik gaan die partye voort om saam te woon en nog 'n kind word gebore. Die man versoek 'n omgangsreëling ten aansien van die kind wat uit die saamwoon gebore is. Die Hoge Raad staan dit toe:

> "De gezinsband, die in dit geval na de echtscheiding heeft bestaan, gelijkt zozeer de gezinsband tijdens een huwelijk, dat er reden is na het uiteenvallen van het gezin de verhouding van de vader tot zijn natuurlijk erkend kind – wat betreft de omgangsregeling als bedoeld in art 1:161 lid 5 BW op één lijn te stellen met de verhouding die na echtscheiding in dat opzicht bestaat tussen een uit het huwelijk geboren kind en de vader die niet met het gezag over het kind is belast."

In 1985[98] het die Hoge Raad nog verder gegaan en beslis dat indien 'n man met 'n kind in 'n gesinsverhouding staan, hy in aanmerking kom vir 'n omgangsreg kragtens artikel 8 van die Europese Verdrag vir die Regte van die Mens (EVRM),

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92 Sien bv Thompson 618; Secor "Michael H v Gerald D: due process and equal protection rights of unwed fathers" 1990 *Hastings Constitutional LQ* 759; Roark "Putative father's right to notice of adoption proceedings involving his child" 1984 *Missouri LR* 651; Bronfin 488; Corley "Removing the bar sinister: adoption rights of putative fathers" 1985 *Cumberland LR* 499.

93 351 – 352.

94 Sien ook Eveleigh "Certainly not child's play: a serious game of hide and seek with the rights of unwed fathers" 1989 *Syracuse LR* 1055.

95 Sien ook par 5 7 hieronder.

96 Sien Weinhaus "Substantive rights of the unwed father: the boundaries are defined" 1980 – 1981 *Journal of Family Law* 445.

97 HR 26-5-1977 NJ 1978 417; Heida 646.

98 HR 22-2-1985, R vd W 1985 47; Heida 648. Sien ook HR 4-5-1984, NJ 1985 510.

dit wil sê 'n menseregtelike basis word daaraan toegeken.[99] Ook in Duitsland word die feitelike huwelik (konkubinaat) in die lig van artikel 6(2) *GG* en artikel 8 EVRM op dieselfde vlak as 'n juridiese huwelik geplaas.[100] In Swede word klaarblyklik gewerk in die rigting van algehele gelykstelling van juridiese en feitelike huwelike.[101]

In die leidende beslissing van die Amerikaanse Supreme Court, *Stanley v Illinois*,[102] het 'n moeder en haar kinders saam met hulle natuurlike vader gewoon. Die moeder is egter oorlede. Die vader (Stanley) staan die poging teë om sy kinders in 'n ander se sorg te plaas. Regter White, namens die hof, bevind soos volg:[103]

> "We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment."[104]

Suid-Afrika het in dié verband agtergebly.[105] Word 'n kind gedurende die bestaan van 'n huwelik verwek maar na ontbinding van die huwelik gebore, het die vader bloot uit hoofde van die feit dat die kind gedurende die bestaan van die huwelik verwek is, 'n omgangsreg.[106] Word die kind egter deur dieselfde persoon na die egskeiding verwek, het hy nie 'n omgangsreg nie. Dit is tog onsinnig! Die Nederlandse benadering, hierbo bespreek,[107] is meer sinvol en dien 'n hoër vlak van geregtigheid.

Dit blyk uit bogaande uiteensetting dat die verwerwing van 'n omgangsreg deur die ongehude vader direk verband hou met die opkoms van die feitelike huwelik of konkubinaat.

5 7 Die omgangsreg as 'n subjektiewe reg

Daar is diegene wat aanvoer dat die hierbo bespreekte omgangsreg nie 'n subjektiewe reg daarstel nie.[108] Scott verklaar egter hieroor:[109]

> "Ek is van mening dat ouerlike gesagsregte moontlik onder persoonlikheidsregte tuisgebring kan word omdat dit wat geobjektiveer word, persoonlikheidsaspekte van 'n

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99 Sien verder Rood-de Boer "Een schok vir het familie- en jeugdrecht" 1984 *NJB* 1277; Doek "Een schok in het familie- en jeugdrecht: iets over de scheuren en barsten" 1985 *NJB* 213.

100 BVerG 7-7-1991; Frenz "Die Unterhaltsgarantie aus Art 6 GG nach der Sorgerechtsentscheidung des BVerfG vom 7.5 1991" 1992 *NJW* 1602; Brötel "Das alleinige Sorgerecht der Mutter für ihr nichteheliches Kind – ein grundrechtswidriges Dogma?" 1991 *NJW* 3119.

101 Radau "Die Gesetzgebung zur nichtehelichen Lebensgemeinschaft in Schweden" 1989 *MDR* 703.

102 (1972) 405 US 645, 31 L Ed 2d 551.

103 557.

104 Sien ook Marcus 47; Buchanan 324; Batty 1173.

105 Sien *F v B* 1988 3 SA 948 (D) 949; sien egter Ohannessian en Steyn 259; Labuschagne 1989 *TSAR* 388.

106 Sien Thomas "A child with three fathers?" 1982 *De Jure* 295; Bevon *Child law* (1989) 63.

107 Sien vn 97 hierbo.

108 Sien bv Sonnekus en Van Westing 241 – 244.

109 "Ouerlike gesagsregte – subjektiewe reg of nie?" 1977 *TSAR* 173.

> minderjarige kind is wat in werklikheid in 'n mindere of meerdere mate die persoonlikheid van die ouer self verteenwoordig. Hierdie persoonlikheidsaspekte van die kind verteenwoordig dus die persoonlikheid van die ouer. Die kind se persoonlikheid dra onteenseglik die stempel van die ouer se persoonlikheid. Daarom, dink ek, is die sosiale, sedelike, verstandelike en godsdienstige vorming van die kind (onteenseglik aspekte van sy persoonlikheid) ook 'n spieëlbeeld van die ouer se persoonlikheidsaspekte en dus deel van die ouer se persoonlikheidsregte."

Hierdie sienswyse poog om die konklusie dat 'n ander se persoonlikheidsgoedere 'n regsobjek kan wees, te omseil. Die opvatting dat slegs dinge wat ekonomiese waarde het, regsobjekte kan wees en dat aspekte van 'n medemens se persoonlikheid nie vatbaar vir regsobjektivering is nie, het ek by 'n vorige geleentheid as rasioneel ongefundeerd verwerp.[110] Die argumente daar geopper, word nie hier herhaal nie.

Uit *Marais v Marais*[111] blyk dat die doel van die omgangsreg is "the nurturing of real affection and companionship between non-custodian parent and child". Marcus[112] verklaar in die verband soos volg:

> "The parental interest in the child most worthy of consideration is the instinctive, moral obligation of the parent to ensure that his child is raised and cared for as well as possible. This interest would include seeing that the child is properly fed, sheltered and receives the appropriate secular and moral (religious) education."

Die omgangsreg van 'n ongehude vader hou myns insiens in dat hy (onder andere) kan deelneem aan die waarde- en persoonlikheidsvorming van die kind. Dit word egter in twee opsigte begrens: Eerstens mag sy optrede nie in stryd wees met die staatsgedragslyn (gemeenskapsopvatting) nie; tweedens mag dit nie onversoenbaar wees met die (redelike) riglyne waarbinne die beheerhebbende ouer, die moeder, die waarde- en persoonlikheidsvorming van die kind waarneem nie. In geval van sodanige onversoenbare optrede kan die kind verwar word en dit is nie in sy beste belang nie.[113] Hierdie omgangsreg kan ook, binne sekere grense, teenoor derdes gehandhaaf word.[114]

6 KONKLUSIE

Die belangrikste konklusies uit bogaande navorsing kan soos volg saamgevat word:

(a) Die ongunstige posisie wat 'n ongehude vader nog hedendaags ten opsigte van sy buite-egtelike kind beklee, is eerstens gebaseer op die anachronistiese ondergeskikte posisie van die vrou. Tweedens berus dit op (barbaarse) diskriminerende regsreëls teen 'n buite-egtelike kind. Derdens dien dit as 'n vorm van (morele) bestraffing van ongehude vaders en by implikasie ook van die kind.

(b) Die opkoms van die feitelike huwelik of konkubinaat, as alternatief vir die tradisionele juridiese huwelik, noodsaak 'n hersiening van die status van die ongehude vader asook 'n herwaardering van die rol wat die staat in huweliksverhoudings te speel het.

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110 "Regsobjekte sonder ekonomiese waarde en die irrasionele by regsdenke" 1990 *THRHR* 257.
111 1960 1 SA 844 (K) 847.
112 5; sien ook Frenz 1600.
113 Sien 418 ev hierbo.
114 Sien *Meyer v Van Niekerk* 1976 1 SA 252 (T) 257; *Coetzee v Meintjies* 1976 1 SA 257 (T) 262.

(c) Daar word aan die hand gedoen dat die ongehude vader wat sy verantwoordelikhede ten aansien van sy buite-egtelike kind erken, 'n omgangsreg ten opsigte van sy kind behoort te hê behalwe as bewys kan word dat dit nie in die beste belang van die kind is nie.

(d) Hierdie omgangsreg is 'n subjektiewe reg wat aspekte van die kind se persoonlikheidsgoedere as objek het. Dié aspekte omvat hoofsaaklik die kind se persoonlikheids- en waarde-ontwikkeling. Genoemde omgangsreg word egter op twee wyses begrens: eerstens moet die uitoefening daarvan nie in stryd met die (steeds veranderende) staatsgedragslyn (gemeenskapsopvatting) wees nie. Tweedens moet dit sinchroniseer met die beheerhebbende ouer (die moeder) se (redelike) optrede in die verband. Die regte van die partye behoort sover moontlik analogies aan die regte binne 'n juridiese huwelik te wees. Die welsyn van die kind behoort in finale instansie egter deurslaggewend te wees.

We are not bound by The Edison [decision], *although in deciding whether South African Courts should continue to follow it, it is appropriate to have regard to the degree to which it is being attenuated in England and the fact that leading writers have criticised it. On the analogy of the position in the law of insolvency, where only the Court of the debtor's domicile can in general make an order with international effect for the sequestration of his estate, although other Courts can make sequestration orders which have operation in their own areas of jurisdiction, it is clear that it is not open to a Court in this country to "sink"* The Edison: *the most we can do is to tow it out of our territorial waters so that it will no longer be a menace to local shipping. I have endeavoured, however, to show that its true* ratio *has been misunderstood and that, properly explained, it should not serve "to foul meritorious claimants". Whether it be towed away or explained away I am satisfied that it is not our law that reasonably foreseeable loss caused by the combined operation of the impecuniosity of the plaintiff and the culpable conduct of the defendant cannot be recovered in delict* (*per* Farlam AJ in *Smit v Abrahams* 1992 3 SA 158 (C) 180).

Trade secrets through the cases: a study of the basis and scope of protection
*(continued)**

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2 2 Protection under the law of delict

2 2 1 Unlawful competition

Aquilian liability in delict has in little more than two decades become indisputably the most important basis for the protection of trade secrets in our law. How did this come about?

The courts already recognised in such early cases as *Combrinck v De Kock*[59] and *Patz v Greene*[60] that where a trader is injuriously affected in his business by competition which is the result of illegal trading, a right of the trader is infringed: this is the right to carry on his trade without wrongful interference from others. The Appellate Division held in *Matthews v Young*:[61]

> "Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *injuria* for which an action under the Lex Aquilia lies if it has directly resulted in loss."

But it was not until the late 1950s that the wide-ranging delict of unlawful competition, of which the misappropriation of trade secrets is but one form, was placed on a firm theoretical foundation. Credit for that must go to HJO van Heerden, whose work helped to pave the way for the trailblazing judgment of Corbett J (as he then was) in *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd*.[62] In the words of a later judge:[63]

> "[W]hat HJO van Heerden advocated in 1958 has now become entrenched, namely

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* See 1993 *THRHR* 229.

59 (1887) 5 SC 405.

60 1907 TS 427 436.

61 1922 AD 492 507.

62 1968 1 SA 209 (C).

63 Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 186D.

> that the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the Lex Aquilia."[64]

Few South African cases have received such penetrating and sustained attention from both judges and academic writers as has *Dun and Bradstreet*. That is hardly surprising, for the judgment is rich in principle and its reasoning is cogent. There is very little one can add to what has already been said of the case. Yet in a study of this kind, whose aim is to trace through the cases the historical development of the protection of trade secrets in our law, some discussion of the decision is unavoidable. The facts were simple; hardly, one would have guessed, the stuff of innovative judicial lawmaking. The plaintiff, ("the proprietor") was the compiler of "Credit Records", a literary work which was circulated to subscribers on a basis of confidentiality. The defendant, ("the rival") by unknown means obtained copies of the work, reproduced substantial portions, and used the information so obtained to issue written and verbal reports on credit matters to its own clients. The proprietor claimed, first of all, that the written reproduction and the issue of the written reports amounted to breach of copyright; secondly, that the issue of the verbal reports infringed a right of the proprietor. This latter right was not specified in the pleadings. The rival raised an exception to the second claim on the ground that it did not disclose a cause of action. It was the exception to the second claim that formed the subject-matter of Corbett J's judgment.

What could the basis of this puzzling unspecified claim be? Not copyright, for copyright can be breached only by reproduction in material form, and the proprietor's complaint against the issue of verbal reports could hardly be brought under that head; not contract, for there was no privity of contract between the litigants; not the equitable action for breach of confidence deriving from English law (this aspect of the judgment is discussed later); not, finally, a delictual action for unlawful appropriation of incorporeal property (also to be examined later). What then?

Counsel for the proprietor suggested that the basis was delictual liability in the form of unlawful interference by the rival with the proprietor's trade or business. Corbett J observed[65] that the rival's conduct did not fall within any specific, judicially-recognised category of unlawful competition. After reviewing the earlier decisions, his lordship nevertheless concluded[66] that the broad and ample basis of the *lex Aquilia* was available in this field for the recognition of rights of action even where there was no direct precedent in our law.

Given that unlawfulness is an essential element of Aquilian liability, what then was to be the standard for testing that element in relation to this new-born general delict of unlawful competition? According to Corbett J,[67] the applicable criteria were those of fairness and honesty in competition.

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64 Van Heerden's ideas have subsequently been elaborated and developed: see Van Heerden and Neethling *Onregmatige mededinging* (1983); for Mr Justice van Heerden's most recent thoughts on the subject, see his contribution "Die mededingingsprinsiep en die boni mores as onregmatigheidsnorme by onregmatige mededinging" in Neethling (ed) *Onregmatige mededinging/Unlawful competition* (1990) 6.

65 217A.

66 218E–F.

67 218H.

The judge held:[68]

> "[W]here, as in this case, a trader has by the exercise of his skill and labour compiled information which he distributes to his clients upon a confidential basis . . . a rival trader who is not a client but in some manner obtains this information and, well knowing its nature and the basis upon which it was distributed, uses it in his competing business and thereby injures the first mentioned trader in his business, commits a wrongful act vis-à-vis the latter and will be liable to him in damages. In an appropriate case the plaintiff trader would also be entitled to claim an interdict against the continuation of such wrongful conduct."

This wrongful act, said the court, consists in the deliberate misappropriation and filching of the products of another's skill and labour. It must be regarded as dishonest and a fraud upon the proprietor. It is an infringement of his right to carry on his trade and attract custom. The damage suffered would normally consist in the loss of customers or potential customers who have been induced by such conduct to deal with the rival rather than with the proprietor. Given the Aquilian character of a claim based upon such conduct, the suffering of damage and its causal connection with the acts of unlawful competition are essential ingredients of the claimant's cause of action.

The proprietor in *Dun and Bradstreet* failed, however, to allege that it carried on business in competition with its rival, the defendant. In the court's view[69] some such allegation was necessary, because it helped to show a causal connection between the conduct complained of and the damage suffered by the proprietor. As this essential requirement of Aquilian liability had not been met, the proprietor's second claim, that in respect of the verbal reports, failed on the facts, and the exception was upheld.

The requirement that the victim of a misappropriation of trade secrets must prove the existence of a competitive relationship with the infringer was criticised earlier in the context of contractual protection. In principle, the objection is equally strong when the basis is delictual, albeit that the delict is styled "unlawful competition". It is gratifying that the *Dun and Bradstreet* case, which is otherwise, I believe, a model judgment, has not been followed in this regard. In *Harchris Heat Treatment (Pty) Ltd v ISCOR*[70] O'Donovan J held:

> "The remedy under the Lex Aquilia in cases of unlawful interference with the business of another is not confined to competitors in trade. Loss will, at least prima facie, be occasioned by the unlawful deprivation of the owner of a trade secret of the right to exploit it, whether by attracting custom, or in other ways."[71]

There is a practical lesson to be learnt from the outcome of the *Dun and Bradstreet* case: the plaintiff in an action for unlawful competition based on the misappropriation of his trade secrets should not be content to seek shelter only under the broad spread of the Aquilian umbrella. The burden of proving that the elements of Aquilian liability are present is, as this case shows, not always

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68 221C-222A.
69 222C – E.
70 1983 1 SA 548 (T) 555D.
71 On appeal, in *South African Iron and Steel Corporation Ltd v Harchris Heat Treatment (Pty) Ltd* 1987 4 SA 421 (A) two judges of appeal approved the decision of O'Donovan J both on the facts and on the law. The majority reversed his decision on the facts and therefore found it unnecessary to investigate questions of law. The appeal was upheld. The decision of the court *a quo* is examined later.

an easy one to discharge. If, therefore, it is open to the plaintiff/applicant on the facts to plead some other ground of protection such as contract or copyright in the alternative, he would be well advised to do so. In the *Dun and Bradstreet* case, of course, such a choice was not available to the proprietor in relation to his claim based on the issue of verbal reports: as it turned out, he had only a delictual cause of action at his disposal.

Corbett J's treatment of the misappropriation of confidential information as a form of unlawful competition, redressible by means of the Aquilian action, has been endorsed by the Appellate Division.[72] It must therefore be taken to be an accurate and authoritative statement of our law.

There is one point on which Van Heerden and Neethling, while generally approving the *Dun and Bradstreet* judgment, take issue with Corbett J: the language of the judgment clearly indicates that only an intentional misappropriation of confidential information will attract liability for unlawful competition. These authors point out[73] that negligent misconduct ought to be sufficient to expose the actor to Aquilian liability. While this view is, of course, correct in principle, such a situation is not, nor does it appear likely to become, one of great practical significance: all of the reported cases to date have concerned deliberate misappropriation of trade secrets.

Diemont J held in *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd*[74] that the conduct of a trader who filches from a competitor knowledge which he knows to be secret and confidential, and which has been developed by the competitor's skill and industry, acts unfairly and dishonestly if he uses the information for his own profit and to the detriment of his rival. His conduct is not different in principle from that of a man who steals goods from the shelves of a rival's shop.

This statement, as well as the court's eventual decision based on Aquilian liability for unlawful competition, is fully consonant with the *Dun and Bradstreet* judgment. Unfortunately, certain passages[75] in Diemont J's judgment appear to confuse, even to equate, the equitable action for breach of confidence of English law with the delictual action for unlawful competition in South African law. These remedies, it is submitted, derive from completely distinct juridical grounds of protection of trade secrets; the two are not equivalent. Moreover, it will appear later that the former ground neither exists nor is needed in our law. Corbett J in the *Dun and Bradstreet* case was careful not to fall into the error of confusing these two discrete bases of protection. (Indeed, the clear and systematic categorisation of the various juridical grounds of protection is perhaps the most impressive feature of the *Dun and Bradstreet* judgment.)

Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd[76] was decided on the basis of the equitable action for breach of confidence deriving from English law. The judgment of Nicholas J (as he then was), is dealt with later under that head. The undoubtedly correct result of the case could, however, as Van Heerden

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72 In *Schultz v Butt* 1986 3 SA 667 (A) 679H.
73 137 fn 2.
74 1972 3 SA 152 (C).
75 See in particular 160G – 161A.
76 1977 1 SA 316 (T).

and Neethling[77] point out, equally have been reached by the application of Aquilian principles.[78]

The court in *Wilrose Timbers (Pty) Ltd v CE Westergaard (Pty) Ltd*[79] had little to say about the basis of protection of trade secrets. Given that the occasion was the return day of an application for an Anton Piller order, that is hardly surprising. Nevertheless, the cause of action was clearly based on unlawful competition. An employee of Wilrose, an importer of timber, had been trapped passing highly confidential business information about his employer's business to the managing director of a direct competitor. Wilrose had obtained an urgent order directing the deputy sheriff to attach and remove documentation belonging to it from the rival's premises. The order was confirmed by the court.

On the uncontested allegations of Wilrose, Philips AJ held that the access gained to the confidential documents had *prima facie* enabled the trade rival to compete dishonestly and unfairly with Wilrose. As a result, the latter had suffered considerable financial prejudice.

Is it only at the instance of the owner of confidential information that our law grants the Aquilian action against a third party who unlawfully filches that information? While the only reported cases dealt with claims at the instance of the owner, Goldstone AJ (as he then was) held in *Prok Africa (Pty) Ltd v NTH (Pty) Ltd*[80] that, in principle, there was no reason for so limiting the scope of the action. In the court's view, a person A (in this case, an exclusive licensee of the owner) who has no proprietary interest in the information, may have *locus standi* to bring the action in appropriate circumstances. Thus if A obtains possession of the information lawfully in order to further his own business interests, it would be a wrong committed against him if his trade rival were to obtain the information dishonestly from him for the purpose of using it to his detriment.[81] Where, on the other hand, A's rival obtains the information by honest means or by means having nothing to do with A, then it is only the owner who can sue.[82]

This is how the court explained the rationale of its decision:[83]

> "The wrong upon which the cause of action is founded and for which the remedy lies is not an invasion of rights of property: the *Dun and Bradstreet (Pty) Ltd* case . . . at 215F–216A. The wrong is the unlawful infringement of a competitor's right to be protected from unlawful competition: *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 440–1."

Van Heerden and Neethling[84] have welcomed the extension of Aquilian relief in the *Prok Africa* case.

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77 141 fn 31.

78 Indeed, Nicholas AJA subsequently explained in *Schultz v Butt* 1986 3 SA 667 (A) 679I–J that "[i]n the case of *Harvey Tiling* . . . it is clear that, although there was no clear statement in the summons to that effect, the cause of action was unfair competition". Van Dijkhorst J, too, in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 185H expressed the view that the basis of the action, and therefore of the judgment itself, was delictual. However, it is submitted with respect that there is little in the reported judgment in *Harvey Tiling* (outside of the plaintiff's particulars of claim reproduced at 320A and 320G–H) to justify these views.

79 1980 2 SA 287 (W).

80 1980 3 SA 687 (W) 696F.

81 696H.

82 697E–F.

83 696F–G.

84 138.

A milestone in the development of the law of unlawful competition (and of trade secrets) is the decision of Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*.[85] This case has wrought a radical change in the criterion used for assessing unlawfulness in the general delict of unlawful competition. In his deeply-researched judgment, Van Dijkhorst J examined the standard of "fairness and honesty" approved in the *Dun and Bradstreet* case and found it wanting in both of its legs.

His lordship went on[86] to formulate a different standard by which unlawfulness is to be judged:

> "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.
> I have come to the conclusion that the norm to be applied is the objective one of public policy. This is the general sense of justice of the community, the *boni mores*, manifested in public opinion.
> In determining and applying this norm 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. 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."

The court went on to deal with the specific issue of filching of trade secrets. These formed the subject of two separate allegations by Atlas, in its application for an interdict against a competitor, Pikkewyn, and certain ex-employees. Atlas alleged firstly that its erstwhile managing director, Lion-Cachet, who had knowledge of the production secrets and know-how of Atlas (a manufacturer of fertiliser), had passed this information to Pikkewyn, which exploited it to set up and equip a new factory for the manufacture of its competing product.

The other allegation was that Lion-Cachet and Papenfus, an ex-sales manager of Atlas, unlawfully used Atlas's marketing secrets and know-how (including names and addresses of customers, and cordial relationships with customers) in furtherance of the interests of Pikkewyn.

Under the first head Atlas argued that, while the various components of the production line were not unique to Atlas and most could be bought on the open market, the correlation between these components was to be found only at Atlas; it was the correlation or "process as a whole" which constituted the production secrets and know-how of Atlas.

Van Dijkhorst J referred to English and Australian decisions[87] which have held that, though all of the separate features of, say, a method of production may have been published, if the whole result could not be achieved except by someone who goes through the same time-consuming process of trial and error, that method will not fail to qualify as a trade secret by reason of such publication. A competitor who then misappropriates production secrets in order to spare himself such laborious and time-consuming development work, obviously enjoys an unfair headstart or "springboard" *vis-à-vis* the owner of the secrets.

The court also approved the broad principle, accepted in English and American law,[88] that an employee is upon the termination of his employment,

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85 1981 2 SA 173 (T).
86 188H – 189B.
87 191F – 192D.
88 193A.

free to draw upon his general knowledge, experience, memory and skill, howsoever gained, provided he does not use, disclose or impinge upon any of the secret processes or business secrets of his former employer. This principle, encountered earlier, has occasioned difficulty to judges in many jurisdictions. The American writer Callmann[89] aptly observes that "this rather piously oversimplified principle is much easier to state than to apply". The same writer finds little merit in the distinction, implicit in the principle, between general and special knowledge of the employee. His criticism has been echoed by Van Heerden and Neethling.[90]

In the light of this principle, did public policy dictate that Pikkewyn's conduct in setting up a competing production plant was unlawful? Van Dijkhorst J found that in a number of respects there was no confidentiality in Atlas's production process as a whole. There was, for instance, no evidence that the production sequence was kept secret or limited to certain employees only; all employees and visitors had access to the plant. Thus the "process as a whole" argument, which succeeded in the *Harvey Tiling* case (to be considered below), failed here. It followed that Atlas's first claim could not succeed.

The second allegation, concerning the filching of marketing secrets and know-how, received short shrift from the court.[91] On the evidence there existed a special relationship between fertiliser salesmen in the field and the farmers who bought their range of products: fertilisers were generally marketed through the goodwill and personal contact of such salesmen. Every salesman had his special clientele who tended to support him. In view of this special relationship, there was little room for Atlas to argue that the identity of purchasers of its products constituted marketing secrets.

The *Atlas Organic* case is valuable for what it has to say about both the basis and the scope of delictual protection of trade secrets.

A novel situation came before the court in *Harchris Heat Treatment (Pty) Ltd v ISCOR*.[92] Harchris, the plaintiff, who carried on the business of the heat treatment of metals, alleged that confidential information relating to a furnace which it had designed, had been unlawfully used by ISCOR, the defendant. ISCOR, it was claimed, had constructed and was using in its trade a furnace which was a copy of that of Harchris. Harchris sought to interdict ISCOR from using or dealing with its furnace.

The distinctive feature of the case was that ISCOR, while a client of Harchris, was not a competitor. ISCOR had placed certain orders with Harchris. Harchris allowed ISCOR's employees to inspect its furnace, in the expectation that further orders would result.

The "concept as a whole" argument was again raised, and here, unlike in *Atlas Organic*, it was successful: while there was no secrecy in regard to the individual items of equipment of which the furnace was composed, Harchris claimed that it had developed the concept as a whole as a result of experimentation, and of the expenditure of time and money, over a period of 22 years; on that account the concept possessed the necessary quality of confidentiality.

89 *Unfair competition, trademarks and monopolies* 3 ed vol II par 54 2(a).
90 139–140, in particular fn 19.
91 196B–D.
92 1983 1 SA 548 (T).

The court was satisfied that the concept of the Harchris furnace was not, at the time of its construction, public property or public knowledge. It was therefore capable of constituting protectable confidential information. This confidentiality had not been lost by reason of the inspection of the furnace by ISCOR's employees. Moreover, on the evidence, ISCOR had arrived at its design by copying the Harchris furnace and it had saved itself a good deal of time, trouble and expense by doing so.

On application of the public policy norm, ISCOR was held to have acted unlawfully in misappropriating and using the confidential information.

Relying on the fact that the parties were not trade competitors, however, ISCOR argued that Harchris had failed to satisfy the Aquilian requirement of pecuniary loss. O'Donovan J ruled,[93] quite correctly in my submission, that Aquilian relief in cases of unlawful interference with another's business is not confined to competitors in trade. Loss will, at least *prima facie*, be occasioned by the unlawful deprivation of the owner of a trade secret of the right to exploit it, whether by attracting custom, or in other ways. The interdict was granted.

It has already been suggested that the statement of the law in this case in relation to the requirement of trade rivalry between the parties, is to be preferred to the earlier approach followed in the *Coolair Ventilator* and *Dun and Bradstreet* case.

The delictual conduct in *Harchris* was not, strictly speaking, unlawful competition as such; it is more accurately described as unlawful interference in trade. It is clear, however, that the same principles of Aquilian liability underlie both situations.

On appeal, in *South African Iron and Steel Industrial Corporation Ltd v Harchris Heat Treatment (Pty) Ltd*,[94] a majority of the judges of appeal reversed the decision of O'Donovan J on the facts, finding it unnecessary to consider questions of law. The two dissenting judges of appeal, however, were of the view that the law had been correctly stated by the court *a quo*.

Easyfind International (SA) Pty Ltd v Instaplan Holdings[95] was concerned with an urgent application for an Anton Piller order, coupled with interim interdicts aimed at, *inter alia*, unlawful competition: Easyfind had employed one Van Rooyen as a commission agent to sell advertising space. He had, however, joined Easyfind with the purpose of spying and acquainting himself with the company's *modus operandi*. Van Rooyen then set up Instaplan to do business in competition with Easyfind. One complaint of Easyfind was that the respondents (Instaplan and Van Rooyen) were guilty of unlawful competition in their removal and use of certain confidential documents and other information belonging to Easyfind. As in the *Wilrose Timbers* case, which also concerned an urgent application, the court in the *Easyfind* case understandably had little to say about the legal basis of protection; clearly, however, *Easyfind*'s case was founded in delict and the basis of liability was Aquilian. Schultz AJ did, however, refer to two important principles: the first was that for material to be confidential "it must not be something which is public property and public knowledge".

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93 555D–E.
94 1987 4 SA 421 (A).
95 1983 3 SA 917 (W).

This test, which was first approved by a South African court in the *Harvey Tiling* case, was also applied in the *Harchris* case. Secondly, the court accepted that a document which was once confidential may cease to have that quality, if it is broadcast or made known to the public.

Schultz AJ systematically examined the misappropriated documents and classes of information. These included art work, a previous year planner (a product of Easyfind, whose business centred around the development and marketing of a special type of year planner), letters of recommendation, the results of a market survey, a sales kit, Easyfind's form of contract with advertisers, customer lists and a map showing divisions into advertising areas. Easyfind also relied on misappropriation of its sales method. The court was prepared to interdict Instaplan's use of some of these documents, namely those which met the requirements of confidentiality. What Van Rooyen took away with him from his study of the sales method, was merely personal skills such as he was entitled to take away with him and not confidential property. The result was that Easyfind obtained only partial relief on the basis of unlawful competition.

Easyfind, it is submitted, would have fared no better by alleging in the alternative that Van Rooyen had breached an implied term in his contract of service: what was in issue here was the scope, not the basis, of protection. Irrespective of the legal ground chosen, Easyfind would still have been faced with the same difficulty, that of showing that the alleged trade secrets which it sought to protect possessed the necessary quality of confidentiality.

Multi Tube Systems (Pty) Ltd v Ponting[96] was considered earlier under the head of contract. The language of the judgment, and the authorities cited by Broome J, however, are equally compatible with a decision based on the delictual ground of unlawful competition. Indeed, Multi Tube's allegation was that Ponting's conduct amounted to "unfair and unlawful competition".[97] It is unfortunate for the development of our law that in this case, as in a number of others discussed in this article, the applicable basis of protection was not properly articulated by the court. Joubert's words, quoted earlier,[98] come strongly to mind in this context.

Aercrete South Africa (Pty) Ltd v Skema Engineering Co (Pty) Ltd,[99] the facts of which were discussed earlier in the context of contractual protection, yet again concerned an application for an Anton Piller order.

It is worth pausing at this point to note that in more than one case where protection has been sought for trade secrets, an application for an Anton Piller order accompanied the usual application for an interdict grounded on Aquilian liability for unlawful competition.

While the last word on the status of the Anton Piller order in our law has yet to be spoken (a ruling is currently awaited from the Appellate Division), it is clear that the drastic relief which that remedy provides has a vital role to

96 1984 3 SA 182 (D).
97 184A.
98 See text to fn 18.
99 1984 4 SA 814 (D).

play in the protection of trade secrets. When the owner of confidential documents or materials becomes aware that they have come into the possession of another (for example, a trade rival) without his authorisation, an urgent *ex parte* application to court for an order directing the deputy sheriff to seize and hold the confidential matter is the only summary procedure currently available in our law for ensuring the recovery and preservation of that matter. An interdict, without more, cannot fulfil this function.

In the *Aercrete* case, Findlay AJ found that the applicants were *prima facie* entitled to relief under the head of unlawful competition. In the court's view, there was no distinction in principle between this case and the *Harvey Tiling* case.[100]

In reaching his conclusion, Findlay AJ stated[101] that, if anything, this case was stronger than the *Easyfind* case (which dealt with a former employee of the owner of the confidential information), inasmuch as here the applicants alleged that the information had been made available to the respondents for a specific and limited purpose only, yet was now being misused and commercially exploited.

In 1986, the delict of unlawful competition and, more pertinently, its role in the protection of confidential information, finally came under the scrutiny of the Appellate Division. The question in *Schultz v Butt*[102] was whether the appellant, Schultz, was competing unfairly with the respondent, Butt. Schultz had made a mould from the hull of a ski-boat designed by Butt, whose design had evolved over a long period of time, with considerable expenditure of time, labour and money. Schultz then proceeded to use this mould to make and sell boats in competition with Butt. Such conduct was alleged, *inter alia*, to constitute a misuse of Butt's confidential information. The court recognised[103] that the misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor's, may constitute a wrongful act in the context of an action for unlawful competition.

The specific issue was thus whether the information appropriated by Schultz was confidential. Nicholas AJA approved[104] the rule that, to be confidential, the information must have the necessary quality of confidence about it, namely, it must be something which is not public property and public knowledge. The Appellate Division has therefore confirmed that this standard, derived from the English case of *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,[105] and applied by our lower courts on a number of occasions, is an accurate reflection of South African law.

His lordship found[106] on the facts that the design of Butt's ski-boat hull was in the public domain; there was nothing confidential about it. (Nevertheless,

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100 It is submitted, however, that reliance on the *Harvey Tiling* case in this and other cases where protection of trade secrets is sought to be based on Aquilian liability, is inappropriate; the better view is that the *Harvey Tiling* case was decided on a different, non-delictual ground: see fn 78.

101 822H.

102 1986 3 SA 667 (A).

103 679H – I.

104 680E.

105 1984 65 RPC 203 (CA) 215.

106 680E – F.

Schultz's conduct was held to amount to unfair competition on a different ground.)

A striking feature of the judgment is the Appellate Division's formulation of the test for unlawfulness in the delict of unlawful competition: Van Dijkhorst J's criterion of public policy, as set out in the *Atlas Organic* case and in *Lorimar Productions Inc v Dallas Restaurant*,[107] was adopted and, indeed, elaborated, but at the same time the standard of fairness and honesty was not jettisoned. In the words of Nicholas AJA:[108]

> "In judging of fairness and honesty, regard is had to boni mores and to the general sense of justice of the community . . . Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 5 ed at 58 note 95 rightly emphasize that 'die regsgevoel van die gemeenskap opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter.' While fairness and honesty are relevant criteria in deciding whether competition is unfair, they are not the only criteria. As pointed out in the *Lorimar Productions* case *ubi cit*, questions of public policy may be important in a particular case, eg the importance of a free market and of competition in our economic system."

A company's tender prices were held to constitute confidential information on the facts of *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*.[109] The erstwhile managing director (Bodell) and general manager (Canty) of the applicant company, Sibex, had resigned to join Injectaseal, a company which they themselves had been responsible for incorporating. Injectaseal was in direct competition with Sibex, whose business consisted almost entirely in providing highly specialised maintenance services to four major clients. Canty and Bodell used their knowledge of the prices at which Sibex tendered its services, to tender lower prices to these clients on behalf of Injectaseal. The result was that Sibex suffered a substantial loss of business, which was awarded instead to Injectaseal. Goldstone J granted an interim interdict ordering Injectaseal to withdraw its tender, directing Canty and Bodell to cause Injectaseal to do so, and prohibiting all three from submitting further tenders to the clients in question.

Two distinct causes of action were available to Sibex, namely unfair competition and the breach of their fiduciary duties by Canty and Bodell. (The latter ground will be dealt with later.) As to the first cause of action, it is submitted in passing that the term "unlawful competition" has gained wide acceptance in our law, and is to be preferred to "unfair competition", despite the use of the latter term in *Schultz v Butt* and in the present case.[110]

Goldstone J quoted passages from *Schultz*'s case, the *Prok Africa* case and the *Easyfind* case[111] in support of the view that the misuse of confidential information is a species of unlawful competition. On application of the test approved in the *Schultz* case, the court found[112] that information concerning tender prices in the circumstances of the present case constituted confidential information, for it was not available to anyone outside Sibex and certainly not to any competitor.

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107 1981 3 SA 1129 (T) 1152 – 1153.
108 678J – 679F.
109 1988 2 SA 54 (T).
110 See Webster and Page *South African law of trade marks, unlawful competition, company names and trading styles* (1986) 400 – 401.
111 63I – 64D.
112 64D – E.

Had this confidential information been misused? Goldstone J applied the test for unlawfulness laid down in the *Atlas Organic* case and subsequently approved by the Appellate Division in the *Schultz* case:[113]

> "If either Bodell or Canty used their knowledge of the prices quoted to Sasol and Natref by Sibex then, in my opinion, they acted unfairly and dishonestly. I have no doubt that that would be the conclusion of any reasonable and honest member of our business community. No argument in favour of a free market or of free competition could justify such dishonest use of confidential information. It follows, in my judgment, that if such information was used, it would have constituted unfair and unlawful competition. That such information was used appears to me to be established as a very substantial probability."

Included in the right to conduct business without unlawful interference is the right of a company to require that its internal communications (such as its directors' private telephone conversations and its secret internal memoranda) will not be eavesdropped upon or recorded or intercepted. This was the conclusion of Joffe J in *Sage Holdings Ltd v Financial Mail (Pty) Ltd.*[114] The court held:[115]

> "In exercising the right to trade and carry on a lawful business, a company or other juristic person would be entitled to regard the confidential oral or written communications of its directors and employees as sacrosanct and would in appropriate circumstances be entitled to enforce the confidentiality of [such] . . . communications. To my mind, such right would in appropriate circumstances be enforceable against whosoever is in possession thereof and whosoever seeks to utilise it. The fact that the person who is in possession thereof was not party to the unlawful conduct in obtaining it does not exclude the right which the applicants would have."

The last sentence of this passage refers to the distinctive and unusual feature of the *Sage Holdings* case. The first respondent, the Financial Mail, had, without any solicitation or payment on its part, obtained tape recordings of private telephone conversations of a director of the applicant, Sage, and a secret and confidential internal memorandum of that company (which was a public company quoted on the Johannesburg Stock Exchange). It appeared that both the making of the tape recordings and the appropriation of the memorandum were the unlawful actions of third parties. The newspaper used the tape recordings and the document as source material for an article, publication of which was imminent. Sage urgently sought interdicts restraining the Financial Mail from publishing any information illegally or unlawfully obtained, and from publishing the article in question.

The parties were obviously not in any kind of competitive relationship. Joffe J held[116] that any person's conduct which interferes with a trader's right to carry on his lawful business, whether he be a competitor or not, may constitute unlawful competition.

The test applied in determining whether the newspaper's proposed action was unlawful was that laid down in the *Atlas Organic* case: at the end of the day,

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113 67F–H.

114 1991 2 SA 117 (W). (See however *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462–463 where Corbett CJ based his decision to protect the company on its personal right to privacy (editor).)

115 132I–133A.

116 132F.

said the court,[117] it was a matter of weighing up the interests of society, the public weal. No attempt had been made by the newspaper to establish that the interests of society were served in breaching the confidentiality that existed in Sage's business premises when the tape recordings were made and in utilising the secret memorandum. The interdicts applied for by Sage were granted.

This case breaks new ground by extending the scope of Aquilian liability for unlawful interference with trade into an area where the person who uses or seeks to use unlawfully obtained confidential information is innocent of its misappropriation and is also not a trade rival of the owner of the information.

2 2 2 Unlawful appropriation of incorporeal property

One argument raised by the plaintiff in the *Dun and Bradstreet* case was that the confidential information contained in "Credit Records" constituted incorporeal property in its hands. Consequently, the defendant's issue of verbal reports based on that work constituted an unlawful appropriation of such property, and, as such, a delict. Corbett J had no difficulty in rejecting the first leg of this argument.[118] Moreover, there was no common-law basis upon which plaintiff could have founded a cause of action in respect of the alleged invasion of its rights of "property" in the information in "Credit Records".[119] Copeling,[120] while agreeing with this view, contends that the confidential information in issue did constitute property in the hands of the plaintiff. Van Heerden and Neethling,[121] too, argue that "[d]ie gangbare opvatting is dan ook dat 'n handelsgeheim 'n immateriële regsgoed daarstel wat as objek van 'n selfstandige immaterieelgoedereg dien". The authors rely on the *Harchris* case;[122] on the view of the American writer, Callman, that "a trade secret, like a patent, copyright or trademark, is intangible property"; and on the fact that rights to trade secrets are freely transferable, usually by way of licensing agreements. Knobel[123] also strongly favours the view that a trade secret is a species of immaterial property.[124]

Persuasive as the arguments of these writers are in principle, it would appear that the balance of authority in our law currently favours the view that confidential information does not constitute property. In this regard, the *Dun and*

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117 134E–F.
118 1968 1 SA 209 (C) 216A.
119 *Ibid.*
120 1968 *THRHR* 189.
121 132–133, in particular fn 82.
122 *Harchris Heat Treatment (Pty) Ltd v ISCOR* 1983 1 SA 548 (T) 555E–F, where O'Donovan J stated: "The defendant has misappropriated intellectual property belonging to the plaintiff." It is clear from the judgment as a whole, however, that the interdict granted by the court was based on one delictual ground only, namely Aquilian liability for unlawful interference in trade.
123 76, in particular fn 43 and 44. See further Du Plessis "Statutêr beskermde immaterieelgoedereregte en onregmatige mededinging (veral prestasieaanklamping)" in Neethling (ed) *Onregmatige mededinging/Unlawful competition* (1990) 91–92.
124 This view is certainly gaining ground in other jurisdictions: in 1984, the United States Supreme Court in *Ruckelshaus v Monsanto Co* 81 L Ed 815 recognised trade secrets as a species of property.

Bradstreet case was followed by Goldstone J in the *Prok Africa* case.[125] Joubert,[126] too, favours the approach adopted in *Dun and Bradstreet*.

2 3 The equitable action for breach of confidence deriving from English law

A lucid explanation of this remedy was given by Corbett J in the *Dun and Bradstreet* case:[127]

> "[T]he term 'breach of confidence' is . . . one derived from English law. It is used to describe the equitable cause of action available in England to a plaintiff where confidential ideas have been obtained, directly or indirectly from the plaintiff by the defendant and the defendant, knowingly and without the plaintiff's consent, proceeds to use such ideas or information to the detriment of the plaintiff . . . The right of action does not depend upon any *nexus* of contract, express or implied, between the parties . . . The remedy has been applied both in the case where the defendant obtained the confidential information directly from the plaintiff . . . and in the case where the defendant has obtained it indirectly, eg where the plaintiff has given it to a third party and the defendant has succeeded in some way in obtaining it from such third party . . ."

The question, however, is whether the action, rooted as it is in English principles of equity, is available for the protection of trade secrets in South Africa.

The following survey of the court decisions tends to bear out the view of Van Heerden and Neethling[128] that "[p]ositiefregtelik skyn die meerderheid beslissings die beskouing te huldig dat dié aksie nie hier deel van ons reg is nie". This view has since been strengthened by the decision of the Appellate Division in *Schultz v Butt*.[129] Furthermore, given the availability in our law of well-established contractual and delictual grounds for the protection of trade secrets, recourse to "breach of confidence" is, as Van Heerden and Neethling correctly observe,[130] neither necessary nor desirable.

"Breach of confidence" made its first appearance in a South African reported case in *Goodman v Von Moltke*.[131] The applicant, Goodman, applied for an interdict restraining Von Moltke from using or publishing confidential documents stolen from Goodman's custody. The documents had been stolen by a third party and then came into the hands of Von Moltke.

The basis on which Centlivres J interdicted the use of the documents appears to have been breach of confidence.[132] However, this is not made entirely explicit in the judgment, and, most significantly, no South African authority is cited. It follows that the *Goodman* case, albeit that it is a decision of a two-judge bench of the Cape Provincial Division, can hardly stand as a binding precedent for the proposition that this remedy forms part of our law. Still, the decision of the court to grant the interdict restraining publication of the documents on

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125 *Prok Africa (Pty) Ltd v NTH (Pty) Ltd* 1980 3 SA 687 (W) 696F – G where Goldstone J categorically states: "The wrong upon which the cause of action is founded and for which the remedy lies is not an invasion of rights of property: the *Dun and Bradstreet (Pty) Ltd* case . . . at 215F – 216A. The wrong is the unlawful infringement of a competitor's right to be protected from unlawful competition . . ."

126 1985 *De Jure* 37 – 38.

127 1968 1 SA 209 (C) 213E – 214D.

128 140 – 141.

129 1986 3 SA 667 (A) 679H.

130 *Ibid.*

131 1938 CPD 153.

132 157.

the ground of breach of copyright (to be discussed below) was undoubtedly correct.

In the *Dun and Bradstreet* case, the court was not referred to *Goodman*'s case, and the judgment proceeded[133] on the basis that there was no previous reported case in which a South African court had even considered, let alone recognised, the existence of the remedy under discussion. As it has been argued that the *Goodman* case is not valid authority for the existence of the remedy for breach of confidence in our law, the fact that this case escaped the attention of the court in *Dun and Bradstreet* is of little consequence and does not materially affect the correctness of Corbett J's remarks.[134] While Corbett J stopped short of stating that this remedy is not part of our law, this conclusion is implicit in his judgment. The Appellate Division in *Schultz v Butt*[135] certainly had no doubts on that score.

Anyone who hoped that the last word on the action for breach of confidence in our law had been spoken in the *Dun and Bradstreet* case was soon to be disappointed. In *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd*,[136] a wine producer ("SWT") was about to market a new wine to be sold under a new label which had been designed and printed in secret. The secrecy was breached and the label came into the hands of a competitor, Oude Meester. Oude Meester clandestinely obtained possession of the label, not directly from SWT, but from the printers. Before SWT's wine could be put on the market, Oude Meester launched its own competing product under a label which was a close imitation of SWT's. SWT was granted an interdict restraining Oude Meester from continuing to use the offending label and from marketing its wine under that label.

Diemont J, after baldly stating that SWT could seek relief by virtue of its right of action for breach of confidence,[137] proceeded to grant the interdict on the basis of Aquilian liability for unlawful competition. This puzzling change of direction may have been prompted by the argument[138] on behalf of SWT that the two causes of action are equivalent. For this questionable proposition, counsel for SWT relied on the *Dun and Bradstreet* case. Diemont J regrettably did not seize the opportunity to address the key question of whether or not the action for breach of confidence exists in our law. The fact that a particular cause of action fits the facts of a case (as breach of confidence probably did in this instance) is of course of no consequence, unless and until it is decided that that cause of action exists in our law. In the result, the *Stellenbosch Wine Trust* case was correctly decided on the basis of Aquilian liability.

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133 1968 1 SA 209 (C) 214G – H.

134 Copeling's view (1968 *THRHR* 186 – 187), penned shortly after *Dun and Bradstreet* was decided, is that the court in *Goodman* treated the action for breach of confidence as part of our law. It follows, according to that writer, that despite the judgment of Corbett J, the question of whether the remedy exists in our law is still very much open. See also the author's more recent and more detailed treatment of this topic in *Copyright and the Act of 1978* (1978) 67 – 70 (par 50).

135 1986 3 SA 667 (A) 679G – I.

136 1972 3 SA 152 (C).

137 160G – H.

138 161A.

The plaintiff in *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd*[139] manufactured roof tiles according to an exclusive process. It was alleged that the process as a whole constituted a trade secret and/or confidential information, which Harvey Tiling referred to collectively as its know-how. Roux, the second defendant, had in the course of his employment with Harvey Tiling, been instrumental in developing and perfecting this process. Roux then left the employ of Harvey Tiling and formed the first defendant company, Rodomac, of which he became a shareholder and the managing director. Rodomac proceeded to manufacture a tile in competition with Harvey Tiling. Roux used information he had acquired while employed by Harvey Tiling in Rodomac's manufacturing process. The court granted an order interdicting both defendants from using that process.

To attempt to identify the basis upon which the interdict was granted, is no easy task. The particulars of claim refer to "plaintiff's know-how which they (Rodomac and Roux) have wrongfully appropriated" and to "know-how contained in documents unlawfully removed or copied by the second defendant". This language suggests a cause of action founded on delictual liability for unlawful competition. But the reported judgment mentions neither this cause of action, nor any of the cases (other than the *Stellenbosch Wine Trust* case) which are associated with it. More's the pity, for the same result could easily have been achieved by the application of Aquilian principles.

Instead, counsel were agreed that the applicable legal principle was breach of confidence.[140] Again, as in the *Stellenbosch Wine Trust* case, the question of whether or not this concept exists in our law was not addressed; nor was there any reference to Corbett J's discussion of the topic in the *Dun and Bradstreet* case.

Nicholas J went on to quote a passage from the *Coolair Ventilator* case. That passage, together with a statement which occurs shortly afterwards,[141] suggests that the court considered the legal basis of liability to be the breach of an implied term in the contract of service between Harvey Tiling and Roux. One may tentatively conclude that the basis of the court's decision was a hybrid of the equitable doctrine of breach of confidence and the breach of an implied term in the contract of service.[142]

Perhaps this is all academic, for the real issue in *Harvey Tiling* was the scope, not the basis, of protection of trade secrets. The important question was whether Harvey Tiling's know-how had the requisite characteristic of confidentiality.

It is for Nicholas J's erudite treatment of this question that the *Harvey Tiling* judgment is valuable. His lordship began by stating a test for confidentiality[143] which, as we have seen, was followed in later cases and approved by the Appellate Division in *Schultz v Butt*: to be confidential, the information must have

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139 1977 1 SA 316 (T).
140 321F–H.
141 322F.
142 It was submitted earlier (see fn 78) that the explanation subsequently advanced by the judge in *Schultz v Butt* 1986 3 SA 667 (A) 679I–680B is not easy to reconcile with the wording and tenor of the *Harvey Tiling* judgment.
143 321H.

the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.[144]

Harvey Tiling claimed confidentiality, not in the constituent parts of its process, but in the process as a whole. This contention found favour with the court:[145]

> "Although . . . there was never any express direction as to secrecy, it is in my view clear that the details of the process were confidential. The Harvey Tiling factory was the first of its kind; it produced a suitable product with reasonable efficiency; and it was a great commercial success . . . None of the details of its process had been disclosed. And unless a potential competitor could acquire information about that factory, he would have to go through the same process that the plaintiff went through. Anyone in the position of Roux must have realised that this was information which the plaintiff would not wish to be communicated to its competitors."

Rodomac had clearly used Harvey Tiling's know-how as a "springboard" which enabled it to get a long start over any member of the public without the expense, effort and delay involved in designing its own plant and getting it into production.

As for Roux, he had expended a great deal of care and time in acquiring details of Harvey Tiling's process. What he passed on to Rodomac was a good deal more than just the practical knowledge and skill which he had acquired in the service of Harvey Tiling and which he was entitled to use after termination of that service. Nicholas J concluded:[146]

> "Here Roux has done more than use his recollection of particular features of the plaintiff's plant, machinery or process, more than apply his knowledge of a particular solution to a problem encountered in practice. The substantial identity of the Rodomac plant with the Harvey Tiling plant, even in matters of detail such as dimensions, shows that he did more than apply the experience gained of the plant in operation by him as works manager."

Explicit and long-overdue rejection of the doctrine of breach of confidence finally came in 1980 in the *Prok Africa* case,[147] discussed earlier. Goldstone J relied on the *Dun and Bradstreet* and the *Stellenbosch Wine Trust* case in holding that

> "our law does not recognise any such 'broad principle of equity' and the equivalent remedy is Aquilian . . ."

Very much in the same vein was the court's treatment of breach of confidence in the *Atlas Organic* case. It is clear from the following *dicta* of Van Dijkhorst J[148] that there exists no independent legal ground of this nature in our law:

> "Insofar as the English action on breach of confidence is based on an implied contractual term relating to confidentiality of information acquired, it finds its counterpart in our law in the action on breach of contract. See, for example, *Coolair Ventilator*.

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144 Cf this test with the one postulated by Schultz AJ in *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 3 SA 1093 (W) 1095F–G: "The [principle] relied upon by the second plaintiff is that it has property in confidential documents, confidential in the sense that they are not the subjects of public knowledge and such that a reasonable businessman might wish to keep to himself." This test for confidentiality clearly differs from the *Harvey Tiling* formulation, although it should be kept in mind that the *Crown Cork* case was concerned with discovery, not with misappropriation of confidential documents.

145 325E–G.

146 327E–G.

147 1980 3 SA 687 (W).

148 1981 2 SA 173 (T) 190F–191B.

> . . . A delictual action on 'breach of confidence' can only be a manifestation of the Aquilian action on unlawful competition . . ."

The final nail in the coffin was (it is hoped) hammered home by the Appellate Division in *Schultz v Butt*. Nicholas AJA said:[149]

> "In the *Dun and Bradstreet* case . . . it was held at 213 – 215 that the equitable cause of action based on breach of confidence which is available in England does not exist in our law, but that does not mean that the misuse of confidential information in order to advance one's own business interests and activities at the expense of a competitor's may not constitute a wrongful act in the context of an action for unlawful competition."

2 4 Breach of the fiduciary duty of a company director

A director or senior officer of a company, by virtue of the fiduciary duty which he owes to the company, must in general conform to a standard of loyalty, good faith and avoidance of conflict between duty and self-interest. It follows that he may not divulge or use, whether for his own advantage or for the advantage of a competitor, confidential information accessible to him as a director. This fiduciary relationship exists independently of contract, and is not to be confused with the duty of good faith which an employee owes his employer by reason of the contract of service.

Breach of fiduciary duty was one of the grounds on which the plaintiff successfully sought relief against its erstwhile managing director and general manager in *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC*.[150] (The alternative ground of unlawful competition was considered earlier.)

Goldstone J approved the view[151] that if a person is in fact in a position of trust – be he agent, mandatary or director – he cannot escape the duty that inevitably attaches to the trust. The judge[152] was not satisfied that in our law, the fiduciary duty of a director arises only in situations where the director acts as agent for the company. In any event, the fiduciary duty of a managing director and of a general manager (even if such manager is not a director) is one which in appropriate circumstances continues even after their resignation.

On the facts of the case, it was clear that Canty, while general manager of Sibex, would have been acting as its agent in submitting prices to the company's clients, and it was in that capacity that he would have gained knowledge of Sibex's tender prices. The position and knowledge of Bodell, as managing director, would have been no different. Once such knowledge had been gained in their capacity as agents for Sibex, it would not have mattered whether they had used it for their own advantage or for that of a rival such as Injectaseal; nor would it matter whether they used it before or after they had ceased to be employed by Sibex. Any such use would constitute a breach of the fiduciary duty which they owed to Sibex. In arriving at this conclusion, his lordship took into account,[153] among other factors, the very specialised nature of Sibex's business, the fact that there was only one competitor (other than Injectaseal)

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149 1986 3 SA 667 (A) 679G – I.
150 1988 2 SA 54 (T).
151 65F – G.
152 65C.
153 67H – 68B.

in the field, and the fact that the market, in practice, consisted almost exclusively of Sibex's major clients (the Sasol companies and Natref). Sibex was therefore successful on both of the grounds on which it relied.

Despite the circumstances of urgency in which it was delivered, Goldstone J's judgment offers valuable insights into the protection of trade secrets on the basis of the fiduciary duty of company directors.

2 5 Infringement of copyright

Provided that the relevant statutory requirements are met, the author of a work (for instance a letter, document or tape recording), which embodies a trade secret, may rely on his copyright in the work to restrain infringing acts such as the unauthorised publication of the work.

Thus in a case considered earlier, *Goodman v Von Moltke*,[154] the applicant, as author of the stolen letters and documents, was held to enjoy copyright in them; he was therefore entitled to an interdict restraining the respondent from publishing them.

In the *Dun and Bradstreet* case, the question of copyright arose in two separate contexts. In so far as the proprietor's complaint related to the rival's issue of written reports, the cause of action was properly based upon breach of copyright and was not affected by the exception in issue before the court.[155] But in so far as the complaint related to the rival's issue of verbal reports, counsel for the proprietor conceded that this act did not constitute an infringement of copyright, since there had been no reproduction of the confidential information in a material form (such as writing). In the view of Corbett J,[156] this concession was correctly made. Copeling,[157] after a careful analysis of the question, arrives at the same conclusion.

The question of infringement of copyright also arose in the *Aercrete* case, considered earlier. Part, at least, of the confidential information made available by the second applicant to the respondents was in the form of plans and diagrams. Findlay AJ held:[158]

> "[L]ooking at the order sought and the allegations where reference is made to plans and diagrams and the complaint is advanced that these too have been abused, it seems to me that if they have been so misused for the purposes of constructing machines or devices, that any such construction would be a three-dimensional reproduction of what is therein depicted and that this, of itself, would afford to the second applicant at least protection for the infringement of his copyright (*Scaw Metals Ltd v Apex Foundry (Pty) Ltd and Another* 1982 (2) SA 377 (D) at 383 *et seq* . . .)"

3 CONCLUSION

After this long odyssey through the cases, little remains to be said. Our law plainly provides ample protection for trade secrets, in relation both to basis and to scope. There exist in our law at least four distinct, judicially-recognised

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154 1938 CPD 153 154 – 155.
155 1968 1 SA 209 (C) 212C – D.
156 213E.
157 1968 *THRHR* 182 – 184.
158 1984 4 SA 814 (D).

legal grounds for such protection.[159] These grounds derive from contract, delict (unlawful competition), company law and copyright. Do we need others? As for the scope of protection, it is arguable that the earlier requirement of a competitive relationship between the owner of a trade secret and the party alleged to have misused it, is unnecessary; it is also unfair where the owner has suffered loss in the absence of such a relationship. In this regard, it is the more recent cases like *Harchris* and *Sage Holdings* that point the true way forward.[160]

159 A number of Anglo-American and European jurisdictions, in which civil remedies have proved to be an insufficient deterrent to industrial espionage, have lately turned to the criminal law in an attempt to rectify the situation. See the recent article by Cross "Protecting confidential information under the criminal law of theft and fraud" 1991 (2) *Oxford Journal of Legal Studies.*

160 For a survey of recent developments in this area of the law see Neethling 1991 *THRHR* 559–563.

In the field of precedents and stare decisis *it used to be said that a decision otherwise binding could be departed from if a later Court considered it to have been "clearly wrong"; nowadays the more usual way of expressing the requirement is that the later Court must be "convinced that it was wrong". The words used in formulating the principle are not important; what matters is the degree of error, or the degree of conviction, but the test to be applied is incapable of exact definition. In functioning under a "virile, living system of law" a Judge must not be faint-hearted, and when he is morally convinced that justice requires a departure from precedent he will not hesitate to do so; but on the other hand he must guard carefully against being over-bold in substituting his own opinion for those of others, lest there be too much chopping and changing and uncertainty in the law. As I see the position, a mere difference of opinion, without more, ought not to justify a departure from precedent* (*per* Botha J in *National Chemsearch (SA) (Pty) Ltd v Chemsearch* 1979 3 SA 1092 (T) 1101).

AANTEKENINGE

LEGAL SCIENCE AND SOCIAL INTERESTS: A HABERMASIAN APPROACH

Differentiation between the different spheres of life in modern society plays a fundamental role in Jürgen Habermas's defence of the normative content of the culture of modernity against the postmodern critique of modern rationality voiced by French philosophers such as Foucault and Derrida. Habermas argues that the greater regard for individual freedom and the universalisation of democratic values in the modern world are indicative of the advanced rationality of modern culture. This advanced rationality, Habermas contends, is the product of the communicative interaction between validity claims made in the various spheres of modern society. At the risk of oversimplication, we can understand Habermas to say that the partial views of what constitutes a desirable social life articulated in the different spheres of art, religion, science and, for that matter, legal science, all contribute to a general process of communicative action in which general values are thrashed out which transcend the partiality of the particular views voiced in this dialogical or dialectic process. (Cf Habermas *The philosophical discourse of modernity* (1987) 322 as well as my forthcoming article "The relation between law and politics: a communitarian perspective" in the *SALJ* for a more extensive discussion of Habermas's views in this regard.)

Habermas's concern with the differentiation in modern society and the general rationality which becomes possible because of this differentiation, is also reflected in his apprehension about the increasing imposition of the system of law on general social life (the lifeworld as he refers to it) in the modern welfare state. Habermas refers to this colonisation of social life by the law as a process of excessive juridification (cf Habermas *The theory of communicative action* vol 2 (1981) 356). However, Habermas is not critical of the process of juridification as such. He argues that modern society has gone through four successive stages of juridification, each of which contributed to the greater autonomy of general social life, but each of which gave rise to new threats to the autonomy of general social life. He speaks of the fundamental ambivalence inherent to the process of juridification in this regard (*idem* 361).

The first stage of juridification was the development from state absolutism to the bourgeois or civil state. This development was essential for the transition from feudal to capitalist economies and was achieved by the establishment of a general and formal system of private law which enabled the free-dealing individual to acquire property and other rights by means of contract. The result

of this development was the establishment of a general field of life or lifeworld which was no longer simply a function of political or economic relations, as was the case in feudal society. The establishment of the constitutional state or "bürgerliche Rechtsstaat" constituted the second major stage of juridification. The gain of the lifeworld in this regard was the institution of a formal system of public law which determined the extent to which state authority could interfere with private life. The third stage in modern legal development was the institution of democratic government which materialised with the French Revolution. This development gave the lifeworld yet greater control over the system of politics and therefore a yet greater ability to fend off any imposition from the system of politics. The fourth stage of juridification was the institution of the social welfare state. This stage of juridification enabled the lifeworld to determine and restrict the extent to which the principles of capitalist economy could interfere with the requirements of social or communal life (cf *idem* 356 – 362).

Habermas's argument is that the institution of the welfare state was necessary to counteract the anti-social and contra-emancipatory effects of the unrestricted capitalism engendered by the restriction of governmental interference in private life in the constitutional state. However, the legislative and governmental interference in all walks of life in the welfare state has now revealed itself to be subject to the same ambivalence that characterised previous phases of juridification:

> "[T]he ambivalence of the last juridification wave, that of the welfare state, can be seen with particular clarity in the paradoxical consequences of the social services offered by the therapeutocracy – from the prison system through medical treatment of the mentally ill, addicts and the behaviorally disturbed, from the classical forms of social work through the newer psychotherapeutic and group-dynamic forms of support, pastoral care and the building of religious groups, from youth work, public education, and the health system through general preventive measures of every type" (*idem* 363 – 364).

The paradoxical consequences to which Habermas refers, pertain to the fact that while all the measures he lists are aimed at serving the goal of social integration, they in fact merely contribute to the process of social disintegration. An *individualising* tendency (*idem* 362) takes root in all walks of life. The question whether the person involved is juridically entitled to unemployment benefits, workmen's compensation, state health care, and so on, takes the place of spontaneous communal support in family as well as in local community life. The intervention of these therapeutic institutions in community life has the further effect that the discontents and conflicts in society are glossed over and pacified. As a result, the revolutionary potential in contemporary society and the willingness truly to address the sources of discontent in contemporary society, are increasingly stifled. Habermas therefore argues that critical social theory should look to public movements like the women's and ecological movements for the last vestiges of revolutionary potential that offer resistance against the bureaucratisation of social life in the welfare state. I discuss these issues in greater detail elsewhere (cf the forthcoming article in the *SALJ* which I mention above). However, I wish to offer these few remarks on Habermas's theory of law and society as a general background for the contention that I wish to make here, namely that legal science too should be aware of the risk of simply contributing to the juridification of social life. On the other hand, it should also be realised that the law does embody an emancipatory potential which should not be sacrificed in order to meet each and every social demand. In other words,

legal science should resist the instrumentalist reduction of law to a mere means of promoting political interests. But it should also refrain from merely becoming a conceptual enterprise which concerns itself solely with the internal logic of legal dogma. It is with this dual task in mind that I shall subsequently discuss Hunt's relational theory of law and the concern of Van Maanen and Van der Walt with "balancing on the border of the legal order".

Hunt does not state whether he represents the strain of critical legal studies which draws its inspiration from Habermas. His "relational theory of law" nevertheless echoes Habermas's theory of communicative action in many respects. Relational legal theory rejects both the internal theories of Hart and Dworkin which are solely concerned with legal doctrine. I think Hunt's stance on Dworkin is largely unfounded, given Dworkin's view that the border between the institutional morality of the law and background political morality is often blurred. His argument is nevertheless important:

> "Internal theory is simply *too close to its subject matter*. The proximity to law and its privileged participants gives rise to normative consequences, either implicit or explicit, through the adoption of the values of legal professionals" ("The critique of law: what is 'critical' about critical legal theory?" in Fitzpatrick and Hunt (eds) *Critical legal studies* (1987) 10 – 11.)

Hunt's concern in this regard comes close to Habermas's concern with juridification. His point is that we cannot entrust the articulation of social or public interests to judges alone, especially not in their capacity as jurists or lawyers. On the other hand, if we are not to fall prey to the other extreme of simply reducing law to existing social interests and thereby to jeopardise the possibility of law and legal science also contributing to the rational development of social interests, we must also take legal doctrine seriously. Critical legal theory, Hunt maintains, therefore cannot simply resort to external theory:

> "There are also problems with the adoption of an external perspective which disclaims interest in 'lawyer's problems' and focuses [only] upon the impact of law on wider society. The history of socio-legal studies and the sociology of law has been dominated by this response which has the practical result of establishing an intellectual division of labour between itself and legal theory which hold each other at arms length. One of the most distinctive features of critical legal studies has been that it has joined battle with liberal theory in a way in which the various trends within the sociological movement in law failed to do. Critical approaches are centrally preoccupied with legal doctrine and with judicial decision-making. Expressed as a slogan the critical movement has insisted on *taking doctrine seriously*" (Hunt 12).

Hunt therefore puts forward a relational theory of the law to address the inadequacies of both internal and external theories of law and "sets out to generate a reconceptualisation of the field of inquiry of legal studies":

> "[Relational theory] proposes an analysis which posits the existence of a number of different forms of legal relations which interact in varying ways with other forms of social relations. Its project is one which takes 'law' as its object of inquiry but which pursues it by means of the exploration of the interaction between legal relations and other forms of social relations rather than treating law as an autonomous field of inquiry linked only by external relations to the rest of society" (Hunt 16).

Van Maanen, an exponent of critical legal theory in Dutch private law, propounds a similar interaction between legal doctrine and social interest, in spite of an openly avowed socialist agenda. He refers in this regard to "balancing on the border of the legal order" (cf "Balanceren op de grens van de rechtsorde" 1982 *Recht en Kritiek* 467 – 471). He discusses the principle of balancing on the border of the legal order with regard to the housing shortage in the

Netherlands and the "Kraker"-movement. "Krakers" are homeless people who, because of the housing shortage, resort to occupying unoccupied houses. The court of Middelburg created a controversy in 1980 by deciding that although "kraken" infringes on the property rights of the owner, it is not necessarily wrongful. The court argued that since ownership was a restricted right, an infringement of property rights could be lawful if the owner exercised his right in a socially irresponsible manner. The court therefore decided that leaving a house unoccupied without good reason under the circumstances of a serious housing shortage constituted a socially irresponsible way of exercising the rights of ownership (cf Van der Walt "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip" 1991 *Recht en Kritiek* 337). Van Maanen argues that not only should social needs serve to stimulate the doctrinal development of law, but that the law itself should be invoked to address and stimulate the rational development of society. He maintains on the one hand that

> "'de' rechtsorde . . . niet een monolithies blok is, maar een gedifferensieerd en geenszins konsistent geheel. Met andere woorden, ik veronderstelt een mogelijkheid tot grensverlegging binnen de rechtsorde, bijvoorbeeld veranderingen in het denken over het eigendomsbegrip. Het is mijn overtuiging dat zonder de invloed van de kraakbeweging, een vonnis als dat van de Rechtsbank Middelburg ondenkbaar zou zijn" (Van Maanen 469).

On the other hand, he records how the Krakers themselves invoked the legal order to further their interests. This was not just a case of being cheated by legal jargon, Van Maanen contends, but an indication of an awareness of the emancipatory potential within the law itself.

> "In het *Zwartboek Overdiep*, tot stand gekomen als protest tegen de rechtspraak van de groninger president van de Rechtbank, besluiten Krakers hun kritiek op de partijdigheid van deze president met de uitroep: 'Leve de rechtstaat'. Hebben zij zich laten verneuken door alle juridiese prietpraat? Ik denk van niet, ik denk dat ze heel goed aanvoelen dat er binnen deze juridiese orde een aantal emancipatoriese principes aanwezig zijn, die de moeite waard zijn om uitgebouwd te worden" (Van Maanen 470 – 471).

The title of Van der Walt's article "The doctrine of subjective rights: a critical reappraisal from the fringes of property law" 1990 *THRHR* 316 – 329 clearly resonates Van Maanen's notion of balancing on the border of the legal order. However, this article deals mainly with the necessity of focusing on the conceptual difficulties within legal doctrine in order constantly to displace, open up and thereby develop the existing doctrinal framework. It is in other articles that he focuses Van Maanen's notion of "balancing on the border of the legal order" squarely on the interaction between social interest and legal doctrine. An important feature of Van der Walt's approach is his insistence that developing legal doctrine is not merely a matter of adapting law to social needs irrespective of the constraints of legal logic. He argues in this regard that the development of the law of ownership in the Netherlands and Germany as a result of the prevalent housing shortage did not constitute a "new concept of property" which simply departed from previous legal logic. The doctrinal development in these countries was much rather a case of interpreting the existing concepts so as to address the needs of the particular circumstances.

What the Middelburg court and the commentators who endorsed its decision did, was to read the existing legal principle that ownership is not an absolute right and has to be exercised in a socially responsible manner, to say that the failure to utilise property under the circumstances of the pressing housing shortage is unreasonable and therefore results in the owner's forfeiting the protection

against infringement he would normally have (Van der Walt 1991 *Recht en Kritiek* 355 – 356). The importance of this approach is that it acknowledges that the internal logic of the law embodies rational insights which can contribute to the rational development of society just as social needs can contribute to the rational development of the law. But it also acknowledges the fact that the specialised rationality of legal doctrine contains insights which should prevent it from submitting to any and every social demand. This is perhaps the essence of Dworkin's insistence that matters of social policy should not override the institutional history of a legal system except as a matter of urgency. This is not a matter of legal conservatism. It is just another way of stating the Habermasian principle that the specialised logic of the various fields of expertise in modern society could inform the learning process which takes place in society as a whole. The reduction of legal doctrine to social interest would deprive it of the critical role it could play in the rational development of society.

In conclusion, I think one can argue that Hunt's view of legal science as relational theory and Van Maanen's and Van der Walt's view of legal science as a balancing act on the border of the legal order provide us with an approach to legal science in which the internal logic of the law and the interests of society can inform each other without the risk that the one will impinge on the autonomy of the other. Approached in this manner, legal science could become a bridging factor or a "process at the boundary" between system and lifeworld. Such a bridging factor will prevent the *unmediated* transposition of specialised knowledge into private and public spheres of the everyday world which, as Habermas puts it,

> "can endanger the autonomy and independent logics of the knowledge systems, on the one hand, and . . . can violate the integrity of the lifeworld contexts, on the other" (*The philosophical discourse of modernity* 340).

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NO HOLY COW – SOME CAVEATS ON FAMILY MEDIATION

Introduction

Does family mediation offer a "break with the complexity of the past"? Freedom from conflict towards a therapeutic understanding of common concerns? A rally cry for those who distrust the legal profession? Does it in fact offer a greater concentration on the needs of children? Or does it merely furnish a forum in which the more powerful spouse will continue to dominate, unharassed by legal constraints; a forum in which a false image of equality is created, enabling the real inequality to endure in a camouflaged form? I recently attended an intensive four-day course on family mediation in order to qualify as a mediator and I wish to disucss some of my views on family mediation as presently practised and for the future in South Africa. Family mediation offers an alternative form

of dispute resolution in an attempt to reduce the expense and acrimony of contested divorce litigation. There is a growing concern with the adversarial system of divorce resolution (Hofmann and Wentzel "Family mediation in South Africa: development and promotion" in *Family mediation in South Africa* (1991) 7 8). The movement towards a no-fault system of divorce (in terms of the Divorce Act 70 of 1979) is perceived as rendering the adversarial system still more inappropriate and has increased demands for a more inquisitorial and less formal system of divorce resolution.

The *Hoexter report on the structure and function of the courts in South Africa* (1983) recommended mediation as a service to be offered in the proposed family court as a way of dealing with these problems. These recommendations were accepted and legislation was drafted (the Family Court Bill 62 of 1985). This bill was rejected by a parliamentary subcommittee and a new bill was formulated and passed by parliament as The Mediation in Certain Divorce Matters Act 24 of 1987. This act provides for the appointment of one or more family advocates to each division of the supreme court. However, the functions of the family advocate do not include mediation in either the public or private sense of the word (Mowatt "Divorce mediation – the Mediation in Certain Divorce Matters Act, 1987" 1988 *TSAR* 47). The word "mediation" does not appear in the substance of the act and the main aim of the act is rather to maintain more careful surveillance of the welfare of children of divorcing parents by the intervention of the family advocate. There has been no move towards a more inquisitorial and a less adversarial approach as recommended by the Hoexter Commission (Part VII 9 4 3), nor has in-court mediation by a family counselling service been established, as recommended by the Hoexter Commission (Part VII 8 8 3). The nature of the mediation depends to a large extent on the family advocate's understanding of the mediation process; it is not voluntarily submitted to by the parties (Bosman "The family advocate and mediation" in *Family mediation in South Africa* 58); and, contrary to mediation practice, it involves an evaluation of the parenting abilities of the parties.

Public in-court mediation

Public divorce mediation is court-connected and is a service usually offered in the United States or New Zealand by a family court. After the First World War, Michigan was the first of several states to set up conciliation court services. These services aimed primarily to help couples re-evaluate and improve their marriages to avoid a divorce (Blades *Mediate your divorce – a guide to cooperative custody, property and support agreements* (1985) 98). In the mid 1970s some court services began doing divorce mediation as well. Today the mediation programme in the United States is supported by the judiciary budget, but there is as yet no comprehensive survey of states that offer mediation services. Court mediation services are generally voluntary, except in California where mediation is mandatory in custody cases. California had one of the first notable mediation programmes. By 1980 the California Senate Act (961) was operational and all divorcing couples were forced to mediate a custody and access settlement before such dispute went before a judge. The act lays down no comprehensive guidelines and there is considerable variation in the mediation styles and powers of public mediators in the different courts in California.

In New Zealand, the family court system provides the infrastructure for mediation to take place. A mediation conference is held if no initial agreement

is reached. Both parties are able to disucss disputed issues with a family court judge with a view to reaching agreement. This conference is chaired by the judge and held at the family court and the general tenor of proceedings is more relaxed than in adversarial court proceedings. Both parties attend: the parties' lawyers may be present – to assist rather than to represent; most of the discussion is done by the parties. If consensus is still not reached, then the matter may proceed to a defended hearing where a judge will adjudicate on the issues in contention. The same judge may chair the mediation conference and any subsequent defended hearing, but an aggrieved party may request another judge or the judge may recuse himself. There is a very strong emphasis, however, on encouraging agreement, with the result that defended hearings are rarely necessary. The judges are specialists: this further facilitates agreement, and a judge may refer a family back for counselling at any stage in proceedings. Psychological reports are made available to the court in highly contested matters. Lawyers may be appointed on the judge's instructions to represent children, which ensures that children's interests are safeguarded and the proceedings less adversarial.

In Britain four different organisational frameworks of "conciliation" may be distinguished: the private mediation service; conciliation undertaken by a judge or registrar on court premises (in-court mediation); conciliation in the course of a welfare enquiry ordered by the court; and the independent conciliation service which may be used at a very early stage in the dispute (Davis and Roberts *Access to agreement* (1988) 12). Two in-court mediation schemes are operating successfully at Edmonton and Brentford courts. It seems that court intervention and court-led litigation is becoming more acceptable to the judiciary – there appears to be a swing towards a more inquisitorial system (Gerlis "Financial in-court conciliation – an update" 1992 *Family Law* 283). The problematic issue is whether the courts should intervene and take control in a case that is really a matter for the parties.

Private or out-of-court mediation

In this country, the private sector established the South African Association of Mediators (SAAM) to promote family mediation services, which are available across the spectrum of South African society. Private mediation is perceived as a social process of conflict resolution where the mediator is a selected third party who, while remaining neutral, facilitates the achievement of a mutually satisfying agreement by utilising specific techniques.

This mediation process normally has five stages (Blades 37), although the middle stages tend to overlap and procedures do vary. The first is the initial introduction stage, during which issues such as payment, definition and explanation of mediation and certain rules of conduct are covered. The mediator describes the amount of work required and tries to convince the couple that "the benefits of mediation are worth the effort involved" (*idem* 38). The next stage is the definition stage, in which the mediator and the couple will define the areas on which they already agree and the areas where there are issues still to be resolved. A considerable amount of research into the couples' budgets and income is required. However, there is no requirement that the information given with regard to income must be proven or verified and there is always a danger that the economically stronger party (usually the man) may withhold information related to his financial position. Successful mediation requires

full and honest disclosure of all the economic assets of the marriage, which assets should then be equitably divided so that no one is prejudiced.

The process of negotiation begins once the parties agree on basic facts and principles. The mediator keeps the parties "focused on one issue at a time and encourages co-operative behaviour" (*ibid*). This encouragement of cooperative behaviour might well induce a gentler, less aggressive party to accept a settlement to which he or she was not totally committed. The mediator is required "to recede into the background when discussions are flowing" and only to step in when one spouse seems "overwhelmed" (*ibid*). The agreement stage begins once facts have been evaluated and options constructed. The mediator's role is to finalise areas of agreement, provide information necessary to discussion, point out unrealistic attitudes and to praise the couple and to get them "to praise themselves for progress made" (*idem* 39). Agreement is described in terms of "progress" and "movement" – a failure to reach agreement is therefore perceived in negative terms.

The contracting stage concludes the process: mediators try to make specific agreements in order to prevent future controversy and to ensure firm commitments. The ultimate goal is an agreement in which no party is ostensibly a loser. The basis of mediation is that the parties should preserve a sense of autonomy by making decisions for themselves motivated by their own "sense of fair play". When the mediator's sense of fairness is offended by a couple's agreement, he or she should state that concern, and should persuade the couples to renegotiate or file a "statement of nonconcurrence" to alert a judge to potential injustices: much depends on the mediator's "sense of fair play". Mediators should therefore pay very close attention to possible imbalances of power in the parties' relationship. Individual counselling ("caucusing") may be necessary in cases of severe emotional upset in the presence of the other party.

Mediation and joint custody

Private mediation involves compromise and tends to favour "shared parenting" arrangements or "joint custody orders". Joint custody has two components – physical custody and legal custody. Joint physical custody results in both parents spending substantial amounts of time with the child and sharing in the daily upbringing, which usually means that both parents spend weekdays and weeknights with the child. Joint legal custody means that both parents have equal rights to make major decisions affecting the child, including matters such as schooling, religious training and medical care. Some attorneys and judges in the United States use joint custody orders "as a placebo" (Atkinson "Criteria for deciding child custody in the trial and appellate courts" 1984 *Family LQ* 37). These orders are in fact traditional sole custody orders with rights of visitation, operating in some cases as a legal device rather than as a real description of parenting behaviour. Many joint custody orders in the United States recognise the parental fitness of both parents and their legal responsibility, but delegate daily care to the mother (Pearson and Thoennes "Mediation and litigation custody disputes" 1984 *Family LQ* 507).

A further argument propounded by private mediators in favour of joint custody is that it avoids the situation where a child is forced to take sides or is treated as a pawn between the parties. Consistent communication is allegedly maintained between the parties so that the child has contact with both parents.

If one accepts that a child needs the involvement of both parents, then joint custody ensures ongoing father-child contact and children may perceive such a plan as evidence of the concern and love of both parents. However, one may question whether joint custody does contribute to cooperative post divorce co-parenting and whether in fact children do benefit. It certainly runs counter to the long-held ideology of the importance of the "psychological parent" and custodian stability (Goldstein, Freund and Solnit *Beyond the best interests of the child* (1979) 37 – 38). The child may well feel unstable and caught between the joint parental rights of both parents, leading to a situation where he or she fails to identify with either home as his/her own. Joint custody seems to be a viable alternative for children only where there is minimum major disruption in the child's routine. In this regard, the opinion of a disinterested party such as a family advocate may be critical.

Traditionally, our courts have not favoured such orders (*Heimann v Heimann* 1948 4 SA 926 (W); *Marais v Marais* 1960 1 SA 844 (C); *Edwards v Edwards* 1960 2 SA 523 (O)). The reason for this seems to have been the belief that it is impossible for the parties to make joint decisions on the care and control of the child without daily conflict. However, in *Kastan v Kastan* 1985 3 SA 233 (C) the court, whilst acknowledging the inherent risk of joint custody, nevertheless granted such an order. The court was persuaded of the merits of such an order by the parental acceptance of the arrangement. It seems, therefore, that a successful plea for joint custody depends on the court's view of the parents' ability to deal amicably with each other over the children. However, the parties are by no means assured of obtaining such an order (see *Schlebusch v Schlebusch* 1988 4 SA 548 (E)).

There appears to be no agreement as to whether joint custody puts women in a disadvantaged position or not (Bottomley "Resolving disputes: a critical view" in Freeman (ed) *The state, the law and the family: critical perspective* (1984) 298; Brophy "Child care and the growth of power: the status of mothers in child custody disputes" in Brophy and Smart (eds) *Women-in-law: explorations in law, family and sexuality* (1985) 97 111; *contra* Maidment *Child custody and divorce* (1984)). It is alleged by those in favour of joint custody that a father who shares in decisions concerning the life of the child is less likely to adopt an irresponsible attitude to the child. Certainly, if a father has partial responsibility for the children through custody, he will acquire a greater claim to accommodation and property. In some cases, this may be detrimental to the wife's best interests where the parties are not wealthy. The whole question needs to be approached with great caution in South Africa, especially in view of the chronic shortage of housing. It must be very clear that both parties want joint custody and are willing to make it work. Both parents must be fit parents who desire continuous involvement with their child and are perceived by the child as a source of love. They must be able to communicate in order to promote the best interests of the child (*In re Wesley JK* 299 Pd Super 504, 455 A 2d 1243 (1982)).

Advantages of mediation

An advantage of mediation is that, properly conducted, it may focus on the needs of children in particular. Some mediators advocate the inclusion of children in mediation (Hoffmann "Divorce mediation: the involvement of

children in the mediation process'' in *Family mediation in South Africa* 73). Children may be brought into mediation at any stage, either simply at the end to be informed of the agreement, or early on, or periodically during negotiations. The success of the inclusion of children depends on the mediator's skill in interviewing children. Successful mediation clients move through the court system more speedily than those involved in the adversarial system, but, on the other hand, unsuccessful mediation clients move the slowest (Pearson and Thoennes ''Mediating and litigating custody disputes'' 1984 *Family LQ* 507). Another of the stated advantages of mediation is the possibility of lower legal costs. At present, mediation generally costs about R80 per hour in Johannesburg. Several hourly sessions will be required. However, if separate legal advice is taken on the final agreement, then mediation may still be fairly costly.

Mediation implies that the parties themselves make the agreement and it is argued in support of mediation that the parties are more likely to adhere to its provisions. It appears to maximise self-determination for divorcing couples. Such a settlement, having been fully discussed, is alleged to be more readily adhered to, especially in regard to the payment of maintenance. Data do suggest that mediated agreements may be more durable than those worked out by attorneys or imposed by judges (Pearson and Thoennes 509; see too Parkinson ''Conciliation: pros and cons'' 1983 *Family Law* 22). A skilled mediator might be able to discuss fully the problems associated with a division of assets on divorce, enabling the parties to reach a more informed and satisfactory settlement.

Disadvantages of mediation

Private ordering of divorce matters suggests a higher regard for the autonomy of family life. There is none the less a contradiction in terms between, on the one hand, encouraging private ordering and mediation, and recognising the increasing concern of the law to protect the interests of the weaker party and the child on the other. It is argued that parties require greater freedom to decide issues for themselves without judicial intereference and that such freedom will therefore engender a greater degree of responsibility of attitude both towards each other and towards society as a whole (Scott-Macnab and Mowatt ''Mediation and arbitation as alternative procedures in maintenance and custody disputes in the event of divorce'' 1986 *De Jure* 313). This may well be so, but the court has a primary role to ensure that the best interests of the children and the position of the weaker spouse are not sacrificed in the interests of bestowing a greater degree of self-determination on the parties.

Private ordering has to operate within a legal framework against a background of legal rules – ''bargaining in the shadow of the law'' (Mnookin *Working Paper No 3, Centre for Socio-Legal Studies* (1979)). A knowledge of substantive legal principles is a vital element in the skills of a mediator. Most divorce cases are in fact settled rather than contested and attorneys who prepare thoroughly can usually reach a satisfactory agreement for their client. Mediation of a sort does in fact often take place between attorneys and clients. To ensure this fair settlement, a thorough knowledge of statute and case law is required. Analysis of assets and liabilities also requires further expertise and consultation with experts. The best guarantee of a fair settlement is a thorough legal training, legal experience and a sensitivity to the emotional interaction of the parties

involved in divorce. If separate legal advice is not taken, then there is a danger of inequitable settlements, especially where one party is under particular pressure to settle.

Without careful vigilance, the process of family mediation may operate to the detriment of the women involved. Divorcing men and women are not in equal bargaining positions, although our no-fault legislative approach to divorce may suggest that they are. Women are generally in an inferior position socially and economically in this country and are more likely to face job and salary discrimination and to be restricted by custodial responsibilities. To the extent that divorce mediation alleviates these problems it is to be welcomed. But all too often it may not alleviate these problems but simply disguise the power imbalance. Although mediators do not determine the outcome of the negotiations, they may exercise a fair degree of control so as to avoid the subjugation of a weaker party. Some acknowledgement of the financial vulnerability of a divorcing woman is therefore necessary. Much depends on the ability of the mediator to retain an even-handed approach, both to the procedural side of the negotiations, and to the different aims of each party. Both the development mediation and joint custody orders present a picture of agreement and settlement which may not in all cases reflect the reality of the situation. The private ordering of domestic relationships may well simply perpetuate unequal power relationships between spouses unless it is very carefully controlled by the mediators (Bottomley "Resolving family disputes" in Freeman (ed) *The state, the law and the family critical perspectives* (1984) 293).

It has been argued that a policy

> "that provides parents with the option of mediation should enhance continuing family ties and reassert the dignity and importance of the family as a self-governing unit" (Folberg "Divorce mediation – the emerging American model" in Eckelaar and Katz (eds) *The resolution of family conflict – comparative legal perspectives* 196).

The family has been a site of oppression for many women. To be locked into a policy based on familial ideology and the continuity of family ties (oddly at variance with the "clean break" principle of much of our divorce law) is unlikely to be beneficial for these women. Mediation is acknowledged even by its proponents to lack the precise checks and balances of the adversarial process. Furthermore, the poor economic status of South Africa means that there is a lack of funding available for a state-funded social welfare mediation scheme. If mediation were to be introduced, it would lead to a reduction of expenditure on much-needed legal aid schemes, thus denying some needy parties an avenue to litigate over conflicting issues in a divorce and forcing them to mediate where one party might prefer to litigate (Burman and Rudolph "Repression by mediation: mediation and divorce in South Africa" 1980 *SALJ* 275).

Recommendations

(a) *"Holistic" treatment* It is essential, if the mediation process is to operate effectively, that questions of custody and access should not be separated from the proprietary issues. These issues are inextricably linked and should be dealt with holistically (Burman and Rudolph 1980 *SALJ* 275). Failure to do so is likely to prejudice the woman.

(b) *Qualifications of mediators* The mediator's role must be carefully explained to the parties: in this regard only carefully trained persons should

be allowed to mediate and such persons should preferably be qualified lawyers or social workers who have some training in divorce procedure and experience in mediation. When a pair of mediators (male and female or lawyer and social worker) co-mediate, this may be the ideal way of removing any potential bias which may exist in favour of or against any party. These mediators need to be highly compatible and complementary in order to function successfully as a team. They need to be able to communicate very effectively – verbally and non-verbally. If they do so, such a team may be ideally suited to mediation. This interdisciplinary co-mediation team presents perhaps the most flexible approach to mediation, bringing together the expertise of two professions and filling in the gaps produced by exclusive use of only a social worker or lawyer. This may also prove very costly.

(c) *Independent legal advice* Ideally, each party should be able to refer back to his or her legal adviser, but this would rarely be possible in South Africa where most parties cannot afford legal representation. The state could perhaps, at reduced cost, provide specially trained legal personnel to assist parties where necessary. Careful attention will need to be paid to the question of the limited availability of a redistribution of assets order and the future of the common home (Burman and Rudolph 1980 *SALJ* 277).

(d) *Guidelines for mediators and the mediation process* Certain guidelines need to be laid down to enable mediators to operate justly and effectively. There is a danger that many professions of varying backgrounds may perceive mediation as a lucrative area without many established guidelines, offering the public a cheap and fairly speedy divorce. Professional careers may thus ride on a widespread acceptance of the mediation alternative as it breaks new ground and opens up a new field of professional advice (Levy "Comment on the Pearson-Thoennes study and on mediation" 1984 *Family LQ* 525). The mediator must define and describe the process of mediation and its cost before the parties reach an agreement to mediate, so that the parties distinguish it from therapy or counselling. The mediator should assess the parties' ability to participate in mediation and his or her own ability to mediate. At the outset of mediation, the parties should agree in writing not to require the mediator to disclose to any third party any of the information obtained through the mediation process. The mediator should also inform the parties that he or she will not voluntarily disclose to any third party any information obtained through mediation unless such disclosure is required by law. The parties must be informed of the limitations of confidentiality when the mediator is subpoenaed.

It is essential that the mediator should be impartial and a mediator should not undertake mediation if he or she has represented one of the parties beforehand. Full financial and factual disclosure of all relevant information is required, and in certain cases expert consultation may be necessary. The mediator should ensure that the parties have sufficient understanding of the legal position before reaching an agreement, by defining the legal issues, but *not* by directing the parties' decision based on the mediator's own interpretation of the law as applied to the facts of this situation. The mediator's role is not that of legal adviser, but he or she may suggest options to the parties based on his or her legal knowledge, or else suggest that the parties obtain independent legal representation. If there is a danger that the process might harm one of the parties –

if one party is being unduly pressurised by the other party to his or her detriment – then the mediator should immediately suspend or terminate mediation. In certain cases, mediation will not be possible and the mediator should be able to identify those cases and should not commence mediation at all. Such cases arise where the parties cannot perceive the situation with any degree of rationality, nor can they separate a child's need from their own.

Mediation may in some cases offer a much-needed and valuable avenue of relief in divorce dispute resolution, but it is to be approached with careful consideration and conducted only by skilled mediators, sensitive to the probability of a power imbalance between the parties, mindful at all times both of the interests of the children and of the special circumstances prevailing in this country at present.

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CONTROLLING THE FLOODGATES – ECONOMIC LOSS AND THE COURTS IN SELECTED JURISDICTIONS (UNITED KINGDOM, AUSTRALIA, CANADA AND SOUTH AFRICA)

Introduction

The question of compensation or non-compensation for "economic loss" has again come under close scrutiny in the aftermath of the fairly recent House of Lords decision on this question in *Murphy v Brentwood District Council* 1990 3 WLD 414 (cf also *Caparo Industries PLC v Dickman* 1990 1 All ER 568; *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (C); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); *McLelland v Hulett* 1992 1 SA 456 (D); *Kadir v Minister of Law and Order* 1992 3 SA 737 (C); see in general Willet and Dlova "Economic loss in the UK after Murphy" 1991 *Northern Ireland LR*; Stapleton "Duty of care and economic loss: a wider agenda" 1991 *LQR* 249; Morris "The liability of professional advisers: Caparo and after" 1991 *JBL* 36). In this note, we intend to approach this on-going debate from a comparative angle. We have selected the commonwealth jurisdictions of the United Kingdom, Canada and Australia as our points of reference in this brief comparative study which naturally includes our own jurisdiction, South Africa. As always, the basic purpose of comparative analysis is to bring into national perspective how others grapple with problems which are either at hand or may face us in future.

We have excluded from our ambit of consideration those categories of economic loss that are traditionally considered under the principles developed out of *Hedley Byrne and Co Ltd v Heller and Partners Ltd* 1963 1 All ER 575, namely, the liability of professional advisers for negligent misrepresentation.

The main reason for this exclusion is that a significant body of more or less coherent jurisprudence dealing with these situations already exists in England (see Morris 1991 *JBL* 36 for critique).

The note addresses briefly, *inter alia*, problems of defining this category of loss, the rationale for its recognition as a special category within the tort of negligence, and principles governing its recovery or non-recovery within the three jurisdictions.

Some definitional questions

Economic loss, sometimes referred to as pure economic loss, is a term usually used to refer to negligently inflicted damage to a financial interest, which is independent of physical damage to the plaintiff's property or person. Not much debate or controversy has been attracted by the courts' readiness to distinguish between financial loss consequent to injury to the person of the plaintiff and financial loss which is independent of such injury. Perhaps the most obvious reason for this is a sentimental one. Society is more sympathetic to issues arising from loss of life or limb.

The distinction between physical damage to property and economic loss, on the other hand, is harder to justify. Both types of loss constitute foreseeable damage to financial interests, the difference being the often fortuitous fact that in the former case the loss is consequent to damage to a physical object, a piece of property. No basis for this distinction exists in either logic or common sense (see the *Hedley Byrne* case *supra* 602 (Devlin LJ)).

The potential for arbitrariness in this artificial distinction is well illustrated in the case of *Spartan Steel and Alloy Ltd v Martin and Co Ltd* 1972 3 All ER 557. (See in particular the dissenting judgment of Edmund Davies LJ. See also *Seaway Hotel Ltd v Cragg (Canada) Ltd and Consumers Gas Co* 1959 21 DLR (2d) 264, where the *Spartan Steel* distinction was not made.) In that case, the plaintiff, who had suffered loss as a result of negligent disruption of the flow of electricity to his plant, was allowed to recover £400, representing the profit lost as a result of the physical damage done to the material which was in the furnace at the time when the power was cut off, but was not allowed to recover the £1,767 profit that would have been realised from the material that would have been put into the furnace had the electricity not been cut off. This was despite the fact that in both instances the loss was equally foreseeable and also a direct consequence of the defendants' negligence.

Moreover, the courts have not always found it easy to maintain even a mere formal distinction between the two classes of loss. In *AG for Ontario v Fatehi* 1981 127 DLR (3d) 603 and 1984 15 DLR (4th) for example, the Ontario Court of Appeal characterised expenses incurred by the crown in cleaning up gasoline and debris strewn across its highway after a motor accident, as pure economic loss. On appeal the Supreme Court of Canada decided to characterise the same loss as physical damage to property. (Lord Wilberforce's classification of manifestation of structural defects in a house as material, physical damage in *Anns v Merton Borough Council* 1978 AC 728-760 did cause some controversy. This matter has since been resolved with the firm and unanimous repudiation of the Wilberforce classification in the *Murphy* case *supra*.) It is, however, the conceptual basis of the distinction rather than the formal distinction that causes most difficulty.

Rationale for the distinction

Courts in England still attach great significance to the distinction between the two types of loss, that is physical and economic (see eg *Council of the Shire of Sutherland v Heyman* 157 CLR 424 503 – 505; see also *Murphy*'s case *supra*; *Fatehi*'s case *supra*). Recurring arguments that seek to justify the maintenance of the distinction include the following:

(a) that protection from economic loss should properly be a matter for contract law and not tort (see eg *Junior Books Ltd v Veitchi Co Ltd* 1983 AC 520 551 – 552 (Brandon LJ); this argument was echoed in the *Murphy* case *supra* 430 (Keith LJ) 441 (Bridge LJ));

(b) that there is no precedent for recovery of this type of loss in tort (*Murphy*'s case *supra* 429 (Keith LJ); and

(c) that allowing this type of loss would lead to "floodgates" of litigation (see eg *Stevenson v East Ohio Gas Co* 1946 73 NE 2d 200 (CA) Ohio (Morgan LJ); *Weller and Co v Foot and Mouth Disease Research Institute* 1966 1 QB 569 (Widgery J); *Smith v Eric S Bush* 1990 1 AC 831 865 (Griffith LJ)).

The first and the second arguments constitute a plea for maintenance of the *status quo* without telling us why it is desirable that this area of the law should remain static. Moreover, as readily admitted by some of the advocates of the "non recovery" rule, even before the *Hedley Byrne* and *Anns* cases (*supra*), the exclusion of economic loss has never been total (see eg *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* 1947 AC 265 (HL); *Wilkinson v Coverdale* 1973 1 ER 75, 170 ER 284).

The third argument is a more substantial policy argument for maintaining the distinction. It is well encapsulated in the oft cited words of Cardozo CJ who warned against "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp v Touche* (1931) 255 NY 170 179).

It cannot be disputed that the potential for explosion in litigation could rise dramatically if all foreseeable financial loss that is independent of physical loss were to be categorised, without further qualification, within the framework of the tort of negligence. This is particularly true in those economic loss cases that involve damage to third party property on which the public or large sections of the public depend.

It should be noted, however, that some categories of economic loss hardly raise the spectre of "floodgates". Examples of this category of cases include cases involving the acquisition of defective property (see the *Junior Books* and *Anns* cases *supra*). Moreover, in some categories of economic loss that do have this explosive potential, for example liability for negligent misstatements, an elaborate body of legal principles has evolved over the years to address the "floodgates" issue (see the *Caparo* and *Hedley Byrne* cases *supra*, and the articles by Morris and Stapleton cited above).

If the most substantial reason advanced for maintaining the distinction is the "floodgates" problem, the next question that must be asked is whether the maintenance of such a distinction is essential to a solution of this problem. The answer to this question must be determined largely by the objective that is being pursued. If the policy is to exclude all hitherto unrecognised categories of economic loss, then maintaining the distinction, however illogical, may be essential. If

the aim is to warn or caution the courts of the explosive potential of this type of loss to enable them to develop principles suited to dealing with this peculiarity, then the role of classification becomes less central. In fact, in those cases where the problem does not arise, classification may even be dispensed with altogether.

The courts' attitude

United Kingdom

Perhaps four phases may be identified in the attitude of the British courts towards pure economic loss, which fall outside the scope of the *Hedley Byrne* case *supra*. First of all, there is the pre-*Anns* era, secondly the post-*Anns* era, thirdly the post-*Junior Books* era and finally the post-*Murphy* era.

Before the historic decision in the *Anns* case *supra*, courts in England as a general rule did not allow recovery, through the tort of negligence, of financial loss suffered independently of physical harm to the person or damage to the property of the plaintiff. (Apart form the category of admissible economic loss known as the *Hedley Byrne* situations, the most cited authority contrary to the exclusion rule is the case of *Morrison Steamship Co Ltd v Greystoke Castle supra*.) Lord Wilberforce's decision in the *Anns* case seems to vary this traditional position. There the House of Lords allowed the plaintiff the costs of making a defective house, that posed immediate danger to the health and safety of the occupier, safe. Lord Wilberforce incorrectly characterised this pure economic loss as physical damage to property (759 – 760; this error has since been corrected (see the *Murphy* case *supra*)). Even more significantly, the judge propounded his two-stage test for recovery of loss in negligence; the first stage is to ascertain whether a "sufficient relationship of proximity or neighbourhood" existed between the plaintiff and the defendant. If the answer to that question is yes, then the next stage is to inquire whether there are any considerations of policy that ought to negative or reduce the scope of the duty that arose as a result of the affirmative answer to the first-stage inquiry. The Wilberforce test, falling as it did within the context of recovery of what was in fact pure economic loss, had the potential of importing the logic of *Donoghue v Stevenson* 1932 AC 562 579 into the area of economic loss. Hitherto, economic loss cases had remained outside this broad principle primarily because of the "floodgates" potential. The notion of a *prima facie* duty once the first stage is satisfied, relegates policy to the role of negativing duty situations rather than a prerequisite for the recognition of new duty situations. The expansionist potential of the *Anns* case made itself apparent in court decisions that came immediately after this case (see *G Ross v Caunters* 1979 3 All ER 580; the *Junior Books* case *supra*).

In the aftermath of the *Junior Books* case, a decision that seemed to extend recovery for economic loss beyond the *Anns* doctrine of dangerous defects, the tendency has been to confine the *Anns* decision within narrow limits (see eg *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co Ltd* 1985 AC 210 240; *Curran v Northern Ireland Co Ownership Housing Association Ltd* 1987 2 All ER 13). The two-stage test has been severely criticised (see eg *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson and Co Ltd supra* 210 240; *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* 1986 AC 785 815). In 1987, for example, the Privy Council sought to develop and narrow the expansive potential of the Wilberforce test, by suggesting that the

first stage of that test subsumes two different elements – foreseeability of harm and proximity (*Yuen Kuen Yeu v AG of Hong Kong* 1987 2 All ER 705 710), and that the second stage may only be triggered in those exceptional situations where considerations of public policy should exclude any duty of care (*Hill v Chief Constable of West Yorkshire* 1989 AC 53 63).

In the *Murphy* case the House of Lords overturned the *Anns* case. It held, *inter alia*, that the operation of the *Donoghue v Stevenson* (*supra*) principle did not extend to the type of loss suffered in the *Anns* case. (429. In *Murphy's* case Keith LJ adopted a generous interpretation of the *Hedley Byrne* situation in that he included all negligent acts where these satisfy the reliance test: see eg his characterisation of *Junior Books* and *Rivtow Marine Ltd v Washington Iron Works* 1973 5 WWR 692 as "reliance" cases.) Their Lordships however manifested some divergence of views on the more general principle of recoverability of economic loss. Lord Keith, in a speech with which most of their Lordships expressly concurred, expressed the view that "the right to recover for pure economic loss, not flowing from physical injury, did not extend beyond the situation where the loss had been sustained through reliance on negligent misstatements, as in *Hedley Byrne*" (the *Murphy* case 446). Lord Oliver's approach on this question is in stark contrast to the robust exclusionary view of Lord Keith. To him "the categorization of the damage as 'material', 'physical', 'pecuniary' or 'economic' appears not to provide a particularly useful contribution" (*idem* 45). The crucial question, according to his Lordship, is not the nature of the damage but the relationship between the plaintiff and the defendant. The essential question therefore is proximity (cf eg the decision in the *Spartan Steel* case *supra* with the Canadian judgment in *Seaway Hotels Ltd supra*).

Lord Keith did not, however, completely shut the door to future developments in this area. He did make clear his preference for an incremental approach to development (of novel categories) of negligence, to the two-stage test or general principle approach of Lord Wilberforce.

Canada

The courts in Canada, for largely the same reasons as their counterparts in the United Kingdom, make a distinction between economic cases involving physical damage to the property or person of the plaintiff on the one hand and pure economic loss cases on the other.

The Canadian courts, however, seem to be more enthusiastic than their United Kingdom counterparts about allowing recovery in negligence for economic loss (see eg the observations of Wilson J on this issue in the *Fatehi* case *supra* 164; see also the decision of the Supreme Court of Canada in the same case). Recovery for this type of loss nevertheless remains an exception rather than a rule.

Perhaps the most significant decision that contributed in shaping contemporary Canadian legal thought in this area is the *Rivtow Marine* case *supra*. There the Supreme Court of Canada allowed the plaintiff charterer to recover loss of profits suffered when he had to remove from service, in peak season, a barge fitted with a defective crane manufactured by the defendant. The court attached particular significance to the defendant's actual knowledge of vital facts, including the defective nature of the crane, the use it would be put into and the timing of the peak season. (This intimate knowledge may have persuaded

Keith LJ in *Murphy*'s case 430 to dub this a *Hedley Byrne* case. However, such a classification lends a new colour to the *Hedley Byrne* case which extends beyond the realm of negligent misstatements and cases of professional negligence. *Yumerouski v Dani* 1977 OR (2d) 704 (Co ct) offers another illustration of a case where knowledge of the risk factor on the part of the defendant seems to have tipped the scales in favour of recovery in these types of cases.)

The *Rivtow Marine* case is essentially an instance of pure economic loss caused by a defective product to a non-contracting party (a category of economic loss not renowned for a significant "floodgates" potential). However, the principle developed in this case has been applied more generally to cover even those cases of economic loss that have the potential of creating the problem of indeterminate liability, for example cases of damage to third party property that results in loss to others with no proprietary interest in the piece of property that has suffered damage (see eg *Gypsum Carrier Inc v The Ship "Harry Lindenberg"* 1977 78 DLR (ed) (3d) 175 (Fed Ct TD). See also *Village Tavern v Nield* 1976 6 WWR 80).

In a recent case, for example, *Canadian National Railway Co v Norsk Pacific Steam Ship Co Ltd* 1990 65 DLR (4th), the Supreme Court allowed the Canadian National Railways (CAR), the principal licensed user of a bridge owned by the Department of Public Works, to recover damages for the additional costs of operation occasioned by the need to re-route as a result of negligent damage to the bridge.

MacGuigan JA, who delivered the leading judgment, interpreted the *Anns* case and other authorities he reviewed on the subject of economic loss, as requiring "sufficient proximity" in addition to the general *Donoghue* requirement of reasonable foreseeability (357). For an exposition of his concept of proximity he relied on Dean J in *Sutherland Shire Council v Heyman* 1985 60 ALR (Aus HC) 55 – 56 (see also *Jaench v Coffey* 1984 155 CLR 549 584 – 585), in particular on the three elements of the notion of proximity Dean J identified – physical proximity (space or time), circumstantial proximity (relational proximity) and causal proximity (directness).

MacGuigan JA satisfied himself that the requisite degree of proximity existed in the case before him. He was particularly impressed by the following factors: the physical proximity of the plaintiff's property, railway tracks, to the bridge; the fact that plaintiff was the principal user and also provided maintenance and repairs. The plaintiff in his view was so closely associated with the position of owner that it was "very much within the reasonable ambit of risk . . . at the time of the accident" (361). In his view it was not necessary to have to have specific knowledge of CAR, nor was it essential for the defendants to be aware of the precise nature of the loss. (This decision has been criticised eg by Rafferty "Recent Canadian decisions in contract and tort" 1990 *Professional Negligence* 191. He seems to prefer a categories-based approach to the problem.)

Canadian courts have not joined the chorus of condemnation of the *Anns* case. Indeed, as can be seen, they have refined this decision, for example by reading into the first stage two distinct elements, namely foreseeability and proximity. Furthermore, they have not confined the *Anns* case to dangerous defects, but have widened its ambit to include sub-standard housing in cases where special facts warranting intervention exist, in particular some strong inference of knowledge-of-risk factor. (See eg *City of Kamloops v Nielsen* 1984

10 DLR (4th) 641. In that case the local authority failed to enforce a "stop work" order or to prevent occupancy without a permit. There was some strong inference of impropriety. The city, it appeared, had knowledge that the work was progressing in violation of the bylaw and that the house was being occupied without a permit. The matter, it seems, was not pursued because one of its aldermen was involved.)

Australia

Australian courts also do not recognise the need to distinguish pure economic loss cases from cases of economic loss which is consequent to damage to persons or property. In order to deal with the peculiar problems of this type of loss, in particular the "floodgates" question, they have sought to limit the persons or class of persons to whom a duty of care may be owed in respect to this type of loss. This approach is well set out in the leading Australian case, *Caltex Oil (Australia) (Pty) Ltd v The Dredge "Willemstad"* 1976 136 CLR 529. Here an underwater pipeline was broken by a dredge as a result of the negligence of its operators and of the Decca Company, which had installed the ship's navigation system. The plaintiffs (Caltex) distributed oil from a refinery by means of the pipeline, which was not their property. They claimed damages against the owners of the dredge and Decca for the costs incurred in arranging for alternative means of transporting petroleum products while the pipe was being repaired. The High Court reversed the decision of the trial judge and held that the loss was recoverable.

Gibbs J pronounced economic loss recoverable in negligence where the defendant has knowledge or means of knowledge that the plaintiff individually, and not as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence (555).

In other words, as long as the floodgate problem does not arise in a particular case, the courts in Australia will not in principle deny recovery for negligently inflicted loss simply because it happens to have been caused independently of physical damage.

For pure economic loss to qualify for recovery, a "sufficient" degree of proximity must be proved. Proximity, in this case, as noted above, entails an extra ingredient in addition to reasonable foreseeability. The word "proximity" conveys the quality of closeness of relationship sufficient to make it just and reasonable that the tortfeasor should compensate the injured party (*San Sebastia (Pty) Ltd v Minister Administering Environmental Planning* 1987 61 ALJR 41 45 *et seq*; see also the *Caltex Oil* case *supra* 574 – 576).

South Africa

In South Africa, as in other similar jurisdictions, a distinction is made between economic loss resulting from physical damage to the property or person of the plaintiff, and pure economic loss unassociated with such damage. South African courts do not as a general rule deny recovery in delict for pure economic loss, but the need for caution in these cases is usually emphasised (see *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (A) 913B – 917D; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377E – G; *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (C) 306H – J; Boberg *The law of delict I: Aquilian liability* (1989) 104; Neethling, Potgieter and Visser *Deliktereg* (1992) 294 – 295).

For the plaintiff to succeed in his action for recovery of damages for pure economic loss, he must satisfy the traditional requirements for delictual liability, that is, he must prove *inter alia* negligence as well as unlawfulness (*Coronation Brick (Pty) v Strachan Construction Co (Pty) Ltd supra* 379E – F; see also Boberg 105 – 106; Neethling, Potgieter and Visser 292 – 293). In addition, the plaintiff must allege and prove that the defendant, even if a member of an unascertained class, foresaw that the plaintiff, as a specific individual, would suffer loss. The fact that the precise identity of the plaintiff was unknown at the time the action arose, will not be a bar to the plaintiff's claim. What is important is the plaintiff's specific knowledge. This principle was stated in the leading South African case of *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd supra* 386 (see also the *Arthur E Abrahams* case *supra* 311; the *Indac Electronics* case *supra* 799; *McLelland v Hulett supra* 464 – 465).

In this case, damages were claimed by the plaintiff for pure economic loss allegedly caused by the negligence of the defendant or its servant. The defendant's servant, whilst acting within the course and scope of his employment, negligently cut certain electrical cables which supplied electricity to the plaintiff's business. It was alleged by plaintiff and by Corocrete (Pty) Ltd, who had ceded his right of action to the plaintiff, that they had suffered loss as a result of power failure to the value of R22 059,29.

In allowing the action, the judge had this to say, amongst other things:

> "It seems to me that there is a difference in principle between a situation in which loss is foreseeable in the sense that it will be suffered by all members of an unascertained class of potential victims and a situation in which loss to a particular victim of an unascertained class is foreseen" (386E – F).

As Hartford has observed ("Some problems on unlawfulness in Aquilian actions for damages for pure economic loss" 1984 *SALJ* 48 – 49), South African courts have extended the Aquillian action to include pure economic loss, subject to the limitations of a kind of "personalized foreseeability".

It was the lack of this specific knowledge on the part of the defendants which led to the failure of the plaintiff's claim in the case of *Shell and BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D) (see also Neethling, Potgieter and Visser 295 fn 114). Howard J held:

> "It has not been shown that the defendant should have foreseen the possibility of loss (on account of delay and liability for demurrage) to the second plaintiff specifically. In the light of the evidence this kind of loss was only contemplated in relation to an unascertained class of potential victims, namely owners of charterers of vessels intending to discharge oil at the SBM (buoy), and it is only because the second plaintiff is a member of that class that its loss was reasonably foreseeable. From the defendant's point of view the class was unascertained because the membership depended on variables such as how many ships had joined or were committted to joining the queue and how long the SBM would be out of commission as a result of the collision" (659G – H).

Summary and conclusions

It is submitted that South African courts, like their counterparts in Canada and Australia, demand an extra ingredient to reasonable foreseeability in order to attach liability in pure economic loss cases. However, unlike these two jurisdictions, they have not gone deeper in building a jurisprudential basis for this extra ingredient.

Perhaps adopting the notion of proximity (as it is defined by the Australian courts) to include physical proximity, circumstantial proximity and causal proximity, would take us a little further.

It is certainly not sufficient to say as Marais J did in *Arthur E Abrahams and Gross v Cohen supra* 309, that

> "[a] defendant may be held liable *ex delicto* for causing pure economic loss unassociated with physical injury but before he is held liable . . . a court must satisfy itself that there are adequate grounds for doing so and be able to say what they are".

While it is true that Marais J noted that it is not possible or desirable to define exhaustively the factors that would give rise to such a duty, since new situations may arise or societal attitudes may change, it is in the interests of the law that some degree of certainty be maintained. The courts cannot abdicate their task of searching for principles to manage uncertain situations. The notion of specific knowledge of the plaintiff, if objectively judged, does provide some guidance. However, it is submitted that it needs to be elaborated upon and could perhaps be part of a broader and more flexible formula, such as proximity as understood and elaborated upon by the Australian high court. It should be understood, however, that the concept of proximity – even in the latter sense – is not a panacea but a platform for the elaboration of jurisprudential principles to guide the courts in managing Aquilian action recovery in situations where the damage is not a corollary of physical damage to the person or property of the plaintiff.

The principal difference between the Australian and the English approach is that the Australian courts see pure economic loss cases as part of the *Donoghue v Stevenson* principle, subject only to rejection if the required degree of proximity is not reached, whereas the English view is that in those cases where the closeness of the relationship is in issue, new categories of remedy may be accorded recognition. (See Derrington "The limits of economic loss through the cases" 1989 *Aust LJ* 13. It should be noted that the approach of Oliver LJ in the *Murphy* case and that of some recent cases in Scotland veer slightly towards the Australian view.)

The relationship of the plaintiff to the defendant, rather than the nature of the harm caused, is at the heart of the Australian approach. The notion of proximity allows the court to evaluate the quality of that relationship and to decide in the light of the particular facts whether a duty of care should be held to exist or not. A regulatory rather than an exclusionary approach is therefore adopted as the main instrument to deal with the problems posed by this type of loss, in particular the "floodgates" question. (The notion of proximity as developed by the Australian courts received conflicting signals in the UK. It was criticised eg in *Junior Books supra* 532 533; *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd* 1985 3 WLR 381 391 – 394; *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd supra*. The concept in some form met with approval in *Yuen Kun Yeu v AG of Hong Kong* 1988 AC 175 and *Clark v Bruce Lance & Co* 1988 1 WLR 881. In the *Caparo* case *supra* 574, Bridge LJ lumped "proximity" with "fairness", and characterised the two concepts as "not susceptible of any precise definition" and as amounting to "little more than labels to attach to features of different specific situations . . . the law recognises pragmatically as giving rise to a duty of care of given scope".

Oliver LJ in the *Murphy* case *supra* 455, in what seems to be a minority of one opinion, gave the notion of proximity "a more central and definitive role on the issue of recovery for pure economic loss".)

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DIE TOELAATBAARHEID VAN 'N ERKENNING TEEN ANDER PARTYE AS DIE VERKLAARDER MET SPESIFIEKE VERWYSING NA DIE BEWYS VAN DIE BESTAAN VAN 'N GEMEENSKAPLIKE DOEL

Dit is 'n algemene reël van die strafreg dat 'n erkenning of bekentenis van 'n persoon wat buite die hof gemaak word en nie tydens die hofverrigtinge onder eed herhaal word nie, slegs teen hom as getuienis toelaatbaar is indien die mededeling toelaatbaar bevind word. Artikel 219 van die Strafproseswet 51 van 1977 bepaal dat geen bekentenis deur iemand gemaak, as getuienis teen 'n ander persoon toelaatbaar is nie. Daar kan met veiligheid aanvaar word dat dieselfde posisie geld waar erkennings ter sprake is (*R v Baartman* 1960 3 SA 535 (A); *R v Kefasi* 1966 1 SA 364 (SRA); *S v Serobe* 1968 4 SA 420 (A)). Getuienis onder eed van 'n beskuldigde in die hof is wel teen sy medebeskuldigdes toelaatbaar (*R v Rarke* 1915 AD 145; *R v Zawels* 1937 AD 342).

Op die algemene reël soos vervat in artikel 219 bestaan daar 'n aantal uitsonderings wat normaalweg onder die hoof "middellike erkennings" of "plaasvervangende erkennings" ("vicarious admissions") tuisgebring word. 'n Mededeling van 'n persoon sal naamlik toelaatbaar wees teen 'n beskuldigde of gedingsparty indien:

(a) die beskuldigde of gedingsparty en die derde 'n gemeenskaplikheid of verbondenheid van belange of verpligtinge deel (Hoffman en Zeffert *South African law of evidence* (1989) 192 – 196;

(b) die gedingsparty uitdruklik of stilswyend te kenne gee dat hy die verklaring van 'n derde as sy eie ratifiseer (Schmidt *Bewysreg* (1989) 479; Engelbrecht *Vonnisbundel vir die bewysreg* (1983) 427; Heydon *Evidence* (1984) 329 – 330); of

(c) dit gemaak is deur iemand wat 'n uitdruklik of geïmpliseerde magtiging gehad het om ten behoewe van die beskuldigde of gedingsparty te praat (Hoffman en Zeffert 185 – 190).

Onder laasgenoemde uitsonderingsgrond ressorteer gevalle waar die gedingsparty en die verklaarder in 'n verhouding van heer en dienaar, lasgewer en lashebber en prinsipaal en verteenwoordiger tot mekaar staan.

Daar word aan die hand gedoen dat handelinge en mededelings wat aangebied word om die bestaan van 'n misdadige klomplot (sameswering) of gemeenskaplike doel te bewys ook onder hierdie uitsonderingsgrond tuishoort (Du Toit ea *Commentary on the Criminal Procedure Act* (1987) 24 – 70A 71; Engelbrecht 427; *contra* Schmidt 455; Hoffman en Zeffert 190 – 192). Dit is veral hierdie uitsondering wat vir bewyslewering in die strafreg van belang is en daar sal verder hierby stilgestaan word.

Die begrip "gemeenskaplike doel" kan soos volg omskryf word: Waar twee of meer persone saamspan in 'n onderneming met 'n wederregtelike doel, is iedereen aanspreeklik vir handelinge wat deur die ander verrig word ter bevordering van die gemeenskaplike doel mits hy die moontlikheid voorsien het dat die ander daardie handeling kan verrig in die nastrewing van hulle gemeenskaplike doel, en mits hy daarby onverskillig was omtrent die gevolge van sodanige handelinge (Hiemstra *Suid-Afrikaanse strafproses* (1987) 348).

Bewys van gemeenskaplike opset is nie beperk tot direkte getuienis van 'n ooreenkoms om 'n misdaad te pleeg nie. Daar kan ook van omstandigheidsgetuienis gebruik gemaak word. Daar mag op die optrede van elke samesweerder gesteun word om óf die *bestaan* van 'n ooreenkoms om 'n misdaad te pleeg óf die *pleging* van die misdaad óf beide te bewys (*R v Miller* 1938 AD 106 116 119; *R v Heyne 1* 1958 1 SA 607 (W) 609B; *S v Cooper* 1976 2 SA 875 (T) 879; *S v Safatsa* 1988 1 SA 868 (A) 898B). Die enigste beperking op die toelaatbaarheid van getuienis oor die optrede van enigeen van hulle is dat wanneer die handeling nie redelikerwys binne die omvang van die ooreenkoms val nie, of binne die oorweging van die partye tot die ooreenkoms was nie, dit uitgesluit word (*R v Heyne supra* 609; *S v Del Re* 1990 1 SASV 392 (W) 397).

Afgesien van die *bestaan* van 'n gemeenskaplike doel moet die *deelname* van die spesifieke beskuldigde daarin ook bewys word. Dit is onbelangrik of die bestaan van die sameswering of die deelname van die beskuldigde daarin eerste bewys word; bewys van een van hierdie elemente sonder die ander is egter waardeloos (*S v Moumbaris* 1974 1 SA 481 (T) 485; *S v Cooper supra* 880).

Hoewel die bestaan van 'n sameswering of gemeenskaplike doel en die deelname van die beskuldigde daarin 'n voorvereiste vir die toelaatbaarheid van die mededeling is, kan die sameswering self deur die mededeling bewys word; die hof hoef dus nie bewyslewering van bedoelde bestaan en deelname te verg sonder om na die mededelings van die samesweerders te kyk nie (*R v Miller supra; S v Cooper supra* 880).

Daar moet *aliunde* getuienis wees wat die basis vir 'n gemeenskaplike opset lê, dit wil sê daar moet afgesien van die mededeling getuienis wees wat aandui dat daar 'n werklike moontlikheid bestaan dat bewys kan word dat die partye gesamentlik opgetree het voordat die mededelings van die een persoon as getuienis teen 'n ander ondersoek sal word (*R v Govey* 1929 CPD 58 64; *R v Leibbrandt* 1944 AD 253 276; *R v Mayet* 1957 1 SA 492 (A) 494; *R v Victor* 1965 1 SA 249 (SRA) 255; *S v Ffrench-Beytagh* 1972 3 SA 430 (A) 455; *S v Moumbaris supra* 485 – 486; *R v Miller supra* 115 – 116 118; *R v Victor supra* 254; *S v Cooper supra* 880. Aldus word in *S v Mayet supra* 494 verklaar:

> "If all the evidence brings the court to the conviction that the existence of the conspiracy and the identity of the conspirators are proved, the law does not find an insuperable difficulty in the logical objection that some of the evidence could only be used if the eventual conclusion were established."

Daar dien op gelet te word dat hierdie uitsonderingsgrond groot ooreenkomste toon met die reëls wat van toepassing is op die toelaatbaarheid van 'n mededeling van 'n verteenwoordiger teenoor sy prinsipaal. Die belangrikste verskil is egter dat bewys van die bestaan van die verteenwoordigingsverhouding 'n essensiële voorvereiste vir die toelaatbaarheid van die verteenwoordiger se erkennings teen die prinsipaal is en dat die agent se eie mededelings nie gebruik mag word om die verhouding te bewys nie (Hoffman en Zeffert 185 – 186). Soos hierbo aangetoon, is dit egter nie die geval waar dit gaan oor die bewys van handelinge en mededelings in die bevordering van 'n gemeenskaplike doel nie.

'n Tipiese voorbeeld waar die uitsondering ten opsigte van mededelings ter bevordering van 'n gemeenskaplike doel ter sprake kan kom, is die volgende: A, B en C word van moord aangekla. Die staat beweer dat hulle met 'n gemeenskaplike doel opgetree het, naamlik om die moord te pleeg. Die volgende situasies kan nou voordoen:

(a) A maak 'n mededeling aan X wat ook vir B en C by die misdaad impliseer. X word as getuie geroep.

(b) A lê 'n verklaring voor 'n vrederegter af wat B en C by die misdaad betrek. Die verklaring word aangebied en toegelaat.

(c) A getuig dat B aan hom mededelings gemaak het wat C impliseer.

Die vraag ontstaan telkens of die mededelings van A teen B en C toelaatbaar is en indien wel, in watter omstandighede en vir watter doel. By die beantwoording van hierdie vraag onderskei die howe tussen mededelings wat verhalend ("narrative") en die wat uitvoerend ("executive") van aard is.

'n *Verhalende* mededeling is 'n terloopse mededeling wat in die verbygaan vir interessantheid of ter inligting gemaak word (*S v Bondi* 1962 4 SA 671 (A) 677F – H).

'n *Uitvoerende* mededeling daarenteen is 'n mededeling wat aandui hoe uitvoering aan 'n sekere doelwit gegee gaan word (*S v Zwane* 1989 3 SA 253 (W) 262F – J). Dit verwys na "acts done in the course of the acting in concert" of na die "acts and declarations of each conspirator in furtherance of the common object" (*R v Levy* 1929 AD 312 324 327; *R v Cilliers* 1937 AD 278 285). Die mededelings waarop gesteun word as uitvoerende mededelings moet gemaak gewees het "for the purpose of carrying out the conspiracy" of vir die vorming van die gemeenskaplike doel (*R v Leibrandt supra* 276; *R v Mayet supra* 494E; *S v Bondi supra*). Die mededelings moet nie bloot aandui wat in die verlede gebeur het nie tensy dit gemaak is om 'n derde te oorreed om hom by die gemeenskaplike oogmerk aan te sluit (*S v Richard Khazamula Nqobeni infra*); of tensy die mededelings wat aandui wat in die verlede gebeur het, ook gemaak is in navolging van vroeëre instruksies en dus in werklikheid steeds gemaak is ter bevordering van die gemeenskaplike doel (*Phipson on evidence* (1976) 108). Indien die mededeling op skrif is, moet dit neergeskryf gewees het "in the course of the plot for the furtherance of the plot" (*R v Rose* 1937 AD 467 472; *R v Miller supra* 118). Woorde wat gesê is as deel van die uitvoering van 'n voorneme, soos bevele of aanwysings, staan op dieselfde voet as handelinge; dit is iets anders as 'n blote relaas daarvan. Al die getuienis van handelinge en van woorde wat ook deel van die uitvoering was, en dus nie van handelinge onderskei kan word nie, moet beoordeel word om te bepaal of daar 'n sameswering was en wie die deelnemers was (*R v Mayet supra* 494F).

By die gebruikmaking van hierdie uitsondering op die algemene reël is dit dus telkens nodig om vas te stel of die bepaalde mededeling 'n uitvoerende of 'n verhalende mededeling is; en hier speel die doel van die mededeling 'n uiters belangrike rol.

Nóg verhalende nóg uitvoerende mededelings is toelaatbaar om die waarheid van die inhoud daarvan te bewys. Uitvoerende mededelings (dus die handelinge en uitings van een samesweerder) is egter wel toelaatbaar teen ander partye tot die sameswering of gemeenskaplike doel ten einde die bestaan en meer in besonder die oorsprong, karakter en doel van die sameswering en derhalwe die aandeel wat die beskuldigde daarin gehad het, te bewys (*R v Miller supra* 119; *S v Adams* 1959 1 SA 464 (T) 654C; *R v Matthews* 1960 1 SA 752 (A) 759C – E; *R v Janko* 1962 3 SA 87 (SR) 90; *S v Ffrench-Beytagh supra*; *S v Twala* 1979 3 SA 864 (T)).

Daar word aan die hand gedoen dat 'n uitvoerende mededeling in enige toelaatbare vorm voor die hof geplaas mag word, byvoorbeeld:

(a) by wyse van 'n getuie aan wie die mededeling gemaak is (*R v Mayet supra; S v Nieuwoudt 1* 1985 4 SA 503 (K));

(b) by wyse van 'n skriftelike dokument soos 'n brief waarop beslag gelê is en wat tydens die vorming en uitvoering van die gemeenskaplike doel opgestel is (*R v Dowjee* 1929 TPD 877; *R v Leibbrandt supra* 275 – 276; *R v Heyne* 1955 2 SA 539 (W));

(c) by wyse van 'n klank- of video-opname wat uitvoerende mededelings bevat (*S v Ramgobin* 1986 4 SA 117 (N) 157E – G 158A 159D); en

(d) by wyse van 'n toelaatbare verklaring aan 'n vredesbeampte of vrederegter wat mededelings uiteensit wat aan die verklaarder gemaak is *tydens* die vorming en uitvoering van die gemeenskaplike doel (*R v Victor supra* 253A – 254A).

Daar word aan die hand gedoen dat dit irrelevant is op welke toelaatbare wyse die mededelings voor die hof geplaas word, byvoorbeeld of die mededeling by wyse van 'n verklaring voor die hof geplaas word of by wyse van mondelinge getuienis. Wat egter wel van belang is, is die aard en doel van die mededeling op die *tydstip* waarop dit aan die verklaarder of getuie *gemaak* is en of dit dus as 'n uitvoerende mededeling getipeer kan word al dan nie.

Hierdie benadering word egter nie deur regter Friedman in *S v Banda* 1990 3 SA 466 (BAA) 507D gevolg nie:

> "As far as such 'executive' statement may be contained in an extra-curial statement, made by one of the accused, such 'executive' statement is not admissible against any of the other co-accused, because the extra-curial statement is hearsay and therefore is inadmissible against any accused other than its maker, notwithstanding that the accused may be found to have a common purpose with the person who made the extra-curial statement. See *S v Zwane and others 3* 1989 (3) SA 253 (W)."

Regter Friedman laat hom ook soos volg uit (507C):

> "If a witness or an accused were to testify in Court as to an 'executive' statement made by a co-conspirator, that is a statement made in furtherance of the common purpose, such statement would be admissible in evidence against any other person who is party to such a common purpose."

Daar word aan die hand gedoen dat dié benadering op 'n uiters geforseerde onderskeid neerkom deurdat die toelaatbaarheid van 'n mededeling gebaseer word op die wyse waarop die mededeling voor die hof geplaas word – indien dit by wyse van mondelinge getuienis geskied, is dit toelaatbaar teen die ander

beskuldigdes maar indien dit by wyse van 'n toelaatbare verklaring geskied, is dit ontoelaatbaar.

Regter Friedman is dus bereid om mondelinge getuienis deur A oor 'n uitvoerende mededeling van B aan hom wat C impliseer, teen C toe te laat ten einde die bestaan van 'n gemeenskaplike doel te bewys – getuienis wat natuurlik in die gewone loop van sake teen B toelaatbaar is. Hierteenoor bevind die regter dat 'n buite-geregtelike skriftelike verklaring van A oor uitvoerende mededelings van B aan hom wat C impliseer nóg teen B nóg teen C toelaatbaar is "because the extra-curial statement is hearsay". Ek ondervind egter probleme om te begryp hoe mondelinge getuienis onder eed deur A die *aard* van die getuienis kan verander. By hierdie uitsonderingsgrond word die getuienis, soos hierbo aangetoon is, juis nie aangebied in 'n poging om die waarheid van die inhoud daarvan te bewys nie (*R v Miller supra* 119 126). Dit is dus nie hoorsêgetuienis soos wat dié begrip gedefinieer is voordat artikel 3 van die Wysigingswet op die Bewysreg 45 van 1988 in werking getree het nie. Die definisie wat toe gegeld het, is dié van regter Watermeyer in *Estate De Wet v De Wet* 1924 CPD 341, te wete

> "evidence of statements made by persons not called as witnesses which are tendered to prove the truth of what is contained in the statement".

In hierdie lig moet die suiwer beslissing in *S v Richard Khazamula Ngobeni en 5 ander* 1992-03-30 saaknr 210/90 (W) (per Du Plessis R) verwelkom word. In hierdie saak het die staat 'n aantal bekentenisse en uitwysings teen die beskuldigdes bewys. Die staat het ook 'n medepligtige, ene Khele, as getuie geroep. Die beskuldigdes het voorts by geleentheid sekere mededelings aan hom gemaak wat die ander beskuldigdes geïmpliseer het. Die hof het sonder om enige onderskeid tussen die getuienis onder eed en die bekentenisse te maak, die uitvoerende mededelings soos vervat in Khele se getuienis en die beskuldigdes se bekentenisse en uitwysings wat ander beskuldigdes impliseer, teen die ander beskuldigdes toegelaat ten einde die gemeenskaplike doel te bewys (sien getikte uitspraak 145 222 231 – 232 236 – 237 239).

Daar word aan die hand gedoen dat hierdie uitspraak die regsposisie korrek weergee en nagevolg moet word.

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THE EXPANDING ROLE OF THE COURTS IN THE BRITISH LAW ON RECOGNITION OF STATES

In 1980, the British government changed its recognition policy to the effect that recognition will no longer be accorded to governments as opposed to states. This new policy further explained that the British government

> "shall contine to decide the nature of [its] dealings with regimes which come to power unconstitutionally in the light of . . . whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so".

In addition, the question whether an unconstitutional regime qualifies as a government, is to be answered with reference to the nature of the dealings between the British government and that regime (cf Warbrick "The new British policy on recognition of governments" 1981 *ICLQ* 568 574 – 575 583).

Whereas before 1980 a formal announcement of recognition was decisive and binding on the courts, the new policy brings an end to this and introduces a form of "inferred recognition" (cf Brownlie "Recognition in theory and practice" 1982 *BYIL* 197 210). The fact that formal recognition is no longer the criterion of a foreign government's *locus standi* in British courts has raised the question of the applicability of certain criteria and the role of the courts in the whole manner.

Warbrick (583 *et seq*) for instance, commented that one could either argue that the new policy is only a change in executive practice which has supplanted express recognition with implied recognition resulting from the nature of governmental relations, but binding on the courts nevertheless, or opt for a new approach which takes into consideration only the question whether a foreign regime is in effective control of a particular territory. This last option would echo Lord Denning's sentiments in the case of *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* 1978 1 All ER 277, which would mean that the British courts are allowed to undertake their own investigation into the matter of effective control, irrespective of the nature of the relationship between the governments concerned and then apply and recognise all the acts and laws of the foreign authority if the latter has passed the test of effective control.

After some years of speculation on the application of the new recognition policy, the Queens Bench Division was given the opportunity to apply the new policy in *Republic of Somalia v Woodhouse Drake and Carey SA* WLR 1992-11-06 744. The case stems from the political turmoil resulting from the overthrow of Siad Barre as president of Somalia in January 1991. Following this event the central government ceased to exist and various parts of the country came under the control of a number of clan-based rival groups. To add to the confusion, an interim government was set up in July 1991 which failed to take control. Amidst this chaos a cargo of rice, bought by the ousted government, arrived at Mogadishu, but it could not be discharged because of the fighting.

In a legal dispute as to what should be done with the cargo, the shipowners obtained a court order to the effect that the cargo be sold and the proceeds be paid into the court. A certain Madame Bihi, accredited to the United Nations as ambassador of Somalia at the time of the ousted government, and in possession of the bills of lading, was ordered to place the said documents at the disposal of the court. In February 1992 the Republic of Somalia was replaced as plaintiff by a commercial court on the strength of an application by solicitors acting for the "interim government". In addition, it was ordered that a certain sum of money be paid to the solicitors for the Republic of Somalia, unless cause could be shown by a certain date why the sum should not be paid out. In an attempt to prevent the execution of this order, Madame Bihi also asked to be joined as a party to the proceedings and for an order that no moneys be paid to the solicitors for the interim government whose status as a government was highly questionable.

Hobhouse J refused to accede to Madame Bihi's application to be joined, in view of the fact that she had no right to represent the state of Somalia. Her

representative capacity had ceased with the ousted government and she had received no other authorisation from any other government. Evidence to the effect that she was recognised as a diplomatic agent by the British government was also lacking (749 750). Thus the only other essential matter left was whether or not the commercial court's order for payment to the solicitors should be confirmed. For this to happen the court had to be satisfied that the authority to act on behalf of the interim government had been properly constituted which, in short, involved the status of the interim government.

With reference to the new recognition policy of the British government, the court identified the following as the most obvious criteria for deciding the question: (1) the effective control exercised by the foreign authority, and (2) the nature of the dealings between the British government and the "interim government" in Somalia. In his decision on the latter criterion, Hobhouse J made the important observation that

> "once the courts are granted the opportunity to make their own assessment of the evidence, making findings is no longer a question of simply reflecting government policy, [and] letters from the Foreign and Commonwealth Office become merely part of the evidence in the case" (754).

This effectively brings to an end the mistaken belief that the courts must yield to the opinions of the executive on recognition matters (see also Strydom "Vrae rondom die erkenning van state" 1992 *Stell LR* 63 *et seq*).

In casu executive letters supported the conclusion that the interim government was not governing at all in Somalia and that there was no administrative or any other visible control over the territory and the population (755). From this assessment, it follows that other considerations such as international recognition or representation of a foreign authority could be relevant but not sufficient and should "be accounted for by policy considerations rather than legal characterisation" (756).

In concluding that the solicitors did not have the authority of the Republic of Somalia to receive the money, the following factors were mentioned by the court as criteria in deciding on the status of a foreign authority: (a) whether the authority is the constitutional government of the state; (b) the degree, nature and stability of its control; (c) whether other governments have dealings with it; and (d) the extent of international recognition in marginal cases.

Since matters of this nature usually involve the rights and obligations of individuals or corporate entities, the constitutional and legal order of a state is a determining factor when courts are asked to come to the assistance of an aggrieved party. This factor does not depend on the status of international relations, so that one can conclude that the third and fourth criteria are of secondary importance only, in the sense that they can at best support existing evidence of the effectivity of the foreign government. Alone they can prove or disprove nothing. This also shows the utter unfairness of making the *locus standi* of an aggrieved party dependent on the status of the relations between the governments concerned, as is the case in the traditional doctrine on recognition.

As a general comment one can say that the court's judgment is based on sound jurisprudence and courts of other countries would be well advised to follow suit.

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VONNISSE

CESSION *IN SECURITATEM DEBITI* ONCE AGAIN!

African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd 1992 2 SA 739 (C)

1 Introduction

The above case once again illustrates the intolerable uncertainty that exists in South African law on the nature and effect of a cession *in securitatem debiti*. It deals with the nature of such a cession and the very interesting question of who has *locus standi* to institute action where a cession *in securitatem debiti* has been effected.

Although I have attempted to explain the principles pertaining to the legal phenomenon of cession *in securitatem debiti* since 1977 (see Scott *Sessie in die Suid-Afrikaanse reg* (LLD thesis Unisa 1977) 303 – 314; *The law of cession* (1991) 231 – 252 (cited as *Cession*); "Case note: *Italtrafo SpA v Electricity Supply Commission* 1978 2 SA 705 (W)" 1978 *THRHR* 334; "Case note: *Holzman v Knights Engineering and Precision Works (Pty) Ltd* 1979 2 SA 784 (W)" 1979 *THRHR* 332; "Case note: *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A)" 1982 *THRHR* 336; "Case note: *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (N)" 1982 *De Jure* 183; "Verpanding van vorderingsregte: uiteindelik sekerheid?" 1987 *THRHR* 175; "Case note: *Sasfin (Pty) Ltd v Beukes* (case nos: 7132/86 and 10849/86 unreported 1987-01-22 (W)" 1987 *De Jure* 355; "Case note: *Airco Engineering v Ensor* 1988 2 SA 367 (W)" 1988 *De Jure* 367; "Algehele sekerheidsessies" 1988 *THRHR* 434, 1989 *THRHR* 45; "Pledge of personal rights and the principle of publicity" 1989 *THRHR* 458; "To burden, or not to burden?" 1991 *THRHR* 264; "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 837), it would seem as if my efforts have been to no avail, at least as far as the courts are concerned. Some academic writers on this subject have, however, taken note of my viewpoint (Boraine "Case note: *Marais en Andere NNO v Ruskin NO* 1985 4 SA 659 (A)" 1986 *De Jure* 171; Lubbe "'n Hernude bydrae tot die reg aangaande sessie" 1991 *Stell LR* 383; "Book review: *The law of cession*" 1992 *THRHR* 162; Oelofse "Book review: *The law of cession*" 1992 *SA Merc LJ* 391; Reinecke "Sessie *in securitatem debiti* en skuldvermenging" 1992 *TSAR* 677). I should stress in this regard that the views I have propagated and the principles pertaining to the two forms of security cession are not my own, but are encountered in several other legal systems based on Roman law. I have endeavoured to set out the principles as they have evolved from Roman times through Roman-Dutch law and also as they find application in modern civil codes such as the French *Code Civil*, the

German *Bürgerliches Gesetzbuch* and the old *Burgerlijk Wetboek* of the Netherlands. The position in the Netherlands has changed to some extent in the *Nieuw Burgerlijk Wetboek*.

South African judges' apparent refusal to take note of the work of academic writers on this subject (see Scott 1991 *THRHR* 264), who have the time and means available to do thorough research on this complicated topic, has resulted in a situation of total confusion in the courts and among practitioners on the nature and effect of cessions *in securitatem debiti* (Harker "Cession *in securitatem debiti*" 1981 *SALJ* 56; "Cession *in securitatem debiti*: in the nature of a *quasi*-pledge" 1986 *SALJ* 200; Clark and Van Heerden "Cession *in securitatem debiti*" 1987 *SALJ* 242–243; *Britz NO v Sniegocki* 1989 4 SA 372 (N) 378 *et seq*; see also the authority referred to above). This has reached such proportions that more and more writers (Scott 1987 *THRHR* 194; 1989 *THRHR* 460; "Sessie *in securitatem debiti – quo vadis*?" *Seminar Department of Private Law* Unisa (1989) 95; Oelofse 1992 *SA Merc LJ* 391) and even judges (*Britz NO v Sniegocki supra* 380G–H) are advocating legislation, since calls (1985 *Annual Survey* 255 258) for the Appellate Division to reconsider the whole issue thoroughly seem to have fallen on deaf ears.

2 Discussion

The case of *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* is an excellent example of this confusion and I shall therefore discuss the deed of cession and the judgment in detail without reiterating the correct principles which I have repeatedly stated and explained in the above-mentioned literature.

2 1 Deed of cession

Lawyers no longer know how to draft the documents when drawing up deeds of cession. They go about it in such a way that they give effect to the intention of the contracting parties as best as possible, but in addition they endeavour to make sure that no matter how the courts may decide to approach the matter, the deed will fall within the ambit of that approach.

Although the whole deed of cession in the case under discussion is not quoted, King J stated that the cedent ceded to the bank "all our right, title and interest in and to . . . as security . . ." From this it is not clear whether the deed contained only the word "cedes", or other words as well, such as "transfers" and/or "pledges", although the court later on (744 *in fin*) stated that no reference is made to a pledge. However, from the quoted part of the clause it appears that it was not an absolute cession, but a security cession, seeing that the words "as security" were added. This extract of the clause is not sufficient to justify the inference that the parties intended an out-and-out security cession and not a pledge, as the court seemingly does.

All the clauses in the deed of cession have to be scrutinised to determine the intention of the parties. The following clause in the deed of cession is therefore also relevant:

> "This cession *shall* remain of *full force and effect and be irrevocable* so long as there are moneys owing by us to the bank" (741D; my italics).

This is a peculiar clause, as it *prima facie* implies that a cession can be revoked unilaterally (on this aspect see Scott *Cession* 1 23 fn 2 54 – 57 154 – 159), but if it is read together with the following clause,

> "the bank is appointed the attorneys and agents *in rem suam* to recover on behalf of the cedent 'all debts or sums of money whatsoever (including, without limiting the generality of the aforegoing, book debts'",

it becomes clear that the parties intended a pledge of the pledgor's (cedent's) rights to the bank and that, in conformity with the requirements of such a pledge, the pledgor ceded only the power to realise these rights to the pledgee.

To my mind, the parties intended a pledge of claims and correctly clothed their deed of cession in such a way that it gave effect to their intention and conformed to the requirements of the law of pledge (see Scott *Cession* 235 *et seq*). Because they realised that neither the pledgor nor the pledgee could institute action on his own and in his own name before maturity of the principal debt, the pledgor as holder of the right (owner) appointed the "cessionary" (as holder of a limited right) to act as the pledgor's mandatary (see Scott 1991 *THRHR* 840 *et seq*). Thus it appears to me from the available information on the contents of the deed of cession that the parties intended a pledge.

2 2 Judgment

In the present case, the plaintiff (cedent) issued summons on a date after the date of cession, but at a time when no moneys were owing to the bank. The defendant raised a special plea that the plaintiff had no *locus standi* to sue. Plaintiff replicated that the cession contemplated only the transfer of debts due to it as a result of its trading activities, that the claim ("debt" according to the judge: see, however, Scott *Cession* 52) relied on in the present case was not included in the cession, and in any event that the cession was effective only as long as an indebtedness by the plaintiff to the defendant existed.

As to the first issue, the court held that the terms of the cession were wide enough to embrace the right on which the plaintiff relied in his summons (741J). The court further was of the opinion that it had to answer the following questions in order to come to a decision on the question of *locus standi*:

> "(1) [H]as the cessionary *in securitatem debiti*, i e the bank, the exclusive right to sue for recovery of the rights ceded, i e to claim and receive from the debtors of the cedent debts due to it;
>
> (2) does that exclusive right automatically revert or fall away if at any given time, although the cession has not been cancelled or re-ceded, there is no existing indebtedness by the cedent to the cessionary; this would for example occur where the cedent's account with the bank was not in debit" (742B).

Although the judge nowhere stated expressly that he adheres to the pledge theory, his exposition of the "settled law" on this matter (742C – D) is clearly in accordance with the generally accepted idea of a pledge. (Lewis "Cessions *in securitatem debiti*" 1986 *BML* 88 is of the opinion that in *Bank of Lisbon and South Africa Ltd v The Master* 1987 1 SA 276 (A) the Appellate Division settled the matter in favour of the pledge construction.) The authority cited by King J for this exposition (viz *Incledon (Welkom) (Pty) Ltd v Quaqwa Development Corporation Ltd* 1990 4 SA 798 (A) 804G – J; *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 2 SA 761 (A) 771D; *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 251; *Frankfurt v Rand Tea Rooms Ltd and Sheffield* 1924 WLD 253 256; *Leyds v Noord-Westelike Koöperatiewe*

Landboumaatskappy Bpk 1985 2 SA 769 (A)), however, shows that he completely confused the two forms of cession *in securitatem debiti* (for a full discussion of the nature and effect of the two forms of security and the distinctions between the two, see Scott *Cession* 231 *et seq*; Scott 1987 *THRHR* 193).

Although the judge referred to the fact that the cedent retains ownership of the right, his description of the content of that right (742C – D) is in accordance with the principles applicable to an out-and-out security cession and not with those of a pledge, as his reference to *Incledon (Welkom) (Pty) Ltd v Quaqua Development Corporation Ltd supra* confirms, since the court in the latter case applied the principles of an out-and-out security cession (see Lubbe 1992 *THRHR* 162; Scott 1991 *THRHR* 264). It is not clear why the judge did not refer on this issue to the leading case on the pledge construction, namely *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235. His description is in any event contrary to the whole tenor of the judgment in the *Cohen* case (see Lubbe 1992 *THRHR* 162) and the principles of the pledge construction, in view of the fact that he described the right as follows:

> "[A] consequence of a cession of an incorporeal right *in securitatem debiti* is that ownership of the right remains vested in the cedent; *that ownership consists in a reversionary interest which entitles the cedent to claim the re-cession of the right upon payment of the indebtedness*" (742C; my italics).

The italicised section of the statement is not true of a pledge, but of an out-and-out security cession (see Scott *Cession* 240 – 241 250 – 251).

As to the nature of the cessionary's right, the judge made the following observation with reference to *Land- en Landboubank van Suid-Afrika v Die Meester supra* 771D:

> "[T]he cessionary acquires a restricted ('beperkte') real right in the right of action to exercise such right in the event of non-payment of the principal debt" (742E).

Here he relied totally on the pledge construction as it was correctly interpreted in the case on which he relied (Scott 1991 *THRHR* 841; Lubbe "Sessie *in securitatem debiti* en die komponente van die skuldeisersbelang" 1989 *THRHR* 493 *et seq*). In spite of this, the judge further on defined the nature of the cessionary's right as the "exclusive right to take action thereon" with reference to *Trautman v The Imperial Fire Assurance Co* (1895) 12 SC 38 41 – 42. In the *Trautman* case the court distinguished between a pledge and an absolute cession, but then went on to describe the pledge as if it were in the nature of an out-and-out security cession (see Scott *Cession* 235 fn 19), an approach which King J also followed.

With reference to Innes JA in *National Bank of SA Ltd v Cohen's Trustee supra* 251, King J even stated "that the secured creditor (ie the cessionary) alone could sue on the ceded 'obligations'". (For criticism of the use of this term, see Scott *Cession* 21 *et seq* 153 *et seq*.) It should, however, be pointed out here that Innes JA, shortly before the *Cohen* case, supported the view that a cession *in securitatem debiti* is in the nature of an out-and-out cession (see *Rothschild v Lowndes* 1908 TS 493) and despite the fact that he qualified this approach in the *Cohen* case, his view on the nature of such a pledge in the latter case was still to a large extent influenced by his earlier view of a cession *in securitatem debiti*.

Before coming to a conclusion on the matter, the judge chose to refer to the following additional cases: *Bank of Lisbon and SA Ltd v The Master* 1987 1

SA 276 (A) 294C, discussed and criticised by me in 1987 *THRHR* 191 – 192; *Hurwitz's Trustee v Salamander Fire Insurance Co* 1917 TPD 216 220 – on careful scrutiny it appears that the court in this case applied the principles of an out-and-out security cession; *National Bank of SA Ltd v Nel* 1916 CPD 148; *Lief v Dettmann* 1964 2 SA 252 (A) 272F – H; *Trust Bank of Africa v Standard Bank of SA* 1968 3 SA 166 (A) – for a discussion of the latter two cases, which deal exclusively with the out-and-out construction of a security cession, see Scott *Cession* 248, 1988 *THRHR* 434, 1989 *THRHR* 45; *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A), where the court also applied the principles pertaining to out-and-out security cessions: see Scott "*Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A)" 1982 *THRHR* 336; *Kotsopoulos v Bilardi* 1970 2 SA 391 (C) 398H, where it was merely stated that the cedent cannot proceed to enforce the right as long as the principal debt remains undischarged; *Moola v Estate Moola* 1957 2 SA 463 (N), where the court paid lip-service to the pledge construction, but applied out-and-out security cession principles: see also Scott 1987 *THRHR* 185 fn 80 86; *De Hart v Virginia Land and Estate Co Ltd* 1957 4 SA 501 (O) 505, where it was held that the principles of pledge find application, but the judge then went on to apply out-and-out security cession principles to the position of the cessionary.

For comparative reasons King J (743I) also referred to *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 1 SA 671 (A) 675, where Jansen JA described the effect of an *absolute* cession as follows: "a cession absolute in terms, does serve to divest a cedent completely of his right of action . . ." This is, of course, absolutely true if one is dealing with an absolute cession, as the judge clearly stated. With a security cession one is definitely not dealing with an absolute cession and depending on the type of security cession which the parties had in mind, the cessionary's position is limited to a greater or lesser extent. He also referred to *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331 – 332, which also dealt with the effect of an absolute cession; and *Holzman v Knights Engineering and Precision Works (Pty) Ltd* 1979 2 SA 784 (W) 788 791 – 793, where the court regarded the cession as an out-and-out security cession and applied the principles pertaining to that form of security cession (see Scott 1979 *THRHR* 332 and *Spendiff v JAJ Distributors (Pty) Ltd* 1989 4 SA 126 (C), where the court also applied the principles pertaining to out-and-out security cessions).

After having referred indiscriminately to all the above cases, the judge came to the following conclusion:

> "It is thus clear that the effect of a cession *in securitatem debiti* is to confer on the cessionary an exclusive right to sue; this right is retained during the subsistence of the cession; the position on insolvency, as dealt with particularly in *Cohen's* case *supra* and *Leyds'* case *supra*, is quite different and is of no application *in casu*.
>
> It is now settled, after much debate, that ownership of the ceded right in the sense of a reversionary interest, remains with the cedent (see the *Incledon* case *supra*), and what must next be considered is the effect of this on the instant matter; the context in which this must be considered is that, as is common cause, at the time the action was instituted (which is the material time . . .) plaintiff's account with the cessionary bank was in credit i e at that moment there was no obligation of plaintiff *vis-à-vis* the bank to be secured by the cession" (743J – 744C).

The judge then went on to pose the question whether the cession was still operative at the time when the principal obligation was not in existence. The answer to this, according to the judge, is determined by the intention of the

parties. To substantiate this statement, he referred to authority which deals with the relevance of the intention of the parties in determining what type of security cession the parties had in mind.

Although the judge had up to this point created the impression that it is settled law that a cession *in securitatem debiti* is in the nature of a pledge, and that he adheres to the pledge construction, albeit in a confused form, he then, for the first time, mentioned the fact that both forms of security cession exist (744E – I) and that in the present case the parties intended an out-and-out security cession (744J – 745B).

Now, although I agree with the statement that both forms of security are possible, I object to the South African courts' failure in general to distinguish between the different sets of legal principles which apply to these two forms of security that are so completely different as to their nature and effect. In particular, I fail to see why the judge in the instant case referred to so many cases in such an indiscriminate way.

I find it odd that the judge only at this stage decided to determine the nature of the security cession. To my mind he had up to this point worked on the premise that the principles relating to the law of pledge find application, and where he then had to apply these principles to this particular aspect, namely whether the cession remained of force and effect despite the fact that there was no principal debt in existence, he held that this was a case of an out-and-out-security cession and not a pledge. In doing so he again turned to the clauses in the deed of cession and held:

> "The cession agreement further provides that 'this cession shall remain of full force and effect and be irrevocable so long as there are moneys owing by us to the bank'; this suggests that an act of revocation is necessary in order to terminate the cession, which may not be done during the subsistence of the principal obligation" (745C).

The following should be pointed out here: if one is dealing with an out-and-out security cession, the right is transferred to the cessionary in its entirety and as a result of this the cedent can neither unilaterally "revoke" the cession (see discussion above under par 2 1), nor appoint the cessionary as his agent *in rem suam* or deal with the right in any way (see Scott *Cession* 154 *et seq*). It is, however, possible in an out-and-out security cession to make the transfer subject to a resolutive condition, in which event the transfer is *ipso iure* terminated on the occurrence of the uncertain future event (Scott 1988 *THRHR* 451).

As I have indicated above in my discussion of the clauses in the deed of cession, the fact that the cedent appointed the cessionary as his agent *in rem suam* is a clear indication that the parties did not intend the cession to be in the nature of an out-and-out security cession, but rather in the nature of a pledge. I think that counsel for plaintiff, with reference to *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), correctly advanced the argument on behalf of the plaintiff that, because there was no principal obligation at the time when the action was instituted, no pledge existed at that time and the "cedent" therefore had *locus standi* to institute action. In other words, counsel was correct in arguing that, because of the accessory nature of a pledge, the right of pledge no longer existed at the time of institution of the action as there existed no principal debt. (As to the meaning and effect of the accessory nature of pledge, see *Thienhaus v Metje and Ziegler Ltd* 1965 3 SA 25 (A) 44: "[T]he real right has neither meaning nor legal efficacy except in relation to the debt which it was intended to secure";

Lubbe "Die aksessoriteitsbeginsel en die sessie van dekkingsverbande" 1987 *De Jure* 242; *Interland Durban (Pty) Ltd v Walters* 1993 1 SA 223 (C) 229C with reference to *Standard Bank of SA Ltd v Neethling* 1958 2 SA 25 (C) 30C – D:

> "[W]here the principle is stated that a mortgage or pledge is only accessory to the original obligation or debt . . . it follows that where the debt is discharged the mortgage or pledge is *ipso iure* extinguished ."

For an up-to-date discussion of the accessory nature of pledge, see the *Nieuw Burgerlijk Wetboek* 3 7 3 82. For a full discussion of the accessory nature of pledge and out-and-out security cessions, see Scott *Cession* 238 – 239; 1987 *THRHR* 181 fn 52 53; 1987 *De Jure* 359; Scott and Scott *Wille's law of mortgage and pledge in South Africa* (1987) 165; see further Reinecke 1992 *TSAR* 679.)

The clause on which the court relied as indicating that the parties really had an out-and-out security cession in mind, was in actual fact added *ex abundanti cautela*, since it only confirmed the common-law principles pertaining to the law of pledge, namely that a pledge is of an accessory nature.

Although the judge distinguished the present case on this issue from the *Sasfin* case *supra*, he still relied on the latter case for the proposition that the intention of the cedent and the cessionary must be established in order to determine the precise nature of the legal relationship between them. The judge further went on to point out that the remarks in the *Sasfin* case as to the nature of the cession were made against the background of the cession being regarded as being in the nature of a pledge, a view which according to the judge is controversial with reference to the remarks of Goldstone JA in the *Incledon* case *supra*.

The judge none the less distinguished *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* from the *Sasfin* case on the basis that in the former instance the court was dealing with the question when the cession *became* operative and in the *Sasfin* case with the question as to when the cession *ceased* to be operative. With all due respect, I fail to see the difference. The accessory nature of a pledge is such that the parties can conclude the security agreement and the cession *in anticipando*. The real right of pledge cannot, however, come into existence before a principal debt exists, and it lapses *ipso iure* once the principal debt is extinguished (see the authority referred to above on the accessory nature of pledge).

The judge finally came to the following conclusion:

> "To return to the agreement with which this case is concerned, it is in my view clear that it was not the intention of the parties that, if at any given time there was no principal obligation, the cession was to become inoperative; in the limited sense that it could not have been acted upon by the cessionary in recovering moneys owing to the cedent, the cession was dormant, but it clearly remained of force and effect between the parties in respect of the advent of the principal obligation from time to time in the future" (746H – I).

Furthermore:

> "I am satisfied that the cession was of full force and effect between the parties at the time of institution of this action and that in terms thereof plaintiff had ceded to the bank the exclusive right to sue for recovery of any moneys due to the plaintiff, including the moneys claimed in this action" (747A).

3 Conclusion

Although the whole judgment is very confusing, I am of the opinion that it can be summarised as follows: The court is of the view that a cession *in securitatem debiti* can take the form of either a pledge or an out-and-out security cession, depending on the intention of the parties. If the parties intended an out-and-out security cession, the right is completely transferred to the cessionary and only the cessionary can institute action on the ceded claim, even in the absence of a principal debt.

The effect of this judgment is that in the case of an out-and-out security cession, the cessionary acquires *locus standi* to institute action and the cedent has no rights, apart from the right to re-cession of the claim after discharge of the debt. If the cessionary has instituted action, this is no longer possible, but the cedent has the right to the proceeds which was collected in excess of the cessionary's claim against the cedent. Both these rights flow from the *pactum fiduciae*.

This view is in accordance with the view adopted by Nienaber JA in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 87G – H. The difference between the two approaches, however, is that Nienaber JA never referred to a pledge and consistently applied principles pertaining to an out-and-out security cession correctly to the facts of the case. Nienaber JA is in any case a staunch supporter of the out-and-out security cession construction, since he is of the opinion that a pledge of personal rights is notionally unacceptable and inconceivable (Nienaber "'n Regterlike perspektief" *Seminar Department of Private Law* Unisa (1989) 167. I shall not deal with the practical effect of the *Goudini* case here).

3 1 Theoretical criticism

Although I agree with the view that there are two forms of cession *in securitatem debiti*, I find the court's indiscriminate references to cases dealing with two completely different legal phenomena unacceptable. I also accept the court's decision that such a cession can be construed as being in the nature of an out-and-out security cession, but I do not agree that the parties in the instant case intended this form of security. I furthermore differ from the way in which the court applied the principles pertaining to such cessions to the facts of the case. I find the court's approach to the accessory nature of security cessions, in particular, unacceptable and trust that other courts will in future rather follow the correct approach which was adopted by Viljoen AJ in *Interland Durban (Pty) Ltd v Walters supra* 229C with reference to *Standard Bank of SA Ltd v Neethling supra* 30C – D.

Although the South African courts have as yet not paid attention to the principles pertaining to an out-and-out security cession, I have indicated that in other legal systems where this form of security cession finds application, the principle that a security cession, even in the form of an out-and-out security cession, is of an accessory nature, is adhered to (see Scott *Cession* 238 – 239; 1987 *THRHR* 181 fn 52 53; 1987 *De Jure* 359; Scott and Scott *Wille's law of mortgage and pledge* 165).

3 2 Practical effect

The practical effect of this decision for banks and credit institutions, in particular, is that they will have to become involved to a much larger extent in

the day-to-day dealings of their clients. They will have to become involved in matters in which they have very little interest, especially in the case of revolving security cessions. Their only interest in the claims of their clients in such cases is that these claims serve as security for the revolving credit arrangements they have with their clients and in most cases where there are no problems with repayment of the credit, the principal debtor goes on with his business as if he is the creditor of his debtor. (For a more detailed discussion of revolving security cessions, see Scott "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 837.)

However, if banks and financial institutions do not wish to become involved in litigation or the day-to-day running of their clients' affairs, they will have to re-cede the rights to their clients. If they re-cede the claims to the cedents, without obtaining additional security, they lose their security.

The clients (debtors) of credit grantors, on the other hand, may be somewhat upset to find that, although they may not be in debt to their credit grantors with whom they have an on-going credit arrangement, their credit grantors are in a position to institute action against their debtors.

Although this is a very unsatisfactory situation for the credit grantor and the principal debtor, as well as for the latter's debtor, it is the prevailing position in South African law both as regards a pledge and an out-and-out security cession, if the court's decision in *African Consolidted Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* is to be followed instead of the correct approach which was adopted in *Interland Durban (Pty) Ltd v Walters supra*. The former approach is the result of the courts' inability to interpret cessions *in securitatem debiti* correctly.

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VERRYKINGSAANSPRAAK VAN BANKIER NA BETALING VAN AFGELASTE TJEK

First National Bank of SA Ltd v B & H Engineering 1993 2 SA 44 (T)

1 Agtergrond

Die vraag of 'n bank oor 'n verrykingseis teenoor die nemer of latere houer beskik indien dit 'n wissel of tjek uitbetaal het waarop byvoorbeeld die trekkershandtekening of 'n endossement vervals is of nadat die trekker betaling van die tjek afgelas het, is 'n probleem wat sigself reeds oor 'n lang tydperk wêreldwyd in wisselregstelsels gemanifesteer het. Verskillende standpunte oor die aangeleentheid het dan ook tot uiteenlopende oplossings vir die vraagstuk gelei. Al hierdie aspekte kan nie binne die bestek van 'n vonnisbespreking uiteengesit of herhaal word nie (sien bv die literatuur waarna in die volgende par verwys

word). Daarom word volstaan met die opmerking dat die oplossings wissel van 'n baie streng standpunt wat die finaliteit van betaling vooropstel en die bank enige eis ontsê, tot die standpunt dat die bank in beginsel altyd oor 'n verrykingseis beskik terwyl sodanige eis hom soms slegs teenoor 'n bepaalde verweerder (wat bv aan die vereistes vir reëlmatige houerskap voldoen) ontsê word.

Hier te lande het die onderhawige onderwerp by verskeie geleenthede die aandag van skrywers geniet (sien bv Cowen en Gering *The law of negotiable instruments in South Africa* (1966) 389 ev; Malan "The rule in *Price versus Neal*" 1978 *CILSA* 276; Oelofse "Die toepassing van die reël in *Price v Neal* in Suid-Afrika" 1981 *MB* 120; Malan en De Beer *Wisselreg en tjekreg* (1981) 308 ev; *Bills of exchange, cheques and promissory notes in South African law* (1983) 278 ev; Stassen en Oelofse "Terugvordering van foutiewe wisselbetalings: geen verrykingsaanspreeklikheid sonder verryking nie" 1983 *MB* 137; Cowen "A bank's right to recover payments made by mistake: *Price v Neal* revisited" 1983 *CILSA* 1; Pretorius "A transferable 'non-transferable' cheque" 1984 *SALJ* 256; Sinclair en Visser "Recovery of payment made under a mistake of fact" 1984 *Annual Survey* 383 ev; Stassen "Countermanded cheques and enrichment – some clarity, some confusion" 1985 *MB* 15; Malan, Oelofse en Pretorius *Proposals for the reform of the Bills of Exchange Act, 1964* SA Regskommissie Werkstuk 22 (1989) 334–346; Joubert "*Solvens* en *accipiens* in verteenwoordigingsverband" 1992 *De Jure* 100; "Verhandelbare dokumente: die verrykingsaanspraak van die bankier" 1993 *De Jure* 34).

Regspraak oor die vraag of die betrokkene bank wat 'n tjek ten spyte van die afgelasting daarvan, nogtans aan die begunstigde uitbetaal het, sodanige bedrag op grond van ongeregverdigde verryking van die begunstigde kan terugeis, is egter uiters karig. Voor die beslissing in *First National Bank of SA Ltd v B & H Engineering* is slegs twee sake oor 'n tydperk van meer as tagtig jaar oor die onderhawige onderwerp gerapporteer (*Natal Bank Ltd v Roorda* 1903 TH 298; *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (K)). Die vraag of 'n bank oor 'n verrykingseis beskik in geval van sogenaamde "onverskuldigde" wisselbetalings is natuurlik nie slegs vir banke van kardinale belang nie maar raak ook die breë publiek (sien bv Cowen 1983 *CILSA* 4). In die beslissing onder bespreking beklemtoon regter Preiss weliswaar slegs die belang van die aangeleentheid vir banke ("an issue . . . which is of considerable importance for commercial banks" (42B)), maar spreek hy tog tereg sy verbasing uit dat so 'n aktuele aangeleentheid by slegs twee vorige geleenthede die aandag van die howe geniet het (44B–C).

Enige nuwe beslissing oor die onderhawige aspek word gevolglik verwelkom. Wat die belang van die huidige beslissing egter beklemtoon, is die feit dat dit lynreg teenoor die beslissing in die *Govender*-saak hierbo staan. Enige sekerheid oor die onderwerp wat dus hoegenaamd deur laasgenoemde beslissing gebring is (sien bv Stassen 1985 *MB* 15), is daardeur van die tafel gevee. 'n Duidelike verskil in die regsposisie heers nou in die Kaapprovinsie en Transvaal. Die belang van die beslissing onder bespreking is dus nie te betwyfel nie.

2 Feite

Volledigheidshalwe word vermeld dat artikel 73(a) van die Wisselwet 34 van 1964 bepaal dat die "plig en volmag" van 'n bankier om 'n tjek te betaal, beëindig word deur die afgelasting van betaling. Indien die bank in stryd met die

afgelasting steeds sodanige tjek uitbetaal, volg dit logies dat dit nie die kliënt se rekening met die bedrag van die tjek mag krediteer nie aangesien die bank nie as lashebber in opdrag van sy kliënt opgetree het nie (sien oor die algemeen Stassen "Die regsaard van die verhouding tussen bank en kliënt" 1980 *MB* 80).

Die onderhawige saak het gehandel oor die vraag of die betrokkene bank die bedrag van 'n tjek van die nemer daarvan kan verhaal nadat die bank, ten spyte van die feit dat die trekker betaling afgelas het, nogtans die tjek uitbetaal het. Die aangeleentheid het by wyse van gestelde saak ingevolge Hooggeregshofreël 33 gedien.

Die trekker het die betrokke tjek ten gunste van die nemer (verweerder) getrek ter betaling van sekere goedere wat hy van laasgenoemde bestel het. Na lewering van die tjek aan die nemer (verweerder) het die trekker egter aan sy bank kennis gegee dat hy betaling van die tjek afgelas. Die werknemer van die bank wat sodanige kennisgewing ontvang het, het egter versuim om hierdie feit onder die aandag te bring van 'n kollega wat uiteindelik moes besluit of die tjek wel betaal sou word al dan nie. Gevolglik is die tjek nieteenstaande die afgelasting deur die trekker wel deur die bank uitbetaal, waarna die bank aksie ingestel het om die bedrag van die tjek van die nemer (verweerder) terug te eis.

Dit was gemene saak dat sodanige eis van die bank op verryking gebaseer is (43J). Die verweer teen die eis kom daarop neer dat die verweerder nie ten koste van die eiser verryk is nie aangesien die trekker inderdaad kontraktueel die bedrag van die tjek aan die verweerder verskuldig was en is soos volg verwoord (44A):

> "It is the defendant's defence that the defendant was not enriched at the expense of the plaintiff as [die trekker] was indebted to the defendant to pay to it the amount of the cheque."

In die lig van die feit dat die trekker inderdaad kontraktueel teenoor die nemer (verweerder) 'n bepaalde bedrag verskuldig was, moes regter Preiss uiteindelik die volgende twee regsvrae beantwoord (44B):

> "(*a*) whether the defendant was unjustifiably enriched and (*b*) whether the payment to the defendant was *sine causa*?"

3 Die beslissing

3 1 Toepaslike verrykingsaksie

Regter Preiss verwys na die *Roorda*-saak hierbo waarvolgens die toepaslike verrykingsaksie die *condictio indebiti* sou wees, maar benader die aangeleentheid, onses insiens heeltemal korrek, op die basis dat die aangewese aksie die *condictio sine causa* is (44I). Hierdie benadering is in ooreenstemming met die standpunte van feitlik al die skrywers in paragraaf 1 genoem (alhoewel die hof nie self na almal verwys nie); dit strook ook met die bevinding in die *Govender*-saak hierbo waarin 'n grondige ondersoek gedoen is na die toepaslikheid van en die onderskeid tussen genoemde twee verrykingsaksies in 'n situasie soos die onderhawige en tot die gevolgtrekking geraak is dat die *condictio sine causa* waarskynlik die aangewese aksie is (400B – C):

> "A *condictio indebiti* would accordingly be inappropriate. For the reasons mentioned, there is considerable difficulty in regarding the claim by plaintiff as a *condictio indebiti*. The claim seems more readily to fit the scope of a *condictio sine causa*."

Hierdie is egter die enigste punt waarin die huidige beslissing met die *Govender*-beslissing ooreenstem. Soos hieronder sal blyk, stem regter Preiss nie

saam met die beslissing waartoe die Kaapse volbank in laasgenoemde saak in feitlik identiese omstandighede geraak het nie.

3 2 Hoofmomente van die Govender-*saak*

Die *Govender*-saak is elders krities bespreek (sien bv Sinclair en Visser 1984 *Annual Survey* 383 ev; Scholtens *idem* 205 ev). Duidelikheidshalwe word hier slegs enkele hoofmomente daaruit aangestip ten einde die twee beslissings in perspektief te plaas.

In die *Govender*-saak het die trekker 'n tjek aan die begunstigde afgegee ter betaling van die huurgeld van 'n bus waarmee laasgenoemde mense na 'n begrafnis sou vervoer. Sonder om die kontrak te kanselleer, het die trekker egter ander vervoer gereël en betaling van die tjek afgelas. Die begunstigde het, nadat hy op die ooreengekome tydstip tevergeefs op passasiers gewag het, die gewraakte tjek laat invorder, onbewus van die feit dat betaling afgelas is. Meer nog, die betrokkene bank se werknemer het op nalatige wyse nie van die afgelastingskennisgewing kennis geneem nie, waarna die tjek inderdaad uitbetaal en die trekker se rekening met die bedrag daarvan gedebiteer is. Nadat die trekker daaroor gekla het, het die bank die debiet teen sy rekening omgeswaai, nieteenstaande 'n vrywaring wat die trekker tydens afgelasting onderteken het

> "on the understanding that I have no claim against the bank in the event of such document being inadvertently paid by the bank" (394H – I).

Hierna het die bank die bedrag van die tjek op grond van verryking van die begunstigde teruggeëis en in die landdroshof geslaag. In appèl het die Kaapse volbank by monde van regter Rose-Innes egter die eis afgewys.

Die beslissing word gelewer op grond van beginsels wat gemeenskaplik is aan sowel die *condictio indebiti* as die *condictio sine causa* en kom in wese daarop neer dat betaling van die tjek (in die woorde van Swart 1985 *MB* 3):

> "1 [N]ie *sine causa* is nie omdat dit 'n skuld wat aan die nemer verskuldig was afgelos het;
> 2 nie die nemer verryk het nie omdat die nemer sy kontraktuele verpligting teenoor die trekker nagekom het of gereed en gewillig was om dit na te kom en hierdie teenprestasie *prima facie* die ontvange betaling uitbalanseer;
> 3 nie die bank verarm het nie omdat die kennisgewing van afgelasting van betaling gegee is met die verstandhouding dat die kliënt, en nie die bank nie, aanspreeklik sou wees indien betaling van die tjek per abuis in stryd met die afgelasting sou geskied."

3 3 Regter Preiss se evaluasie van die Govender-*saak*

Regter Preiss (45A – C) haal die volgende gedeelte aan uit regter Rose-Innes se uitspraak in die *Govender*-saak 404B – E waar laasgenoemde met verwysing na De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1971) 290 – 291 soos volg opmerk:

> "There is a firmer ground upon which, in our opinion, the matter can and should be decided . . . It is cardinal to plaintiff's case that the obligation of the defendant to make recompense can arise only to the extent that defendant has been enriched at plaintiff's expense. The question which must be posed is whether plaintiff has shown that defendant was unjustifiably enriched by the payment of the cheque. The fact of the payment of money is itself *prima facie* proof of enrichment, but not conclusive proof. In assessing whether defendant has been enriched by the payment, account must be taken of any performance rendered by defendant which was juridically connected with his receipt of the money. Thus Professor *De Vos* in discussing the bringing into

account of losses incurred by the recipient of propery [*sic*] or money in determining his true or actual enrichment, says:

'Dit behels alle nadele wat die oorsaak of gevolg van die verrykende gebeurtenis is of wat voortvloei uit dieselfde oorsaak wat tot die verrykende gebeurtenis aanleiding gegee het en *sluit dus ook teenprestasie in wat die verrykte gelewer het en wat in 'n juridiese relevante verband met die verryking staan*. . .'." (Beklemtoning dié van Rose-Innes R.)

Veral bogenoemde bevinding word in die *B & H Engineering*-saak deur die eiser se advokaat in twyfel getrek; hy argumenteer (45D) dat

"the cambial relationship between the parties to the cheque is too far removed from the contractual relationship in respect of which the cheque was furnished [met gevolg dat die verweerder se prestasie ingevolge die kontrak nie juridies relevant tot sy ontvangs van die tjekbetaling was nie]".

Volgens regter Preiss bevind die advokaat hom in die goeie geselskap van Sinclair en Visser 1984 *Annual Survey* 385 wat regter Rose-Innes se bevindinge soos volg kritiseer:

"Central to the court's decision was its conclusion that the defendant had neither been enriched nor enriched *sine causa*. It was held that 'account must be taken of any performance rendered by defendant which was juridicially connected with his receipt of the money' (at 404D – E). 'There was a clear juridical connection between the contractual obligations of the defendant and his receipt of payment from the bank' (at 405E – F). Undoubtedly, the fact that the money was owed to the payee in terms of his contract with the drawer is what drove the court to this conclusion. It has been argued that the contractual entitlement of the payee against the drawer is irrelevant (but cf Malan [1978 *CILSA*] 288) unless the payment by the bank has the effect of discharging the debt owed by the drawer to the payee (see Sir Robert Goff & Gareth Jones *The Law of Restitution* 2 ed (1978) 75n43, Cowen [1983 *CILSA*] 10, 23 – 4). Rose-Innes J held that payment of the cheque had been a 'final payment' (at 405G – H) which had discharged the debt owed by the drawer to the payee. With respect, this may not be so. The drawee bank, it is submitted, was not purporting to discharge an indebtedness owed by the drawer to the payee. Its (mistaken) purpose was merely to obey its mandate. It paid in its own name, not as the agent of the drawer. This being so, the payment did not fall within the rule in *Froman v Robertson* 1971 (1) SA 115 (A) that a payment without authority but in the name of the debtor and in his discharge induces extinction of the obligation."

Sinclair en Visser (*ibid*) verwys na die Engelse beslissing *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* 1979 3 All ER 522 (QB) en Stassen 1985 *MB* 17 maar maak ook die volgende stelling waarna die regter nie spesifiek verwys nie maar wat tog 'n rol in sy gedagtegang moes gespeel het:

"That the issue of a cheque by a drawer to a payee is a conditional payment that becomes final on payment by the bank is true, but only, it is submitted, if the payment is made in terms of the mandate. In the face of a countermand, the payment by the bank and receipt of it by the payee should be regarded without just cause and not a discharge of the underlying obligation."

In the *Simms*-saak het regter Goff in wesenlik dieselfde omstandighede as dié *in casu* die bank se eis toegestaan. Alhoewel regter Preiss versigtig is om nie te veel gewig aan 'n Engelse beslissing te heg nie – die *condictio sine causa* is immers vreemd aan die Engelse reg – heg hy tog groot waarde (46D) aan die stelling in die *Simms*-saak 535f, naamlik dat 'n persoon wat weens 'n feitedwaling 'n onverskuldigde betaling aan 'n ander maak moontlik nie sodanige betaling sal kan terugeis nie indien

"the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to discharge the debt)",

en merk op dat

> "[p]ayment will defeat a bank's claim where it has been made under authority to discharge the debt or in the name of the debtor".

Regter Preiss (46E – F) haal vervolgens, met klaarblyklike goedkeuring, die volgende passasie uit die *Simms*-saak 542e – g aan:

> "In the light of the above principles, it is plain that in the present case Barclays are entitled to succeed in their claim. First, it is clear that the mistake of the bank, in overlooking the drawer's instruction to stop payment of the cheque, caused the bank to pay the cheque. Second, since the drawer had in fact countermanded payment, the bank was acting without mandate and so the payment was not effective to discharge the drawer's obligation on the cheque; from this it follows that the payee gave no consideration for the payment and the claim cannot be defeated on that ground."

(Regter Preiss wys daarop dat Malan en De Beer (1983) 282 oënskynlik die redenasie in die *Simms*-saak as toepaslik op die Suid-Afrikaanse posisie beskou (46G), maar sien klaarblyklik nie raak dat genoemde skrywers 'n dubbele *causa*-vereiste stel nie:

> "However, it is suggested that in our law the drawee bank should be entitled to recover the amount of a forged, unauthorised or countermanded cheque from the payee only if *both the payment and the acquisition* of the instrument and receipt of its proceeds by the payee were without legal ground" (ons kursivering).

Genoemde skrywers se dubbele *causa*-vereiste is reeds bevraagteken (sien bv Stassen en Oelofse 1983 *MB* 140) en die aangeleentheid word vir doeleindes hiervan daargelaat.)

Wat regter Preiss egter werklik beïndruk, is die standpunte van Cowen 1983 *CILSA* 23 – 24 en veral 37 waar laasgenoemde opsommenderwys soos volg verklaar:

> "If a bank pays a cheque *because* it has made a mistake concerning the existence or extent of its customer's instruction to pay, the payment is *sine causa* and . . . may be recovered from the recipient to the extent of the recipient's unjust enrichment. *Prima facie* the recipient (not being an agent for a third party) will be unjustly enriched by virtue of having received a mistaken payment. The fact that the bank was negligent does not debar it from recovering. Furthermore, the fact that the drawer of the cheque owed money to the recipient of the payment, does not affect the bank's claim. This is because the bank does not pay as its customer's agent; nor does it purport to be discharging its customer's indebtedness in his name without his authority within the meaning of the rule formulated by Pothier and adopted by the Appellate Division in *Froman v Robertson*. Accordingly, the debt owed by the customer to the recipient is not discharged and may be enforced by the recipient against the customer. As between the bank and the recipient, the receipt of the payment is *sine causa* and recoverable by the bank."

3 4 Regter Preiss se gevolgtrekking

Regter Preiss bevind (47J – 48A) dat bogenoemde uiteensetting van Cowen "incontrovertible" is en dat

> "I am persuaded thereby that the payment by the plaintiff on a countermanded cheque was not payment effected in its capacity as the drawer's agent. It cannot qualify as a discharge of the drawer's indebtedness in terms of *Froman v Robertson*".

Die beginsel in *Froman v Robertson* het, terloops, onder andere reeds vroeër in *Commissioner for Inland Revenue v Visser* 1959 1 SA 452 (A) die aandag van die appèlafdeling geniet. Dit handel oor die feit dat iemand anders 'n skuldenaar se skuld selfs teen sy sin en wil kan aflos en is gebaseer op 'n stelling van Pothier *Obligations* 111 1 1 wat soos volg deur Evans vertaal is:

> "It is not essential to the validity of the payment that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority,

> or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

Die regter (48D – E) wys onder andere daarop dat daar in die onderhawige beslissing, anders as in die *Govender*-saak, nie sprake was van 'n vrywaringsklousule in die afgelastingskennisgewing nie, maar beklemtoon dat

> "[p]ayment is a bilateral act requiring on the one hand an intention to pay the debt and on the other hand an intention to receive payment of the debt",

en voorts dat

> "I am unable to find that the performance rendered by the defendant was juridically connected with its receipt of the money. It follows that I am in respectful disagreement with the decision reached in *Govender v Standard Bank (supra)* and I decline to follow it" (48C 48E – F).

Gevolglik staan die regter die eis toe en bevind dat die eiser aan al die vereistes vir die *condictio sine causa* voldoen het en in die besonder dat die verweerder "was unjustly enriched at the plaintiff's expense" (48F).

Die volgende beginsels kan moontlik te midde van al voorgaande aanhalings uit die onderhawige beslissing gedistilleer word:

(a) 'n Bank wat 'n tjek in stryd met 'n afgelastingkennisgewing betaal, beskik in beginsel oor die *condictio sine causa* en kan daarmee die betaalde bedrag van die ontvanger terugeis.

(b) Sodanige bank is *solvens* in eie reg en tree nie as verteenwoordiger van sy kliënt (die trekker) op nie. Die betaling deur die bank is dus *sine causa*.

(c) In die lig van (b) hierbo, het die betaling deur die bank geen invloed op die onderliggende verhouding tussen die trekker en die begunstigde nie, met ander woorde die trekker se prestasieverpligting word nie uitgewis nie en so ook nie die begunstigde se vorderingsreg nie.

(d) Enige prestasie deur die begunstigde ingevolge die onderliggende verhouding is nie juridies relevant tot sy ontvangs van betaling deur die bank nie – dit kan dus hoegenaamd nie as 'n skadelike newewerking van enige moontlike verryking ten koste van die bank gesien word wat teen sy "verryking" in verrekening gebring kan word nie.

(e) Die logiese konsekwensie van bostaande is dat die begunstigde wat die bank moet vergoed, gewoon op die meriete ingevolge die onderliggende verhouding vir betaling teenoor die trekker sal moet ageer.

4 Effek van die verskillende beslissings

Die effek van die verskillende beslissings kan moontlik aan die hand van die volgende voorbeeld getoets word:

T(rekker) koop 'n motor van N(emer) vir R10 000 en betaal met 'n tjek vir daardie bedrag getrek op B(ank). Na ontvangs van die motor ontdek T sekere verborge gebreke in die motor op grond waarvan hy ingevolge die *actio quanti minoris* op R2 000 aan prysvermindering teenoor N geregtig is, waarna T betaling van die tjek by B staak. B ignoreer om een of ander rede die afgelasting en betaal die bedrag aan N. Dit staan vas dat B nie T se rekening met die bedrag van die tjek mag debiteer nie en dat B in der waarheid nou R10 000 "armer" is. Wat staan B te doen?

Ingevolge die *Govender*-saak kan B nie die R10 000 van N terugeis nie aangesien betaling aan N nie *sine causa* was nie omdat N ingevolge die koopkontrak presteer het deur die motor te lewer en sy vorderingsreg op betaling van die koopprys deur betaling deur die bank uitgewis is, met die gevolg dat hy nie verryk is nie. Beteken dit dat B die verlies dra? Nee, want dit staan tog vas dat T teenoor B verryk is in die mate waarin T se betalingsverpligting teenoor N deur betaling deur B uitgewis is. Streng gesproke moet T dus die volle R10 000 aan die bank betaal (want hy is *sine causa* daarmee verryk) en daarna sy verhaal met die *actio quanti minoris* ingevolge die koopkontrak teenoor N neem. *B is dus geholpe en T en N moet self hul probleme ingevolge die onderliggende verhouding uitstryk.*

Ingevolge die *B & H Engineering*-saak kan B die R10 000 van N terugeis aangesien betaling daarvan *sine causa* deur B geskied het en N tot daardie bedrag ten koste van B verryk is, daar T se prestatsieverpligting (betaling van die koopprys) nie deur betaling deur B uitgewis is nie. Die feit dat N wel die motor gelewer het in ruil vir betaling van die koopprys deur B, is nie 'n juridies relevante skadelike newewerking van sy "verryking" wat teen B se eis in verrekening gebring kan word nie. N moet B dus vergoed en daarna die koopprys ingevolge die onderliggende verhouding (koopkontrak) van T eis. T sal in so 'n geval waarskynlik 'n teeneis vir prysvermindering op grond van die *actio quanti minoris* instel. *B is dus geholpe en T en N moet self hul probleme ingevolge die onderliggende verhouding uitstryk.*

Uit bostaande wil dit voorkom of die praktiese gevolge van die twee teenstrydige beslissings nie noemenswaardig verskil nie – in beide gevalle word die bank vergoed en moet die partye op grond van die meriete ingevolge die onderlinge verhouding ageer. Tussen die *onmiddellike* partye tot sowel die tjek as die onderliggende verhouding (T en N as kontrakspartye saam met B as nie-aanspreeklike betrokkene wat in betalingsverband bykom) word die bank volgens enige van die twee benaderings beskerm en is dit dalk 'n suiwer akademiese oefening om tussen die twee beslissings te wil kies.

Die hele aangeleentheid kry natuurlik 'n ander kleur sodra die ontvanger van die foutiewe betaling nie meer 'n onmiddellike party tot sowel die onderliggende as die wisselverbintenis is nie, soos waar N in bostaande voorbeeld die tjek verhandel het aan R wat *bona fide* waarde vir die tjek gegee het en origens aan al die vereistes vir reëlmatige houerskap voldoen. R staan in geen onderliggende verhouding met T nie en het ook geen wisselkontrak met hom gesluit nie (wel met N). Seer sekerlik sal nóg die wissel- nóg die verrykingsreg toelaat dat B, indien dit die tjek aan R betaal het, weer die bedrag van R kan terugeis nadat R ter goeder trou en vir waarde sy vertroue in die dokument gelaat het, onbewus van en sonder dat hy deel het aan enige probleem in die onderliggende verhouding wat tot afgifte van die tjek aanleiding gegee het? B se beskerming kan wel geld in gevalle waar daar slegs onmiddellike partye betrokke is en moontlik selfs in gevalle waar R 'n verwyderde party is wat nie 'n reëlmatige houer is nie, maar sekerlik nie in die geval waar R wel 'n reëlmatige houer is nie. In laasgenoemde geval sal B die verlies moet dra, net soos waar hy in beginsel die verlies moet dra indien die trekkershandtekening vervals is maar die tjek by wyse van byvoorbeeld 'n geldige endossement aan R verhandel is.

5 Wetgewing

Sinclair en Visser 1984 *Annual Survey* 384 het reeds na die *Govender*-saak gevoel dat "clarifying legislation" dringend nodig was. Dit is insiggewend om daarop

te let dat hul standpunte, waarby Cowen 1983 *CILSA* 24 ev aansluit en waarop regter Preiss in die *B & H Engineering*-saak steun, deur Malan, Oelofse en Pretorius in hul voorstelle vir nuwe wisselwetgewing (*Proposals* par 1 hierbo 345) as "not convincing" bestempel word. Geen wetgewing om die onderhawige en verbandhoudende aangeleenthede te reël, word gevolglik deur laasgenoemde skrywers beoog nie, wat soos volg verklaar (*ibid*):

> "What has emerged is that *Price v Neal* raises involved questions of enrichment liability. These questions are by no means relevant to bills and cheques only; they concern all kinds of payment instruments and the entire field of enrichment liability. They cannot be solved in an act which deals only with bills and notes. Enrichment is not a general source of obligations in South African law. Perhaps our law is on the threshold of recognising a general enrichment action. This indeed seems inevitable, but it entails an appreciation of the interests and policy considerations underlying the enrichment remedies . . . It is submitted that the law of unjustified enrichment constitutes the proper forum for the solution of the rule in *Price v Neal* and related questions. *Govender's* case is an invaluable starting point. The adoption of a "finality of payment" rule and measures comparable to those in section 4 – 407, 3 – 417 and 3 – 418 UCC are accordingly not recommended."

Dit is ook interessant om kennis te neem van die feit dat die voorgestelde nuwe Tjekwet nie ruimte sal laat vir vrywaringsklousules soos dié wat in die *Govender*-saak ter sprake was nie. Artikel 63(1)(a) van die voorgestelde nuwe wet bepaal:

> "Die plig en volmag van 'n bank om 'n tjek te betaal wat op hom deur sy kliënt getrek is word beëindig deur (a) die afgelasting van betaling; . . . met dien verstande dat sodanige afgelasting . . . die besondere tjek . . . met redelike besonderhede identifiseer en daar 'n redelike geleentheid aan die betrokkene gegun word om op die kennisgewing te kan reageer."

In hul kommentaar op hierdie artikel verklaar die skrywers (*Proposals* 675):

> "Clause 63(1)(a) repeats [die bestaande] section 73(a) [sien par 2 hierbo] but requires the countermand to identify the cheque with reasonable particularity and to give the drawee a reasonable opportunity to act on it . . . The latter requirement is borrowed from sections 4 – 403(1) and 4 – 405(1) UCC. The view is taken, 'that stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking' . . . It is submitted that the provisions of clause 63(1) . . . would render unenforceable a term in an agreement such as the one in *Govender*."

6 Slotopmerkings

Die regsposisie insake foutiewe wisselbetalings is nog lank nie in die Suid-Afrikaanse reg uitgeklaar nie. Dit is inderdaad 'n Medusa-agtige probleemaangeleentheid waar die oplossing van een probleemaspek maar net 'n volgende kop laat uitsteek. Met wetgewing om die aangeleentheid te reël nie in die nabye vooruitsig nie (nie dat dit noodwendig die oplossing is nie), bly enige voorgestelde lig aan die einde van die tonnel in die woorde van Cowen 1983 *CILSA* 2 bloot 'n "will-o'-the-wisp, it almost seems".

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DIVORCE SETTLEMENTS, PACKAGE DEALS AND THE BEST INTERESTS OF THE CHILD

Van Vuuren v Van Vuuren 1993 1 SA 163 (T)

1 Introduction

The *Van Vuuren* case once again highlights the delicate nature of settlement talks and the involvement of the family advocate in divorce actions. The focus in this discussion, however, falls on a remark by the court that the report and recommendations by the family advocate often enable the court to evaluate the settlement reached by the parties to establish whether it is in the best interests of the children. The court had the following to say about settlements:

> "Dit is welbekend dat, omdat so 'n skikking ook finansiële geskille tussen die partye bylê, die een party soms onbehoorlike druk op die ander party te pas mag bring om toegewings ten opsigte van of die beheer en toesig oor die kinders, of sy toegang tot die kinders te maak.
>
> Veral tydens die huidige swak finansiële toestand, is dit ongelukkig 'n sterk versoeking, veral by 'n party wat geldelik in 'n swakker posisie staan as die ander eggenoot, om toegewings ten opsigte van die kinders te maak as teenprestasie vir 'n gunstiger skikking van finansiële aangeleenthede. Die partye se regsverteenwoordigers behoort hiervoor op hulle hoede te wees en hulle nie te leen tot sulke wanpraktyke nie. Hulle plig as amptenare van die hof is om in die eerste plek om te sien na die belange van die kinders."

The facts of the case were relatively simple. In terms of both her particulars of claim and the settlement reached with defendant, plaintiff seemed to be content that the children visited defendant over certain weekends and during school-holidays without any restrictions placed on the visits. However, from a letter to the family advocate and from her testimony in court it seemed that defendant had the habit of consuming alcohol excessively every day ("elke dag") and although he had assaulted her, he had never done so to the children. In the letter she requests the following from the family advocate:

> "Daar word gevra dat respondent huidiglik die reg van redelike toegang kry in teenwoordigheid van die applikant gesien in die lig van die respondent se ernstige drankprobleem" (165G).

No evidence was placed before the court which could explain why plaintiff had changed her mind so drastically (between the settlement and in her particular of claim) about allowing the children to visit defendant without any conditions for such visits (165I). The court pointed out that this is a clear example where a report and recommendations by the family advocate should have been obtained. The court also mentioned certain other instances for the guidance of the family advocate, in which the latter should approach the court for an order in terms of section 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987, namely where there is an intention

(a) not to place young children under the custody and control of the mother;

(b) to separate children from each other by awarding custody and control of, say, one child to one parent and the other child to the other parent;

(c) to award the custody and control of a child to a person other than the child's parents; and

(d) to make an arrangement in respect of custody and control which is *prima facie* not in the interests of the child.

In a further remark about the role of the family advocate, the court pointed out that it would be good practice for the family advocate in a case such as the one under consideration to indicate to plaintiff's lawyer the circumstances it had established with a view to changing the particulars of claim.

2 Discussion

As mentioned initially, the intention is to focus on the remark of the court that undue pressure is sometimes applied to manipulate a party into a (detrimental) settlement. As this is to be expected in the South African divorce context in view of the highly emotional nature of the proceedings, the pecuniary implications of custody and maintenance orders and the stigma the mother of the child often experiences if custody is not awarded to her, it would seem appropriate to reconsider settlement discussions when custody and access orders are considered by the parties. The situation as set out above is similar to that of the dispensation which prevailed in Britain before the Children Act of 1989 came into operation on October 14, 1991. The English Law Commission (*Report on family law, review of child law, guardianship and custody* Law Com No 172) explains that in the pre-Children Act era a tendency seems to have developed for orders concerning the children to be made whenever divorce cases came to court. Although this may have been necessary previously when mothers required a court order if they were to acquire any parental powers at all, there was, strictly speaking, no need for such orders at the time of the reporting by the Law Commission. Studies have also shown that the proportion of contested cases were very small, so that orders were not usually necessary to settle disputes. Rather orders were seen by solicitors as "part of the package" for their matrimonial clients, and by courts as part of their task of approving the arrangements made in divorce cases (Law Com 172 par 3 2). On the other hand, it is a truism that orders are necessary even in uncontested cases in the child's own interest, to confirm and give stability to the existing arrangements and to clarify the respective roles of the parents.

After considering the arguments, the Law Commission was of the opinion that a flexible approach should be adopted, in which it was not always assumed that an order had to be made. It indicated that it was always open to parents to separate without going to court, in which case there could be no order. Also, and perhaps more important, the proportion of relatively amicable divorces was increasing and this gave rise to the conclusion that parents were able to make responsible arrangements for themselves without a court order.

> "Where a child has a good relationship with both parents the law should seek to disturb this as little as possible. There is always a risk that orders allowing custody and access . . . will have the effect of polarising the parents' roles and perhaps alienating the child from one or other of them" (Law Com 172 par 3 2).

The Law Commission's aim consequently was that of "encouraging both parents to feel concerned for the welfare of their children" and of "lowering the stakes in cases of parental separation and divorce" (par 2 10 *et seq*). The novel features of the act can be outlined against this background.

3 The general principles of the act

3 1 The paramountcy of the child's welfare

Section 1(1) embodies the welfare principle. It provides that the child's welfare shall be the paramount consideration whenever any court (high court, county court or magistrate's court) determines any question with respect to the upbringing of a child, the administration of its property or the application of any income arising from it. It consequently does not apply to the determination of other questions, even though they do (indirectly) affect the child (for example, whether a court should make an order excluding a parent from the matrimonial home, or whether blood tests should be taken to ascertain paternity) (Bridge, Bridge & Luke *Blackstone's guide to the Children Act 1989* 5). It is, however, primarily of importance for the proper resolution of residence or contact disputes. The purpose of this section is to emphasise that in matters where it is applicable, the child's welfare is the court's only concern.

3 2 Delay in family proceedings

Section 1(2) requires that the court must have regard to the general principle that any delay in determining any question with respect to the upbringing of a child, is likely to prejudice the welfare of the child. The Law Commission explains that prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty it brings them, but also because of the harm it does to the relationship between the parents and their capacity to co-operate with one another in the future. Moreover, a frequent consequence is that the parent who is not living with the child has been severely prejudiced by the time the hearing takes place. Regrettably, it is almost always to the advantage of one of the parties to delay the proceedings as long as possible and, what may be worse, to raise difficulties about contact in the meantime. In the pre-1989 dispensation, paticularly in divorce courts, the responsibility for the progress of the proceedings laid principally with the adult parties, although a considerable source of delay was the time taken to prepare welfare officers' reports and sometimes to attempt conciliation between the parties (Law Com par 4 55).

3 3 The statutory checklist

A further means of promoting the child's welfare is the application of the statutory checklist. The aim of the checklist is specifically to focus the minds of all concerned – courts, lawyers and even clients – on the broad criteria that are relevant to decisions. It serves as a minimum standard that must be considered in every case. It is consequently mandatory in all *contested* private proceedings (*inter alia* divorce) and all proceedings regarding care and supervision by local authorities. The checklist is therefore a means of providing greater consistency in law by preventing lawyers and courts from relying on "rules of thumb" as to what the court is likely to think best in any given circumstances (Law Com 172 par 3 18).

The following factors are mentioned in the checklist:

(a) The ascertainable wishes and feelings of the child concerned (considered in the light of its age and understanding);

(b) its physical, emotional and educational needs;

(c) the likely effect on it of any change in its circumstances;

(d) its age, sex, background and any of its characteristics which the court considers relevant;

(e) any harm which it has suffered or is at the risk of suffering;

(f) how capable each of its parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting its needs; and

(g) the range of powers available to the court under the act in the proceedings in question.

3 4 The presumption against court orders

On divorce the court should not automatically make an order for the children (as in the past) as part of the divorce package. This stems from the prescriptions of section 1(5) which provides that where a court is considering whether or not to make an order under the act with respect to the child, it shall not make the order unless it considers that doing so would be better for the child than making no order at all. The motivation for this provision is to be found in the explanation of the Law Commission (*supra*) that where a child has a good relationship with both parents, the law should seek to disturb it as little as possible.

Consequently, the point of departure now is that no parent will win a custody case (residence order) or lose an access case (contact order) but instead that parents will share their responsibility towards their children after divorce as well.

3 5 Parental responsibility

The Law Commission pointed out that the law previously had no inherent legal concept of parenthood, but was in fact conceptually based upon guardianship. Even that concept was inadequately developed, for while for practical purposes mothers and fathers had equal authority, in strict legal theory fathers remained the sole guardians of their children. The Law Commission was also concerned that the law did not adequately recognise that parenthood was a matter of responsibility rather than of rights. In fact, the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* (1986) AC 112 emphasised that the parental power to control a child did not exist for the benefit of the parent, but in fact for the benefit of the child. The Commission consequently recommended the introduction of the concept of parental responsibility to replace ambiguous terms such as parental authority or powers or rights.

Section 3(1) embodies these recommendations by providing that parental responsibility includes all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and its property. It is therefore for the courts to interpret parental responsibility in accordance with the needs and circumstances of each child.

4 Section 8 orders

Under section 8, four orders may be made in relation to children, namely residence, contact, prohibited steps and specific issue orders. Before a section 8 order can be issued, the principles as set out above must be taken into account.

4 1 Residence orders

These are orders settling the arrangements to be made as to the person with whom the child is to live. It may be made in favour of a non-parent, in which

case such person automatically also acquires parental responsibility while the order is in force.

Residence orders replace custody orders but are narrower in scope, since such orders determine only where the child should live. After a divorce, if the order is made in favour of one parent, the other retains all other parental responsibilities and can exercise them independently without consulting the other resident parent. If the order is made in favour of a non-parent, that person acquires parental responsibility but the parents retain their responsibilities, with the exception of the right to have the child live with them.

A residence order may be made in favour of two or more persons who do not live together. The order may specify the periods during which the child is to live in the different households concerned (s 11(4)).

A residence order requiring residence with a parent ends automatically if the parents live together for a continuous period of more than six months (s 11 (5)).

4 2 Contact orders

These orders require the person with whom a child lives or is to live, to allow the child to visit or stay with the person named in the order or for that person and the child otherwise to have contact with each other.

A contact order replaces an access order but is wider in scope, since it permits the court to order not only physical contact but also contact by letter or telephone. As it may provide for the child to stay over, there is some overlapping with a residence order.

4 3 Prohibited steps order

This is an order that no step which could be taken by a parent in meeting his parental responsibilities for a child and which is of a kind specified in the order, shall be taken by any person without the consent of the court.

4 4 Specific issue order

This is an order giving directions for the purpose of determining a specific question which has arisen or which may arise in any connection with any aspect of parental responsibility for a child.

5 Conclusion

The provisions of the Children Act represent a recognition of an awareness internationally advanced that the interests of the child should always be the court's only consideration. The South African legal system which, albeit remotely, leaves the possibility that "package deals" detrimental to the child's interests can be struck (even though the involvement of the family advocate goes a long way to prevent such practice), should take cognisance of developments in the English legal system. From the facts of the *Van Vuuren* case it seems that the father was still prepared to fulfil his "parental responsibility" towards the children and that he was content that they remained with the mother. *Prima facie* there seems to be no reason for a custody order to have been made. With the children "out of the deal", the "stakes would have been lower" and the parties could have settled their disputes much more easily (and more amicably).

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RISIKOSKEPPING BY MIDDELLIKE AANSPREEKLIKHEID

Tshabalala v Lekoa City Council 1992 3 SA 21 (A); Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd 1992 3 SA 643 (D); Minister van Wet en Orde v Wilson 1992 3 SA 920 (A); Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd 1992 4 SA 425 (ZSC); Dithipe v Ikgeng Town Council 1992 4 SA 748 (T); Minister of Law and Order v Ngobo 1992 4 SA 822 (A); Macala v Maokeng Town Council 1993 1 SA 434 (A); Romansrivier Koöperatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd 1993 2 SA 358 (K)

In al hierdie sake het die vraag ter sprake gekom of 'n werkgewer middellik vir die onregmatige daad van sy werknemer aanspreeklik is. Ons plaas die fokus net op die rol van sogenaamde *risikoskepping* deur die werkgewer – dit wil sê, die invloed op die middellike aanspreeklikheid van die werkgewer van die feit dat hy deur die aard van sy aktiwiteite deur middel van sy werknemer(s) 'n risiko van benadeling vir buitestanders skep.

Die aanloop tot hierdie vraag is gelê deur die uitspraak van appèlregter Jansen in *Minister of Police v Rabie* 1986 1 SA 117 (A). Ten aanvang is volgens die regter die standaardtoets by die vraag of 'n werknemer tydens deliktspleging binne die perke van sy diensbetrekking opgetree het, enersyds subjektief en andersyds objektief van aard (134):

> "It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that '. . . a master . . . is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them . . .'"

Volgens die standaardtoets is daar dus twee faktore wat 'n rol kan speel ten einde vas te stel of 'n werknemer binne die grense van sy diensbetrekking opgetree het: die subjektiewe bedoeling van die werknemer (nastreef van eie belange of dié van die werkgewer) en die objektiewe verband tussen die werknemer se optrede en die aard van sy werk (algehele versaking van of verband met uitoefening van sy werk).

Die *Tshabalala*-saak illustreer die toepassing van die standaardtoets goed. Hier het K, 'n munisipale polisieman, die eiser geskiet en beseer. Die stadsraad word middellik aangespreek aangesien die voorval na bewering in die uitvoering van K se diens plaasgevind het. K was die betrokke aand van diens af, in siviele klere, en saam met 'n vriend voor 'n sjebeen. M het uit die sjebeen gekom en met K se vriend handgemeen geraak. K wou M arresteer en het onder andere 'n skoot in die lug afgevuur. Die eiser, 'n buitestander, het op die toneel afgekom, gesien hoe M weghardloop, en bewus geword dat K en sy vriend met 'n byl op hom (die eiser) afstorm. Die eiser het die byl afgeneem en probeer

weghardloop maar is, nadat K uitgeroep het dat hy hom arresteer, deur K in die rug geskiet. Daarna het K vir sy polisiekollegas gewag en die eiser aan hulle oorhandig.

Appèlregter EM Grosskopf beslis dat hoewel K van diens af en in privaatklere was, hy bevoeg was om as polisieman op te tree waar omstandighede dit noodsaak. Die omstandighede dui ook daarop dat dit deurgaans K se bedoeling was om sodanig te handel. Gevolglik beslis die hof tereg dat hy in die uitvoering van sy diens opgetree het en dat die stadsraad middellik aanspreeklik is:

> "It seems to me to be very strong inference that, in acting as he did, [K] was not only purporting to perform his duties as a policeman, but also intended to perform them. A policeman, when in the presence of a fight, is clearly entitled and expected to restore order, and this is in essence what [K] did in the present case" (28G).
>
> "My conclusion from the evidence as a whole is accordingly that [K] was, from the time of the incident with [M], purporting to act as a policeman. Since his intention can in the present case only be deduced from his actions, and since there is nothing to suggest that his conduct was a mere charade designed to conceal ulterior motives . . . it seems to me that we should infer that, as a fact, he also intended to act as a policeman. This would then mean that, in shooting the appellant, he acted in the course and scope of his duties as a servant of the respondent, and that the respondent would be vicariously liable for his delict" (31G – I).

Afgesien van die toepassing van die standaardtoets, dui appèlregter Jansen in die *Rabie*-saak *supra* 134 ook aan dat die kwessie of die werknemer binne die perke van sy diensbetrekking opgetree het, op die basis van risikoskepping deur die werkgewer beoordeel kan word:

> "By approaching the problem whether [an employee's] acts were done 'within the course and scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and [his] work, to the dominant question whether those acts fall within the risk created by [his employer]."

Die vraag is nou presies wat die verband tussen risikoskepping en die sogenaamde standaardtoets vir middellike aanspreeklikheid is, naamlik of dit binne die konteks van die standaardtoets opereer, dan wel of dit as 'n selfstandige skuldoorsaak, onafhanklik van die standaardaanspreeklikheidskriteria vir middellike aanspreeklikheid, moet dien.

Dié probleem is in die *Ngobo*-saak op die spits gedryf. Hier het die eiseres, wat die Minister van Polisie middellik aanspreeklik wou stel, skadevergoeding weens verlies van onderhoud geëis omdat haar seun na bewering deur polisiemanne doodgeskiet is. Die seun en twee vriende was na 'n huweliksonthaal laatnag in 'n onderonsie betrokke met twee polisiemanne wat van diens af was. Albei het hul diensrewolwers by hulle gehad en skote afgevuur. 'n Koeël uit een se rewolwer het die seun noodlottig getref.

Die vraag was of die polisiemanne in die uitvoering van hul diensbetrekking opgetree het. By die toepassing van die standaardtoets antwoord die hof ontkennend: die polisie was tydens die voorval van diens af en in privaatklere; hulle het nooit voorgegee of beoog om polisiewerk te doen nie; en hulle het sonder rede na vuurwapens gegryp tydens die skermutseling wat onnodig plaasgevind het. Gevolglik was hulle "in no sense engaged in the affairs" van die minister (828C). Volgens die hof was die enigste verband tussen hulle optrede en hulle dienswerk, die gebruik van die vuurwapens wat hulle gemagtig was om te besit. Hierdie feit is volgens appèlregter Kumleben egter nie op sigself voldoende om die vereistes van die standaardtoets te bevredig nie.

Die eiseres voer desnieteenstaande aan dat die standaardtoets aansienlik deur die vermelde risikoskepping-toets van die *Rabie*-saak *supra* uitgebrei is. Die uiteindelike argument is trouens dat die standaardtoets deur die risikoskepping-toets vervang moet word. Daar word naamlik aangevoer (832E – F) dat

> "considerations of 'social policy' should prompt this Court to accept the creation of risk as the basis and determinant for vicarious liability with the requirement of reasonable foreseeability of risk serving as the factor limiting the scope of such liability".

Die betoog kom met ander woorde daarop neer dat die bestaande middellike aanspreeklikheidsgrondslag vervang moet word deur risikoskepping as nuwe, selfstandige bron vir aanspreeklikheid.

Die hof beslis eerstens, onses insiens tereg, dat die *Rabie*-saak nooit bedoel het om die standaardtoets deur risikoskepping te vervang nie (en indien dit wel die bedoeling was, was die saak verkeerd beslis) (830 – 832). Voorts bevind regter Kumleben, anders as wat deur Van der Walt 1988 *THRHR* 515 517 en Scott 1979 *CILSA* 44 49 – 50 64 (sien ook *Middellike aanspreeklikheid in die Suid-Afrikaanse reg* (1983) 35 – 68) aan die hand gedoen is, dat daar ook nie voldoende regverdiging bestaan om 'n nuwe skuldoorsaak gebaseer op risikoskepping in die lewe te roep nie (833G – H):

> "To my mind the standard test adequately serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person, who might otherwise not be recompensed. Whilst one cannot gainsay the difficulty of applying the standard test in certain cases, the indeterminacy of the elements of the proposed alternatives suggests that their adoption would not make the task of determining liability any easier."

Die vraag is nou hoe die kwessie van risikoskepping in verband met die middellike aanspreeklikheid van die werkgewer vir die optrede van sy werknemer verstaan moet word. Onses insiens kan risikoskepping op twee vlakke ter sprake kom. Eerstens dien dit as 'n algemene verklaring vir die behoefte aan skuldlose of strikte aanspreeklikheid in die onderhawige verband. Verskeie teorieë is al in die verlede aangevoer waarom die werkgewer middellik aanspreeklik is (sien Neethling, Potgieter en Visser *Deliktereg* (1992) 365). Die bekendste hiervan is dat die heer se aanspreeklikheid op sy *eie skuld* berus (*culpa in eligendo*, dws skuld in die keuse van 'n werknemer) (sien nietemin *Feldman (Pty) Ltd v Mall* 1945 AD 733 738; *Ables Groceries (Pty) Ltd v Di Ciccio* 1966 1 SA 834 (T) 839). Ander teorieë is die *belange- of profytteorie* waarvolgens die heer as korrelaat vir die voordele van sy dienaar se dienste, ook die laste moet dra (*RH Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd* 1992 3 SA 907 (K) 908); die *identifikasieteorie* waarvolgens die dienaar net die arm van die heer is; en die *solvensieteorie* waarvolgens die heer aanspreeklik is omrede hy finansieël gewoonlik sterker as die dienaar is (*De Welzim v Regering van KwaZulu* 1990 2 SA 915 (N) 921). Alhoewel al hierdie teorieë waarheidsmomente bevat (sien Van der Walt 1967 *THRHR* 70 – 76), toon Scott *Middellike aanspreeklikheid* 30 ev, veral 37 ev, oortuigend aan dat die *risiko- of gevaarteorie* (vgl Neethling, Potgieter en Visser 354 – 355) die ware regverdiging vir die heer se aanspreeklikheid verskaf. Die werk wat aan 'n werknemer toevertrou word, skep naamlik bepaalde risiko's van benadeling (die pleeg van delikte) waarvoor die werkgewer op grond van billikheid en regverdigheid in besondere omstandighede teenoor benadeelde buitestanders aanspreeklik gehou behoort te word.

Hierdie algemene verklaring vir skuldlose middellike aanspreeklikheid op grond van risikoskepping beteken egter geensins dat risikoskepping nou tot selfstandige eisgrond naas die tradisionele middellike aanspreeklikheid erken behoort

te word nie. Ons vereenselwig ons dus ook in hierdie verband met regter Kumleben se uitspraak in die *Ngobo*-saak. Al rol wat risikoskepping in die onderhawige verband *de lege lata* te speel het, is, soos reeds in die *Macala*-saak 441D – E aangedui is (en waarna met goedkeuring in die *Ngobo*-saak 832B verwys is)

> "that the 'creation of risk' principle is directly related to the enquiry as to whether the policeman was acting in the course and scope of his employment as such".

Baie kortliks gestel, het in die *Macala*-saak 'n munisipale polisieman die eiser in die maag geskiet toe hy 'n toilet wou besoek in 'n huis waar die polisieman in 'n redetwis met 'n besoeker van 'n vrou in die huis betrokke was. Alhoewel die polisieman sy polisie-uniform aangehad en sy amptelike vuurwapen gebruik het, was hy van diens af. Appèlregter Goldstone gaan van die standpunt uit dat die standaardtoets toegepas moet word (441B):

> "In other words the cardinal question is always whether the policeman is acting in the course and scope of his employment as such and, in order to find that he was so acting, his acts must have some connection to policework, whether subjectively or objectively viewed."

Die hof bevind dan dat daar geen getuienis was dat hy subjektief bedoel het om as polisieman op te tree nie (hy het dit nooit gesê nie), en dat hy ook nooit inderdaad, objektief gesien, polisiewerk tydens die skietery gedoen het nie. Daar was volgens die standaardtoets dus nóg objektief nóg subjektief enige aanduiding dat hy binne sy diensbetrekking ("about the business of the respondent") opgetree het. Gevolglik besluit regter Goldstone (441G – H) dat die polisieman se

> "acts did not fall within the risk of harm created by the respondent in appointing him as a municipal policeman. *Whatever the limits of liability based on creation of risk in this context may be*, I have no doubt that the acts of [the policeman] do not fall within them. I have reached this conclusion with regret as the plaintiff was an unfortunate and innocent victim who sustained substantial damages by reason of the unlawful act of the respondent's employee".

Nou wil dit met die eerste oogopslag uit hierdie uitspraak voorkom of die appèlhof die omvang van aanspreeklikheid op grond van risikoskepping wil bepaal deur middel van die standaardtoets. So gesien, word in effek geen daadwerklike rol aan risikoskepping toegeken nie en kan dit net sowel gelaat word. By nadere ondersoek skep die gekursiveerde woorde in die laaste aanhaling egter tog die indruk dat risikoskepping wel die standaardtoets sou kon aanvul, alhoewel die regter hom nie oor die omvang daarvan *in casu* wou uitlaat nie. Hierdie uitleg sluit aan by appèlregter Jansen se benadering in die *Rabie*-saak *supra* waar hy risikoskepping beslis van die standaardtoets onderskei, maar hom eweneens nie oor die grense daarvan wou uitspreek nie.

Na ons mening kan die begrip risikoskepping tog in sekere gevalle 'n nuttige rol speel by die vraag of 'n werkgewer middellik vir die delik van sy werknemer aanspreeklik is. Dit is naamlik in die tipe geval waar die werkgewer aanspreeklik gestel is

> "even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – *although improper modes* – of doing them . . ." (*Feldman (Pty) Ltd v Mall* 1945 AD 733 774; sien ook die *Rabie*-saak *supra* 134; ons kursivering).

'n Interessante voorbeeld van sogenaamde "improper modes of doing work" het in sowel die *Hirsch*- as *Fawcett*-saak voorgekom. Die vraag was telkens of 'n werkgewer middellik aanspreeklik kan wees vir diefstal (opsetlike optrede) wat sonder sy medewete deur 'n onbetroubare werknemer vir laasgenoemde se

uitsluitlike eiegewin gepleeg is. In beide sake het die werknemers – sekuriteitswagte aangestel om diefstal te voorkom – van die goedere gesteel wat hulle veronderstel was om op te pas. In die *Hirsch*-saak, asook in die hof *a quo* in die *Fawcett*-saak (1991 2 SA 441 (ZH)), word bevind dat die werknemers binne die perke van hul diensbetrekking opgetree het omdat die diefstal "constituted a mismanagement in the performance of their work" (*Hirsch*-saak 649 652), of omdat dit so nou aan die werkgewer se werk verbonde was dat dit "may rightly be regarded as modes – although improper modes – of doing [the work]" (*Fawcett*-saak 448; sien ook die laaste aanhaling hierbo uit die *Feldman*-saak, asook die *Rabie*-saak *supra* 134 waar dieselfde *dictum* met goedkeuring aangehaal word). Die werkgewers word gevolglik aanspreeklik gehou. (In die appèl van die *Fawcett*-saak 432 word die beslissing van die hof *a quo* egter verwerp, hoofsaaklik op grond daarvan dat die diefstal van die werknemer beskou is as "an independent act for which the master is not responsible".)

Na ons mening is die eerste twee beslissings korrek, ook op die basis dat die sekuriteitsfirmas *die risiko geskep het* dat hulle werknemers onbetroubaar kan wees en daarom hulle werksomstandighede tot hulle eie voordeel kan misbruik. Risikoskepping verklaar die middellike aanspreeklikheid van werkgewers in hierdie gevalle onses insiens egter bevredigender as die verduideliking dat die werk wel gedoen is, maar op 'n onbehoorlike manier. Noukeurig beskou, het die werknemers hulle hoegenaamd nie, nie eers op 'n onbehoorlike wyse, met hulle werk besig gehou nie. Gevolglik behoort aanspreeklikheid weens "improper modes of doing work" glad nie onder die geldingsgebied van die standaardtoets geakkommodeer te word nie. Die enigste verband wat die werknemers se deliktuele optrede met hulle werk gehad het, was dat hulle werksomstandighede hulle in staat gestel of in die posisie geplaas het – en derhalwe die risiko geskep het – om 'n delik te pleeg. *Ons wil dus as algemene riglyn vir hierdie tipe gevalle aan die hand doen dat 'n werkgewer op grond van risikoskepping middellik vir die delik van 'n werknemer aanspreeklik is indien sy aanstelling en werksomstandighede hom sodanig in staat stel om die delik te pleeg dat dit sy werkgewer op grond van redelikheid, billikheid en regverdigheid toegereken moet word.* In hierdie verband kan die blote feit dat die werknemer *aan diens was* toe die delik gepleeg is, 'n baie belangrike vingerwysing wees dat die delik weens risikoskepping die werkgewer redelikerwys toegereken moet word. (Die aan-diens-wees-riglyn kom vanselfsprekend net ter sprake in gevalle waar die werknemer se optrede hoegenaamd nie met die uitvoering van sy werk verband hou nie en daarom streng gesproke buite die trefwydte van die tradisionele toets val.) Waar die dader tydens delikspleging *nie* aan diens was nie, behoort middellike aanspreeklikheid net te volg indien daar ander faktore is wat die hof oortuig dat die delik desnieteenstaande die werkgewer toegereken moet word; omgekeerd kan daar natuurlik ook gevalle voorkom waar dit onredelik sou wees om die werkgewer, ongeag die feit dat die werknemer aan diens was, aanspreeklik te hou. Die besondere omstandighede van elke geval moet telkens in ag geneem word. Hierbenewens behoort die howe voortdurend voor oë te hou dat werkgewers, veral in die huidige ekonomiese tydvak, nie as versekeraars vir die delikte van hulle werknemers beskou moet word nie. Daar behoort dus in gevalle waar die werknemers nie aan diens was nie, nie ligtelik 'n bevinding van middellike aanspreeklikheid gemaak te word nie.

Uit die voorafgaande volg dat risikoskepping dan eintlik 'n beter verklaring bied vir die beleidsbesluit om middellike aanspreeklikheid soms uit te brei na

gevalle (soos by die vermelde sekuriteitswagsake) waar daar 'n daadwerklike behoefte aan aanspreeklikheid buite-om die standaardtoets bestaan.

Weens die soepele en algemene aard van die kriteria wat aan die hand gedoen word om aanspreeklikheid op grond van risikoskepping te vestig, is dit – afgesien van die voorgestelde riglyn dat die delik gepleeg moes gewees het terwyl die dader aan diens was – nie moontlik of selfs wenslik om die grense van sodanige aanspreeklikheid streng te omskryf nie. Dit is waarskynlik om hierdie rede dat appèlregter Jansen in die *Rabie*-saak *supra* 135 en appèlregter Goldstone in die *Macala*-saak 441 hulle nie oor vermelde grense wou uitspreek nie (sien ook die *Wilson*-saak 927E). Alhoewel verdere riglyne waarskynlik mettertyd in die regspraak sal uitkristalliseer, moet elke geval met inagneming van die betrokke omstandighede aan die hand van die aan-diens-wees-riglyn en algemene billikheidskriteria beoordeel word. (Terloops kan opgemerk word dat hierdie benadering nie die howe se taak behoort te bemoeilik nie aangesien dit immers nie moeiliker kan wees om hierdie beoordeling te doen as om vas te stel of 'n werkgewer vir 'n "improper mode of doing his work" van 'n werknemer aanspreeklik moet wees nie.) Ons beklemtoon by herhaling dat die risikobenadering nie aan die tradisionele vereistes vir middellike aanspreeklikheid afbreuk doen nie. Inteendeel, die standaardtoets behoort steeds die primêre rol te speel by die vraag of die werknemer die delik binne die perke van sy diensbetrekking gepleeg het. So gesien, funksioneer die risikotoets slegs aanvullend tot die standaardtoets. Dit sal uiteraard net gebeur in gevalle waar die optrede van die werknemer nie bevredigend aan die hand van die standaardtoets (subjektief of objektief) verklaar kan word nie en die standaardtoets as 't ware verwring moet word (soos in die sogenaamde "improper mode of doing his work"-gevalle) om die werknemer se middellike aanspreeklikheid te akkommodeer.

Om terug te keer na die benadering wat ons aan die hand doen, bied die *Ngobo*-, *Macala*-, *Wilson*- en *Dithipe*-saak voorbeelde van gevalle waar die dader (polisiebeampte) nie tydens delikspleging aan diens was nie en die werkgewer telkens nie middellik aanspreeklik gestel is nie. Daar is reeds na die *Ngobo*- en *Macala*-saak verwys; net laasgenoemde twee word vervolgens kortliks bespreek.

In die *Wilson*-saak het 'n polisiebeampte (A) in privaatklere die eiser by sy (A se) vorige vrou in die woonstel aangetref en hom gruwelik aangerand. Daarna het A die eiser tot in die straat gesleep en hom verder afgeransel. Eers toe 'n omstander wou inmeng, is hy deur A ingelig dat hy 'n polisiesersant is. Intussen het iemand die polisie gebel. Toe hulle daar aankom, het A die eiser na die vangwa geneem waar hy beveel is om in te klim. Na 'n relaas deur A se vrou van wat gebeur het, is die eiser losgelaat. Die vraag was of A in die uitvoering van sy diens opgetree het. Die hof antwoord ontkennend: A wou nooit die eiser arresteer of sy bevoegdheid as polisieman uitoefen nie maar het slegs sy hoedanigheid aan omstanders vermeld en versoek dat die polisie ontbied moet word as rookskerm om sy eie onregmatige geweldsuitoefening in persoonlike hoedanigheid teenoor die eiser te verbloem. Appèlregter Van Heerden (928B) bevind dat A se gedrag, toe hy voorgegee het dat hy as polisieman optree,

> "so ver verwyderd van die risikoskepping deur sy aanstelling as polisieman [was] dat die Staat nie daarvoor aanspreeklik gehou kan word nie".

Op 'n ander plek (927F – G) som die regter sy algemene benadering soos volg op:

> "Dit kom my dus voor dat . . . die verband tussen onregmatige benadeling deur 'n polisiebeampte vir sy eie doeleindes, *maar met aanwending van sy bevoegdhede*, en

die risikoskepping so skraal kan wees dat die staat nie middellike aanspreeklikheid oploop nie'' (ons kursivering).

Hierdie bevinding sluit aan by die benadering wat ons hierbo aan die hand gedoen het. Omdat daar geen twyfel bestaan nie dat A die aanvanklike aanranding in die woonstel in sy persoonlike hoedanigheid, onafhanklik van sy werk, gepleeg het (en die staat dus volgens die standaardtoets nie middellik aanspreeklik gehou kan word nie), kom die kwessie van risikoskepping eers ter sprake met betrekking tot die latere aanranding waartydens die eiser sy polisiehoedanigheid aan omstanders bekend gemaak het. In hierdie verband is die rookskerm wat hy opgewerp het om sy deliktuele optrede te probeer verberg, beslis onvoldoende (oftewel te ''skraal'') om sy werkgewer aanspreeklik te stel omdat hy in ieder geval nie eers aan diens was nie. (Vir sover die gekursiveerde woorde in die aanhaling die indruk skep dat die regter in verband met risikoskepping ook die begrip ''improper mode of doing his work'' in gedagte het, moet ons vroeëre opmerkings in hierdie verband, naamlik dat die dader hoegenaamd nie met die uitoefening van sy werk besig was nie, ook *in casu* voor oë gehou word.)

In die *Dithipe*-saak (vgl ook die feite van die *Ngobo*-saak hierbo) het die eiseres 'n eis teen die stadsraad ingestel vir skade wat sy gely het toe sy deur M, 'n munisipale polisieman, geskiet is. Dit blyk dat voor die skietery plaasgevind het, M in 'n sjebeen in 'n geveg betrokke was. Na die geveg is hy huis toe om sy vuurwapen te gaan haal wat deur die stadsraad aan hom uitgereik is en wat hy vir persoonlike beskerming in sy besit kon hou. By sy terugkeer by die sjebeen – sy idee was om wraak te neem – het M verskeie mense, waaronder die eiseres, verwond. Die vraag was of die stadsraad middellik vir M se optrede aanspreeklik was. Die eiseres het onder andere aangevoer dat die stadsraad aanspreeklik is omdat hulle deur die uitreiking van die vuurwapen 'n risiko van benadeling geskep het.

Die hof beslis dat die kwessie van risikoskepping net ter sprake kom indien dit vasstaan dat die werknemer se gewraakte optrede ''in *carrying on his work*'' gepleeg is (751C). Regter MacArthur verduidelik (751C – D):

> ''I emphasise those last four words because it cannot be correct that the employer bears an overall responsibility as soon as a servant uses, for example, a firearm provided by his employer. The employer's responsibility can only exist when the servant is carrying out the work of the employer. If it were not so, it would mean the employer remained liable for a servant to abuse his position of trust, and use the firearm, for example, to rob a bank.''

Die hof kom dan ook tot die slotsom dat aangesien M net wraak wou neem, sy optrede nie met sy werk verband gehou het nie en hy ook nooit bedoel het om as polisiebeampte op te tree nie. Gevolglik faal die beroep op risikoskepping en word die eis van die hand gewys (752A):

> ''The principle of a risk being created by the employer cannot apply in this instance, because he [M] was not ostensibly holding himself out as a policeman or 'carrying on his employer's work'.''

Terwyl met die uiteindelike bevinding van die hof akkoord gegaan kan word, wil ons tog 'n ander benadering tot die toepassing van die beginsel van risikoskepping aan die hand doen. Soos die regter hierdie beginsel toepas, naamlik dat dit slegs binne die trefgebied van die standaardtoets werking het, kon dit goedskiks daargelaat gewees het: alhoewel M sy diensvuurwapen gebruik het, is die staat volgens die standaardtoets nie middellik aanspreeklik nie omdat, soos die regter tereg uitwys, M nooit (subjektief) die bedoeling gehad het om as

polisieman op te tree nie, en sy optrede (objektief gesien) ook nie met die aard van sy werk verband gehou het nie. Volgens die benadering wat ons hierbo aan die hand gedoen het, kom die vraag na risikoskepping as *aanvullende* kriterium vir middellike aanspreeklikheid eers ter sprake nadat op grond van die standaardtoets bevind is dat aanspreeklikheid ontbreek. By hierdie aanvullende ondersoek is, soos gesê, die feit dat die dader *aan diens was* toe hy die delik gepleeg het, 'n sterk aanduiding dat die werkgewer op grond van risikoskepping middellik aanspreeklik gehou kan word. *In casu* was dit nie die geval nie en is die blote feit dat hy sy amptelike vuurwapen gebruik het, *redelikerwys* nie voldoende om sodanige aanspreeklikheid te vestig nie.

Ten slotte kan daar na die *Romansrivier*-saak verwys word. Hier het die eiser skadevergoeding geëis weens skade wat veroorsaak is toe 'n vragmotor van die verweerder wat filterpoeier vir 'n filter in die wynkelder van die eiser wou aflaai, die filter beskadig het. Die vragmotor is deur die bestuurder tot by die ingang van die kelder agteruitgestoot waar dit teen 'n skuinste gelaat is. Toe die vragmotor afgelaai moes word, was net die wag wat die bestuurder vergesel het, teenwoordig. Die wag het toe, instede van die bestuurder te laat haal, sonder om die enjin aan die gang te sit, self die vragmotor nader aan die filter laat tru om die vrag te laat aflaai. Hy het egter beheer oor die vragmotor verloor en die filter beskadig. Die verweerder word middellik aangespreek.

Dit blyk dat die wag nie 'n swaarvoertuiglisensie gehad het nie en dat sy primêre taak die op- en aflaai van die vragmotor was. Desnieteenstaande bevind die hof dat sy bedoeling met die terugstoot was om die aflaaiproses te vergemaklik. Gevolglik kom sy poging om die vragmotor te laat tru sonder om die enjin aan te skakel, nie neer op 'n verlating ("abandonment") van sy voorgeskrewe taak, of so 'n afwyking daarvan, dat sy werkgewer kwytgeskeld kan word nie – sy optrede was trouens volgens regter Van Deventer deel van die risiko wat deur sy werk geskep is. Regter Van Deventer vat die regsposisie in die huidige verband soos volg saam (366A – F):

> "The test of a master's liability for a wrong committed by his servant in the course of unauthorised activity is not whether it occurred while the servant was engaged in his master's affairs.
>
> The question to be considered in the light of the facts in each case is whether the wrong was committed in the course of the servant's employment.
>
> The course or scope of a servant's employment is an expansive concept that encompasses such unauthorised acts as can be regarded as wrongful or unauthorised modes of performing an authorised task. In this respect, a subjective test may be appropriate, though not necessarily conclusive, for, if there is, objectively tested, a sufficiently close link between the servant's act for his own interests and purposes and his master's business, the latter may nevertheless be liable.
>
> The question ultimately resolves itself into one of degree. *What has to be considered in the final analysis is whether the servant's departure from the path of duty constituted such an abandonment of or deviation from his prescribed task as to disassociate his wrong from the risk created by his employment and exonerate his master from liability.*
>
> In each case a matter of degree will determine whether the servant can be said to have ceased to perform the functions to which he was appointed . . . or whether his unauthorised acts can be regarded as wrongful or unauthorised modes of performing his prescribed task.
>
> It stands to reason that the less precisely the scope of the servant's duties is defined, the more likely it becomes that a deviation from his prescribed duties will be regarded as merely an unauthorised mode of performing his authorised tasks" (ons kursivering).

By implikasie sluit regter Van Deventer aan by die benadering wat ons hierbo aan die hand gedoen het, naamlik dat risikoskepping in hierdie tipe gevalle 'n

beter verklaring vir middellike aanspreeklikheid bied as die "improper modes of doing work"-benadering. Voorts kan met die hof se bevinding dat die werkgewer hier aanspreeklik is, saamgestem word aangesien die werknemer deur sy werk in staat gestel is om die vragmotor ongeoorloof te bestuur en dit sy werkgewer redelikerwys toegereken kan word aangesien hy *aan diens was* tydens sy optrede, en die naderbring van die vragmotor boonop *in 'n mate verband gehou het* met sy primêre op- en aflaaitaak.

Samevattend Die beginsels wat hierbo met betrekking tot middellike aanspreeklikheid aan die hand gedoen is, kan soos volg saamgevat word: as uitgangspunt geld die *standaardtoets* met betrekking tot die vraag of die werknemer tydens deliktspleging binne die perke van sy diensbetrekking opgetree het. (Die ander elemente vir middellike aanspreeklikheid, naamlik dat daar 'n werknemer-werkgewer-verhouding moet bestaan het en dat die werknemer 'n delik moet gepleeg het, is nie nou ter sake nie). Aanvullend hierby kan voldoening aan die *risikoskepping-toets* – te wete dat die *werkgewer vir die delik van 'n werknemer aanspreeklik is indien sy aanstelling en werksomstandighede hom sodanig in staat stel om die delik te pleeg dat dit sy werkgewer op grond van redelikheid, billikheid en regverdigheid toegereken moet word* (en waar die feit dat die werknemer *aan diens was* toe die delik gepleeg is, *prima facie* op aanspreeklikheid dui) – middellike aanspreeklikheid vestig.

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DETERMINATION OF RENT BY ONE OF THE PARTIES

Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd
1993 1 SA 179 (A)

1 Introduction

The requirement that the performance must be determined or determinable from the lease agreement for the lease to be valid, is still applied to cases where the determination of the rent is left to the discretion of one of the parties. It is a general principle of the law of contract that the contents of an agreement must be either certain or ascertainable. If the performances are vague or indefinite the contract is void for vagueness; if a debtor is uncertain about the performance he must render and a creditor about the performance he is entitled to, there is no obligation. A court cannot order an uncertain performance. However, numerous agreements are concluded in which the parties do not specify explicitly what the duties of the parties are, but are nevertheless in agreement, since these duties are determined by what is customary between the parties or in the trade or industry concerned. Although it is permissible to leave the determination of the performance to a third party, the contract is considered invalid if it is

left to one of the parties to determine the rights and duties (cf *Theron v Joynt* 1951 1 SA 498 (A) and the references to *D* 45 1 17, *D* 45 1 46 and *D* 45 1 108 1). Therefore, contracts in which the contents of the performances are left by the parties to be negotiated at a later stage, or one party is given the discretion to decide what is to be performed, are invalid for vagueness. On the other hand, the South African courts are reluctant to declare void contracts which were clearly intended to be legally binding, and therefore attempt to find certainty in vagueness (cf Hutchison (ed) *Wille's principles of South African law* (1991) 424; Christie *The law of contract in South Africa* 2nd ed 111 *et seq*).

A distinction should be made between vagueness and the situation in which the determination of performance is left to the discretion of one of the parties. Common sense and practical reason dictate that there is no obligation in the first instance. However, this argument does not apply in the second case. It is not so much the uncertainty which renders the contract unenforceable as another reason: perhaps the fear of exploitation and unfairness?

In particular, where contracts are to operate over a long period in an inflationary economic climate, it is common practice to provide for an escalation clause whereby the performance agreed upon can be adjusted accordingly. However, these clauses must make the future performances objectively ascertainable and should not empower one of the parties to determine the adjustment unilaterally (Lubbe and Murray *Farlam & Hathaway: Contract – Cases, materials and commentary* (1988) 316; Hawthorne "The contractual requirement of certainty of price" 1992 *THRHR* 638).

The courts' attention has recently been drawn, in particular, to the validity of contracts in cases where the parties provide that the lessee will be held responsible for an increase in rent, where the increase occurs after the conclusion of the contract and its determination is alleged to be in the sole discretion of the lessor. The courts do not however, apply to these clauses the rule that performance must be certain or ascertainable, but find on the facts of each case that the future performance is objectively ascertainable without developing a set of principles according to which a particular method of determination of the performance can be judged. Therefore, where the performance is not definite, each contract runs a certain risk of being held void for vagueness.

2 Facts

Appellant and respondent entered into a lease agreement in terms of which the appellant let certain premises to the respondent. The initial lease was for a period of five years and the respondent had to pay a fixed but escalating rent. The agreement provided (in cl 8.5) that should charges for certain listed items be increased to exceed those in force at, or imposed after the date of commencement of negotiations, the appellant would be entitled to recover from the tenant 74,4% of these increments (181B – D). The items listed in clause 8.5 of the agreement included the following: rates and taxes; wages and payments regarding cleaning, gardening and security services; insurance premiums; and charges relating to the maintenance, repair and upkeep of the building and/or property; any levies, taxes or other charges imposed by any authority; the cost of electricity, water, gas, sanitary fees, refuse removal, domestic effluent used in or relating to the common areas; and any costs incurred in regard to the management, administration and letting of the building (cl 8.5.1 – 7 resp; 181G – C).

Three other clauses in the agreement require attention: clause 5.3 defines "common areas" as those portions of the building and property other than those actually let or capable of being let as determined by the landlord in its sole discretion (182C); clause 28 provides that the landlord shall take all such steps as it may consider necessary in its sole and absolute discretion for the maintenance and operation of the common areas (182D); and clause 29 provides that the nature of the services to be provided by the servants of the landlord or its agents, directors, contractors or representatives shall be at the sole discretion of the landlord (182E).

Two years after conclusion of the contract, the respondent sought an order in the Witwatersrand Local Division declaring the lease invalid, contending that the amounts which could become payable in terms of clause 8.5 constituted additional rent; that these amounts were neither determined in or determinable from the written agreement; that in consequence clause 8.5 was void and that it was not severable from the other provisions of the agreement (181D – F).

The court *a quo* held that some of the provisions of clause 8.5, read in conjunction with the other clauses mentioned, were invalid. Regarding the question of severability, the court held that if these provisions were invalid, the entire lease was invalid and the question of severability consequently irrelevant (181F). The respondent therefore succeeded in obtaining his declaratory order.

On appeal, Van Heerden JA assumed that the increased expenditure payable by the respondent did qualify as a component of the rent (182I). He also pointed out that although the court *a quo* relied on *Kriel v Hochstetter House* 1988 1 SA 220 (T), the provisions in that case differed in a number of respects from those listed in clause 8.5 of the case under discussion. It is important to note, however, that Van Heerden JA acknowledged that according to the approach adopted in the *Kriel* case, several of the provisions in clause 8.5 of the case presently under discussion would also have been invalid, since they conferred upon the appellant the power to determine the extent of the additional rent payable by the respondent (183C – D).

Counsel for the respondent contended that some of the provisions listed in clause 8.5 were invalid because it was left to the appellant to determine in its discretion any amounts of increased expenditure (184B). Van Heerden JA conceded that, subject to three qualifications, the extent of the respondent's liability may have been dependent upon the appellant: the fact that a specific share of the increased expenditure could be recovered from the tenant; the fact that the expenditure had to have been actually incurred by the landlord; and the fact that the tenant was only obliged to contribute to increased contractual expenditure incurred by the landlord after the date of commencement of negotiations in respect of the specific listed items (184C – E).

Regarding the question whether a provision in a lease is void merely because it confers upon the landlord a measure of discretion in determining the components of the rent payable by the tenant, Van Heerden JA referred to the opinion of some of the institutional authors – opinion to which he felt bound. According to Voet, De Groot, Van der Keessel, Van der Linden and Pothier, a sale/lease is invalid if the price/rent is to be determined by one of the parties to the agreement (185A – G). Van Heerden JA correctly identified the anomaly

that determination of performance by one of the parties voids the contract for vagueness:

> "I must confess to considerable difficulty in grasping why a price (or rent) to be fixed by one of the parties should be regarded as less *certain* than one to be determined by a third party. As a matter of logic it is also not clear to me why the requirement that a third party must act *arbitrio boni viri* . . . should not also govern the situation where it has been left to one of the parties to determine the price (or rent)" (185F).

In a comparative survey, Van Heerden JA very briefly referred to the position on certainty of performance in Germany, the Netherlands, Switzerland, Scotland and the United States of America. All these legal systems hold that a provision that allows one of the parties to an agreement to determine his or the other party's performance is valid, provided that the determination is made reasonably and equitably (185H – 186B). Van Heerden JA nevertheless considered himself bound by the views of the institutional authors that a sale/lease is invalid if the price/rent is to be determined by one of the parties to the agreement (186C) and continued by way of an ingenious interpretation, which runs as follows: the old authorities disapproved of a lease where the determination of the rent depended *entirely* (his emphasis) on the will of one of the parties. However, this was not the position *in casu* (186C – D), since the appellant cannot unilaterally impose an obligation upon the respondent under clause 8.5. In terms of this lease agreement there were three qualifications before the respondent could incur such liability (186F – J).

The judge found support for the view that an agreement is invalid only if the determination of the performance depends entirely upon the unfettered will of one of the parties in the distinction between a pure and a mixed potestative condition (the former being invalid, the latter not); in English case law (*Greater London Council v Connolly* [1970] 1 All ER 870 (CA) 876; *Re Knight, Ex parte Voisey* (1882) 21 ChD 442 (CA) 456); and in a clause often found in consent papers in matrimonial matters that all of the wife's future medical and hospital expenditure is to be paid by the former husband (187B – G). In respect of condition, it should be noted that the performance is determined or objectively determinable, but the condition imports an uncertainty by reference to some future event. Joubert *General principles of the law of contract* (1987) 170 states:

> "The uncertainty must be commensurate with the nature of an obligation. A promise to give another a stated sum of money if the promissor chooses is not a conditional promise at all but a statement of intention which creates no obligation, conditional or otherwise. But it may happen that the resolution of the uncertainty is within the power of the creditor."

However, the distinction between *si voluero* (invalid) and *si displicuisset* (valid) is tenuous. The relevant passage of the *Re Knight* case *supra* refers to *improvements* in regard to agricultural leases, namely to drainage, in which case the landlord does the necessary drainage and receives a certain percentage as remuneration or a rent increase. The analogy with matrimonial matters is suspect because of the special nature of the relationship in question.

After discussing the above analogies Van Heerden JA distinguished three categories of agreement where one of the parties to the contract has a discretion in determining the performance, namely where A has the right to claim expenditure from B, the determination of the extent and nature of which is completely within the discretion of A; where A is only entitled to recover reasonable expenditure (that is, expenditure which is objectively reasonable); and where A must

exercise an *arbitrium boni viri*, namely where B is liable only for expenditure which a reasonable man in A's position could have incurred (187I – 188B). An agreement falling into the first category may be void, since such an agreement would be against public policy (188C). Counsel for the respondent contended that the lease in the present case fell within the ambit of the first category and was consequently invalid (188C – D). This argument was based on clauses 28 and 29 which provided that the landlord had sole discretion in respect of maintenance and services. Van Heerden JA dismissed these clauses on procedural grounds as well as the argument that they were solely designed to limit the landlord's common-law liability (188D – H). He concluded that it was unnecessary to decide whether the respondent was liable for objectively reasonable increased expenditure or for expenditure incurred *arbitrio boni viri*, since on either construction most of the items listed in clause 8.5 were not objectionable (189C – D). He was furthermore of the opinion that although the decision in the *Kriel* case *supra* is not in conflict with the conclusions he came to, it should not be followed (189D). Van Heerden JA concluded (190F) that the application declaring clause 8.5 void for vagueness should be dismissed.

In respect of clause 8.5.6, which pertained to the cost of electricity, water and refuse removal relating to the common areas, counsel for the respondent relied on the definition of common area in clause 5.3 *supra*, contending that, since the appellant was entitled to determine the common area he was in a position to determine the charges (189F). On this point Van Heerden JA found for the respondent that clause 8.6.5 read in conjunction with clause 5.3 was void for vagueness (189D – I). However, it must be noted that clause 8.5.6 would have been acceptable had the words "determined by the landlord in its sole discretion" been deleted. The question is therefore whether the phrase is severable from the rest of clause 5.3 and the other provisions of the lease. Van Heerden JA found that the phrase is both grammatically and notionally severable and that severance would have had no effect on the character of the lease. This in turn leaves only the question whether the parties would have entered into the agreement if the phrase had been omitted (189J – 190A). On this point Heerden JA came to the conclusion that the deletion would not have had a prejudicial effect on the rights and obligations of the tenant (190C).

Finally, the question of public policy merits attention. Van Heerden JA also stated that there is no policy reason why such an undertaking (ie by one party to compensate the other for expenditure to be incurred by the latter, albeit in his discretion) should be void merely because it relates to the exercise of a discretion (187H). He supported this view with the oft-quoted *dictum* of Sir G Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 465:

> "[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."

However, a public policy based on the nineteenth-century so-called classical theory of contract, in which the ideal of individual autonomy was paramount and the function of the law restricted to ascertaining whether the minimum requirements for the creation of liability have been met, might not be considered apposite in the present case.

Strengthened in his convictions by the results of the comparative study, Van Heerden JA stated that, apart from the decision in the *Kriel* case *supra*, he was unaware of any other authority for the proposition that a provision that a party undertakes to compensate another for expenditure incurred by the latter in his own discretion, is invalid (187G).

Once again the Appellate Division has found on the facts of a particular case that a rent determination is not void for vagueness. As has happened in the past (cf Hawthorne 1992 *THRHR* 638 and the cases discussed there) the court in the case under discussion stated in an *obiter dictum* that it was unnecessary to decide whether the respondent is liable for increased expenditure which is objectively reasonable, or for expenditure incurred *arbitrio boni viri*, since on either construction, clauses 5.2.4 and 7 would be not objectionable (189D). Van Heerden JA went even further in admitting that

> "on the approach adopted by the Full Bench (in *Kriel v Hochstetter house supra*) clauses 8.5.2, 8.5.3, 8.5.4, 8.5.6, and 8.5.7 of the present lease would also be invalid because they confer upon the appellant the power to 'determine' the extent of additional rent payable by the respondent" (183C–D).

It appears that the time has come for a court to hold without reservation that a provision for reasonable rent is valid and not void for vagueness. Justification for such a finding is to be found in Roman-Dutch case law, the opinions of certain South African textbook authors, as well as comparative legal literature and the practical need for such an arrangement.

3 Roman-Dutch case law

Although the Roman-Dutch authors appear to have reiterated what is contained in Roman law as received, that sales or leases where no price or rent had been agreed upon or which made provision for a reasonable price were void for vagueness (cf Hawthorne 1992 *THRHR* 639 *et seq*), there is an indication that Roman-Dutch case law followed a different approach.

As discussed (cf *idem* 640) Bynkershoek relates a case which was heard before the Hooge Raad, in his *Observationes Tumultuariae* II 1558 (cf Erasmus, Van Warmelo and Zeffertt "Pretium certum and the Hooge Raad" 1975 *SALJ* 267 for the text, translation and discussion of the case). The question which arose in this case pertained to the fact that the contract made no provision for a price for gold and silver thread which had been purchased. The court held that since there was no agreement regarding the price it had to be fixed by judgment of the court (Erasmus *et al* 267). Bynkershoek (himself) was of the opinion that since the parties were in agreement that no price had been agreed to and that the accounts proved nothing, the price had to be determined *arbitrio boni viri*. He also believed that judgment should be given for an amount which fell somewhere between the amount claimed and the price at which the thread could have been bought from other sellers, as was suggested by one of the members of the "Raad" (cf *idem* 270). These authors are of the opinion that such a computation suggested an attempt to determine an amount which was fair and reasonable and come to the conclusion that the decision was one *boni viri arbitratu* (cf *idem* 270 271). In this case no price had been determined at the time of conclusion of the contract. The amount allowed to be recovered was not the usual or the market price but the reasonable price in the circumstances. Erasmus *et al* 271 are to be supported in their conclusion that

> "[t]his (that the amount recoverable was the reasonable price) is enough to throw doubt on the correctness of the view of some of the institutional writers, some modern writers,

> and our courts who say that such an agreement is unenforceable or void for uncertainty".

Moreover, as discussed in detail (by Hawthorne 1992 *THRHR* 645 *et seq* 647 *et seq*) and remarked upon by Van Heerden JA *supra*, it is a fact that in both Anglo-American law and continental codifications, provision had been made for the determination of a performance by one of the parties, as well as for contracts of sale without a price. Equitable manner of determination and reasonableness are requirements which indicate that inequity or unreasonableness, and not vagueness, form the basis of the prohibition "void for vagueness".

4 Opinions of South African textbook authors and positive law

Although case law supports the view that a contract to sell for a reasonable price is invalid (*Erasmus v Arcade Electric* 1962 3 SA 418 (T) 419G – 420B), there appears to be no unanimity on this point (cf *Genac Properties Johannesburg (Pty) Ltd v NBC Administration CC* 1992 1 SA 566 (A) 577C – D). Mackeurtan (*Sale of goods in South Africa* 5 ed 18) is of the opinion that the law on the point cannot be regarded as settled and Kerr (*The law of sale and lease* 27) states that "[w]hether or not the formula 'a reasonable price' is acceptable is debatable".

In *Genac Properties Johannesburg (Pty) Ltd v NBC Administration CC supra* Nicholas AJA made the interesting statement that

> "[t]here is no general agreement that a lease for a reasonable rent is invalid. The question is moot" (577F – G),

and that

> "[i]t is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid" (577G).

In the *Genac* case *supra* Nicholas AJA (577G – J) contrasted the opinions of Myburgh J (in *Adcorp Spares PR Ltd v Hydromulch Ltd* 1972 3 SA 663 (T) 668F – G) with those of Zeffertt ("Sales at a reasonable price" 1973 *SALJ* 113). According to Myburgh J, an agreement to pay a fair and reasonable price was too uncertain to give rise to a valid contract of sale. On the other hand Zeffertt 113 opines:

> "While it is clear law that the price will not be certain if it has either to be fixed by the parties themselves in the future, or by an unnamed third party . . . it does not follow that there cannot be a sale at a reasonable price: that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable in the circumstances of a particular agreement."

In another recent decision, *Lewis v Oneanate (Pty) Ltd* 1992 4 SA 811 (A), Lewis concluded an agreement in terms of which he purported to purchase the respondent company. The agreement made provision for the incorporation of terms which had not specifically been discussed, as well as for a term in which Lewis also reserved the right to make the acquisition in whatever corporate or trust structure he would be advised to. Lewis reneged on the transaction, after which the respondent company issued summons, claiming an order obliging Lewis to perform the obligations undertaken by him. Lewis excepted, amongst others on the ground that the agreement was void for vagueness, because of the uncertainty regarding the structure of the transaction and the fact that final documentation which could include terms which had not been decided upon could be included (814B – 816B). Nicholas AJA conceded that such a term could have

the effect that a binding contract did not come into existence (820J – 821A). However, the judge referred (821A – C) to *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA 81 (A) where Corbett JA made the following statement:

> "[T]he existence of such outstanding matters does not . . . necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand."

Nicholas AJA concluded that the term in question fell within the scope of Corbett JA's *dictum* (821C – D) and that the exception had been rightly dismissed (821E).

With respect, Corbett JA's *dictum* contrasts rather radically with the provisions of the agreement. Lewis reserved the right to make the acquisition in whatever corporate or trust structure he would be advised to have (815C – D). The effect of this provision was that the merx could have changed should Lewis have been advised to purchase the shares from a different company to the one originally agreed upon. In my opinion this is a contract which should definitely have been held to be void for vagueness. The fact that Nicholas AJA decided differently is once again indicative of the trend favouring a less restrictive approach to the interpretation of the requirement of certainty of performance.

5 Conclusion

In practice there is a need for more latitude in the determination of performance. This is illustrated by the fact that the majority of lease contracts often require the lessee to pay a *pro rata* percentage of the running and maintenance costs, the determination of which is actually left to the discretion of the lessor, as well as providing for renewal of the lease coupled with an escalation clause. In order not to be declared void for vagueness such clauses must be objectively ascertainable without any need for further negotiations between the parties. The fact that any provision which enables one of the parties unilaterally to determine a rent at the time of renewal invalidates the entire contract (*D* 45 1 17; *D* 45 1 46 3; *D* 45 1 108 1), raises the question whether the theoretical requirement of certainty meets the needs of legal practice. The courts have solved this problem by stretching the limits of the meaning of the term "objectively ascertainable". (Cf Hawthorne 1992 *THRHR* 638, the recent decisions in *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) and the *Genac* case *supra* in which this point is adequately proved.)

A basis for a more fluid approach to the certainty requirement can be found in both Roman-Dutch and modern South African case law. Bynkershoek's *Observationes Tumultuariae* II 1558 clearly provides scope for an interpretation recognising the validity of a contract in which provision is made for a reasonable price. Logic dictates that if, for example, a sale at a reasonable price is valid, the determination of performance by one of the parties to the agreement should not be objectionable if it is reasonable. This effectively eliminates the arguments of vagueness and unfairness which underlie the prohibition against the determination of performance by one of the parties. The performance can

be determined and may not be unfair. Apart from the Roman-Dutch authority, it is clear that the judges apply a variety of interpretive methods to achieve a more liberal application of the certainty of performance requirement. As Van Heerden JA pointed out (183C – D), if the present legal position in this regard had been consistently applied, this contract would not have survived the principle of "void for vagueness". It is to be hoped that, should an opportunity present itself to decide the question whether a performance is so uncertain as to cause a contract to be void for vagueness, recourse will be had to both Roman-Dutch law and comparative legal literature on the subject. In this way it should be possible to lay down as a general rule that a *reasonable performance* can be regarded as being a certain performance in that it is ascertainable, without the necessity of having to define the exact independent objective standard against which it must be measured. In this way parties to contracts could be accorded much-needed latitude in the determination of performance.

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CAUSATION AT THE DEATH?

Clarke v Hurst 1992 2 SA 676 (D)

1 Introduction

In 1988, Dr Fred Clarke suffered a cardiac arrest that restricted the blood supply to his brain. He was placed on a ventilator and resuscitated. He had, however, already suffered severe brain damage, and from that moment until mid-1992 he remained in a coma and was fed by means of a tube inserted through his nose into his stomach. During this period his already severely damaged brain continued to atrophy. He was described as being in a "persistent vegetative state" (PVS). In mid-1992, Dr Clarke's wife made an application *inter alia* for curial sanction of the removal of his food supply. The application was granted by Thirion J in *Clarke v Hurst*, and Dr Clarke's food supply was duly removed. He died some days later.

A reading of the decision reveals that Thirion J was concerned mainly with the unlawfulness of active euthanasia, in this instance the discontinuation of an artificial feeding regime. He concluded that such conduct was not unlawful in principle, since it would not violate "society's legal convictions" (702E). However, in an *obiter dictum*, the judge stated further that the applicant in this matter would – as a matter of policy – not be regarded in law to be the cause of Dr Clarke's death (702F 703E). According to him the cause of death would be the patient's original cardiac arrest. This note will briefly examine how Thirion J applied the law of causation to come to this conclusion.

2 The causal problem

When Thirion J granted the order, he made it plain that he believed that the person whom Mrs Clarke would instruct to remove the naso-gastric tube would not be the cause of her husband's death. Internalised in his reasoning is the "orthodox" dualistic test of causation, namely that for a person's conduct to be regarded as a cause of a consequence it must be both the factual, in the sense of a *sine qua non*, and the legal, in the sense of the imputable, cause of that consequence (see generally Burchell and Milton *Principles of criminal law* (1991) 91 – 105). On the question of factual causation Thirion J, referring to the similar situation dealt with by Rabie CJ in *S v Williams* 1986 4 SA 1188 (A), stated that

> "it seems obvious that the uncoupling of the ventilator accelerated the moment of death and therefore in a sense caused it. It is however clear that a factual causal connection is not enough to entail legal liability. *S v Mokgethi en Andere* 1990 (1) SA 32 (A)" (703C).

Thirion J therefore accepted that the removal of the naso-gastric tube from Dr Clarke would be the factual cause of his death. Thirion J's *obiter dictum* turns, however, on his conception of the test for legal causation. He pointed out that there is no agreement among the writers on the correct test for legal causation (703D). He then noted two of the many tests: (a) Glanville Williams's suggestion (*Textbook of criminal law* (1978) 381) that the test is not a test at all but, in the judge's words, a "moral reaction" which involves a "value judgment" as to whether a "result can fairly be said to be *imputable* to the defendant" (the judge's emphasis); and (b) the test of adequate causation advocated by Snyman. The latter test insists upon an adequate connection between cause and effect based on normal human experience (*Criminal law* (1988) 60). Against this background, Thirion J then concluded:

> "It appears, however, from *S v Mokgethi en Andere* (supra at 40) that matters of policy are also relevant to the enquiry and that the Court should guard against allowing liability to exceed the bounds of reasonableness, fairness and justice. So viewed, it would appear to me that the steps envisaged by the applicant would not in law be the cause of the patient's death" (703E).

Thirion J's conclusion appears to contradict the accepted legal position in such situations. The essence of the submission made by counsel for the Attorney General, who opposed the application, was that any act that hastened death – even if the patient's condition was terminal – would be both the factual and legal cause of death. In support of this proposition, counsel relied on the authority of *R v Makali* 1950 1 SA 340 (N) and *S v Hartmann* 1975 3 SA 532 (C). The *Hartmann* case is apposite in that it involved the "mercy killing" of a terminally ill cancer patient by his son, a medical doctor. In his decision in the *Hartmann* case Van Winsen J observed:

> "It is true that the deceased was in a dying condition when this dose of pentothal was administered and that there is evidence that he may very well have died as little as a few hours later. But the law is clear that it nonetheless constitutes the crime of murder even if all that an accused has done is to hasten the death of a human being who is to die in any event. See *R v Makali* 1950 (1) SA 340 (N). Here the state has proved that but for the accused's action the deceased would not have died when he did."

It is suggested that Thirion J avoided coming to a similar conclusion in the *Clarke* case by, in effect, placing the patient, because of his condition, in a position on the scale between life and death (in the sense of total extinction of all organic activity) beyond the limit where any further action could cause his death. To provide a foundation for this finding, the judge relied on the extreme example of *S v Williams* 1986 4 SA 1188 (A) as an illustration of a patient who was

not yet dead, but who was nevertheless beyond the point where further conduct could cause death.

3 Causation in *S v Williams supra*

The accused in this case had shot his victim in the neck. She was taken to a hospital and attached to a respirator which kept her breathing. When a CAT Scan indicated total inactivity in the brain stem, the respirator was switched off. Ten minutes later she ceased to breathe and her heart stopped beating. The appeal from a conviction of murder in the trial court was based *inter alia* on the submission that the disconnection of the respirator was a *novus actus interveniens* breaking the causal chain between the accused's conduct and the patient's death, and that such an action was a *sine qua non* of death itself. Rabie CJ declined to decide whether brain stem death should be accepted as death in law even though this is the accepted medical criterion and had been accepted by the trial court as the correct legal criterion (1194D). Although he decided the issue on the basis of the popular conception that death only occurs when the heart stops beating or breathing stops, somewhat contradictorily the Chief Justice did not give this popular conception his support either (1194E). Importantly, however, he did note that "morele of selfs godsdienstige oorwegings, asook *die opvattings van die gemeenskap*" (my emphasis) could be taken into account in deciding when death occurs for the purposes of the law (1194G). Rabie CJ rejected the argument that the switching off of the respirator was a *novus actus* (1195B). He reasoned that this act did not cause her death but merely terminated a fruitless attempt to save her life (1195C). What then did the doctor who disconnected the respirator do?: "Dr Buchmann het haar . . . nie gedood nie, maar hoogstens toegelaat om te sterf" (1193C). This apparently fine distinction was elucidated further by the Chief Justice's reference (1195G – 1196A) with approval to Lord Lane's statements in the English case of *R v Malcherek; R v Steel* 1981 2 All ER 422. In two similar situations where a similar contention was advanced by the defence, Lord Lane CJ said (429C – D):

> "Where a medical practitioner adopting methods which are generally accepted comes *bona fide* and conscientiously to the conclusion that the patient *is for practical purposes dead*, and that such functions that exist (for example, circulation) are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted injury from being responsible for the victim's death" (my emphasis).

Lord Land added (429E);

> "*Whatever the strict logic* of the matter may be, it is perhaps somewhat bizarre to suggest . . . that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient" (my emphasis).

By his unequivocal support for these statements Rabie CJ implied that he agreed with Lord Lane and the medical practitioners that brain stem death placed the patient in a position beyond the limit on the scale between life and the extinction of biological activity where further conduct by the doctor could cause death. In effect, he rejected the idea that a patient attached to a respirator whose brain stem was dead, could be killed by the switching off of that machine as "bizarre logic". Why is it bizarre? Avoiding discussion of whether such a symbiosis of man and machine can be termed "human", it is submitted that the general tenor of Rabie CJ's judgment in the *Williams* case *supra* and specifically his support

of the statements made by Lord Lane point to the reasoning that it is a matter of good public policy that doctors in such situations should be able to act unfettered by such "bizarre logic" which may have some appeal for sections of the public but which has little or no medical support. Thus we can conclude that Rabie CJ was driven by policy to conclude that the death of a patient in such a debilitated state cannot be caused by any further conduct. But it is submitted that this policy is underpinned by the Chief Justice's tacit acceptance that brain stem death is death for the purposes of the law of causation.

4 The resolution of the causal problem in *Clark v Hurst*

The difficulty for Thirion J was that Dr Clarke, unlike the victim in the *Williams* case, was not brain stem dead. It was thus uncertain because of Dr Clarke's less debilitated state, whether or not he was beyond the limit where further conduct could be recognised by law as able to cause his death. For Thirion J, the solution was to equate Dr Clarke's condition with a state very near death and thus to place him beyond that limit. When setting out the background to the case, the judge agreed with the factual finding of the neurologist who examined Dr Clarke while he was still being fed artificially that "biological life remains, but the patient does not experience it at all" (692C). He went on to say (701J – 702A):

> "The maintenance of life in the form of certain biological functions such as the heartbeat, respiration, digestion and blood circulation but unaccompanied by any cortical and cerebral functioning of the brain, cannot be equated with living in the human or animal context."

After referring to the detailed evidence of the patient's debilitated condition Thirion J concluded (702E):

> "In short, the (patient's) brain has permanently lost the capacity to induce a physical and mental existence which qualifies as human life."

Thirion J's argument therefore runs as follows: if the patient is in a state that does not qualify as human life, then no further conduct acting upon him can cause his death.

5 Causation and policy in *Clarke v Hurst*

The importance of Thirion J's judgment for the principles of causation is the way in which public policy was used to limit causal liability. Policy intruded by way of the enquiry into legal causation to allow someone who is at least biologically alive, to be considered to be partially dead or at most in a state of limbo between life and death. Once in this state, the conduct that finally causes the cessation of any remaining life is not deemed to cause or causally contribute to death. Thirion J cited the Appellate Division judgment in *S v Mokgethi* 1990 1 SA 32 (A) in support of his statement that "matters of policy are relevant to the enquiry" into the establishment of legal causation (703E). In *Mokgethi's* case, Van Heerden JA noted the flexibility of the test, and the relevance of policy considerations to determine "whether a sufficiently close causal connection between act and consequence exists" (40I – J). In *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) Corbett CJ also acknowledged this trend towards the open consideration of policy in establishing

legal causation. He quoted from Fleming (*The law of torts* 7th ed 173) as follows:

> "There must be a reasonable connection between the harm threatened and the harm done. This inquiry . . . involves a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter . . ."

Thirion J in the *Clarke* case accepted the value judgment that it was not only not unlawful to stop feeding Dr Clarke, but that one could not cause his death by doing so. In effect he found that the roots of the test for legal causation were planted in the same soil as the test for unlawfulness. Thirion J did not make this connection expressly, but his extensive reference to Rabie CJ's decision in the *Williams* case *supra* when discussing both unlawfulness and causation, and Rabie's own reference to "die opvattings van die gemeenskap" as being significant in the test for legal causation, makes the inference that such a connection exists easy to draw. Thus it is submitted that for both judges the roots of the test for legal causation and the basis for unlawfulness are "society's legal convictions" (Thirion J 702E).

6 Conclusion

Policy is a significant factor in establishing causation. And the law has been forced to use policy to guide it in novel situations now arising as a result of developments in medical science. Unfortunately, because of its inherent vagueness, policy tends to endanger the *certainty* of the principal function of the test for legal causation, that is, to limit causal liability once a factual causal link has been established between conduct and result. The policy-based approach to the test for legal causation is sure to throw up some peculiar results in difficult cases such as the *Clarke* case. Take the following hypothetical example: what would have happened had the person who removed Dr Clarke's feeding regime been acting maliciously? It is submitted that he would have been found to have been acting unlawfully, to have caused death and ultimately to be guilty of murder. The reason for this is that while "society's legal convictions" consider the removal of the feeding regime by a doctor (a) to be lawful and (b) not to cause death because it is medically-ethically justifiable, those same convictions are certain to find that someone who does not act for *bona fide* reasons would be (a) acting unlawfully and (b) would cause death. The accused's motive thus dictates the finding of whether he did or did not cause death.

One is forced to question whether the ever greater intrusion of policy into causation is to be welcomed. What, for instance, is the basis of the policy to be applied? There will always have to be a strong evidential basis such as the very clear medical evidence of Dr Clarke's debilitated condition upon which the courts will make their policy choice. But how are the courts to decide what "society's legal convictions" are about this evidence? Must public opinion be surveyed? And which society are we referring to in a heterogeneous country like South Africa? Perhaps we are just one step away from applying the reasonable-man test, a more familiar cloak over the judicial officer's own predilections, to establish causation? It would be better, it is submitted, for the South African courts to adopt Lord Goff's approach in the recent House of Lords decision *Airedale NHS Trust v Bland* Times Law Report 1993-02-05, that it is "the law" that must provide "authoritative guidance" in such cases. Thus the "value judgment" that would be applied would not be the indiscernible

reaction of an indefinable community, but the more gaugeable reaction of a member of the judicial community, that is "the law's" convictions.

In the *Airedale* case, the House of Lords, also faced with an application to discontinue naso-gastric feeding to a patient in a PVS, appeared, according to the summary of their findings, to concede that the "discontinuance of the treatment would cause the patient's death within a matter of weeks", a concession they made because they found that the patient was still alive as his brain stem was still functioning. By contrast, as noted above, in the *Clarke* case Thirion J relied on the device of situating Dr Clarke in a position on the scale between life and death beyond the limit where further conduct could cause his death, to avoid the finding that the removal of the feeding regime could cause death (in the sense of legal causation). In doing so Thirion J placed Dr Clarke in the same category as the victim in the *Williams* case *supra*. It is submitted that Thirion J should have adopted a similar approach to the House of Lords and accepted that death meant brain stem death and that Dr Clarke did not belong in the same category as the victim in the *Williams* case *supra*. Interestingly, Hart and Honore (*Causation in the law* (1985) 345 – 346) have this to say on the subject:

> "In that case [brain-stem death] it may be said that a doctor who discontinues life support . . . has discontinued support to a person already dead, so that his act cannot amount to homicide. On that view, if it was the accused who inflicted on the patient the injuries which resulted in brain stem death, the latter intervention of the doctor can afford no defence on a charge of homicide. It cannot negative causal connection between the act of the accused and the patient's death because the patient is already dead when the doctor terminates the life support system. Whether it should be a crime of some sort for an unauthorized person to terminate the life support of an 'irreversible' is debateable. Such an act should not be regarded as homicide, since a body which cannot regain the exercise of its directive functions is effectively dead. It would be different if the patient, though in a coma, had not suffered brain stem death, since there is always a possibility in such a case that an individual may recover the control of his directive functions."

Hart and Honore equate irreversible condition with brain stem death. If Thirion J had followed such an approach, he would then have done a number of things, namely:

(a) accepted for legal purposes that brain stem death meant legal death and vice versa, which would have lent legal weight to the general medical view and led to greater certainty in this area of law;

(b) accepted that the removal of the feeding regime could still have caused Dr Clarke's death; and

(c) confined the question of society's legal convictions to the issue of unlawfulness and not applied them (tacitly) in the context of causation where they are out of place in what should be – at least in the main – an objective inquiry and in a situation where their application is sure to lead to some absurdity or incongruity. The more policy intrudes into the test for causation, the greater the uncertainty. Such uncertainty may result in increased support for the extreme position held by De Wet and Swanepoel (*Strafreg* (1985) 64) that the only test for causation is the test for factual causation:

> "Die vraag of die gevolg 'voorsienbaar' was of 'n 'natuurlike' of 'waarskynlike' of 'normale' gevolg van die handeling was, het met die vraag of die toestand 'n gevolg van die handeling is, niks te maak nie, maar kan van belang wees by die bepaling of die persoon opsetlik of uit onagsaamheid gehandel het."

It is submitted that we need not go as far as De Wet and Swanepoel. However, liability can be effectively limited in other ways, for instance by finding a lack of fault or, as in the *Clarke* case, by the finding that the doctor's conduct is justifiable in medical-ethical terms and is therefore not unlawful for policy reasons. "The law" should resort directly to policy to decide an issue of causation only when it has no alternative.

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Mr Kuschke *for the excipient urged us to curtail rather than extend liability. He emphasised that our Courts have been avowedly conservative in extending the Aquilian action to cases involving pure economic loss . . . This is broadly speaking correct, but one should remember that we are 10 years wiser now and that Courts nowadays are a great deal more comfortable with the notion that a decision on the wrongfulness of an act or omission in a novel duty situation, whether in the field of physical damage or economic loss, is custom-made for that particular situation* (*per* Conradie J in *Kadir v Minister of Law and Order* 1992 3 SA 737 (C) 742).

BOEKE

INSOLVENCY LAW AND ITS OPERATION IN WINDING-UP

deur PM MESKIN (bygestaan deur JA KUNST)

Butterworths Durban 1990; xi en 795 bl

Prys R180,00 (BTW uitgesluit)

Hierdie werk is die eerste losblad-uitgawe oor die insolvensiereg. Dit is ook die eerste werk waarin gepoog word om die insolvensiereg ten opsigte van sowel individue as regspersone in een werk te kombineer. Bloot om hierdie redes moet die skrywers se arbeid verwelkom word as 'n nuttige toevoeging tot die literatuur oor die onderwerp. Ek mis egter 'n bespreking van die *gronde* vir likwidasie van maatskappye en beslote korporasies. Dit is natuurlik so dat sommige van die gronde vir likwidasie nie verband hou met insolvensie as sodanig nie, maar daarsonder kom die hele uiteensetting, sover dit regspersone betref, onvolledig voor. Die werk skyn hoofsaaklik op die praktisyn gemik te wees. Op enkele uitsonderings na, is daar feitlik geen verwysing na literatuur in regstydskrifte nie terwyl die verwysings na regspraak baie volledig is. Die tegniese versorging is uitstekend. Spel-, skryf en drukfoute is so te sê heeltemal afwesig.

Om 'n werk van hierdie omvang te resenseer, is nooit maklik nie. Daar is baie aspekte waaroor 'n mens 'n stuiwer in die armbeurs kan gooi, maar dit sou die perke van 'n bespreking oorskry. Ek volstaan dus met 'n paar opmerkings oor aspekte wat my spesifiek opgeval het. Oor die algemeen kan gesê word dat die onderwerp behoorlik gedek is. Tog mis 'n mens 'n bespreking van tersaaklike bepalings van die Landbankwet 13 van 1944 en die Wet op Landboukrediet 28 van 1966.

'n Opvallende kenmerk is die laaste hoofstuk van die werk. Dit bevat 'n besonder volledige uiteensetting van die talle misdade wat in verband met insolvensie gepleeg kan word. Die skrywers het egter nagelaat om in die jonste vervangingsbladsye daarop te wys dat die voorgeskrewe strawwe vir sommige van hierdie misdade (sien bv par 16 1 5 20, 16 1 5 23, 16 1 5 25 en 15 1 5 27) deur die Wet op die Aanpassing van Boetes 101 van 1991 beïnvloed word.

Dit is bekend dat artikel 17(4) van die Wet op Huweliksgoedere 88 van 1984 heelwat praktiese probleme oplewer vir die sekwestrerende skuldeiser wat nie weet ingevolge watter bedeling sy skuldenaar moontlik getroud is nie (vgl *Du Toit v Du Toit* 1985 3 SA 1007 (T); *Acar v Pierce* 1986 2 SA 827 (W); *Trust Bank van Afrika Bpk v Meintjies* 1990 2 SA 268 (T)). In *Detkor (Pty) Ltd v Pienaar* 1991 3 SA 406 (W) het 'n Transvaalse volbank uiteindelik beslis dat 'n sekwestrasiebevel wel verleen mag word indien daar geen aanduiding op die stukke is dat artikel 17(4) moontlik van toepassing is nie. Die skrywers (par 2 1 6) wil nog verder gaan en die bevel verleen al blyk daar twyfel uit die stukke voor die hof, mits die hof oortuig is dat die applikant nie redelikerwys kon vasstel wat die posisie is nie. Dit kan nog aanvaar word maar nie die verdere standpunt dat die bevel steeds geldig sal wees as dit later blyk dat artikel 17(4) wel van toepassing was, maar die ander eggenoot nie gevoeg is nie. Dit sou eenvoudig van artikel 17(4) 'n dooie letter maak (sien ook die opmerkings in die *Detkor*-saak 411G).

Paragraaf 5 3 handel oor goed wat by sekwestrasie aan die insolvent behoort en van die insolvente boedel uitgesluit is. Artikel 12 van die Wet op die Beheer oor Trustgoed 57 van 1988 moes beslis hier aandag gekry het, en veral die vraag of artikel 12 enigsins deur artikel 11 gekwalifiseer word of nie (vgl Honoré en Cameron *Honoré's South African law of trusts* (4e uitg) 473 – 480).

By die uitreiking van die jongste vervangingsbladsye is nie daarvan kennis geneem dat die bedrae wat in artikels 39, 42 en 44 van die Versekeringswet vermeld word, deur die Tweede Wysigingswet op Finansiële Instellings 119 van 1991 verhoog is nie (par 5 3 2 1B). In par 5 3 2 1H word die stelling gemaak dat artikel 44 van die Versekeringswet (in verband met versekeringspolisse wat die insolvent aan sy vrou gesedeer of ten gunste van haar uitgeneem het) onderworpe aan artikels 26 en 27 van die Insolvensiewet geld. Die enigste gesag wat hiervoor aangehaal word, is Gordon en Getz *The South African law of insurance* (3e uitg) 334-335. Hoewel die punt, sover ek weet, nog nie deur 'n hof beslis is nie, is die teenoorgestelde standpunt wat deur die meerderheid skrywers ingeneem word meer oortuigend (vgl De Wet en Van Wyk *Kontraktereg en handelsreg* (4e uitg) 476 vn 459 en skrywers daar aangehaal).

In paragraaf 5 21 1 maak die skrywers die interessante stelling dat wanneer die kurator 'n kontrak repudieer wat nog nie ten tyde van sekwestrasie ten volle uitgevoer is nie, die ander party in werklikheid nie 'n keuse het oor die vraag of hy die repudiëring wil aanvaar of nie. Hulle meen dat so 'n keuse 'n reg op spesifieke nakoming teenoor die kurator veronderstel, en sodanige reg bestaan natuurlik nie. In effek kom hulle standpunt dus daarop neer dat die kurator se repudiëring wel die kontrak ontbind, maar hierdie standpunt is in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) deur die appèlhof verwerp. Omdat die appèlhof se uitspraak swyg oor die presiese gevolge indien die solvente party nie die repudiëring aanvaar nie, kan aanvaar word dat hierdie kwessie nog lank nie afgehandel is nie. Vir sover die skrywers se standpunt daarop neerkom dat die solvente party outomaties verplig is om enige deel van die insolvent se prestasie wat hy moontlik reeds ontvang het, terug te gee wanneer die kurator repudieer, is dit klaarblyklik onaanvaarbaar.

Artikel 27 van die Wet op Vervreemding van Grond 68 van 1981 verleen aan die koper van grond wat die koopprys in paaiemente betaal, die reg om oordrag te eis nadat hy minstens 50 persent van die koopprys in sodanige paaiemente betaal het. Die voorwaarde is dat 'n eerste verband ten gunste van die verkoper ter versekering van die res van die prys en rente gelyktydig met die transport geregistreer word. In navolging van Mars *The law of insolvency in South Africa* (8e uitg deur De la Rey) 150 (en skynbaar ook Smith *The law of insolvency* (3e uit) 158 – 159) meen die skrywers (par 5 21 7 2 (*a*)) dat hierdie reg ook teen die kurator van die insolvente verkoper afgedwing kan word. Hierdie standpunt is heeltemal onaanvaarbaar. Die artikel kom nie in die Insolvensiewet voor nie en 'n mens kan dus nie aanvaar dat die gewone beginsels van toepassing by insolvensie nou sommer oorboord gegooi moet word nie (sien ook tereg De Wet en Van Wyk 465 vn 397 in verband met die voorganger van hierdie bepaling). Die skrywers se standpunt kom daarop neer dat een bepaalde soort kontraktant by die insolvensie van sy teenparty voorkeurbehandeling kry sonder dat die betrokke wetgewing vir so 'n voorreg voorsiening maak. Nog 'n fout wat die skrywers in verband met artikel 27 maak, is om te aanvaar dat dit slegs van toepassing is op kontrakte waarop hoofstuk II van die Wet op Vervreemding van Grond *nie* van toepassing is nie. Wat die oorsprong van hierdie foutiewe gevolgtrekking is, is vir my duister.

In paragraaf 5 2 1 8 2(b) word gesê dat die Engelse teks van die omskrywing van "afbetalingsverkooptransaksie" in artikel 1 van die Wet op Kredietooreenkomste 75 van 1980 van die Afrikaanse teks verskil. Ek kan geen verskil in bewoording bespeur nie. Volgens die skrywers beteken die (ondertekende) Afrikaanse teks dat die omskrywing betaling in paaiemente vereis. Hoewel daar ander skrywers is wat ook hierdie standpunt huldig (vgl bv Otto "Statutêre regulering van kredietooreenkomste: 'n kritiese evaluering" 1985 *TSAR* 19 – 20), is die omskrywing na my mening duidelik wyd genoeg

om betaling van die koopprys in een bedrag op 'n toekomstige datum te dek (sien ook Mars 151; Forder "Insolvency of the hire-purchase seller: concursus creditorum, ownership and possession" 1986 *SALJ* 84 vn 10). In paragraaf 5 21 9 2(b) volg die skrywers diegene wat meen dat die kurator van die insolvente boedel van 'n verkoper van roerende goed op afbetaling met voorbehoud van eiendomsreg, nie die koopsaak van die koper kan opeis nie (sien bv Du Plessis "The insolvency of the seller on hire-purchase of movables" 1978 *SALJ* 574). Hierdie standpunt verloor uit die oog dat die kurator nie tot spesifieke nakoming gedwing kan word nie, en dat die kontrak na sekwestrasie dus ook nie meer as 'n verweer teen die kurator se *rei vindicatio* kan dien nie (vgl Mars 151; Smith 169 – 172; De Wet en Van Wyk 469).

In paragraaf 5 30 3 word gesê dat artikel 21(5) van die Insolvensiewet van toepassing is indien die solvente eggenoot se aansoek om vrylating van goed ingevolge artikel 21(4) van die hand gewys word. In *Constandinou v Lipkie* 1958 2 SA 122 (O) is tereg beslis dat artikel 21(5) nie in so 'n geval van toepassing is nie, aangesien die beslissing van die hof tog beteken dat die goed inderdaad deel van die insolvente boedel uitmaak en nie aan die solvente eggenoot behoort nie. In voetnoot 9 sê die skrywers dat die *Constandinou*- beslissing verkeerd is maar hulle wend geen poging aan om te sê waarom nie. In paragraaf 5 30 5 word met goedkeuring na *Coetzer v Coetzer* 1975 3 SA 931 (OK) verwys. Daarin is beslis dat die solvente eggenoot wat ingevolge artikel 21(4) vrylating van goed eis, nie kan volstaan met die bewys van een van die gronde in artikel 21(2) vermeld nie indien die kurator beweer dat die goed in elk geval ingevolge 'n vernietigbare regshandeling verkry is. Hierdie foutiewe standpunt is by implikasie in *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (K) 561G – 562A verwerp. Daar moet egter toegegee word dat die kwessie in *Snyman v Rheeder* 1989 4 SA 496 (T) 506A – B oopgelaat is.

In paragraaf 9 1 2 4 word gesê dat die aanspreeklikheid van iemand wat hom as borg en medehoofskuldenaar verbind het, onvoorwaardelik is. Die beslissing waarop gesteun word, huldig wel hierdie standpunt maar daar is ook (meer oortuigende) gesag tot die teendeel (vgl die aantekening in 1988 *MB* 52). Per slot van rekening is 'n borg slegs aanspreeklik indien die hoofskuldenaar nie betaal nie en dit is sonder twyfel 'n onsekere toekomstige gebeurtenis.

In paragraaf 10 2 (vgl par 5 21 6 1) word verwys na die situasie waar 'n huurkontrak oor onroerende goed bestaan ten tyde van die sekwestrasie van die verhuurder se boedel. Die volgende stelling word in hierdie verband gemaak:

> "Given that the property is leased but not mortgaged, it may (at any rate, theoretically) occur that the trustee is unable to sell the property, ie, by auction or private treaty (not even at a nominal amount to the lessee). In such a case, it is submitted that the trustee has an election to terminate the lease: he cannot be obliged to continue the administration simply in order to enable the lessee to continue to enjoy the benefit of the lease."

Geen gesag word hiervoor aangehaal nie en 'n mens kan wel vra wat dan nou van *huur gaat voor koop* geword het.

Hoofstuk 13 handel oor akkoord. In paragraaf 13 1 1 word gesê dat slegs bewese *konkurrente* skuldeisers oor 'n akkoord kan stem. Dit lyk miskien logies dat dit so moet wees aangesien skuldeisers deur 'n akkoord gebind word slegs vir sover hulle eise nie verseker of andersins preferent is nie, tensy 'n skuldeiser skriftelik afstand doen van sy preferensie (a 120(1)). Die effek van artikels 119(7) en 52 is egter dat preferente skuldeisers wel oor 'n akkoord kan stem hoewel hulle nie daardeur gebind word nie. In *Beckett and Co Ltd v Trustee Rissik Station Stores* 1923 TPD 216 is uitdruklik met verwysing na die herroepe Insolvensiewet van 1916 beslis dat die houer van 'n algemene verband oor roerende goed wel oor 'n aanbod van akkoord kan stem.

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SILBERBERG AND SCHOEMAN'S THE LAW OF PROPERTY

deur DG KLEYN en A BORAINE (bygestaan deur W DU PLESSIS)

Derde uitgawe; Butterworths Durban 1993; xviii en 594 bl

Prys R137,59 (sagteband)

Die grondslag vir een van die hoogs aangeskrewe en gesaghebbendste handboeke op die gebied van die sakereg is in 1975 gelê deur die oorspronklike outeur, wyle dr H Silberberg. Die eerste uitgawe het in 1977 'n herdruk beleef. Daar is voortgebou op hierdie grondslag deur Schoeman in die tweede uitgawe wat in 1983 verskyn het. Hierdie uitgawe is in 1987 ook herdruk. Die derde uitgawe, wat vanjaar verskyn het, is die pennevrug van Kleyn en Boraine.

Die skrywers verklaar dat hulle dit as hul taak beskou het om die vorige uitgawe op datum te bring met die jongste ontwikkelinge op hierdie gebied van die reg. Alhoewel hulle dieselfde struktuur nagevolg het, spreek hierdie verwerking van rype en uitgebreide navorsing. Die boek bestaan uit 23 hoofstukke wat elk 'n aspek van die sakereg in besonderhede bespreek en ontleed. Die konstruksie en aanbieding van elke hoofstuk maak die aanwending daarvan maklik en om 'n probleem op sakeregtelike gebied aan die hand van hierdie boek op te los, sal vir die juris geen probleem verskaf nie.

Die skrywers het nie alleen die vorige uitgawe op datum gebring nie maar inderdaad sommige hoofstukke totaal herskryf. Daarbenewens is twee nuwe hoofstukke bygevoeg, terwyl twee hoofstukke wat gehandel het oor waterreg en die sakereg in perspektief beskou, uitgelaat is. Hierdie veranderinge het na my mening die kwaliteit van die boek nog verder verhoog.

Die hoofstukke wat herskryf is, is die volgende: Hoofstuk 2 waarin die regsbegrip van 'n saak uiteengesit word. Die verskillende eienskappe wat aan 'n saak toegedig word, word juridies ontleed en die hoofstuk sluit af met 'n sinvolle en weldeurdagte definisie. 'n Groot verbetering is die herskryf van die afdeling in hoofstuk 8 wat met spoliasie handel. Die mandament van spolie word nou volledig, vanaf sy historiese ontstaan tot die hedendaagse praktiese aanwending daarvan, onder verskeie subhoofde uiteengesit. Hierdie aanbieding van een van die belangrikste beskermingsmiddele vir besit kan met groot vrug deur die praktisyn aangewend word. Die afdeling oor die begrip eiendomsreg in hoofstuk 9 verskil wesenlik van die vorige uitgawe. Nie alleen word die herkoms van die regsfiguur deeglik onder die loep geneem nie, maar die skrywers slaag ook uitmuntend daarin om die betekenis van die begrip deur te trek tot by die hedendaagse praktyk; hierbenewens word aandag gegee aan die moontlike toekomstige behoeftes van die Suid-Afrikaanse gemeenskap. Interessant is hulle gevolgtrekking dat eiendomsreg ook kan bestaan ten opsigte van onliggaamlike sake wat onder andere elektrisiteit, hitte, klank en radio-aktiwiteit insluit. Hoofstuk 15 wat handel met deeltitels is ook grootliks aangepas om dit in ooreenstemming met die bepalings van die nuwe Wet op Deeltitels 95 van 1986 te bring.

'n Insiggewende nuwe toevoeging is vervat in hoofstuk 16 waarin alternatiewe vir deeltiteleienaarskap ondersoek word. Die skrywers laat die klem val op aandeleblokskemas, eiendomstyddeling en behuising vir afgetrede persone. Die waarde van hierdie hoofstuk is daarin geleë dat daar telkens by elk van die moontlikhede gewys word op die beskerming wat aan 'n verbruiker verleen word. Vir die praktisyn wat sy kliënt moet adviseer oor welke skema vir hom die gepaste sal wees, sal hierdie hoofstuk van groot nut wees. Die boek word afgesluit met 'n nuwe hoofstuk (23) wat oor die hervorming van grondbesit

handel. Hierin word die historiese verloop van besit van grond in Suid-Afrika, met inagneming van verskeie wette wat aangeneem en herroep is, weergegee. Die skrywers doen onder andere aan die hand dat eenvormige wetgewing daargestel word wat vir sowel stedelike as landelike grondbesit voorsiening sal maak.

Die boek het 'n keurige omslag en is taalkundig en tegnies goed versorg. Regspraak en wetgewing is tot en met Junie 1992 bygewerk. Ek kan sonder huiwering konstateer dat hierdie boek 'n aanwins op die gebied van die sakereg is en 'n prominente plek op elke juris se boekrak behoort in te neem.

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PERSONEREG BRONNEBUNDEL

deur RA JORDAAN en T DAVEL

Juta Kaapstad Wetton Johannesburg 1992; xxvi en 340 bl

Prys R104,50

Soos uit die voorwoord van hierdie bronnebundel blyk, is dit veral daarop gerig om eerstejaarstudente van hulp te wees by die bestudering van die personereg. In dié opsig is die bundel 'n voortbouing op die tweetalige werk van Cronjé en Heaton *Casebook on the law of persons and family law/Vonnisbundel oor die persone- en familiereg* (1990) wat slegs hofbeslissings bevat. Die bronnebundel is egter die eerste publikasie wat sowel hofbeslissings as al die tersaaklike wetgewing op die terrein van die personereg bevat en is dus 'n welkome aanwins tot ons regsliteratuur.

Die werk volg min of meer dieselfde sistematiek as Van der Vyver en Joubert se *Persone- en familiereg* (1991). Die bundel bestaan uit ses hoofstukke: Ontstaan van regsubjektiwiteit; Domisilie; Invloed van ouderdom op status; Invloed van buite-egtelikheid op status; Diverse faktore wat status beïnvloed; en Totnietgaan van regsubjektiwiteit. Die indeling van die hoofstukke, veral hoofstuk 3, is egter meer logies en verstaanbaar vir eerstejaars as dié van Van der Vyver en Joubert. Hofbeslissings en wetgewing word nie afsonderlik nie maar gesamentlik onder die toepaslike onderwerp bespreek.

Die bundel bevat 111 hofbeslissings. Elke beslissing word ingelei deur 'n kort opsomming van die feite waarna relevante uittreksels uit die uitspraak volg. Vonnisse tot en met die Junie 1992-uitgawe van *Die Suid Afrikaanse Hofverslae* is vir insluiting oorweeg.

Ook wat wetgewing betref, is die bundel baie volledig. Al die belangrike statutêre veranderinge wat onlangs op die gebied van die personereg plaasgevind het, word behandel. Die Wet op die Registrasie van Geboortes en Sterftes 51 van 1992 wat op 1 Oktober 1992 in werking getree het, word byvoorbeeld volledig aangehaal. So ook die Wet op Domisilie 3 van 1992 wat op 1 Augustus 1992 in werking getree het. Die implikasies van laasgenoemde wet word duidelik uiteengesit en op voortreflike wyse vergelyk met en onderskei van die posisie wat voor inwerkingtreding van die wet gegeld het. Op 88 verwys die outeurs byvoorbeeld na die toeskietliker interpretasie van die *animus manendi*-vereiste in artikel 1(2) van die nuwe wet. Hulle kom dan tot die gevolgtrekking dat die onsekerheid wat geheers het oor die domisilie van keuse van sekere kategorieë persone, soos lede van die gewapende magte, diplomatieke amptenare en persone wat op instruksie van hulle werkgewers op 'n bepaalde plek werksaam is, nou uit die weg geruim is

en dat sodanige persone vandag wel 'n domisilie van keuse kan vestig op die plek waar hulle werksaam is. Verder word 'n hele aantal ander wette, of dan wel uittreksels uit wette, aangehaal wat oor die algemeen vir die personereg van belang is, byvoorbeeld die Kinderwet 33 van 1960, die Boedelwet 55 van 1965, die Wet op Vrugafdrywing en Sterilisasie 2 van 1975 en die Wet op Menslike Weefsel 65 van 1983.

Elke onderafdeling van die onderskeie hoofstukke word afgesluit met bondige aantekeninge wat die aangehaalde bronne treffend met bestaande regsreëls in verband bring. Hierdeur word die regsreëls prakties geïllustreer en word die hele werk tot 'n geïntegreerde geheel saamgesnoer. In die aantekeninge vind die leser ook heelwat verwysings na die standpunte van ons gemeneregskrywers en akademici wat as aanknopingspunt kan dien vir 'n persoon wat meer oor 'n betrokke onderwerp te wete wil kom. Die outeurs se bespreking van die bronne is deurgaans bondig en duidelik.

Wat die omvang van die bundel betref, moet daarop gewys word dat die versameling vonnisse wat daarin opgeneem is, baie omvattend is. 'n Mens kan miskien selfs sê dat dit té omvattend is, veral aangesien die werk primêr op *eerstejaar*studente gerig is. Oor die keuse van vonnisse kan 'n mens seker altyd twis en alhoewel die outeurs oor die algemeen met hulle keuse gelukgewens kan word, is dit, vanweë die groot omvang van die boek, moeilik om te begryp hoekom 'n ou saak soos *Adams v Adams* (1882) 2 SC 24 ingesluit is. Die Wet op Domisilie 3 van 1992 het per slot van sake die gemeenregtelike reël omvergewerp dat 'n vrou die domisilie van haar man volg en diskriminasie teen persone op grond van geslag of huwelikstaat is opgehef. Die outeurs kon eerder bloot in die aantekeninge na laasgenoemde saak en na 'n paar ander beslissings, byvoorbeeld *Baddeley v Clarke* (1923) 44 NLR 306, *Dempers Van Ryneveld v SA Mutual Life Assurance Society* (1908) 25 SC 162 en *McCallum v Hallen* 1916 EDL 74 verwys het.

Die skrywers bespreek ongeveer 50 beslissings wat ook in Cronjé en Heaton se *Vonnisbundel / Casebook* ingesluit is, en as 'n mens die uittreksels uit die hofuitsprake in die twee werke met mekaar vergelyk, moet jy noodgedwonge tot die gevolgtrekking kom dat die outeurs van die bronnebundel beslis Cronjé en Heaton se werk as bron gebruik het. Daarom val dit vreemd op dat laasgenoemde werk nie onder die hoof "HANDBOEKE AANGEHAAL" op ix voorkom nie.

'n Verdere punt van kritiek is dat die outeurs sekere gegewens soms onnodig herhaal. Op 308 gee hulle byvoorbeeld die feite van *Re Beaglehole* 1908 TS 49 weer terwyl hulle op net die volgende bladsy 'n gedeelte van Innes HR se uitspraak aanhaal waarin hy ook die feite van die saak uiteensit.

Die uiters volledige vonnisregister en die lys van statute aangehaal, verhoog die bruikbaarheid en toeganklikheid van die bundel. Uit die lys van aangehaalde statute blyk egter nie altyd duidelik watter artikels van 'n spesifieke wet aangehaal word nie. In hierdie lys verskyn daar byvoorbeeld onder andere die volgende gegewens oor die Insolvensiewet en die Wet op die Registrasie van Geboortes en Sterftes:

"Insolvensiewet 24 van 1936..... **294**"
"Wet op die Registrasie van Geboortes en Sterftes 51 van 1992..... **21**, 31, 273"

Wanneer die leser dan na 294 blaai, sal hy merk dat net artikels 8 – 12 en 20 – 23 van die Insolvensiewet daar aangehaal word, terwyl die hele Wet op die Registrasie van Geboortes en Sterftes op 21 aangehaal word. Myns insiens sou die bruikbaarheid van die bundel nog verder verhoog kon word as die outeurs in die lys van statute duidelik aangedui het presies na watter artikels van 'n spesifieke wet op 'n bepaalde bladsy verwys word en of die wet *in toto* aangehaal word.

Ten slotte kan die vraag gevra word of 'n bundel van hierdie aard nie eerder in losbladformaat gepubliseer moes gewees het nie. Na alle waarskynlikheid gaan die bundel oor 'n jaar of twee nie meer op datum wees nie en sal 'n tweede uitgawe moet verskyn. Enersyds is publikasiekoste vandag baie hoog en andersyds moet studente darem ook op die hoogte van sake bly. Daarom is dit miskien geregverdig om te vra of dit nie goedkoper sal wees om alle vonnis- en/of bronnebundels in losbladformaat te publiseer nie.

Bostaande punte van kritiek het nie ten doel om aan die meriete van die bronnebundel afbreuk te doen nie. Dit is 'n maklik hanteerbare werk en behoort deur sowel dosent as student met vrug gebruik te kan word.

In die lig van die omvang van die bundel is die prys redelik. As 'n mens egter in gedagte hou dat feitlik al die Suid-Afrikaanse universiteite personereg saam met familiereg in een kursus aanbied, kan dit te duur raak vir studente as die bundel as verpligte handboek voorgeskryf word.

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POWER, LAW AND PROCEDURE: A CONTEMPORARY GUIDE TO INDUSTRIAL RELATIONS

by AT TROLLIP and SC BON

Butterworths Durban 1992; 220 pp

Price R73,70 (soft cover)

Despite the title of this book, there is little discussion of the law on the subject matter which it covers. The authors have sought to cover a vast range of issues within the space of 215 pages. Of these, 89 are devoted to a discussion of various issues — the remaining pages are made up of a collection of appendices (35 in all). The first 89 pages are broken down into no fewer than 20 chapters in which the authors deal with topics ranging from the contract of employment (ch 1), to the limits of law and the limits of power (ch 11), democratic balloting (ch 16) and the social responsibility of South African capital (ch 20).

The authors do not state whom the book is aimed at, but it becomes apparent on reading that it is intended to be used by employers rather than employees. That impression is confirmed in chapter 8, dealing with accountability, where it is said that

> "[t]he intention of this book is to assist management and we will, therefore, necessarily emphasise the accountability of labour interests to management" (37).

The work really appears to be aimed at guiding the reader through the extensive body of appendices at the end. The collection of appendices may certainly be useful to employers, particularly small employers who have little experience in the field of industrial relations. But the information offered in the text itself is limited. Each chapter reads rather like a preface to a full discussion of the particular issue. In chapter 1, which deals with the contract of employment, for example, the authors refer to the distinction between an employee and independent contractor, but say no more than:

> "Many problems arise as to whether a particular person is actually an employee or an independent contractor. The advent of close corporations has resulted in the proliferation of so-called independent contractors operating in the guise of close corporations but in reality being employees. It is not the scope of this work to examine this work in any detail other than to sound a word of caution that legal policy is to have regard to the realities of any particular situation rather than the form in which the parties choose to represent their relationship" (9 – 10).

This information is of no assistance to an employer grappling with the problem of whether persons who work for it are employees or not. Similarly, the important topic of negotiation is dealt with in little more than three pages (ch 10). There the authors state (43):

"It is only possible in a work of this nature to deal cursorily with negotiation." Chapter 13 deals with what is termed "Guerrilla Tactics: Overtime Bans, Go-slows and Refusal to Undertake Shift Work". This significant and complex aspect of industrial relations/ law is covered in fewer than two pages. The following advice is offered:

> "In our experience management often fails to understand the nature of power, the need to exert or weather the power play and the inevitability of taking some pain until such time as the exercise of power is limited by its own internal limiting dynamics, namely the pain of reality being brought to bear" (59).

On the following page the authors go on to state:

> "In our view. . . management has no obligation to accept partial performance and can in essence advise employees that they should either work properly and get paid for a proper day's work, failing which management is not prepared to pay employees for any work they do whatsoever" (60).

Advice of this nature, offered as it is in a virtual vacuum, could harm rather than assist employers.

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THE LAWYER'S POCKETBOOK 1993

Butterworths Durban 1992; 335 pp and Diary for 1993

Price R82,50 (hard cover)

This well-known pocketbook for lawyers is edited by Butterworths' legal editorial staff. The 1993 edition is updated until 15 September 1992.

It is a fact that updating a library is a huge expense in the budget of any attorney or advocate. The availability of important information required for practising law such as contained in this diary at a reasonable price must be a great comfort to many practitioners.

The pocketbook is a concise quick-reference source consisting of, among other things, information on several professional bodies which cannot easily be found in a library, tables of costs and fees, the adresses of government departments and judges, and calendars for the Supreme Court. The largest part of this book consists of extracts from provisions of enactments. Even information such as income tax rates, the conversion between metric and other units and prescribed rates of interest is given, although these are not useful only to those who practise law.

The pocketbook has an alphabetical table of contents and an index which makes reference very easy. Although it may not fit into the average pocket, it is indeed an attractive and very useful diary on the desk of every practising lawyer.

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THE JUTASTAT CD-ROM DATABASE ON STATUTES AND LAW REPORTS

Jutastat Cape Town Wetton Johannesburg

Prices: see below

Jutastat is the publication of the *South African Law Reports* as well as the South African statutes on CD-ROM. (Although tax cases and reports are also available, I did not test these.) This review will try to address three questions:

1 What is CD-ROM?
2 How does Jutastat work?
3 Does one really need it?

1 What is CD-ROM?

Most lovers of music will already know the small silver discs which have virtually replaced records. Instead of being played by a mechanical stylus these discs are brought to life by a laser beam and are therefore sometimes called "laser discs". The most popular name seems to be a "CD", however, the abbreviation of "compact disc". CD-ROM is the acronym for "Compact Disc Read Only Memory", the latter part of the title indicating that the data on the disc (instead of music) may be read off the disc, but that the user cannot write data onto the disc. This is important for certain areas of law, since it means that the document, once written onto the disc, cannot be altered again. The CD-ROM drive should be distinguished from a WORM drive. The latter is an acronym for "Write Once Read Many Times" and shares the characteristics of inalterability and optical storage with CD-ROM, but whereas the CD-ROM disc has to be mastered by a special process, the first (and final) writing process onto a WORM may be done by the computer user himself.

Why is the CD-ROM medium so popular, especially in the light of the fact that traditional magnetic storage and the WORM seems to be more convenient? I think it is because publishers have discovered that the CD-ROM disc is probably the most convenient and cost-effective way to disseminate data (this statement includes paper-based dissemination). Magnetic media are more susceptible to damage and data loss than are optical media. In addition, most floppy discs (a magnetic medium) can hold only between one and two megabytes of data, necessitating the use of multiple discs when data has to be "transported" from one computer to another. One CD-ROM disc, however, holds about 550 megabytes of data, which represents about 500 floppy discs (or about 11 000 typed pages of information). Even though the WORM drive can hold more than this, it lacks the removable (and mailable) characteristics of CD-ROM.

Abroad many legal databases were originally made available "on-line"; in other words, one could dial into a remote computer database using the telephone network, a dedicated line or even microwave and "download" relevant data from the distant database into one's own computer. Because of the practice adopted by many of these data-providers to charge users for time spent on the system, users were often overcome by the "sweaty palms" syndrome and often had to pay even for relatively unsuccessful searches. Some of these information providers (eg JURIS in Germany) have recently started to provide sections of their database on CD-ROM, which the user can order by mail, for once and for all, and then spend as much time as he likes browsing through the database and following leads at his leisure. The South African publisher Juta flirted for a while with the concept of providing legal information on-line, by means of its Jutalex service. This

illustrated the main advantage of "on-line" over CD-ROM, namely that updates made at the central node are immediately available to all users connected to it. Online databases are therefore usually more up to date than are those on CD-ROM, whereas Juta's current practice is to send out an updated CD-ROM disc every three months. With data which are reasonably stable, such as law reports and statutes, this does not seem to be too much of a handicap, however, with the paper-based equivalents not being updated any faster. After a survey among its users, Juta decided to drop the Jutalex service, and rather concentrate on Jutastat, its service on CD-ROM.

2 How does Jutastat work?

I tested the South African statutes, which were all on one compact disc, as well as the consolidated *South African Law Reports*. The latter were split into two discs, the one starting with 1947(1) and ending with 1970(4) and the other starting with 1971(1) and ending with 1992(2). Each disc had to be inserted into a plastic "caddy" before the latter was inserted into the CD-ROM drive. The latter was built into a 386SX MS-DOS (or IBM-compatible) computer, although stand-alone versions of the drive are also available. Because of the specific construction of the computer, the slot for the CD-ROM drive was immediately below the slot for the floppy discs. This makes inserting the CD-ROM discs inconvenient since the lower slot is hidden behind the computer keyboard. In addition, it increases the risk of nervous users trying to stuff a CD-ROM disc into the floppy drive and *vice versa*. This may sound far-fetched, but some libraries in the United States have gone so far as to place labels on CD-ROM drives which say "The silver disc goes in here", and on the floppy disc drives which say "The silver disc does not go in here"! Another tip for ham-fisted users would be to buy a caddy (a protective plastic container) for each compact disc which you plan to use, since opening up the caddy to change discs is almost guaranteed to break either your fingernails or the caddy itself.

Activating the database is done by means of a locally-written word processing programme called Ghost-Writer. Once this has been started, one can activate its database adjunct called Ghost-Access and this leads in turn to the CD-ROM database. Ghost-writer is bundled with the Jutastat system, which means you have to buy both and find space for both on a sometimes crowded hard disc. It also means that you have to learn at least enough of Ghost-Writer to enable one to make print-outs of, or to export in ASCII-format, those relevant files found on the compact disc. Juta has responded to criticism in this regard by pointing out that the data may be exported to other word-processing programmes, but in my opinion they would have been wiser not to make the database accessible only through Ghost-Writer. Although it has been claimed in advertising to be the "*de facto* standard" for the legal fraternity in South Africa, in my experience programmes such as MS-Word and WordPerfect are much more popular amongst lawyers.

Once into Ghost-Access, one inserts the relevant compact disc, chooses the menu equivalent on the screen, and is immediately able to start searching for relevant concepts. A simple word search usually yields too many documents containing the required word (called a "hit") and these documents are too numerous to read through (this phenomenon is called "noise"). Combining two words, for instance "residential use", usually brings the number of hits down to manageable proportions. In this respect the Jutastat system has been improved tremendously by the recent addition of proximity searching. This means that it is possible to limit the number of hits to those where the words occur within a certain distance of each other. In this way one avoids the "noise" of documents which may have "residential" somewhere in the beginning of the document and "use" (in an entirely unrelated sense) somewhere towards the end of the document. This method did not save me from some noise in a search for the words "time share", however. I found a few instances of the phrase "from time to time shareholders may", which was definitely not what I had in mind! One soon develops a sense of which

of these combination (or Boolean) searches will work, however. Instead of the logical operator AND used in the previous examples, one can also use OR and NOT. As may be gathered, a search for "residential OR use" will find all those documents, usually too many, in which either of the two words (or both) occur. A search for "residential NOT use" will find all those documents in which the word "residential" occurs, but the word "use" does not.

A very valuable facility is the possibility of searching for phrases by simply typing the words into the search window. Even though the search may take the computer about five minutes for the search and one can almost see the sweat pouring from its brow, this type of research would usually occupy a team of human researchers for a week or two. Do not be alarmed and switch off the computer if it flashes cryptic messages containing garbled names of cases on the bottom of the screen while it is working so hard. This seems to be a harmless eccentricity and the first occurrence of the phrase enquired for appears on the screen (in context) after a few minutes. One can start the computer on its way to the next occurrence by simultaneously pressing the CONTROL, ALT and PAGE-DOWN keys.

Another huge improvement over earlier versions of the database is that if one does not wish to search for a particular phrase through all the sources, it is now possible to get to a specific statute or to a law report by means of its numerical reference alone. After pressing the ALT-key together with the [-key one can simply type in the number and year of the act, or the normal *SALR*-reference, and get to the destination directly. Formerly one had to go through menus to get to, for example, a heading called Procedure, from there to Criminal law and Procedure, and only from that point was it possible to get to the Criminal Procedure Act itself. Typing "51,1977" is much quicker and more satisfying. The hierarchical method of access described just now survives, however, and sometimes still comes in handy when one does not wish to get lost in the bookshelves' worth of information which one is wading through. When the hierarchical system is used, it simplifies matters to remember that pressing the ENTER-key takes one a level lower into the hierarchy and that pressing the ENTER-key together with the SHIFT-key brings one back a level. An indented version of the hierarchy is visible in the upper left hand corner of the screen, helping to prevent disorientation.

At the end of the disc containing the most recent law reports, Juta has included various indexes, *inter alia* Juta's Supreme Court Digest. This consists of summaries of recent cases due to be published in the *SALR* within the immediate future. This would seem to take the place of the similar facility offered by Jutalex, the service on BELTEL which was discussed above. A unique feature is the consolidated index to all the law reports, from 1947 to 1992. Not only is this not available in published form, but the computer allows one to jump from a phrase considered in a decided case into the full text of the case itself. This facility for jumping from one instance to another, the latter being logically connected to the former, but existing in a completely different part of the text, is called "hypertext" and is only possible if one's data are stored in electronic form. The use of footnotes in paper-based data is but a poor approximation of this powerful function. The feat is accomplished by pressing the CONTROL-key in combination with the]-key, which highlights the numeric reference (in the first text). Pressing the ALT-key in conjunction with the]-key then takes one directly to the full text of the case referred to (the second text), and pressing the CONTROL plus B-keys brings one back. In the alternative, one could use the (colour-coded) bookmark facility to place a more permanent point of return in the first text. This procedure is slightly more complicated but seems to work quite well and would be suitable when one wishes to return to the bookmarked position in the future. The hypertext facility described above is available from any part of the database, provided that the correct compact disc has been loaded.

An interesting adjunct to the Statutes disc is PENDLEX, which contains a number of recent acts which have been published, but have not yet come in force, as well as PRELEX, which consists of the text of repealed statutes which might still be relevant

to someone. This disc also contains the regulations promulgated in terms of certain acts, but I feel that this is one area which could be fruitfully expanded. Subordinate legislation is notoriously hard to get hold of, and I would like to see at least the regulations in terms of the Road Traffic Act and the Customs and Excise Act included, to mention just two examples. A valuable addition to be found on the disc, however, is the text of both the magistrate's court and the supreme court rules.

3 Does one really need Jutastat?

I think that the answer to this question depends entirely upon the use that one makes of statutes and law reports in your daily work. As an academic, I have become addicted to Jutastat because not only do I have one-stop access to both the *SALR* and the statutes, but I can search for phrases and combinations of words which would take weeks to find manually. In addition, by means of the hypertext facility described above, I can follow threads through widely disparate and separated documents, a process which is possible only on computer. Once I have found a relevant case or statute I can have that (or the relevant portion of the whole) printed out and then simply carry the printout around instead of a heavy pile of books with little slips of paper peeping out everywhere between the pages. Because it is only a printout, I also have no compunction to add glosses and comments in the margin, something that I would be hesitant to do with a published law report. On the other hand, I must confess that some of my colleagues are very slow to take to the new medium and that the most enthusiastic devotees to Jutastat are to be found amongst our young student assistants. Could there be a generation gap as far as using modern technology is concerned? As far as legal practitioners are concerned, I realise that a great proportion of an attorney or advocate's time is spent on merely studying the facts of a case. Nevertheless most law offices do find the money to invest in a law library containing the law reports and the statutes. Once a huge investment has been made in leather-bound law reports, it is probably over-capitalising to invest in an electronic duplication of this, since the new technology does not come cheap (see prices below). Besides, the leatherbacks make a wonderful backdrop for photographs of esteemed lawyers! On the other hand, if I were about to invest in the paperbased version of the law reports and/or the statutes, I would rather apply the money towards purchasing Jutastat. The time which will be saved on researching the law will then be available to spend on the facts of the case. An interesting new development which might also influence one's buying is the phenomenon of networking all the computers in an office. Although the network version of Jutastat is more expensive than that for single users, it would mean that a centrally stored copy of the programme could be made available on every computer of the firm which is connected to the network.

If Jutastat were to continue developing this product and would be prepared to add certain handbooks (in the United States one already has the choice to buy a CD-ROM version of certain handbooks) as well as the *South African Criminal Law Reports*, it would make their product almost indispensable to academic and practitioner alike.

Prices at the time of writing are as follows:

SA Statutes (including GhostAccess)	R 3 850
SA Statutes (total for annual update, done quarterly)	R 2 000
SA Statutes (networked version for 2 – 4 users)	R 3 300
SA Statutes (networked version for 5 – 10 users)	R 5 500

For 11 or more users, the cost is R5 500 plus R110 for each additional user.

SA Law Reports (including GhostAccess)	R11 000
SA Law Reports (total for annual update, done quarterly)	R 920
SA Law Reports (networked version for 2 – 4 users)	R 1 830
SA Law Reports (networked version for 5 – 10 users)	R 2 530

For 11 or more users, the cost is R2 530 plus R55 for each additional user.

There are various discounts available if one buys a combination of the above or the above in combination with Jutastat's Tax Library (which I did not test). One also needs the CD-ROM player described in the first paragraph of this review and prices here range from about R2 000 for slower, less reliable drives to about R5 000 for better technology. It is also recommended that the drive be coupled to at least a 386 IBM-compatible computer.

DANA VAN DER MERWE
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Professor Van der Merwe received the following reply to his review from Mr SP Sephton at Jutastat (*editor*):

Further to my letter of 23/09/92, I have at last got around to the relatively simple task of letting you know about the few inaccuracies that I noted in your review of Jutastat's discs. While not agreeing with all you wrote, I shall confine my comments, on the whole, to those places where actual errors were detected (in my understanding, at any rate).

On the first page, second para, you state that a CD holds about 500 floppy discs of information, or about 11 000 typed pages. The former is obviously referring to 1,2 Mb floppies, and I'd suggest that this is clarified, as many laymen think of floppies as 360 Kb, and may well read other literature equating the information on one CD with 1 200 floppies. As for the pages – 11 000 pages would fill only a small fraction of a CD: the most common figure that I have read is 150–160 000 pages. Naturally the figure will depend on type, format, spacing etc, but certainly 11 000 pages is not a correct figure.

Your mention of Juris lower down on the first page sparks an observation rather than a criticism. I believe that Juris in fact issue all their databases on CD now and use the online system primarily as an updating system. Other traditional online publishers, like West in the USA, also have combined CD/online services, often with the CD component designed to protect their existing online investment rather than superseding the online service. Others, though, such as Context in the UK, have completely shut down their online service in favour of the CD service (for their CELEX EEC database), and I recently heard a rumour that Kluwer intend doing the same, though this is not substantiated.

In your heading no 2 ('How does Jutastat work?'), you say that you still get noise when using a phrase search, and cite the example of time share. The example you cite is, I believe, not possible: if you use the Ctrl + Page down keys to find the phrase, it will definitely not pick up the 'from time to time shareholders' quote cited. Even though the 'share' in shareholders will be highlighted, the cursor will not stop at that point with the Ctrl + Page down command. Perhaps you pressed Ctrl + down arrow (for an ordinary word search) which then stopped you at the word 'time', and seeing a highlighted 'share' immediately thereafter you thought that the phrase search had found this occurrence?

You comment three paragraphs later that 'Juta has included various indexes, inter alia Juta's Supreme Court Digest.' I hope I am not being too nitpicking when I point out that it is Jutastat, a publishing company and not a product, that has included the material! It appears that Jutastat is sometimes mistaken as a product (usually our Statutes disc, understandably enough) published by Juta. It is in fact a company, named after its parent companies – Juta and Compustat. A further point on the same part of the review: the Supreme Court Digest is not a set of summaries of 'recent cases due to be published in the SALR within the immediate future' as stated, but in fact digests all cases received by the SALR editors, regardless of whether they will or will not ultimately be published. In this way we will be building up a considerable body of summaries of unreported cases on the discs, rendered all the more useful by the consolidation of this material on the CD. The subsequent comparison with Jutalex is thus perhaps less valid.

While you mention Pendlex and Prelex, I note that you make no mention of the Indexes to Gazettes that accompany the Statutes disc, and which I believe many librarians find most useful. On the features front, a valuable feature that gets no mention is the Research Record.

Since you wrote your review there have been some notable advances that you may or may not wish to mention by way of a post script. The most important are: the picture viewing facility, allowing the inclusion of diagrams in cases and Acts; the direct jump from cases to relevant Annotations; and the inclusion of Hiemstra and Gonin's *Trilingual Legal Dictionary*.

The prices you state are correct as at the time of writing, but for the sake of completeness, perhaps it should be pointed out that these include VAT at 10%, and also that the SALR basic price is from 1947 – 1991, while the subscription is not for an 'annual update' (ie for a year from time of purchase, as it is in the case of the Statutes and Tax discs), but specifically for the 1992 Reports. I have 1993 prices available, and if you would like to update prices to reflect those at the time of publication rather than the time of writing, I shall happily supply them.

Thank you for writing the review and for giving me the opportunity of reading it prior to publication. I hope that you continue to derive ever more use from the system in the meanwhile.

Reviewer's reply:

I submitted the original review of the Jutastat CD-ROM database to Jutastat and received the informative reply published above. As reviewer I have the advantage of having the last word on the topic, however!

The remarks with regard to the capacity of the disc are valid – it remains difficult to visualize the tremendous amount of paper information contained on three discs. It might be useful to imagine the space occupied on a library shelf by the consolidated South African law reports as well as the space occupied by a set of South African statutes.

My bad experiences with the search terms "time" and "share" had been with the first edition of Jutastat, without the facility of a proximity search. I agree that with proximity searching this problem will not recur. (Proximity searching means that only documents will be retrieved where the occurrence of the first search terms occurs within a specified number of words from the second search term.) My remarks remain valid with regard to reaction time, however. After setting up a proximity search for the two terms "time" and "share" it might be best to go and have a cup of tea, leaving the computer to slave away at the job.

Following on the Jutastat reply, I specifically tried out the Research Record and found it to be a valuable tool, which saves one from making frantic notes of all the finds which one does not wish to have printed out entirely. The printing commands are not very clear to a Ghostwriter novice, however. I also tried to investigate the Indexes to the Gazettes but kept getting an error message about a module not matching. After a few telephone calls to Jutastat I got some telephone support from Jutastat, Cape Town, and effected the necessary repairs. Apparently the latest update had not been effected as far as the Gazettes were concerned, which seems strange, since all the other modules had been updated. The other "notable advances" all worked and would probably be useful to the respective users concerned – I personally had great fun viewing all the diagrams and trade marks by means of the picture viewing facility – a must for patent and trade mark attorneys.

Since I do not know how long this review will take to be published, I suggest that interested buyers contact Jutastat in order to obtain the latest prices.

Exemption of directors from liability and section 247(1) of the Companies Act, 1973

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OPSOMMING

Vrystelling van direkteure van aanspreeklikheid en artikel 247(1) van die Maatskappywet, 1973

Artikel 247(1) van die Maatskappywet 61 van 1973 lui dat enige bepaling in 'n maatskappy se statute, of in 'n kontrak met 'n maatskappy, wat 'n direkteur (of 'n beampte of ouditeur) "heet vry te stel van 'n aanspreeklikheid wat anders regtens op hom sou rus ten opsigte van nalatigheid, versuim, pligsversuim of vertroueskending waaraan hy met betrekking tot die maatskappy skuldig is", nietig is. In *Movitex Ltd v Bulfield* [1988] BCLC 104 beslis Vinelott R (tereg, so word in oorweging gegee) ten aansien van die Engelse reg dat hierdie voorskrif die effek het dat nie alleen 'n bepaling wat voorgee om direkteure van aanspreeklikheid ten opsigte van pligsversuim te vrywaar nie, maar ook 'n bepaling wat daarop gemik is om direkteure van hul pligte vry te stel, ongeldig is. In hierdie verband ontstaan die vraag egter na die regsposisie in 'n geval waar die statute 'n direkteur toelaat om sy belang in kontrakte aan die direksie (in plaas van aan die algemene vergadering) te openbaar. Vinelott R beslis dat, indien aanvaar sou word dat die geen konflik-beginsel inderdaad pligte op 'n direkteur plaas, dit noodwendig sou volg dat sodanige bepaling in die statute 'n skending van artikel 247(1) sal wees. Met ander woorde, 'n bepaling van hierdie aard kan nie beskou word as die blote vervanging van die algemene vergadering deur die direksie as die gepaste orgaan van die maatskappy waaraan die openbaarmaking moet geskied nie. Dit is so omdat 'n direkteur, op grond van die geen konflik-beginsel, aan die maatskappy verskuldig is om beide sy onpartydige opinie te gee aangaande alle sake wat voor die direksie dien en om hom daarvan te weerhou om te stem oor enige aangeleentheid waarin hy 'n belang het. Dus, indien die pasgenoemde riglyne van die geen konflik-beginsel inderdaad "pligte" daarstel, sal 'n bepaling soos die een tans onder bespreking noodwendig 'n poging wees om die direkteur van een of beide hierdie pligte vry te stel. Vinelott R kom egter tot die gevolgtrekking dat 'n oplossing vir hierdie probleem daarin geleë is om te aanvaar dat die geen konflik-beginsel nie soseer pligte nie, maar eerder 'n "onvermoë" ("disability") om bepaalde handelinge te verrig op 'n direkteur plaas. Aangesien artikel 247(1) slegs 'n vrystelling van pligte verbied, is 'n bepaling wat slegs sodanige onvermoë van direkteure ophef, nie nietig nie.

Daar word aan die hand gedoen dat die geen konflik-beginsel wel 'n plig op 'n direkteur plaas: 'n plig om hom nie in 'n posisie te plaas waarin hy in die versoeking kan kom om een van sy primêre pligte te verbreek nie. Indien die ware posisie dus inderdaad was dat van 'n direkteur verwag word om sy maatskappy te adviseer aangaande alle sake wat deur die direksie oorweeg word, sou dit 'n primêre plig wees en nie een wat deur die geen konflik-beginsel opgelê is nie (en gevolglik ook nie een wat deur middel van die sogenaamde "disability"-teorie weggepraat sou kon word nie). Maar in der waarheid rus daar geen sodanige plig op 'n direkteur nie. 'n Direkteur het (i) 'n plig om sy belange in kontrakte te openbaar ('n primêre plig) en (ii) 'n plig om nie sonder toestemming namens sy maatskappy op te tree in 'n aangeleentheid waarin hy 'n belang het nie (die geen konflik-beginsel). 'n Bepaling wat 'n direkteur dus toelaat om sy belang in 'n kontrak aan die direksie te openbaar, stel hom

nie van die plig vry nie: dit vervang slegs openbaarmaking aan die algemene vergadering deur openbaarmaking aan die direksie. En 'n bepaling wat 'n direkteur toelaat om 'n vergadering by te woon asook oor die kontrak te stem, stel hom eweneens nie van 'n plig vry nie. Sy plig is immers om nie in so 'n aangeleentheid op te tree tensy hy die toestemming van die maatskappy het nie – en die betrokke bepaling verleen tog die nodige toestemming. Aangesien 'n direkteur se plig in verband met winste 'n plig is om nie winste sonder die toestemming van die maatskappy te behou nie, kan 'n bepaling wat direkteure toelaat om sodanige winste te behou op dieselfde manier verklaar word, naamlik dat dit slegs die nodige korporatiewe toestemming verleen en dus nie voorgee om direkteure van 'n plig vry te stel nie.

INTRODUCTION

Section 247(1) of the Companies Act[1] renders void any provision "whether contained in the articles of a company or in any contract with the company", which

> "purports to exempt any director or officer or the auditor of the company from any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company".[2]

The meaning of the corresponding provision in the English Companies Act[3] has been disputed. In *Movitex Ltd v Bulfield*,[4] Vinelott J attempted te settle this dispute. His solution is considered in this article. The provision, whether in our Companies Act or in the English Companies Act, will be referred to as "the section".

ORIGIN OF THE SECTION

In England, the decision in *Re City Equitable Fire Insurance Co Ltd*[5] drew attention to the practice of including in articles of association provisions exempting directors from liability for loss except when due to "their own wilful neglect or default"[6] or, going even further, in every case except that of actual dishonesty.[7] The Greene Committee[8] considered the protection given by such articles to be "quite unjustifiable". Believing it to be a "hopeless task" to attempt "by statute to define the duties of directors", it concluded that the Companies Act should

> "prohibit articles and contracts directed to relieving directors and other officers of a company from their liability under the general law of negligence and of breach of duty or breach of trust".[9]

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1 61 of 1973.
2 It also renders void any such provision that purports "to indemnify" the above persons "against any such liability". This provision is subject to the provisions of s 247(2).
3 S 310 of the Companies Act, 1985.
4 [1988] BCLC 104.
5 [1925] Ch 407.
6 In *Re City Equitable Fire Insurance Co Ltd ibid* one of the company's articles provided that none of the directors should "be answerable . . . for any loss, misfortune, or damage which might happen in the execution of their respective offices or trusts, or in relation thereto, unless the same should happen by or through their own wilful neglect or default". See also *Leeds City Brewery Ltd v Platts* [1925] Ch 407.
7 See *Re Brazilian Rubber Plantations and Estates* [1911] 1 Ch 425.
8 *Company Law Amendment Committee* 1925 – 1926 Cmd 2657 par 46.
9 *Idem* par 46, and see par 47.

Such a provision was accordingly introduced as section 152 of the English 1929 Companies Act. It was contained in section 205 of the 1948 Act, and is now in section 310 of the 1985 Act.

Our Lansdown Commission, noting that the articles of companies sometimes purported to relieve directors "of liability for negligence or other default committed in the performance of anything done by them on behalf of the company", recommended the adoption of the provisions contained in section 152 of the English 1929 Companies Act,[10] and in 1939 the provisions were inserted[11] as section 70*sext* into the Companies Act 46 of 1926. As we have seen, they are now contained in section 247(1) of our 1973 Act. But the exact wording of the English section was not adopted. In particular, while the English section refers to any provision "for exempting" such persons from liability, our section refers to any provision "which purports to exempt" them from liability.

"WHICH PURPORTS TO EXEMPT ANY DIRECTOR . . . FROM ANY LIABILITY"

Difficulty arises from the lack of clarity of the words "any liability". It is certain that the section renders void provisions that purport to relieve directors from liability for breach of duty.[12] What is uncertain, is whether it also renders void provisions that purport to release directors from duties.

Any answer to this question must take into account provisions of the kind that were contained in Table A of the English 1948 Act,[13] for such provisions appear to release directors from certain fiduciary duties. If they do indeed release directors from those duties, can the legislature nevertheless have intended the section to prohibit release from duties? Although our Table A does not contain these provisions,[14] similar provisions are often put into the articles of our companies, and their validity has never been questioned.[15]

Since the debate has been about the articles contained in Table A of the English 1948 Act, I shall refer only to those articles (and shall refer to them as "the provisions in Table A"). Article 78 permitted a director to become a

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10 *Report of the Company Law Commission* 1935 – 1936 UG No 45 1936 par 135.

11 By s 43 of the Companies Amendment Act 23 of 1939.

12 See *Viscount of the Royal Court of Jersey v Shelton* [1986] 1 WLR 985 (PC), where the articles of the company provided both that the directors should be indemnified against certain liabilities and exempted them from liability for certain breaches of duty. Lord Brightman said (992): "This case has been argued throughout on the basis that the law of Jersey is in all relevant respects the same as the law of England, save that English legislation which now invalidates such a clause . . . does not exist in Jersey."

13 Arts 78 and 84. Similar provisions are contained in arts 85, 94, 95 and 96 of Table A of the Companies Act, 1985.

14 The provisions in arts 78 and 84 of Table A of the English 1948 Act have not appeared in our Tables A; but cf the curiously worded provision in art 76 of Table A of our 1973 Act, which (perhaps) does permit disclosure of interests in contracts to the board: "Subject to the provisions of sections 234 and 241, inclusive, of the Act, a director shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising therefrom, and if he does so vote, his vote shall not be counted."

15 See eg *African Claim and Land Co Ltd v WJ Langermann* 1905 TS 494 523; *Mendonides v Mendonides* 1962 2 SA 190 (D); *Novick v Comair Holdings Ltd* 1979 2 SA 116 (W) 152 – 153.

director or officer, or otherwise interested in, a company promoted by his company or in which his company had an interest; and it provided that he was not accountable to his company

> "for any remuneration or other benefits received by him as a director or officer of, or from his interest in, such other company unless the company otherwise directs".

Article 84(1) required a director to declare his interests in company contracts at a meeting of the directors in accordance with section 199 of the 1948 Act, which section imposed a statutory duty on a director to declare his interest to the board (as do sections 234 – 241 of our Companies Act, 1973). Article 84(2) prohibited a director from voting in respect of any contract in which he had an interest and from being counted in the quorum present at the meeting. But this prohibition could be suspended or relaxed by the company in general meeting; and it did not apply (*inter alia*) to any arrangement for giving a director security or indemnity in respect of money lent or obligations undertaken by him for the benefit of the company, or to any contract by a director to subscribe for securities of the company, or to any contract with another company in which he was interested only as an officer of that company or as a holder of its securities. Article 84(3) permitted a director to hold another office or place of profit under the company; and it provided that no contract entered into by the company in which a director was interested was "liable to be avoided", and that the interested director was not

> "liable to account to the company for any profit realised by such contract . . . by reason of such director holding that office or of the fiduciary relations thereby established".

The narrow construction: release from duty permissible

It was argued that the section prohibits exemption from liability for breach of duty, but that it does not prohibit release from duties.[16] This, it was said, follows from the fact that the section refers only to provisions which exempt a director from liability which would otherwise attach to him in respect of a breach of duty "*of which he may be guilty*". Since a director who has been released from a duty cannot be guilty of a breach of that duty, it follows that the section does not prohibit release from duties.[17]

This narrow construction was not thought to undermine the section. It was argued that under the general law directors can be released from only certain duties,[18] and that the Table A provisions merely released directors from their duty not to place themselves in a position where their interests conflict with their duty (the "no-conflict" rule), a duty which *is* "releaseable" under the general law.[19] Gower[20] says that directors may be released from this duty because,

> "if the articles permit a director to place himself in certain situations and to retain the benefits he derives thereby, it can no longer be said that the situations are ones in which there could be a conflict with his duty in the light of the permission".

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16 See *Gore-Brown on companies* 43rd ed 27 – 37; Parkinson "The modification of director's duties" 1981 *JBL* 339.

17 Parkinson *ibid.* Thus, Lord Wedderburn says, "the articles may . . . still avoid 'breach of duty' in some cases by ensuring that there is no duty to break" ("Shareholders' rights and the rule in *Foss v Harbottle*" 1957 *CLJ* 194, 1958 *CLJ* 97).

18 Parkinson 1981 *JBL* 339 – 342.

19 Gower *The principles of modern company law* (1979) 601; Parkinson 1981 *JBL* 335. There was disagreement about the "proper purpose" duty. Most commentators consider that

But surely to remove the no-conflict duty is not to remove the conflict? Parkinson[21] argues that release from this duty is permitted because its breach does not result in damage to the company. It exists merely "to remove any temptation which a director may feel to put his personal interests before his duty to the company", and it renders the director liable "even though he has acted consistently with the company's best interests".[22]

From what duties *cannot* directors be released? Gower[23] says that they cannot be released from their "duty to display subjective good faith". Thus, although the articles may permit directors to vote themselves service agreements, "these will still be liable to attack if so unfavourable to the company that they could not have been voted for in good faith".[24] To the duty of good faith Parkinson[25] adds the duty of care. He argues that a company cannot release its directors from these duties, because a breach of them cannot be ratified by the majority of the members in general meeting. The majority cannot ratify the breach, for to do so would be to commit a "fraud on the minority". This is because a breach of these duties results in damage to the company, and the majority would not act "bona fide in the interests of the company as a whole" if they were to forgo the company's right to be compensated for damage done to it.[26]

Since the courts have held that a breach of the duty of care and skill is ratifiable,[27] Parkinson[28] experiences some difficulty here. What is more, fraud on the minority cannot be the test for non-ratifiability. Ratification constitutes a fraud on the minority only when the majority has the power to ratify, but abuses it. More important, although it is said that breaches of certain duties cannot be ratified, there is no authority for this proposition. Even a breach of the duty to act "bona fide in the interests of the company" can be ratified; indeed (at least in certain circumstances) its breach can even be authorised.[29] And this

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this duty can be abrogated. On the other hand, Parkinson (*idem* 343 – 344) argues that, although a breach of this duty "is not necessarily harmful to the company" and can be both ratified and authorised by the members in general meeting, the duty cannot be released by a provision in the articles, because the duty exists "to maintain the constitutional separation of powers within a company" (referring to *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, [1974] 1 All ER 1126 (PC)). Therefore, a duty-releasing article would, by diverting such issues away from the shareholders to the board, "undermine the rationale of the duty".

20 601 – 602; and see also Parkinson 1981 *JBL* 335; Instone 1982 *LQR* 548.

21 1981 *JBL* 344.

22 *Idem* 339 – 340.

23 601.

24 *Idem* 601 fn 11.

25 1981 *JBL* 339 – 340.

26 *Ibid.*

27 See *Pavlides v Jensen* [1956] Ch 565, [1956] 2 All ER 518; *Heyting v Dupont* [1963] 3 All ER 97, affd [1964] 2 All ER 273 (CA); cf *Daniels v Daniels* [1978] Ch 406, [1978] 2 All ER 89. And this means that, if ratification is the test for releaseability, the articles can exclude the duty of care and skill, the very case that motivated the Greene Committee's recommendation (see Baker 1975 *JBL* 188).

28 He argued that it is difficult to see why breaches of the duty of care should necessarily be ratifiable (1981 *JBL* 340).

29 See *Bamford v Bamford* [1970] Ch 212, [1969] 1 All ER 969 (CA).

ought not to be surprising. Breach of that duty does not necessarily entail harm to the company, and, where harm has been caused, it may nevertheless be in the interests of the company to condone the breach. Of course, a particular ratification may be voidable as a fraud on the minority – but that is another matter. Finally, and most important, one cannot argue that directors can be released from a duty whenever a breach of that duty can be ratified or authorised. It is one thing to empower the members in general meeting to condone or sanction a particular breach of duty; it is quite another thing to empower a company to release its directors from a duty.

The wide construction: release from duty also prohibited

It is argued that, on a proper construction, the section does not merely prohibit release from liability for breach of duty: it also prohibits release from duty.[30] It is pointed out that the narrow construction, though "logical",[31] if "jesuitical",[32] legitimises the very position that the Greene Committee wished to prohibit;[33] a director

> "is exempted from liability just as effectively by a provision which says that the rules do not apply to him, as by one which says that the consequences of a breach of the rules do not apply to him".[34]

THE SECTION

The section does not (as the narrow construction would have it) render void an article which, *but for the section*, would exempt a director from any liability of the kind specified by the section (liability for breach of duty), thus leaving it open for the articles to determine what constitutes a breach of duty. Rather, the section renders void an article that has as its purpose[35] the exemption of a director from any liability which would, *but for the article in question*, attach to him for breach of duty. As Gregory[36] puts it, the section requires one

> "to compare the director's position under that provision with his position under the general law, and not with his position under the general law as modified by that provision".

It is "the *consequence* of the exemption rather than the *type* of exemption which is the dominant consideration under the section".[37] Hence the section renders

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30 See Baker "Disclosure of directors' interests in contracts" 1975 *JBL* 181; Birds "The permissible scope of articles excluding the duties of company directors" 1976 *MLR* 394; Rule and Brar "Exempting the directors" 1979 *New LJ* 6; Gregory "The scope of the Companies Act 1948, section 205" 1982 *LQR* 413, 1983 *LQR* 194.

31 Gregory 1982 *LQR* 414.

32 Rule and Brar 1979 *New LJ* 7.

33 Baker 1975 *JBL* 186–187.

34 Gregory 1982 *LQR* 414.

35 That is to say, in the English section the word "for" in the phrase "any provision . . . for exempting" has a gerundive function; what is meant is "any provision that has for its purpose the exemption of a director from liability" (see Gregory 1982 *LQR* 414–415; *Movitex Ltd v Bulfield supra* 117). As noted above, our section refers, not to a provision "for exempting" a director from liability, but to a provision "which purports to exempt" a director from liability ("wat 'n direkteur . . . heet vry te stel van 'n aanspreeklikheid").

36 1982 *LQR* 415.

37 *Ibid.*

void *both* an article that purports to exempt a director from liability arising from a breach of duty *and* an article that purports to release a director from a duty. In both cases the article purports to relieve a director from "liability . . . which would otherwise attach to him".

In *Movitex Ltd v Bulfield*[38] Vinelott J accepted this wide construction of the section; and there can be little doubt that it is correct. Moreover, there are clear indications that the Greene Committee intended to prohibit release from duty.[39] As we have seen, the Committee's only reason for not recommending that the duties of directors be written into the Companies Act, was that it was not practicable to do so.[40] Furthermore, the Committee considered that, since articles are drafted by those concerned in the formation of the company, it is "fallacious" to say that the shareholders agree to articles exempting their directors from liability, and that "it is obviously a matter of great difficulty and delicacy" for them to attempt to alter such an article.[41] To remove "any possible hardship", the Committee suggested that the court in exercising its statutory power to grant relief from liability[42] should take the circumstances of the director's appointment into account[43] and recommended that a provision be added requiring the court to do so.[44] Our Lansdown Commission[45] made a similar recommendation.[46]

Clearly, the argument that the Greene Committee was concerned only with the situation in *Re City Equity Fire Insurance* (exclusion of liability for breach of duty) carries no weight. As Vinelott J said in *Movitex Ltd v Bulfield*,[47] "[a] patch may be intentionally wider than the visible hole to which it is applied". What is more, Vinelott J pointed out, the solution that a provision may reduce or abrogate a duty so long as it does not exempt the director from liability for breach of it

> "leads to the absurd result that an article would, without infringing [the section], modify a director's duty to use reasonable skill and care in the conduct of the company's affairs

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38 *Supra* 117–118, where he said that the view that the section does not prohibit release from duty "fails . . . to give effect to the words, 'for exempting'".

39 See Gregory 1982 *LQR* 414. Birds (1976 *MLR* 395) submits that "in so far as it is possible to discover, the intention of the Greene Committee was to have a section with a wide effect, permitting no exclusions for directors from the duties otherwise cast on them by the general law".

40 Par 46. See also Gregory 1982 *LQR* 414, 1983 *LQR* 194 195.

41 *Supra* fn 8 par 46.

42 Now s 727 of the Companies Act, 1985.

43 *Supra* fn 8 par 46.

44 *Idem* par 46 47. As Birds (1976 *MLR* 397) says, there is "an even more cogent policy reason for a construction of [the] section . . . wider than Gower would allow; namely, the existence in section 448 of the 1948 Companies Act of the court's power to relieve directors, wholly or partially, and on whatever terms it thinks fit, from liability for breach of duty where they have acted honestly and reasonably, and in all the circumstances ought fairly to be excused. It is surely preferable to have technical, though honest, breaches of duty forgiven by a court than never brought to light because of provisions in Articles of Association".

45 *Supra* fn 10 par 136.

46 See s 95 of the Commission's Draft Bill (and s 96 of the Companies Amendment Act 23 of 1939, amending s 217 of the Companies Act 46 of 1926). This provision is now in s 248 of the Companies Act, 1973.

47 *Supra* 118.

> and so avoid a liability for damages for breach of duty which would otherwise arise, a conclusion which seems to me manifestly in conflict with the purpose of the section".[48]

Indeed, the fact that the Greene Committee did not intend to permit modification of the duty of care and skill can be deduced from its conclusion that "the general law of negligence" is sufficient to deal with those situations where the director is appointed not to direct the company's business generally but merely to exercise a "general supervision", or because he has some special expertise.

EXPLAINING THE PROVISIONS IN TABLE A

But if the wide construction is correct, how are the Table A provisions to be explained? Do they not purport to release directors from duties? Two answers to this question have been advanced. First, it is argued that, properly understood, provisions of the kind contained in Table A do not purport to release directors from their duties under the no-conflict rule: they merely "modify" those duties. Secondly, it is argued that, properly understood, the no-conflict rule does not impose duties; hence provisions of the kind contained in Table A, because they merely release directors from the no-conflict rule, do not conflict with the section.

The Table A provisions merely "modify" duties

It is argued that there is no exemption from liability within the meaning of the section where a duty is merely "modified" without being relaxed. The duty to disclose interests and profits to the general meeting is merely "modified" in this sense when the articles substitute for that duty a duty to make disclosure to the board. As Birds[49] puts it, such an article does not relieve the director of his duty, it is merely "the body charged with forgiving or ratifying a breach that has been changed". Of course, if the article does not preserve the sanction contained in the general equitable principle, "the original duty of disclosure is not so much modified as abrogated".[50] But the Table A provisions do preserve that sanction, for, although compliance with article 84(1) is not expressly made a condition of reliance on article 84(3), it is clear that a director cannot rely on that article unless he has disclosed his interest. In other words, article 84(3) must be understood as conditional in its operation upon the making of disclosure of interest to the board in terms of article 84(1). Hence article 84(3) does not abrogate the director's duty to disclose; it merely "modifies" that duty, replacing the duty to disclose to the general meeting with a duty to disclose to the board, and making breach of the latter duty subject to the same consequences as breach of the former.[51]

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48 *Idem* 117 – 118. Gregory (1982 *LQR* 415) made the same point. But cf Instone 1982 *LQR* 549 – 550.

49 1976 *MLR* 399; and see Baker 1975 *JBL* 189 – 190; Rule and Brar 1979 *New LJ* 7.

50 Baker 1975 *JBL* 189.

51 *Idem* 189 – 192. Baker argues (193 – 194) that, if not read together with art 84(1), art 84(3) simply abrogates duties and, consequently, falls foul of the section. If it does conflict

This "modification theory" has been criticised. Parkinson[52] argues that, even assuming that article 84(3) is conditional on article 84(1), its effect is not "merely modificatory". A director who has an interest in a contract is in breach of duty, "because he has placed himself in a position where his interest and duty may conflict". Even where he takes no part in the company's decision, he places himself in a position of potential conflict, since he owes his company a general duty not to injure it, and in contracting with the company he has ample opportunity to injure it by using information acquired as a director to obtain an unfair bargain. What is more, the company is entitled to the advice of all its directors in the consideration of its affairs. Although this does not mean that a director is obliged to give his opinion on every contract that his company proposes to conclude, it does mean that a director may not escape the no-conflict principle simply by not voting. Liability for breach of this duty cannot be avoided merely by disclosure to the general meeting. The members must also either ratify or authorise the breach of duty. But article 84(1) merely requires disclosure to the board; it does not empower the directors to authorise a breach of duty when disclosure is made to them. It is article 84 itself that authorises the breach of duty. Hence article 84 is "better described as a conditional exclusion, rather than a modification, of duty".

The modification theory also fails to explain those provisions of article 84(2) that permit a director (in certain circumstances) to attend and vote on matters in which he has an interest. Birds[53] says that this does not fall foul of the section, because "it is merely a reduction of duty and not an exemption". But that cannot be correct. A director has *both* a duty to disclose his interest to the general meeting *and* a duty not to act for his company in the matter. While a provision that permits disclosure to the board may perhaps be said merely "to modify" the director's duty of disclosure, a provision that permits a director to act in a matter in which he is interested cannot in any sense be said merely "to modify" his duty not to act in such matters.

What of article 78, which (as we have seen) abrogates the director's duty to account for certain profits "unless the company otherwise directs"? As Parkinson[54] points out, the modification argument cannot be relied on here, because the article permits a director to retain the profits. Birds[55] accepts that article 78 does relieve the director from a duty. But he argues that it is a statutory aberration, valid in spite of the provisions of the section, because and only

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with the section, then: (a) as to contracts by individual directors with the company, art 84(3) will have no effect, for a breach of duty is involved (ie failure to disclose interest in general meeting) "and there is no logical reason for excluding from the category of liability to the company a liability to have a contract made with the company avoided by it"; and (b) as to contracts with other persons or companies in which a director has an interest, art 84(3) will not be void under the section, since avoidance here is hardly an enforcement of a liability *of the director* to the company. As to accountability of the director to the company for profits, an unconditional exclusion of this liability is void under the section.

52 1981 *JBL* 336–338.

53 1976 *MLR* 400. Rule and Brar (1979 *New LJ* 7) say that a provision entitling a director to attend and vote is contrary to the section; but they do not consider art 84(2), where this is permitted. This surely contradicts their claim that art 84 is redundant.

54 1981 *JBL* 337.

55 1976 *MLR* 398–401.

because, it is included in Table A. This argument is unconvincing. As Gower[56] says,

> "it seems implausible to read into [the section] the words 'subject as otherwise provided in Table A from time to time' and ridiculous if only articles identical with those of Table A are effective".

The Table A provisions merely exclude the no-conflict rule, which rule does not impose duties

Gregory[57] argues that a beneficiary has two distinct rights to demand recession or obtain an account against his fiduciary: (a) a right by reason of the fact that the fiduciary has committed a breach of duty; and (b) an absolute right ("the automatic avoidance rule") to claim such relief without proof of the commission of a breach of duty by the fiduciary.[58] A beneficiary "has an absolute right to refuse to consent to his fiduciary having an interest which conflicts with his duty". Hence "any contract made in such circumstances is *automatically* voidable at the beneficiary's option". Proof of breach of duty is not necessary.[59] Since the section applies only to provisions that exempt directors from various types of *duty*, it does not render invalid articles that waive the "automatic avoidance rule". And that is all that article 84(2) and (3) purport to do. On the other hand, articles 84(1) and 78 do not even purport to release a director from the automatic avoidance rule. Article 84(1), by requiring disclosure to the board, merely entrenches the director's statutory duty of disclosure,[60] which is no more than a duty to disclose the nature of his interest to the board sanctioned by criminal penalty.[61] And since article 78 concludes with the words "unless the company otherwise directs", it merely entrenches the equitable principle enunciated in *Regal (Hastings) Ltd v Gulliver*,[62] namely that the company in general meeting has the right to allow the directors to keep their profits.

In *Movitex Ltd v Bulfield*[63] Vinelott J explained the Table A provisions in much the same way. There the company claimed that certain transactions it

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56 602; see also Parkinson 1981 *JBL* 337–338.

57 1982 *LQR* 417–422.

58 He refers here to Lord Herschell's famous statement of the profit rule in *Bray v Ford* [1896] AC 44 51: "It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

59 1982 *LQR* 417.

60 S 199 of the Companies Act, 1948 (s 317 of the Companies Act, 1985, and s 234–241 of our Companies Act, 1973). Gregory (1982 *LQR* 421) says that the fact that art 84(1) merely entrenches the provisions of the section does not mean that it is without any effect, for a director's failure to disclose his interest to the board thereby constituted a breach of the articles for which civil remedies may be available, and thus goes beyond section 199 in its effect. This is difficult to understand, for the articles do not constitute a contract between the company and its directors (see s 65(2) of the Companies Act, 1973).

61 Gregory (1982 *LQR* 421) points out that s 199(5) stated that "nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors from having any interests in contracts with the company", thereby leaving the rules of equity intact. See s 234(5) and 237(4) of our Companies Act, 1973.

62 [1967] 2 AC 134n, [1942] 1 All ER 378 (HL).

63 *Supra*. Vinelott J's judgment in the *Movitex* case is noted by Sealy 1987 *Camb LJ* 217; Birds 1987 *The Company Lawyer* 31; Prentice 1988 *All ER Annual R* 34.

had entered into with another company were void because two of its three directors had failed to disclose their interests (they were directors and shareholders of the other company). The company's articles were similar to the Table A provisions. Article 99 provided that no contract of the company in which a director was interested could be avoided, and that a director was not

> "liable to account to the company for any profit realised by any such contract . . . by reason of such director holding that office or of the fiduciary relationship thereby established".

A director was, however, required to declare his interest in the contract to the board. Article 100 prohibited a director from voting on any contract in which he was interested and from being counted in the quorum present at the meeting. To this prohibition there were certain exceptions. One of these ("the exception") excluded the prohibition where the contract was with another company and the director's sole interest was his interest as a director, officer, member or creditor of that other company. It was on this exception that the defence of the two interested directors turned: although the third director knew and approved of their interests, unless the exception was valid, the directors' meeting that approved the contracts was inquorate, and hence invalid.

The company submitted that the exception was invalid. It argued that an article permitting a director to place himself in a position of conflict of interest and duty is

> "one 'for exempting' the director from all liability which under the general law would otherwise attach to him in respect of a breach of his duty not to place himself in a position of conflict".

Vinelott J said that this "argument, if sound, would have very startling consequences". It would give rise to inconsistency between the section and articles 78 and 84 of Table A, and it would be "at the lowest very paradoxical" to find that the section conflicted with Table A. Therefore, if the section "is fairly capable of a construction which avoids that conflict, that construction must clearly be preferred to one which does not".[64]

Vinelott J was "at first inclined to find the solution to this conundrum" in the principle that a fiduciary who acts in a matter in which he has an interest does not breach the rule against "self-dealing" when he acts with the consent of his beneficiary, and its consent

> "protects the director not because it operates to release or absolve him from the consequences of a breach of the self-dealing rule but because, to the extent that the company in general meeting gives its informed consent to the transaction there is no breach, the conflict of duty and interest is avoided".

On this theory, the Table A provisions (and articles 98 and 100 of Movitex's articles) could be construed

> "as substituting the board, at least to the extent that there is a quorum of independent directors, for the purpose of giving the concurrence of the company".[65]

But, the judge held, if a director is indeed under a duty not to place himself in a position of conflict, this solution must be rejected, and for two reasons. First, "the company is entitled to the unbiased judgment of every one of its

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64 *Supra* 117.
65 *Ibid.*

directors''; a director therefore permits his interests to conflict with his duty even when he does not vote and is not counted in the quorum. Consequently, an article that permits disclosure to the board on the condition that the interested director does not vote and is not counted in the quorum, does not merely substitute the board for the general meeting – it also purports to release the director from a duty. Secondly, the solution leaves unexplained those articles that permit a director to vote and be counted in the quorum.[66] Clearly, if a director is under a duty not to place himself in a position of conflict, these articles purport to release the directors from a duty, and so conflict with the section.

Vinelott J found the ''true solution'' in the judgment of Megarry V-C in *Tito v Waddel (No 2)*.[67] In *Tito*'s case the question was whether a beneficiary's right to set aside his sale of trust property to his trustee is a right arising from the trustee's ''breach of trust'', and hence subject to the six-year period of limitation provided for in section 192(2) of the Limitation Act 1939. Megarry V-C pointed out that two rules govern purchases by a trustee of trust property. First, there is the rule against ''self-dealing'', which entitles the beneficiary to avoid *ex debito justitiae* a trustee's sale of trust property to himself, however fair the transaction. Secondly, there is the ''fair-dealing'' rule, which provides that where the beneficiary sells trust property to his trustee,

> ''the transaction is not voidable *ex debito justitiae*, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest''.[68]

The Vice-Chancellor held that a failure to comply with these rules is not a breach of *trust*, since these rules apply to fiduciaries generally – and not only to trustees. What is more, failure to comply with them is not *a breach of duty*; for they do not impose duties on fiduciaries. They merely subject fiduciaries ''to particular disabilities''. That is to say, they merely subject fiduciaries ''to certain consequences if they carry through certain transactions without, where appropriate, complying with certain requirements''. The judge explained that there are

> ''many things that a trustee may do or omit to do which will have consequences for him as a trustee without the act or omission amounting to a breach of trust''.

For example, his bankruptcy may be a ground for removing him from his trusteeship; yet ''it could not be said that a trustee is under a duty as trustee not to become bankrupt''.[69]

Vinelott J said that, looked at in ''the light of this analysis of the self-dealing rule, the apparent conflict between [the section] and articles 78 and 84 becomes clear''.[70] It is not ''strictly accurate'' to say that a director owes a fiduciary *duty* to the company ''not to put himself in a position where his duty to the company may conflict with his personal interest''.[71] The ''true principle'' is that, if a director places himself in such a position, ''the court will intervene

66 *Idem* 118–119.
67 [1977] 3 All ER 229.
68 *Idem* 241.
69 *Idem* 247–248.
70 *Supra* 120.
71 *Idem* 125.

to set aside the transaction without inquiring whether there was any breach of the director's duty to the company''. Therefore, articles ''can exclude or modify the application of this principle'', for that is not to ''exempt the director from the consequences of a breach of a duty owed to the company''.[72]

Vinelott J did, however, add an important qualification to Megarry V-C's analysis. It is, he said,

> ''one thing to say that a breach of the fair-dealing rule . . . is not a breach of trust and quite another thing to say that it involves no breach of duty''.

Failure to make proper disclosure *is* a breach of duty. A director also owes a statutory duty of disclosure and a duty of disclosure under articles such as article 99 of Movitex's articles. What is more, a director owes duties to promote the interests of his company and to prefer his company's interests when they conflict with his own; and any purported modification of either duty would infringe the section.[73]

Vinelott J's explanation has found general acceptance.[74] Although it is admitted that the distinction between a ''disability'' and a ''duty'' may contain ''an element of question-begging'',[75] and may be nothing more than ''different verbal formulations for describing what is in substance the same thing'',[76] it is agreed that the distinction does

> ''allow the courts to gradate the nature of the obligations imposed on directors and to permit the shareholders in different degrees to 'waive' them''.[77]

Thus it provides a

> ''neat solution to the problem posed by the relationship of [the section] and provisions in articles permitting a director to have an interest in transactions in which the company is also interested''.[78]

According to Sealy,[79] a provision in the articles falls outside the ambit of the section, ''only where a rule can legitimately be formulated without using the language of duty at all''.

It would seem to be accepted that the general principle underlying the distinction is, as Birds[80] puts it, that ''directors can be relieved from liability for breach of any 'duties' which do not cause damage to the company''; in other words, such ''duties'' are in truth ''disabilities''. And it is agreed that certain duties do *not* fall within this category, namely, the duty to act in good faith in the interests of the company,[81] the duty of care and skill,[82] the duty not to

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72 *Idem* 120.
73 *Idem* 120–121.
74 See Birds 1987 *The Company Lawyer* 32; Sealy 1987 *Camb LJ* 217; Prentice 1988 *All ER Annual R* 34; *Gore-Browne on companies* (Boyle and Sykes) vol 2 par 27.21.
75 Sealy 1987 *Camb LJ* 218.
76 Prentice 1988 *All ER Annual R* 34.
77 *Ibid.*
78 *Ibid.*
79 1987 *Camb LJ* 218–219; and see Birds 1987 *The Company Lawyer* 32.
80 *Ibid.*
81 *Gore-Browne on companies* par 27.21; Prentice 1988 *All ER Annual R* 34; Birds 1987 *The Company Lawyer* 32; Sealy 1987 *Camb LJ* 219.
82 *Gore-Browne on companies* par 27.21; Birds 1987 *The Company Lawyer* 32; Sealy 1987 *Camb LJ* 219.

misappropriate company property,[83] the duty to give unbiased judgment,[84] and all statutory duties (for example liability for profits on loss of office and the duty to disclose interests).[85] These "are all duties properly so called".[86]

Which rules impose "disabilities" rather than duties? It is agreed that one such rule is the rule avoiding transactions involving a conflict of duty and interest.[87] There is, however, disagreement about the rule that requires directors to exercise their powers for "the proper purpose".[88] And there is uncertainty about the general rule imposing accountability for secret profits. In *Gore-Browne on companies*[89] it is said that this rule is "excludable". Sealy,[90] however, points out that the

> "rule against making secret profits . . . is a complex of rules rather than a single one, and would not admit of any ready classification without careful analysis".

Birds[91] says that while "there seems no bar to a fairly general exclusion of the rule" if the rule is "merely an application of the conflict principle", the rule arguably is "a separate principle in its own right". He points out that in *Regal (Hastings) Ltd v Gulliver*[92] all the Law Lords made statements of principle to the effect that directors are under a duty to account for secret profits obtained by use of their position without reference to the need for a conflict of duty and interest. For this reason, Birds[93] says that he

> "remains convinced for the present at least that article 78 is truly exceptional, and that articles seeking to affect a director's accountability in this respect can only, consistently with [the section], modify and not exclude his duty".

CRITICISMS AND SUGGESTED SOLUTION

The proposition that the no-conflict rule imposes a disability rather than a duty challenges accepted doctrine, the classical statement of which is that of Lord Cranworth LC in *Aberdeen Ry Co v Blaike Bros*:[94]

> "[A]gents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interests of those whom he is bound to protect."

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83 *Gore-Browne on companies* par 27.21; Birds 1987 *The Company Lawyer* 32.
84 Prentice 1988 *All ER Annual R* 34.
85 *Gore-Browne on companies* par 27.21; Birds 1987 *The Company Lawyer* 32. See s 227 and 234–241 of the Companies Act, 1973.
86 Birds 1987 *The Company Lawyer* 32.
87 *Gore-Browne on companies* par 27.21; Prentice 1988 *All ER Annual R* 34; Birds 1987 *The Company Lawyer* 32; Sealy 1987 *Camb LJ* 219.
88 *Gore-Browne on companies* (par 27.21) considers that it cannot be excluded; but Birds and Sealy consider that it can because, as Birds puts it, the duty "is derived from the articles themselves" (1987 *The Company Lawyer* 32; Sealy 1987 *Camb LJ* 219). See also fn 19 *supra*.
89 Par 27.21.
90 1987 *Camb LJ* 219.
91 1987 *The Company Lawyer* 32.
92 *Supra*.
93 See 1976 *MLR* 33. Birds (1987 *The Company Lawyer* 32) also says that one point that Vinelott J "did not seem to consider, but which must surely be right, is that whatever the effect of [the section] on specially drafted articles, it cannot have any effect on articles in Table A, which have statutory authority". Birds therefore has not abandoned his theory of the statutory authority of Table A.
94 (1854) 1 Macq 461 471, [1843–1860] All ER Rep 249 (HL) 252.

Why did Megarry V-C and Vinelott J think that this is incorrect?

It cannot be because breach of the no-conflict rule merely results in voidability; Vinelott J himself accepted that a breach of the *duty* of disclosure merely renders the contract voidable. It would seem that the no-conflict rule is thought to impose a disability rather than a duty, because liability is thought to be "automatic", that is to say, the fiduciary incurs liability regardless of whether he was in any sense responsible for the facts giving rise to his liability. For example, how can a director be said to be in breach of duty when his fellow directors decide to contract with a company in which he happens to have an interest? True, he is then under a duty to disclose his interest. But the mere fact that he has that interest cannot constitute a breach of duty on his part. And the same holds true for the rule about profits: a profit may be simply an unforeseen consequence of a transaction entered into in the promotion of the company's best interests. Ought we not, therefore, to accept that the no-conflict rule imposes disabilities rather than duties? As we have seen, in *Tito v Waddel (No 2)*,[95] Megarry V-C pointed out that although bankruptcy is a ground for removing a trustee from office, we do not consider that a trustee is under a *duty* not to become bankrupt.

It is submitted that this argument is based on a misunderstanding of the no-conflict rule. Let us first consider the no-conflict rule as it applies to interests in contracts.

Contracts in which the director has an interest

There is no general rule that "all contracts are voidable in which a director has an interest". Interests in company contracts are governed by two rules, the rule against "self-dealing" and the rule requiring "fair dealing".

The rule against self-dealing prohibits a director from acting for his company in a matter in which he has an interest. As Lord Eldon said in *Ex parte Lacey*:[96] "The rule I take to be this; not, that the trustee cannot buy from his cestui que trust, but, that he shall not buy from himself." In other words, although a director may contract with his company, he may not act for it in the matter. This rule prohibits a director from acting for his company whenever he has an interest in the matter, that is, not only where he is the other contracting party,[97] but also where he has an interest in the affairs of the other contracting party.[98] The rule is prophylactic: if a director were permitted to act

95 *Supra* 248.

96 (1802) 6 Ves Jun 625 626, 31 ER 1228.

97 As Innes CJ put it in *Robinson v Randfontein Estates GM Co Ltd* 1921 AD 168 178, the rule prevents an agent "from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell, if employed to sell, he cannot buy".

98 As Sir Richard Baggally said in *North-West Transportation Co v Beatty* (1887) 12 AC 589 593 (PC): "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect . . ." See also eg *Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314 323: "It is an elementary principle of company law that (apart from explicit power in the articles of association) a director cannot vote for the adoption of a contract or on a matter in which he is an interested party" (per Stratford CJ).

for his company in the matter, he might be tempted to prefer his interests to those of the company. Breach of this duty renders a contract between the company and the director voidable. Where, however, the contract is with a third party in whose affairs the director has an interest, the company can avoid the contract only if the third party had knowledge of the director's breach of duty.

This rule against self-dealing is not an absolute one. The company in general meeting may permit a director to act in a matter in which he has an interest – which permission he can get only after making full disclosure of his interest. Thus, strictly speaking, the director's duty is a duty not to act *without the permission of his company* in a matter in which he has an interest; and therefore, when granting such permission, the company neither exempts the director from liability for breach of duty nor releases him from a duty.

The "fair-dealing" rule,[99] on the other hand, governs the situation where the director (in obedience to the self-dealing rule) does *not* act for the company in a matter in which he has an interest. Here, again, the director is either the other contracting party or he has an interest in the affairs of the other contracting party. There is no rule prohibiting a director from contracting with his company or from having an interest in a contract entered into by his company with a third person.[100] The rule is that a director who has an interest in a contract must act openly and in good faith. That is to say, he must make full disclosure to the general meeting of his interest and of all material information which he acquired in his capacity as director of the company. The purpose of this rule is to ensure that the transaction is at arm's length.[101] As Lord Eldon said in *Coles v Trecothick*,[102] a trustee may buy from the cestui que trust

> "provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving, that the cestui que trust intended, the trustee should buy; and there is no fraud, no concealment, no advantage taken, by the trustee of information, acquired by him in the character of trustee".

Where the director acts openly and in good faith, he does not ask the general meeting to consent to anything. The company must decide whether to enter into the contract. If it does decide to enter into the contract, it does not thereby permit the director to have an interest in the contract, or exempt him from liability, or release him from duty. Where, on the other hand, the director does not act openly and in good faith, the contract is voidable if he is the other contracting party. Where the other contracting party is a third person in whose

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99 This is the rule that Megarry V-C and Vinelott J referred to as the "fair-dealing" rule. The term can be misleading. It is taken from American law where the transaction is voidable only if it is unfair. That is not our rule. Both in England and in South Africa the transaction is voidable no matter how fair; cf Megarry V-C's formulation of the rule (text to fn 68 *supra*).

100 As Roskill J said in *Hely-Hutchinson v Brayhead Ltd* ([1967] 2 All ER 14 27, affd [1967] 3 All ER 98 (CA)), "[t]he true principle" is that "[t]here is no rule of company law that a director cannot validly contract with a company of which he is a director . . . [But] in certain cases equity would permit the company to void the contract".

101 As Innes CJ said in *Robinson v Randfontein Estates GM Co Ltd supra* 178: "There is only one way by which such transaction can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. In such a case the special relationship quoad that transaction falls away and the parties deal at arm's length with one another."

102 (1804) 9 Ves Jun 234 247, 32 ER 592 597.

affairs the director is interested, the contract is voidable if, and only if, that third person had knowledge of the director's breach of duty. Thus, whenever the transaction is voidable, it is voidable because the director was in breach of his duty to disclose. The no-conflict rule is not relevant: since the director did not act for his company in the matter, he did not place himself in a position in which his interests conflicted with his duty to act in the best interests of his company. His wrong is not that he placed himself in a position of temptation. His wrong is that he succumbed to temptation.

As we have seen, Vinelott J rejected this reasoning. He contended that by not acting in the matter the interested director *does* place himself in a position in which his interests conflict with his duty. This, according to Vinelott J, is because a company is "entitled to the unbiased judgment of every one of its directors". The interested director who does not participate in the board's decision therefore places himself in a position in which his interests conflict with his duty to give his company his unbiased judgment on the matter.

Support for the proposition that a director is under a duty to give his company his "unbiased judgment" is to be found in *Imperial Mercantile Credit Association v Coleman*.[103] There, Lord Hatherley said that the reasons why a director cannot be "a partaker in any benefit whatever from any contract which requires the sanction of the board" were given by Knight-Bruce V-C in *Benson v Heathorne*,[104] and are

> "that the company have a right to the services of their directors, who they remunerate by considerable payments; they have a right to their entire services, they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration . . ."[105]

And in *African Claim and Land Co Ltd v WJ Langermann*[106] Bristowe J, referring to both *Benson v Heathorne*[107] and *Imperial Mercantile Credit Association v Coleman*,[108] summed up the position in terms identical to those of Vinelott J:

> "A company . . . has a right to the voice and advice of every one of its directors in giving his opinion on matters which are brought before the board for consideration. If a director contracts with a company in the ordinary way through the board of directors as its agents . . . he places himself in a position in which his interest and duty conflict. If on the one hand he is present at the board meeting at which the matter is considered he cannot give independent advice, for his duty to the company pulls him in one direction and his self-interest in another; and if on the other hand he absents himself from the meeting, or being present takes no part in the proceedings, he deprives the company of the benefit of services for which they have paid and to which they are entitled."[109]

In other words, because the company is entitled to the unbiased judgment of all its directors, a director who does not act for his company in a matter in which he has an interest both places himself in a position of "conflict of interest and duty" and paralyses the board, so that disclosure cannot be made to it.

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103 (1871) 6 Ch 558.
104 (1842) 1 Y & CCC 326, 62 ER 909.
105 *Coleman* case *supra* 567 – 568.
106 *Supra*.
107 *Supra*.
108 *Supra*.
109 *Supra* 523.

This argument is fallacious. Whether the no-conflict rule imposes a duty or a disability, one thing is certain: it is a rule *about* duties. A director's interests conflict with his duty, not when he breaches a duty, but when he places himself in a position in which he may be tempted to breach a duty, that is, when he acts for his company in a matter in which he has an interest. Hence, if the director were indeed under a duty to participate in all decisions of the board, a director who failed to participate would breach that duty, and would not merely place himself in a position in which he might be tempted to do so. From this it would follow that an article prohibiting an interested director from voting would not merely purport to release him from the no-conflict rule. It would purport to release him from a duty, his duty to participate in all decisions of the board. Hence the article would conflict with the section, and would be invalid. Clearly, we have now entered the realm of the absurd; for if the no-conflict rule is releaseable (because it merely imposes a disability), we must now accept that an article allowing disclosure to the board is valid if, and only if, it permits the interested director to vote! That it can do, because to do so is merely to release the director from a disability imposed on him by the no-conflict rule; and that it must do, because to prohibit the director from voting is to release him from his duty to participate in all decisions of the board (and an article that purports to release a director from a duty is invalid).

But of course a director is not under a duty to participate in all decisions of the board.[110] And the board is not paralysed whenever one of its members fails to attend.[111] When a director has an interest in a contract, *he* is paralysed (for he may not act for his company in a matter in which he has an interest). As Knight-Bruce V-C put it in *Benson v Heathorne*:[112]

> "One of these very directors becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch: at once, therefore, to put the case at the very lowest, and in a manner most favourable to [the defendant], paralyzing him as a director in this respect . . ."

Knight-Bruce V-C did go on to say that, by so paralysing himself, the director leaves the company under the protection of the other directors while the members believe themselves to be under the protection of all the directors.[113] But by this he did not mean that the board cannot act in the absence of one of its members, and that therefore disclosure cannot be made to the other members of the board. He meant that disclosure cannot be made to the other members of the board, because disclosure to them is disclosure to fellow fiduciaries. As he put it:

> "The . . . remaining directors were placed in the difficult and invidious position of having to check and control the accounts of one of their own body, with whom they

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110 "A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings . . . He is not, however, bound to attend all such meetings though he ought to attend whenever, in the circumstances, he is reasonably able to do so" (per Romer J in *In re City Equitable Fire Insurance Co Ltd supra* 429; see also *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W) 165).

111 It is, of course, paralysed only when inquorate.

112 *Supra* 342 916.

113 *Ibid.*

> were associated on equal terms, in the management of every other part of the affairs of the concern."[114]

Indeed, the other directors are not merely placed in an invidious position. They are also likely to resolve their difficulty by deciding in favour of their fellow director. As Gower[115] puts it,

> "[i]t hardly seems over-cynical to suggest that disclosure to one's cronies is a less effective restraint on self-seeking than disclosure to those for whom one is a fiduciary".

In other words, the other directors have an interest in permitting the contract – for their turn will come. Thus the "disinterested" directors are never truly disinterested. As Justice Davies of the New York Supreme Court expressed it in *Cumberland Coal and Iron Co v Sherman*,[116]

> "[t]he moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self control".

This is why disclosure to the general meeting is necessary. The members in general meeting are not fellow fiduciaries. On the contrary, they are the ultimate owners of the company.

We can therefore conclude that there is no general rule that "all contracts in which a director has an interest are voidable". A contract in which a director has an interest is voidable only when, and only because, the director has committed a breach of duty in connection with it. This he does: (a) when, without the consent of his company, he acts for it in the matter; and (b) when, where he does not act for the company, he fails to make disclosure to it. What is more, where the contract is with a third person in whose affairs the director has an interest, the transaction is voidable if, and only if, that third person had knowledge of the director's breach of duty.

Secret or incidental profits

It is true that a profit is not necessarily acquired by a director at the expense of his company, and it is also true that the acquisition of a profit may be a mere unintended[117] consequence of something done when acting in good faith in the interests of the company. No doubt, therefore, it is wrong to say that a director is "under a duty" not to make a profit from his office. But it does not follow from this that the rule in regard to profits merely subjects the director to a "disability". The director is not rendered incapable of acquiring profits. Nor is he (as Gregory would have it) liable to account for profits only if called upon by the company to account for them. He is under a *duty* to account for

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114 *Ibid*. As the Maryland Supreme Court put it in *Cumberland Coal and Iron Co v Partish* 42 Md 598 606 (1875): "The remaining directors are placed in the embarrassing position of having to pass upon, scrutinize and check the transactions and accounts of one of their own body, with whom they are associated on terms of equality in the general management of all the affairs of the corporation." See Marsh "Are directors trustees?" 1966 *The Business Lawyer* 37.

115 587.

116 30 Barb 533 573 (NY Sup Ct 419), referred to by Marsh 1966 *The Business Lawyer* 37.

117 Of course a director, acting on behalf of his company, who knows that as a consequence of the transaction he will obtain a profit, commits a breach of duty. By acting thus, he places himself in a position of conflict of interest and duty.

them unless permitted by the company (in general meeting) to retain them. As Lord Wright said in *Regal (Hastings) Ltd v Gulliver*:[118]

> "The rule . . . is compendiously expressed to be that an agent must account for net profits secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency."

Thus Gregory's explanation of article 78 is not correct. By permitting a director to retain certain profits "unless the company otherwise direct", article 78 did not merely entrench the equitable principle enunciated in *Regal (Hastings) Ltd v Gulliver*.[119] Because the director is not merely liable for profits *if called upon to account for them*, but is liable to account for profits *unless permitted to retain them*, article 78 did not merely entrench the equitable principle in regard to profits. On the contrary, it reversed that principle.

Waiver clauses

There is no authority suggesting, even remotely, that a company can release its directors from the duties imposed on them by the common law.[120] True, the company can "ratify" a breach of duty and, at least in certain cases, "authorise" a breach of duty. But subsequent ratification and prior authorisation are a far cry from release from duty. And it would be odd indeed if the members of a limited liability company could release its directors from their common-law duties – leaving those directors free to do what they pleased with the company's assets. In other words, in so far as the section prohibits release from duty, it does no more than endorse the common law.

But, as we have seen, certain duties of directors are merely duties to do (or not to do) something *without the permission of the company*. These are the duties concerning interests in contracts and incidental profits. Breach of these duties does not entail harm to the company (whenever the company is harmed, the director has breached some other duty). Their purpose is not to place an absolute prohibition on transactions in which directors are interested, since such transactions may benefit the company. Their purpose is, rather, to ensure that such transactions are subjected to scrutiny. Hence, when the company in general meeting permits a director to act in a matter in which he has an interest, or to retain a profit, the company does not waive its rights against the director or release him from a duty: it simply permits him to do what he may not do without its permission.

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118 *Supra* 154 392.

119 *Supra*.

120 Instone (1982 *LQR* 549) argued that relaxation from duties is permissible in the articles as it is in a will or settlement. But, as Gregory (1983 *LQR* 195) points out, while there is no "public policy" which forbids testators to confer the benefits of exemption on their trustees, in company law "the Greene Committee Report and [the] section . . . constitute a public policy that such benefits are forbidden to directors". This, it is submitted, is an important argument. There is a great danger in drawing an analogy between the position of a director of a limited liability company and fiduciaries whose fiduciary relationship arises from relationships established by agreement (or what is akin to agreement). In the latter case, it is open for the parties to establish whatever relationship they please between themselves. The director, on the other hand, holds an office within a statutory regime. He cannot *qua* director be made a kind of partner by the articles; the assets belong to the company, and not to the members. Hence the need for the section.

The courts recognise the validity of articles that: (a) allow a director to fulfil his duty of disclosure to the company by making disclosure to the board instead of to the general meeting; and (b) permit a director to retain an incidental profit and to act in matters in which he, or one of his fellow directors, has an interest. This may or may not be a wise policy. But one thing is certain: in recognising the validity of such articles, the courts do not recognise the validity of articles that purport to release directors from duties. Rather, they recognise that permission that can be granted by the company in general meeting can also be granted in the articles.

And that is what articles of the kind contained in Table A of the English 1948 Act purport to do. Article 84(1) required disclosure to the other directors. Article 84(2) permitted an interested director to act in certain matters. Article 84(3) permitted a director to retain certain incidental profits, as did article 78. Article 84(3) also provided that contracts in which a director was interested were not voidable. And by providing that such contracts were not voidable, article 84(3) both substituted disclosure to the board (as required by article 84(1)) for disclosure to the general meeting, and permitted the other directors to act in the matter.

"Duty of care": tendense in die Suid-Afrikaanse en Engelse regspraak

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SUMMARY

Duty of care: trends in South African and English case law

The article deals with the development of the criteria for the imposition of a delictual duty of care in South African and English law. On the basis of clear authority, wrongfulness is accepted as a fundamental element of delictual liability. It is further contended that wrongfulness is constituted by either the infringement of a right or the breach of a legal duty.

The main part of this article is devoted to an analysis of case law and the opinion of writers about the development of the criterion to establish the existence or otherwise of a legal duty in a particular situation. The development in South African law clearly reveals the abandonment of the traditional foreseeability test in favour of a more complex criterion of policy or the *boni mores*. Foreseeability is but a component of this more comprehensive test.

The same basic trend is discernible in English law. In *Donoghue v Stevenson* 1932 AC 562 the classic foreseeability test was enunciated; in *Anns v Merton* 1978 AC 728 Lord Wilberforce formulated a two-phase investigation and test (namely, is there an adequate relationship of "proximity or neighbourhood"? and, if the answer is positive, whether the *prima facie* duty is negatived by policy considerations); in the *Van Oppen* case 1989 3 All ER 389 a three-phase test is preferred (namely foreseeability of harm, proximity, and justness and reasonableness).

1 INLEIDING

Die doel van hierdie artikel is om aan die hand van die Suid-Afrikaanse en Engelse regspraak, en die siening van enkele skrywers, aspekte van die ontwikkelinge rondom veral die maatstaf ter bepaling van die bestaan al dan nie van 'n "duty of care" (regsplig) aan te toon.

Die artikel dek 'n ontwikkelingsgang wat die volgende aspekte behels: die erkenning van onregmatigheid as delikselement, die kriteria vir die vasstelling van onregmatigheid en veral die ontwikkeling van 'n komplekse en gesofistikeerde maatstaf ter bepaling van die bestaan al dan nie van 'n regsplig in bepaalde gevalle.

Ten einde hierdie ontwikkelinge betreklik akkuraat – ook ten opsigte van bepaalde nuanses – te beskryf, is dit nodig om uitvoerig uit die regspraak en literatuur aan te haal. 'n Blote persoonlike weergawe en interpretasie kan in hierdie geval dalk te subjektief, en derhalwe wetenskaplik onaanvaarbaar, wees.

2 ONREGMATIGHEID: ERKENNING

Die kwalifikasie van die handeling as *onregmatig* is 'n onontkombare, fundamentele vereiste vir deliktuele aanspreeklikheid. Moderne skrywers oor die

deliktereg aanvaar hierdie vereiste vandag sonder teenspraak.[1] In die Romeinse en Romeins-Hollandse reg vind die vereiste (natuurlik in betreklik onverfynde vorm) uitdrukking in die begrippe *non iure* en *contra ius*.[2] In ouer sake is daar talle verwysings (sonder uitvoerige bespreking of regverdiging daarvan).[3] In *Herschel v Mrupe*[4] stel appèlregter Van den Heever onregmatigheid as "an essential element" vir aanspreeklikheid.[5] Sedert 1960 word onregmatigheid toenemend eksplisiet as delikselement erken.[6]

3 KRITERIA VIR DIE BEPALING VAN ONREGMATIGHEID

Onregmatigheid is geleë in óf die aantasting van die eiser se subjektiewe reg óf die nie-nakoming van 'n regsplig.[7]

Van der Merwe en Olivier[8] aanvaar in beginsel slegs die aantasting van 'n subjektiewe reg as onregmatigheidskriterium. Dit is te eng en strydig met die regspraak. Neethling ea[9] aanvaar beide die kriteria van regskending en pligskending; hulle gee voorkeur aan regskending maar aanvaar dat dit in besondere omstandighede "doelmatiger" is om met pligskending te werk. Hierdie doelmatigheid is onder andere ter sprake by suiwer ekonomiese verlies. Boberg[10] meen dat reg en plig altyd korreleer en dat reg- en pligskending dus nie selfstandige kriteria is nie; ten grondslag van beide lê 'n waarde-oordeel op grond van "morality and policy".[11] Pligskending kan geriefshalwe in sekere gevalle as alternatiewe roete na 'n beleidsbeslissing benut word.[12] In ons regspraak

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1 Vgl Neethling, Potgieter en Visser *Deliktereg* (1992) 31 ev (hierna Neethling ea); Boberg *The law of delict* (1984) 30 ev; Van der Walt *Delict: principles and cases* (1979) par 19 – 20; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1985) 48 ev.

2 *D* 9 2 5 1; Voet 47 1 1; Van den Heever *Aquilian damages in South African law* (1944) 33 – 35; De Villiers *The Roman and Roman-Dutch law of injuries* (1899) 26 – 27 37 – 43; Beinart 1949 *THRHR* 141; Lawson *Negligence in civil law* (1950) 32 – 33.

3 Vgl bv *R v Umfaan* 1908 TS 62 66; *Whittaker v Roos and Bateman* 1912 AD 92 113 122 129 – 131; *Matthews v Young* 1922 AD 492 507; *Shahmahomed v Hendriks* 1920 AD 151 158 – 159; *Bredell v Pienaar* 1924 CPD 203 209 – 211; *Perlman v Zoutendyk* 1934 CPD 151 155; *Stern v Podbrey* 1947 1 SA 350 (K) 361 – 363.

4 1954 3 SA 464 (A) 485 490.

5 Vgl Grosskopf AR in *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496 – 497.

6 Vgl *Wentzel v SA Yster en Staalbedryfsvereniging* 1967 3 SA 91 (T); *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 109 – 112; *SA Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A) 403; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *UP v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); *Lillicrap*-saak *supra* 496 – 497; *Marais v Richard* 1981 1 SA 1157 (A) 1166 – 1167; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 188 – 189; *Franschhoekse Wynkelder (Koöperatief) Bpk v SAR&H* 1981 3 SA 36 (K) 38 – 40; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 379 ev; *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832 – 833.

7 Van der Walt *Delict* par 20; *UP v Tommie Meyer Films (Edms) Bpk supra* 387.

8 50.

9 31 ev.

10 32 ev.

11 33.

12 32.

word *pligskending* duidelik en gesaghebbend as die kriterium in die geval van *suiwer ekonomiese verlies* gestel.[13]

Die kern van die saak is geleë in hoofregter Rumpff se kriptiese *dictum* in *Administrateur Natal v Trust Bank van Afrika Bpk*:[14] "By afwesigheid van 'n regsplig, is daar geen onregmatigheid nie."

4 REGSPLIG: MAATSTAF VIR VASSTELLING

Ten spyte van historiese akademiese kritiek teen die regspligkonsep, en meer in besonder die "duty of care"-weergawe daarvan,[15] is daar met enkele klein nuanse-verskille algemene aanvaarding daarvan in ons regspraak.

In *SAR&H v Marais*[16] is daar die klassieke *dictum* ter aanvaarding van die leerstuk:[17]

> "I do not propose to enter upon a discussion, from an academical point of view, whether the doctrine that liability in cases of negligence depends on a duty of care owed to the injured *should* be a part of English and our law, as in my opinion the question whether it *is* a part of our law has been answered by judgments in this court."

Alhoewel hoofregter Rumpff in die toonaangewende saak *Administrateur Natal v Trust Bank van Afrika Bpk*[18] na die Engelsregtelike "duty of care"-leerstuk verwys as "'n onding in ons gemene reg" aanvaar hy die regsplig-konsep en -benadering wat, volgens die hof, op "beleidsoorwegings" berus. Veral in die geval van suiwer ekonomiese verlies word die regspligbenadering tot onregmatigheid toenemend deur ons regspraak aanvaar en toegepas.[19] Die *tradisionele toets* vir die bestaan al dan nie van 'n "duty" in 'n bepaalde geval is die voorsienbaarheidstoets of redelike man-toets; die toets het sy oorsprong in Lord Atkin se klassieke formulering van die "neighbour principle" in *M'Alister (or Donoghue) v Stevenson*.[20]

Selfs so onlangs as 1965 formuleer en pas die appèlhof nog die tradisionele toets toe. In *Peri-Urban Areas Health Board v Munarin*[21] word dit só gestel:

> "I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would – (a) foresee the possibility of harm occurring to him; and (b) take steps to guard against its occurrence."[22]

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13 Vgl *Administrateur Natal v Trust Bank van Afrika Bpk*-saak *supra*; *Coronation Brick*-saak *supra*; *Franschhoekse Wynkelder*-saak *supra*; *Shell and BP South African Petroleum Refineries (Pty) Ltd v Osborn Panama SA* 1980 3 SA 653 (D); *Tobacco Finance (Pvt) Ltd v Zinmat Ins Co Ltd* 1982 3 SA 55 (Z); *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corp (Pvt) Ltd* 1985 4 SA 533 (Z); *Barlow Rand v Lebos* 1985 4 SA 341 (T); *Lillicrap*-saak *supra*.

14 *Supra*.

15 Vgl bv Van den Heever *Aquilian damages* 42 – 44; Van der Merwe en Olivier 133 ev; Price 1949 *SALJ* 171 269; Swanepoel 1957 *THRHR* 126 198 266; 1958 *THRHR* 50 134.

16 1950 4 SA 610 (A).

17 621.

18 *Supra*.

19 Vgl *Shell and BP South African Petroleum Refineries*-saak *supra*; *Franschhoekse Wynkelder*-saak *supra*; *Coronation Brick*-saak *supra*; *Bedford v Suid-Kaapse Voogdy Bpk* 1968 1 SA 226 (K).

20 1932 AC 562 580.

21 1965 3 SA 367 (A) 373.

22 Sien ook *Cape Town Municipality v Paine* 1923 AD 207 216 – 217; *Joffe & Co Ltd v Hoskins* 1941 AD 431 450 – 452; *Stride v Reddin* 1944 AD 162 172; *Wasserman v Union Government* 1934 AD 228; *Herschel v Mrupe* 1954 3 SA 464 (A) 474 – 477 481 491 – 493; *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A) 585.

Maar: reeds in die gesaghebbende uitspraak van die appèlhof in die *Ocean Accident*-saak[23] word die "foreseeability"-toets by name as kunsmatig ("a measure of artificiality") en "a manner of speaking" gekritiseer. Veral in gevalle waar partye nie in 'n verhouding van "physical proximity" staan nie (soos gewoonlik by gevalle van suiwer ekonomiese verlies), skep "foreseeability" as 'n toets probleme. Ek haal egter appèlregter Schreiner volledig aan:

> "The duty of care is in our case law rested upon foreseeability and this gives rise to a measure of artificiality. But this is really unavoidable for, if there is to be control over the range of persons who may sue, the test must be that of the reasonable man; what he would have foreseen and what action he would have taken may not be calculable according to the actual weighing of probabilities, but the device of reasoning on these lines helps to avoid the impression of delivering an unreasoned moral judgment ex cathedra as to how the injurer should have behaved. The duty of care fits conveniently into the reasoning process and even if it is no more than a manner of speaking it is a very useful one.
>
> The enquiry whether in any particular case there is a duty of care commonly involves no difficulty at all; the answer is usually covered by authority or is obvious. In the case of road accidents there is no difficulty in seeing a duty of care to other users of the road who are near enough to be physically injured. When one goes further, however, difficulties may arise in applying the test whether a reasonable person would have foreseen harm to the person injured and would have guarded against it. Once one goes beyond physical proximity and considers the possibilities that may arise out of the relationships, contractual or other, between the physically injured person and other persons who may suffer indirectly, though materially, through his incapacitation, one is immediately met with the prospects of an unmanageable situation. It is easy to imagine the absurdities that would arise if all persons contractually linked to the injured person could sue the careless injurer for the loss suffered by them. The case was put to us of the injured building contractor who in consequence of his injury has to discontinue his contract so that his employees and the building owner and the architect and his sub-contractors and their employees are all put to some loss. Insurance companies would also be a wide class of plaintiffs who could bring actions when persons insured by them were negligently injured or, presumably, killed, if the extension of liability contended for were recognised. In fact it would be a rare accident that did not give occasion for a crop of actions at the suit of persons who had made contracts with the injured party."

Die *leerstuk van die "unforeseeable plaintiff"* is ook 'n bestanddeel van die klassieke redelike man-toets.[24] Benewens die vraag of die redelike man nadeel sou voorsien het, is daar ook die belangrike vraag of hy nadeel aan die betrokke eiser of klas van persone waartoe die eiser behoort, sou voorsien het; indien nie, het hy geen regsplig teenoor die eiser nie.[25]

Die tradisionele toets van voorsienbaarheid rus dus, saamgevat, op drie bene: (a) sou die redelike man, in geval van onsorgvuldige (nalatige) optree, nadeel voorsien; (b) sou die redelike man nadeel aan die betrokke eiser (of sy klas) voorsien; en (c) sou die redelike man stappe doen om die voorsienbare nadeel af te weer. Hierdie toets is nie heeltemal irrelevant nie; dit is wel deur latere ontwikkelinge in die regspraak verfyn (sowel Suid-Afrikaanse as Engelse regspraak – sien *infra*). Van 'n oorspronklike min of meer selfstandige toets is

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23 *Supra* 584–586.

24 Boberg 26 meen dit is deel van die skuldtoets.

25 *Union Government v National Bank of SA Ltd* 1921 AD 121 128–130 148–150; *Steenkamp v Steyn* 1944 AD 536; *Workmen's Compensation Commissioner v De Villiers* 1949 1 SA 474 (K); *Union Government*-saak *supra* 585; *Cowan v Balam* 1945 AD 81 (veral die minderheidsuitspraak van Greenberg AR); *Bedford*-saak *supra*; *Coronation Brick*-saak *supra*; *Franschhoekse Wynkelder*-saak *supra*; *Shell and BP*-saak *supra*.

dit gereduseer tot 'n bestanddeel van 'n meer gesofistikeerde maatstaf of, anders gestel, tot 'n belangrike faktor by die judisiële waardering van die erkenning al dan nie van 'n regsplig in 'n bepaalde geval. Van der Walt[26] stel dit so: "The foreseeability of harm is a factor which is taken into consideration; it is, however, not the sole criterion."

Hedendaagse skrywers, gerugsteun deur tendense in die regspraak, is dit betreklik eens dat die toets vir onregmatigheid – en die bestaan al dan nie van 'n "duty" in bepaalde gevalle – op 'n veel breër en gesofistikeerde basis berus as die betreklik eenvoudige "foreseeability"-toets. Die basiese toets is 'n judisiële waarde-oordeel of die eiser se betrokke aangetaste belang in die omstandighede en tipe van situasie, ooreenkomstig die *boni mores* (die regsopvattings van die gemeenskap) beskermingswaardig is; indien wel, is daar 'n regsplig; andersins is daar geen regsplig op die dader (verweerder) nie.

Ek haal Boberg, Van der Walt en Neethling ea aan in verband met die basiese toets:

Boberg[27] skryf:

> "At the root of each of these crystallized categories of wrongfulness lies a value judgement based on considerations of morality and policy – a balancing of interests followed by the law's decision to protect one kind of interest against one kind of invasion and not another. The decision reflects our society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not – the *boni mores*, or, as Rumpff CJ put it in *Minister van Polisie v Ewels* (*supra*), the legal convictions of the community.
>
> And so it follows that the same considerations must determine wrongfulness in the doubtful case. Thus some maintain that the essence of lawful conduct is its concurrence with the criterion of objective reasonableness – a criterion applied *ex post facto* ('diagnostically') and in the light of the actual consequences of an act, and not to be confused with the reasonableness criterion of negligence, which is applied 'prognostically' and in the light of what a reasonable man in the actor's position would have foreseen at the time of acting. In so far as this test merely affirms that in determining wrongfulness the law seeks a socially acceptable (ie 'reasonable') balancing of conflicting interests it is unobjectionable. But it is also not particularly helpful. (After all, one could hardly assert that the imprimatur of lawfulness reflects what society regards as *unreasonable*!) Certainly it furnishes the courts with the flexibility they require to make the policy decision called for, but the satisfaction of its advocates with this virtue should not allow them – as indeed it sometimes does – to leave the matter there and ignore the actual policy factors that a court can and should weigh in reaching its conclusion. Frankly acknowledging their law-making role in these cases, some judges have essayed to state the considerations that motivate them. Matters such as the social utility of the damage-producing activity, the legislature's attitude in analogous cases, a comparison of the relative facility with which the plaintiff and the defendant can avoid the risk or insure against it, the economic consequences for each party of burdening him with the loss, the nature of the loss, the possibility of inviting a multitude of claims (some perhaps spurious), the nature of the defendant's calling, and the proximity of relationship between the parties, have all been properly canvassed in appropriate cases. This, it is believed, is the proper approach to the problem of wrongfulness."

Van der Walt[28] skryf:

> "The criterion of reasonable foresight for the determination of the existence of a duty is in reality used as a device to control the range of persons who may sue on the ground

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26 27.
27 33.
28 26–27.

> of negligence. Although it gives rise to a measure of artificiality, the use of the duty concept helps to avoid the impression of delivering an unreasoned moral judgment ex cathedra. The foreseeability test as a determinant of duty is therefore more often than not founded on considerations of reason and policy. As a controlling device the foreseeability test is not concerned with 'the actual weighing of probabilities', but with the question whether, in the particular circumstances, the particular interest of the plaintiff is in principle entitled to legal protection against negligent conduct from persons in the position of the defendant. In short: the recognition of a duty of care in a particular situation is the outcome of a value judgment."

en:

> "The existence of a duty of care depends on a comparative judicial evaluation of the relevant individual and social interest involved in the particular circumstances of the case. The basic question is whether the plaintiff's interest should be accorded judicial protection against inadvertent conduct in the particular type of situation. The foreseeability of harm is a factor which is taken into consideration; it is, however, not the sole criterion. The paramount importance of the policy-based concept of duty of care necessarily prevents rigid adherence to the untenable proposition inherent in the foreseeability test that all harm caused to another which could reasonably have been foreseen and guarded against is in principle recoverable."

Neethling ea[29] skryf:

> "Die algemene norm of maatstaf waarvolgens vasgestel word of 'n belange-aantasting regtens ongeoorloof is al dan nie, is die regsopvattings van die gemeenskap: die *boni mores*. Die *boni mores*-toets is 'n objektiewe redelikheidsmaatstaf. Die kernvraag is of die dader die benadeelde se belang(e) in die lig van al die omstandighede van die geval volgens die regsopvattings van die gemeenskap op 'n redelike of onredelike wyse aangetas het."

Die beleidsbeslissing en regterlike waarde-oordeel berus dus op die toets van die *boni mores*. Die gemeenskap se regsbeleidmakers, naamlik die wetgewer en regter, vertolk die "regsgevoel van die gemeenskap".[30] *Boni mores* (letterlik: goeie sedes) is 'n *regsmaatstaf* – soos weerspieël in die sinoniem daarvoor, naamlik "regsoortuiging van die gemeenskap" – en nie 'n sedelike, sosiale of morele maatstaf nie.[31]

Die *boni mores* as toets is wesenlik daarop gerig om die *redelikheid* al dan nie van die dader se optrede en die aantasting van die benadeelde se belange in die lig van die besondere omstandighede teenoor mekaar af te weeg: lê die "redelikheid" by die dader, het hy geen regsplig nie; lê dit by die benadeelde was daar 'n regsplig op die dader.[32] Die sogenaamde "algemene redelikheidsmaatstaf" word, waarskynlik as sinoniem van die *boni mores*, beskou as 'n "grondnorm" om tussen regmatige en onregmatige optrede te onderskei.[33]

Die toepassing van die fundamentele, dog vae en algemene toets van die *boni mores* behels basies 'n *ex post facto afweging van die belange* (sowel individuele as openbare belange) en die inagneming van die tipe situasie en die besondere

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29 33 – 34.

30 *Schultz v Butt* 1986 3 SA 667 (A) 679.

31 *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596. Vgl Neethling ea 34 vn 18. In *Meskin v Anglo-American Corp of SA Ltd* 1968 4 SA 793 (W) 799 – 800 807 – 808 is Jansen R se traagheid om die *boni mores*-kriterium sonder meer te aanvaar, te wyte aan 'n te sterk vereenselwiging met 'n suiwer etiese standaard – sien Van der Walt 23 vn 9.

32 Vgl veral *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111 – 112 116 – 117 121 – 122; vir ander sake sien Van der Walt 23 vn 12.

33 Vgl *Marais v Richard* 1981 1 SA 1157 (A) 1168; *Lillicrap*-saak *supra* 498; *Hawker v Life Offices Ass of SA* 1987 3 SA 777 (K) 790.

omstandighede van die geval; dus: 'n opweging van belange in die situasie as sowel getipeerde as feitlike geval.[34] Hierbenewens moet die werklike beleidsfaktore wat in die regspraak ter sprake was, geïdentifiseer word. In hierdie verband noem Boberg oorwegings soos:[35] die sosiale nut van die verweerder se optrede, die wetgewer se benadering in analoë gevalle (ek voeg by: regters se uitsprake in soortgelyke sake), die relatiewe moontlikhede om die risiko te vermy, die ekonomiese gevolge vir eiser en verweerder, aard van die nadeel, die "spook" van 'n vloedgolf aksies, die verweerder se beroep (posisie) en die "proximity of relationship" tussen die eiser en verweerder. Hierdie faktore speel in die regspraak 'n wesenlike rol.

Ek verwys na regspraak waarin die maatstawwe van beleidsbeslissings, *boni mores*, redelikheid, belange-opweging aanvaar is en toepassing gevind het. Reeds in appèlregter Greenberg se uitspraak in *SAR&H v Marais*[36] blyk die toepassing van beleidsoorwegings eerder as 'n suiwer toepassing van die voorsienbaarheidstoets.[37]

Die duidelikste uiteensetting van die "policy-based function" van die "duty of care"[38] is in die *Union Government*-saak.[39] Appèlregter Schreiner wys duidelik daarop dat 'n mens probleme kry as die redelike man-toets (voorsienbaarheidstoets) op verhoudinge, *in casu* kontraktuele verhoudinge, toegepas word waar daar geen "physical proximity" bestaan nie. Die hof wil, weens die "unmanageable situation", die "absurdities" en "occasion for a crop of actions", nie 'n regsplig op 'n motoris plaas teenoor 'n persoon (of persone) wat 'n kontraktuele verhouding (*in casu* 'n dienskontrak) met die (direk) beseerde het nie. In die geval van indirekte benadeling, weens 'n kontraktuele of ander verhouding tussen die (direk) benadeelde en ander persone, verhoed die vooruitsig van 'n vloedgolf aksies en eisers dus die erkenning van 'n "duty to take care"; 'n duidelike beleidsbeslissing.[40] [41]

Steun vir die beleidstoets, in teenstelling tot die voorsienbaarheidstoets, vind 'n mens ook by Engelse en Amerikaanse skrywers. Ek haal aan:

Millner skryf:[42]

> "The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms a part of the enquiry

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34 Van der Walt 22 27; Neethling ea 33 ev.
35 34.
36 1950 4 SA 610 (A).
37 Sien Van der Walt 26–27.
38 Vgl Boberg 37.
39 *Supra* 584–586.
40 Ook in *Administrateur Natal v Trust Bank van Afrika Bpk supra* erken die appèlhof die belangrikheid om, veral in die geval van suiwer ekonomiese verlies, "die vrees van oewerlose aanspreeklikheid" te "besweer"; dit word gedoen deurdat die hof die taak het om oa in elke geval vas te stel of daar 'n "regsplig" was.
41 Ander sake: *UP v Tommie Meyer supra* 387–388; *Silva's Fishing Corp v Maweza* 1957 2 SA 256 (A) 265; *Minister van Polisie v Ewels supra* 597; *Herschel v Mrupe supra* 477–478; *Administrateur Natal v Trust Bank supra*; *Marais v Richard supra* 1168; *Coronation Brick*-saak *supra* 380; *Hawker*-saak *supra* 781; *Atlas Organic Fertilizers*-saak *supra* 188–189; *Schultz v Butt supra* 679; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* 1988 2 SA 350 (W) 356–357; *Shell and BP*-saak *supra*; *Franschhoekse Wynkelder*-saak *supra*; *Tobacco Finance*-saak *supra* 61. In *UP v Tommie Meyer supra* 387 word onomwonde verklaar: "Onregmatigheid word basies aan die hand van die *boni mores* bepaal"; latere uitsprake bevestig dit.
42 *Negligence in modern law* (1967) 230.

whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and "duty of care" in this sense is a convenient but dispensable concept.

On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature. The syntheses achieved in *Donoghue v Stevenson* and the *Hedley Byrne* case were concerned with duty of care in this sense and show the duty concept as an antenna with which to probe delicately the novel categories of relationship and classes of injury which come before the courts for recognition. The dynamics of the duty of care are largely outside the conceptual framework of negligence. The social forces which promote change interact in a profoundly complex and subtle manner to yield normative solutions in law and morals. For this reason, there is no simple explanation of the sudden shifts in the scope and character of the duty of care or the precise timing of such movements."

Fleming skryf:[43]

"In truth, in the decision whether to recognise a duty in a given situation, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of evolving community attitudes."

Rogers skryf:[44]

"First, the law in a novel situation is no more easily determined or certain than it was under *Anns*: it is true that we have abandoned an apparently exclusive reliance on the uncertain criterion of the individual judge's view of policy but the criteria of proximity are sometimes themselves almost as vague.

Secondly, it should not be thought that the role of policy in the broad sense has been reduced in importance as a result of the relegation of the second stage in *Anns* to a limited role: to require, for example, a link closer than mere foreseeability of harm where the case involves information or advice is neither more nor less than a statement of judicial policy that words should be treated differently from deeds because, for example, the range of persons who may be affected by reliance on them is so great as to create a risk of imposing an unreasonable burden on their originator. 'Policy', whether concealed in the language of proximity, or free-standing in the comparatively rare cases to which the *Anns* second stage is now said to be applicable, means simply that the court must decide (subject to the doctrine of precedent) whether there should be a duty, taking into account the established framework of the law and also the implications that a decision one way or the other may have for the operation of the law in our society."[45]

Prosser skryf:[46]

"The statement that there is or is not a duty begs the essential question – whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not suprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. It is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised. But it should

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43 *The law of torts* (1987) 128.
44 *Winfield and Jolowicz on tort* (1989) 80.
45 Die verwysing na *Anns* is na die saak van *Anns v Merton London Borough* 1978 AC 728.
46 *Law of torts* (1971) 325 – 326.

be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."

5 "DUTY" IN DIE ENGELSE REG

Ek raak die onderwerp kortliks aan. Die Engelsregtelike agtergrond en ontwikkelinge is besonder interessant.

Die Engelse reg het altyd aanvaar dat daar nie 'n "duty" is bloot omdat skade redelikerwys voorsienbaar is nie. Reeds in 1846 verklaar Du Parcq LJ:[47]

> "It is not true to say that whenever a person finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, it is his duty in the one case to be careful to do the act and in the other to be careful not to do the act."[48]

Wat is die beginsel om vas te stel of 'n "duty" bestaan? In navolging van Rogers[49] onderskei ons drie stadia in die ontwikkeling van 'n maatstaf.

5 1 Regsposisie voor die uitspraak in *Anns v Merton*

In *Donoghue v Stevenson*[50] – die slak in die gemmerbierbottel – vind ons Lord Atkin se klassieke formulering van die "neighbour principle" of die "foreseeability"-toets. Ek haal aan:[51]

> "In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

5 2 *Anns v Merton*[52]

Die feite Die eisers was huurders van woonstelle in 'n gebou wat in 1962 gebou is. In 1970 het die mure begin bars en die vloere opgelig; dit was na bewering die gevolg van defekte fondamente. Die eis is teen die plaaslike owerheid op grond van 'n nalatige versuim om die fondamente te ondersoek of om die gebreke en afwykings tydens inspeksie op te merk.

Lord Wilberforce Die "Council" se aanspreeklikheid kan nie slegs op die "neighbourhood"-beginsel berus nie; 'n "essential" faktor is die feit dat die

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47 *Deyong v Shenburn* 1846 KB 227 233.
48 Vgl Rogers 73 – 74.
49 *Idem* 72 ev.
50 1932 AC 562.
51 580.
52 1978 AC 728.

verweerder 'n "public body" is, wat ingevolge wet pligte en magte het. Die vraag is of, benewens hierdie openbare pligte en magte, daar ook 'n privaatregtelike "duty" behoort te wees.

Of 'n "duty" bestaan, berus op 'n twee-fasige ondersoek: (a) was daar 'n genoegsame verhouding van "proximity or neighbourhood" tussen die eiser en verweerder? (die voorsienbaarheidstoets dus); indien wel, ontstaan 'n "*prima facie* duty of care"; (b) is daar enige oorwegings wat hierdie *prima facie* "duty" behoort te neutraliseer? (klaarblyklik handel dit hier oor "policy considerations").[53]

Hierdie toets is in 'n reeks uitsprake, beginnende by *Peabody v Parkinson*[54] tot by *A-G of Hong Kong*[55] skerp gekritiseer en verteenwoordig vandag waarskynlik nie meer die aanvaarde weergawe van die toets vir "duty" nie.

5 3 Huidige regsposisie

Die *A-G of Hong Kong*[56] is tans die toonaangewende saak.

Lord Keith kritiseer die *Anns*-uitspraak en wys op verskillende interpretasies van die eerste fase van die *Anns*-toets, naamlik: "proximity or neighbourhood". Die hof aanvaar die siening dat hierdie fase meerdere elemente bevat; dit beklemtoon "the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v Stevenson*".

Lord Keith stel dit so:

> "The truth is that the trilogy of cases referred to by Lord Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning."

Lord Keith sê verder:

> "The second stage of Lord Wilberforce's test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability."

Hy verwys na twee sake waar "public policy" hierdie rol gespeel het: *Rondel v Worsley*[57] ('n regspraktisyn het nie 'n "duty" teenoor die kliënt in 'n litigasieproses nie) en *Hill v Chief Constable of West Yorkshire*[58] (die moeder van die laaste slagoffer van die berugte "Yorkshire Ripper" eis op grond van nalatigheid van die polisie; die hof ontken 'n "duty" teenoor haar).

Dit lyk of daar tans 'n drie fase-toets bestaan. In *Van Oppen v The Bedford Charity Trustees*[59] stel Balcombe LJ dit so:

> "The three requirements necessary to establish a duty of care are (1) foreseeability of harm, (2) proximity and (3) that it should be just and reasonable for liability to be imposed" ("proximity" beteken eintlik 'n "direct and close relationship").

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53 751–752.
54 1985 AC 210.
55 1987 All ER 705.
56 *Supra*.
57 1969 1 AC 191.
58 1987 1 All ER 1173.
59 1989 3 All ER 389.

In ander sake word die toets in 'n enkele, algemene formule saamgevat. In *Abrahams v Nelson Hurst & Marsch*[60] word byvoorbeeld verklaar:

> "The difficulties arising with regard to proximity and the policy exception in recent years had evolved into the more general question 'was it fair, just and reasonable that duty of care having the proposed scope should be held to exist?' without altering the basic nature of the test to be applied."

Vanaf *Donoghue v Stevenson*, so lyk dit, eindig die Engelse reg met die toets van "redelikheid en billikheid"[61] en die "algemene redelikheidsmaatstaf".[62] 'n Finale formulering van die toets is egter nog nie voor hande nie.

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60 Sien Huxley 1990 *Modern LR* 369.
61 *Regal*-saak *supra*.
62 *Marais v Richard supra*; *Lillicrap*-saak *supra*.

In the present matter the . . . founding papers [of the applicant] comprise 34 pages. How many folios is unknown, but it would be considerably more than that. Suffice it to say that there are a number of aspects in the affidavits which are quite unnecessary and irrelevant and should not have been referred to and it is also clear that the allegations in the affidavit could have been considerably more concisely stated so that they approximate more to the form of a declaration than was in fact the case.

I consider that this is a fortiori *a case . . . where the finding must be made that this application is an abuse of the process of the Court.*

When I turn to the reply of the respondent, the criticism must be even more trenchant. The reply is just short of 100 pages. Clearly it does not constitute an answer in the form of a plea. It, too, contains irrelevancies and unacceptable verbosity. It, too, is an abuse of the process of the Court.

Counsel for the applicant and for the respondent have sought to persuade me that reasons existed for this inordinate prolixity in the papers on the part of both parties. I remain unpersuaded that there is any merit in the basis on which they sought to excuse the unacceptable length of the papers.

It is my experience, and I understand that of my Brothers to be the same, that there is a tendency for the provisions of Rule 43 to be disregarded and for the applications and the reply thereto to assume voluminous proportions. That practice must be firmly discouraged and the present is an appropriate case where that discouragement will commence (*per* Kroon J in *Visser v Visser* 1992 4 SA 530 (SE) 531).

Ownership and personal freedom: subjectivism in Bernhard Windscheid's theory of ownership*

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OPSOMMING

Saaklike regte en persoonlike vryheid: subjektivisme in Bernhard Windscheid se eiendomsteorie

Daar work dikwels aanvaar dat die negentiende-eeuse eiendomsopvatting van die pandektiste, waarvolgens eiendomsreg as 'n absolute en eksklusiewe beskikkingsreg beskou word, basies met die klassieke Romeinse eiendomsopvatting ooreenstem. Gevolglik word middeleeuse en vroeg-moderne opvattings as onklassieke nuwighede afgemaak en vermy. In werklikheid kan baie van die essensiële kenmerke van die negentiende-eeuse eiendomsopvatting egter nie na die klassieke Romeinse reg teruggevoer word nie, en dikwels is die werklike oorsprong daarvan veel later. Die aanname dat die pandektiste se eiendomsopvatting op die Romeinse eiendomsreg berus, versluier juis die moderne herkoms van sekere belangrike aspekte en kenmerke van die moderne eiendomsopvatting. In hierdie artikel word die pandektiste se eiendomsopvatting sistematies geanaliseer ten einde die essensiële aspekte en kenmerke daarvan te identifiseer, en enkele implikasies van en gevolgtrekkings daaromtrent word verder bespreek. Die sistematiese analise van die pandektiste se eiendomsopvatting word aangepak aan die hand van Windscheid se eiendomsteorie; daarna word enkele sistematiese en filosofiese aannames wat hierdie teorie ten grondslag lê, uitgewys en in die lig van huidige teoretiese ontwikkelinge behandel. Daar word veral klem gelê op aspekte en kenmerke van die moderne eiendomsopvatting wat van die pandektiste oorgeneem is, wat nie van die Romeinse reg afkomstig is nie, en wat in die vorm van onderliggende strukturele, teoretiese en filosofiese aannames verskuil bly.

1 INTRODUCTION

The nineteenth-century pandectist concept of ownership is of importance to contemporary legal theory because of its influence on the creation of what may be called the traditional civil-law perception of ownership as it is understood and used in modern civil-law systems.[1] Pandectist theory occupies a curious

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1 See Visser "The 'absoluteness' of ownership: the South African common law in perspective" 1985 *Acta Juridica* 39 – 52; Van der Walt "Der Eigentumsbegriff" in Feenstra and Zimmermann (eds) *Das römisch-hollandische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 485 – 520.

position in this regard, as it is regarded as a representative picture of both classical Roman law and modern civil law. It is often said that the pandectist concept of ownership (and, by implication, the traditional civil-law concept of ownership) is fundamentally similar to or even a modern revival of the concept of ownership of classical Roman law, specifically in so far as both ascribe an absolute and exclusive right of disposal to the owner. Of course, the theory of absolute ownership was not accepted by all German lawyers of the nineteenth century. Jhering[2] referred to this perception as the individualist Roman concept of ownership, and contrasted it with his own perception of the social concept of ownership that was supposed[3] to derive from Germanic customary law. However, according to many romanists, the absolute concept of ownership was representative of Roman law, and accordingly medieval and early modern perceptions are consequently presented as unclassical novelties which vulgarised Roman law and which should be abandoned.[4] On the other hand, many of the essential characteristics of the nineteenth-century perception and description of ownership cannot be traced back to Roman law, and they are more often than not of much later origin. In fact, as the Dutch legal historian Van den Bergh[5] has pointed out, it would be unrealistic to accept that a legal institution such as ownership could occupy exactly the same place and social function in two societies that differ so widely as those of classical Rome and modern western Europe. Such a presumed similarity of the Roman, pandectist and contemporary perceptions of ownership is a misrepresentation of Roman, medieval and modern law, and tends to obscure the true origin and the philosophical foundations of the modern concept of ownership. It is, therefore, much more acceptable nowadays to argue that there are certain Roman elements in the modern civil-law

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2 *Der Zweck im Recht* (1877) vol 1 514. See further in this regard Süss *Heinrich Dernburg – ein Spätpandektist im Kaiserreich: Leben und Werk* (1991) 241 – 242. Compare Tautscher "Der Wandel im Eigentumsbegriff" in *Festschrift zum 60. Geburtstag von Walter Wilburg* (1965) 205 – 214.

3 See in this regard Kroeschell "Zur Lehre vom 'germanischen' Eigentumsbegriff" in *Rechtshistorische Studien: Festschrift H Thieme* (1977) 34 – 71. Kroeschell argues that the so-called Germanic law is to a large extent nothing but an abstraction or projection that is not backed up by empirical evidence. In many cases it consists of nothing more than a projection from the assumption that it must have been the opposite of Roman law on a certain point, based on the presumed difference in approaches (individual v social) between the two systems. In fact, the characteristics ascribed to Roman law were often also no more than projections from nineteenth-century values.

4 See Olzen "Die geschichtliche Entwicklung des zivilrechtlichen Eigentumsbegriffs" 1984 *Juristische Schulung* 334: "An Stelle grundlegender Neuerungen trat in der Pandektistik des 19. Jahrhunderts die wissenschaftliche Durchdringung des römischen Eigentumsbegriffs der Klassik." Compare Van der Merwe *Sakereg* (1989) 171: "Bogenoemde omskrywing van eiendom en die strenge onderskeid wat dit tussen eiendom en beperkte saaklike regte trek, is uit die klassieke Romeinse reg afkomstig." In later editions of *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* (see vol 3 II ed Beekhuis (1990) 17) criticism of the historical inaccuracy of this view is noted.

5 *Eigendom: grepen uit de geschiedenis van een omstreden begrip* (1988) 31 – 50, particularly 31 – 32: "Het is fantastisch, te veronderstellen dat eigendom precies dezelfde plaats en functie zou hebben in twee maatschappij-stelsels die zo hemelsbreed van elkaar verschillen als het antieke Romeinse en het onze."

concept of ownership, although many of its essential characteristics derive from later developments.[6]

With reference to Henry Ford's statement that "history is bunk", Van den Bergh[7] has described legal history as "debunk", to indicate that at least one of its functions is to undermine the authority of established legal principles by scrutinising their historical authenticity. In the same spirit, the aim of this article is to criticise the traditional concept of ownership by questioning traditional assumptions regarding its breeding. However, the purpose is not to paint a complete picture of the origin and development of the pandectist concept of ownership – such a venture would require more than just a single article.[8] The idea is rather to analyse the pandectist concept and explanation of ownership systematically in order to identify its essential elements and characteristics, and to isolate some of these elements and characteristics for further discussion. In this regard special attention is given to the systematic structure of which ownership forms part, and to the philosophical values underlying that structure – aspects of the traditional concept of ownership which are obscured by the emphasis which is placed on its so-called Roman roots, which more often than not restrict evaluations to the surface of the theory of ownership. Because of his influence upon and stature amongst the pandectists, Bernhard Windscheid (1817 – 1892) has been selected as the main spokesman for pandectism, and his description of ownership is analysed as a representative example of the pandectist method and point of view in general. Finally, a number of implications and conclusions arising from the systematical analysis are worked out, especially with regard to the question whether the value system underlying the traditional

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6 A number of authors have indicated that the supposed "absoluteness" of ownership is not of Roman origin, and in fact derives from nineteenth-century thinking: see Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* (1955); Van Maanen *Eigendomsschijnbewegingen: juridische, historische en politiek-filosofische opmerkingen over eigendom* (1987); GCJJ van den Bergh "Schijnbewegingen. Hercodificatie en eigendomsdefinitie in historisch perspectief" 1987 *Recht en Kritiek* 327 – 341; Peter van den Bergh "De mythe van het onbegrensde in de negentiende-eeuwse eigendomsopvattingen" 1984 *Recht en Kritiek* 293 – 314.

7 *Geleerd recht: een geschiedenis van de europese rechtswetenschap in vogelvlucht* (1980) 2. Van den Bergh also refers to a like-minded statement by Oliver Wendell Holmes jnr (quoted by Van den Bergh iv): "But in fact some rules are mere survivals. . . . History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old."

8 See in this regard Van der Walt "Der Eigentumsbegriff" (fn 1) 485 – 520, as well as Klemm *Eigentum und Eigentumsbeschränkungen in der Doktrin des usus modernus pandectarum* (1984); Wiegand "Zur theoretischen Begründung der Bodenmobilisierung in der Rechtswissenschaft: der abstrakte Eigentumsbegriff" in Coing and Wilhelm (eds) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* vol III (1976) 118 – 155; Wilhelm "Private Freiheit und gesellschaftliche Grenzen des Eigentums in der Theorie der Pandektenwissenschaft" in Coing and Wilhelm (eds) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* vol IV (1979) 19 – 39; Mayer-Maly "Das Eigentumsverständnis der Gegenwart und die Rechtsgeschichte" in Baumgärtel *et al* (eds) *Festschrift für Heinz Hübner zum 70. Geburtstag* (1984) 145 – 158; Winkel "Der Umschwung der wirtschaftswissenschaftlichen Auffassungen um die Mitte des 19. Jahrhunderts" in Coing and Wilhelm (eds) *Wissenschaft und Kodifikation im 19. Jahrhundert* vol IV (1979) 3 – 18; Hecker "Das Eigentum, eist Gottesgabe, heute Herrschaftsrecht" 1988 *Zeitschrift für neuere Rechtsgeschichte* 179 – 193; Coing "German 'Pandektistik' in its relationship to the former 'ius commune'" 1989 *Am JCL* 9 – 15; Beutter *Die Eigentumsbegründung in der Moraltheologie des 19. Jahrhunderts (1850 – 1900)* (1971).

perception of ownership, which was strongly influenced by pandectism, is still acceptable and workable today.

2 WINDSCHEID'S THEORY OF OWNERSHIP

Windscheid[9] defines ownership in the context of subjective rights,[10] with particular reference to the assumption that rights are enforced by the human will. According to his theory the legal order (objective law) issues a norm or principle[11] on the basis of a particular set of circumstances, thereby allowing a specific kind of act or behaviour, and grants this norm or principle to a specific person for his/her free disposal. That does not mean that the person is forced to act or behave in accordance with the principle, but rather that s/he is free to decide whether or not to do so, and more specifically whether or not to make use of the judicially provided remedies to enforce their freedom to do so in the face of interference or opposition from others. For this reason it is said that the will of the person is decisive for the enforcement of the principle laid down by law.[12] On the basis of this theory a right is defined as the power to exercise the will that is conferred by law.[13]

Windscheid's distinction between real rights[14] and personal rights[15] is an important aspect of this theory. Real rights are described as rights with regard to which the person's will is decisive for a thing, while the person's will is decisive for the actions or behaviour of a specific person in the case of personal rights.[16] Windscheid deliberately does not say that a real right is a right which has a thing as its object, because he regards all rights as relationships between person and person, and not between person and thing.[17] He therefore explains his definition of a real right as follows: in the case of personal rights the will

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9 *Lehrbuch des Pandektenrechts (Lehrbuch)* was published in 1862; references here are to the 8th ed by Kipp (1900).

10 Windscheid describes a subjective right as a "Recht im Sinne von Berechtigung (Recht im subjectiven Sinne, subjectives Recht)", and contrasts it with objective law, which he refers to as "Die Rechtsordnung (das Recht im objectiven Sinne, das objective Recht)": *Lehrbuch* vol 1 book 2 par 37 (130). Rights are discussed *idem* 130 – 602.

11 Windscheid *idem* 131 uses the word "Befehl", and in the fn "Norm, Imperativ".

12 *Ibid*: "Demgemäss ist sein Wille massgebend für die Durchsetzung des von der Rechtsordnung erlassenen Befehls. Die Rechtsordnung hat sich des von ihr erlassenen Befehls zu seinen Gunsten entäussert, sie hat ihren Befehl zu seinem Befehl gemacht. *Das* Recht ist *sein* Recht geworden."

13 *Ibid*: "Recht is eine von der Rechtsordnung verliehene Willensmacht oder Willensherrschaft."

14 He prefers the term "dingliche Rechte" to "Sachenrechte"; see *idem* par 38 (143).

15 Windscheid uses the term "persönliche Rechte", but he mentions the alternative "Forderungsrechte" or "obligatorische Rechte": *idem* par 39 (146).

16 *Idem* par 38 (140): "Dingliche Rechte sind diejenigen Rechte, kraft deren der Wille des Berechtigten massgebend ist für eine Sache"; *idem* par 39 (144): "Persönliche Rechte sind diejenigen, kraft deren der Wille des Berechtigten nicht massgebend ist für das Verhalten der Menschen in Betreff einer Sache, sondern für ein irgendwelches Verhalten einer einzelnen Person (oder ein Mehrheit einzelner Personen)."

17 *Idem* par 38 (140): "Alle Rechte bestehen zwischen Person und Person, nicht zwischen Person und Sache." Compare Brinz *Lehrbuch der Pandekten* (1857) book 3 part 1 ch 1 par 49 (175).

of the holder of the right is decisive for a specific action or behaviour[18] of a specific other person or group of persons;[19] whereas in the case of real rights the will of the subject is decisive for the actions of everybody or anybody else with regard to that thing.[20] A real right is, therefore, a right in terms of which the law permits the beneficiary of the right to determine the actions of everybody else with regard to the object of the right.[21]

Windscheid explains that the content of the power of will conferred by a real right is negative: it permits the holder the power to determine the behaviour of all other people with regard to the object of his/her right, in the sense that they must refrain from (any or specific) actions with regard to the object, and they must refrain from behaviour that would hinder (any or specific) actions of the holder of the right towards the object.[22] Real rights are, therefore, defined in terms of their exclusivity: they allow their holders to exclude all others from actions with regard to the object and from actions that interfere with the beneficiary's own use of it.[23]

In this context, ownership[24] is distinguished from the limited real rights[25] with reference to the scope of the power to exclude others from actions relating to the object: if the right allows the holder to enforce his/her will with regard to the object in the totality of its relations, it is called ownership;[26] if it allows the holder to enforce his/her will only with regard to a specific relation or a

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18 The performance, called a "Forderung" or "obligatio", which must be performed by the debtor; see Windscheid *Lehrbuch* vol 1 book 2 par 39 (146).

19 The debtor who has to perform in terms of the obligation.

20 See Windscheid *Lehrbuch* vol 1 book 2 par 38 (140): "Sondern es soll damit gesagt sein, dass der Wille des dinglich Berechtigten massgebend ist für das Verhalten in Betreff der Sache, d. h. für das Verhalten eines Jedweden, nicht für das Verhalten Dieses oder Jenen."

21 This distinction of Windscheid is an example of the personalist theory, substantiated by his statement that real rights are absolute rights, which are enforceable against everybody, while personal rights are relative and enforceable only against a specific person or persons: *idem* par 41 (149).

22 *Idem* par 38 (140–141)): "Der Inhalt der das dingliche Recht ausmachenden Willensmacht aber ist ein negativer: die dem Berechtigten Gegenüberstehenden sollen sich der Einwirkung auf die Sache – aller oder einer bestimmten – enthalten, und sie sollen durch ihr Verhalten zur Sache die Einwirkung des Berechtigten auf die Sache – eine beliebige oder eine bestimmte – nicht verhindern."

23 Schlossmann "Ueber den Begriff des Eigenthums" 1903 *Jherings Jahrbuch für die Dogmatik des bürgerlichen Rechts* 289–390, who comments upon the then recently adopted *BGB*, argues (338 ff) that the right to exclude is the only essential characteristic of ownership: "Das Eigenthumsrecht ist ein Ausschliessungsrecht und nichts weiter als ein Ausschliessungsrecht."

24 Windscheid *Lehrbuch* vol 1 book 3 par 167 (755) refers to "ownership" ("das Eigenthum"), but in the same par (755–756) he indicates that "the right of ownership" ("das Eigenthumsrecht") would be more accurate, even though he does not regard the two terms as referring to different concepts (see 756 fn 1). Compare Schlossmann 1903 *Jherings Jahrbuch für die Dogmatik des bürgerlichen Rechts* 291.

25 Windscheid *Lehrbuch* vol 1 book 3 par 38 (629). The limited real rights are referred to as "Rechte an fremder Sache".

26 Windscheid *idem* book 2 par 38 (143–144); book 3 par 145 (629): "Dasjenige dingliche Recht, kraft deren der Wille des Berechtigten massgebend ist für die Sache in der Gesammtheit ihrer Beziehungen, ist das Eigenthumsrecht." Compare Leist *Ueber die Natur des Eigenthums* (1859) 57–90.

specific group of relations towards the object, it is a limited real right.[27] The distinction between ownership and the limited real rights is, therefore, characterised by the total or abstract exclusivity of ownership, as opposed to the limited exclusivity of the limited real rights.

Ownership is distinguished from possession in similar terms. Whereas ownership is defined as a lawful right which empowers the owner to enforce his/her will with regard to the actions of others towards the object,[28] possession is described as the factual enforcement of a person's will towards the object; a possessor actually enforces his/her will with regard to control and use of the object regardless of the right to do so. Despite its definition as a factual relationship, possession nevertheless has important legal consequences.[29] The factual nature of possession is emphasised in this definition by the statement that the lawfulness or unlawfulness of actual physical control is not considered when dealing with possession.[30] Ownership is a right, and possession as actual physical control may or may not be justified by the existence of such a right, but for the purposes of possession itself, the lawfulness of control is not in issue. Windscheid[31] restricts ownership to corporeals, which is typical and logical for a theory which distinguishes between ownership as a right and possession as factual control,[32] since possession as factual control can exist only with regard to corporeals.

In the pandectist system of rights, ownership is defined as the most complete real right; it allows the owner to enforce his/her will with regard to all aspects of the control and use of the object.[33] This definition inevitably means that the object lawfully belongs to the subject in the sense that it is his/her own.[34] In this way the *proprium* or belonging-to aspect of ownership, which was well-known in Roman, medieval and Roman-Dutch law, is related to the complete exclusivity that is characteristic of ownership. Windscheid[35] indicates that this

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27 Windscheid *Lehrbuch* vol 1 book 2 par 38 (144); vol 1 book 3 par 145 (629): "Dingliche Rechte, kraft deren der Wille des Berechtigten für die Sache nur in einen einzelnen Beziehung (oder in einer Mehrheit einzelner Beziehungen) massgebend ist, heissen Rechte an fremder Sache." Compare Dernburg *Pandekten* (1884) vol 1 part 2 ch 1 par 192 (436).

28 Windscheid *Lehrbuch* vol 1 book 3 par 145 (629).

29 *Ibid*: "Aber auch schon die blosse thatsächliche Geltendmachung des Willens für die Sache, der Besitz, ist ein Rechtsverhältniss, welches wichtige rechtliche Folgen hat." See further vol 1 book 3 par 148 – 150 (640 – 661).

30 *Idem* par 148 (642).

31 *Idem* par 168 (759). Compare *idem* par 137 (603).

32 Compare in this regard Dernburg *Pandekten* (1884) vol 1 part 2 ch 1 par 192 (434); Brinz *Lehrbuch der Pandekten* (1857) book 3 part 1 ch 1 par 50 (176).

33 Windscheid *Lehrbuch* vol 1 book 3 par 167 (756): "Dass aber Jemandem eine Sache nach dem Rechte eigen ist, will sagen, dass nach dem Rechte sein Wille für sie entscheidend ist in der Gesammtheit ihrer Beziehugen." Compare Arndts *Lehrbuch der Pandekten* (1865) book 2 ch 2 par 130 (193).

34 Windscheid *Lehrbuch* vol 1 book 3 par 167 (755): "Eigenthum bezeichnet, dass Jemandem eine (körperliche) Sache eigen ist, und zwar nach dem Rechte eigen ist; daher genauer statt Eigenthum Eigenthumsrecht."

35 *Idem* par 167 (756): "Diess zeigt sich nach einer doppelten Richtung: 1) der Eigenthümer darf über die Sache verfügen, wie er will; 2) ein Anderer darf ohne seinen Willen über die Sache nicht verfügen." The distinction between these two aspects of ownership still forms the backbone of the modern distinction between the positive and negative aspects of ownership as described in *BGB* par 903; see Baur *Lehrbuch des Sachenrechts* (1989) 211. Schlossmann regards the negative aspect as the only one that is really essential to ownership (see fn 23 above).

complete right of disposal, which permits the owner to enforce his/her will with regard to all aspects of control and use of the object, characterises ownership in two directions: the owner has the complete right of disposal, which means that s/he can dispose of the object as s/he wishes; and on the other hand the owner has the complete right of exclusion, which means that nobody else can dispose of the object in any way against the owner's will.

The fact that ownership is defined as the complete right of disposal, means that the owner can do with the object as s/he likes,[36] and while certain specific entitlements may be identified and enumerated, ownership itself exists in the completeness of the owner's powers, and therefore cannot be described as the sum total of these entitlements.[37] Ownership is, in this perspective, an abstract right which is always more than the sum total of its individual entitlements.

The abstract nature of ownership as the complete right of disposal over a corporeal object also has implications for restrictions and limitations on ownership. The abstract nature of ownership means that, just as the sum total of individual entitlements cannot add up to constitute ownership itself, the sum total of individual restrictions or limitations on ownership cannot have any fundamental effect upon its nature. Windscheid[38] declares that ownership is fundamentally or intrinsically unlimited, even though it can accommodate limitations. This formulation is not a theoretical flight of fancy, and it must be seen in the context of reaction against feudal land relations, which were regarded as a social and economic disaster. To the post-medieval mind, the law could do no better than ensure that ownership (and especially land ownership, which was seen as the prime sphere of individual freedom) remained free of unnecessary feudal-type bonds and restrictions.[39] As an abstract totality ownership is, moreover, an elastic right: as soon as a limitation or restriction falls

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36 As reflected in the modern definition of ownership in the *BGB* par 903: "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen."

37 Windscheid *Lehrbuch* vol 1 book 3 par 167 (756): "Es lassen sich ferner einzelne Befugnisse namhaft machen, welche dem Eigenthümer kraft des Begriffs des Eigenthums zustehen, z. B. die Befugniss die Sache zu gebrauchen und zu nützen, die Befugniss jeden von aller Einwirkung auf dieselbe auszuschliessen, die Befugniss sie von jedem dritten Besitzer abzufordern, die Befugniss ihr rechtliches Schicksal zu bestimmen (Veräusserungsbefugniss). Aber man darf nicht sagen, dass das Eigenthum aus einer Summe einzelner Befugnisse bestehe, dass es eine Verbindung einzelner Befugnisse sei. Das Eigenthum ist die Fülle des Rechts an der Sache, und die einzelnen in ihm zu unterscheidenden Befugnisse sind nur Ausserungen und Manifestationen dieser Fülle." Compare Puchta *Pandekten* (1845) ch 2 par 144 (204); but see Schlossmann 1903 *Jherings Jahrbuch für die Dogmatik des bürgerlichen Rechts* 315.

38 *Lehrbuch* vol 1 book 3 par 167 (757): "Das Eigenthum ist als solches schrankenlos; aber es verträgt Beschränkungen. Aus der Gesammtheit der Beziehungen, in welchen Kraft des Eigenthums die Sache dem Willen des Berechtigten unterworfen ist, kann durch eine besondere That des Rechts eine oder die andere Beziehung herausgenommen und dem Willen des Eigenthümers entzogen werden. Dadurch hört er nicht auf, Eigenthümer zu sein; denn es ist immerhin wahr, dass er ein Recht hat, welches als solches seinen Willen entscheidend macht für die Sache in der Gesammtheit ihrer Beziehungen, und welches ihn jeder besonderen Rechtfertigung für irgend eine an der Sache denkbare Befugniss überhebt." See further in this regard Süss *Heinrich Dernburg – ein Spätpandektist im Kaiserreich: Leben und Werk* (1991) 238–242.

39 See Dernburg *Pandekten* (1884) vol 1 part 2 ch 1 par 192 (437): "Freies und unbelastetes Eigenthum ist wirtschaftlich und social ein hohes Gut, schwer belastetes ein Misstand."

away, ownership resumes its former and natural completeness.[40] Two categories of limitation are mentioned by Windscheid,[41] namely those that derive from general legal principles, and those that result from rights granted to another person.

The fundamental tenets of Windscheid's theory of ownership can be reduced to the following main points:

(a) Ownership is a right, which means that the law provides the owner with a general principle according to which s/he is free to decide whether or not to enforce his/her will with regard to the disposal of the object against other persons.

(b) Ownership is a real right, which means that the owner's objectively guaranteed freedom of will is decisive with regard to an object. The main implication is that the owner can enforce his/her will with regard to disposal over the object against everybody, or rather against anybody who happens to interfere, and not just against a specific person or group of persons.

(c) Even though it is a real right and therefore concerned with disposal over objects, ownership is nevertheless regarded as a relationship between person and person, and not between person and object. This means that ownership is a relationship between persons in terms of which one person, the owner, can enforce his/her will and exercise his/her freedom against other persons with regard to the use and disposal of an object.

(d) As a real right, ownership is defined primarily with reference to its exclusivity: the right to exclude others from disposal of the object and from interference with the owner's own disposal of the thing.

(e) Among the real rights, ownership is distinguished from the limited real rights by the scope of its exclusivity: the holder of a limited real right can exclude others from certain identified and enumerated relations towards the object, but the owner can exclude others from all relations *vis-à-vis* the object.

(f) In the same sense, ownership is said to be abstract: it is a totality of entitlements that is always more than the sum total of any group of identified and enumerated entitlements.

(g) In a more positive sense, ownership is described by stating that the object belongs to the owner, and that s/he can dispose of its as s/he wishes. This right of disposal is unlimited in principle, although it can accommodate the temporary existence of limitations. Ownership is elastic in the sense that the right as such (which is not temporary) automatically resumes its original and natural plenitude as soon as any limitation (which is always temporary) falls away.

These characteristics of ownership as described by Windscheid are still accepted in modern South African law.[42] Some aspects of Windscheid's theory

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40 Windscheid *Lehrbuch* vol 1 book 3 par 167 (758): "Fällt die Eigenthumsbeschränkung weg, so entfaltet des Eigenthum sofort wieder seine ganze Fülle."

41 *Ibid*. These limitations are discussed in greater detail *idem* par 169 (760 – 770) and par 200 – 249 (906 – 1124). Compare Schlossmann 1903 *Jherings Jahrbuch für die Dogmatik des bürgerlichen Rechts* 332, who states that statutory limitations are actually nothing but general limitations of everybody's personal freedom, which has been projected onto ownership.

42 See Van der Merwe *Sakereg* 173 – 176.

of ownership are easily recognised and can be traced back to their historical origins, but others are more difficult to identify. However, although some aspects of Windscheid's theory clearly derive from Roman law, it is clear that it cannot simply be regarded as a revival of classical Roman perceptions. Three examples illustrate the point.

Windscheid's statement that ownership implies that the object belongs to the owner, that it is legally his/hers, is an example of the *proprium* aspect often embodied in or associated with the definition of ownership. This aspect can be traced back to classical Roman law, as illustrated by the classical distinction between *proprietas*, which is a different formulation of the same *proprium* aspect, and *usus*, which refers to the possibility of separating use from ownership.[43] It is true that this aspect of ownership and the possibility of separating ownership from use did originate in classical law, that it subsequently received less attention from medieval jurists (probably as a result of their acknowledgement of the concept of divided ownership) and that the post-medieval revival of this aspect of ownership does boil down to a rejection of medieval developments and a rebirth of classical concepts. It seems likely that modern authors such as Grotius[44] revived the importance of the *proprium* aspect of ownership on the authority of Spanish moral theologians.[45] In a sense it is understandable that the *proprium* aspect of ownership should survive in most Roman-based legal systems, since it underlies both the vindicatory action and the basic distinction between ownership and possession which characterise these systems of property law. For this reason the similarities between classical Roman law, pandectist theory and modern law on this specific point should not be surprising.

Windscheid distinguishes between ownership as a right to an object and possession as factual control of an object. This distinction is also based upon a classical distinction which is typical for the perception of ownership in the Roman-based tradition.[46] So fundamental is this distinction that it even survived the medieval acceptance of the concept of divided ownership – in fact, Bartolus's influential fourteenth-century formulation of the first definition of ownership in the Roman-law tradition is set out in the course of his discussion

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43 See *Inst* 2 4 4: "Cum autem finitus fuerit usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in potestatem."

44 *De jure praedae* (1604 – 1605) ed Hamaker (1868) 214; *Inleidinge tot de Hollandsche rechtsgeleerdheid* (1619 – 1621) ed Dovring, Fischer and Meijers (1952) II 3 1 (50). Compare Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen" in *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 209 227.

45 Feenstra "Hugo de Groot's eerste beschouwingen over dominium en over de oorsprong van de private eigendom: *Mare liberum* en zijn bronnen" 1976 *Acta Juridica* 280 fn 41 – 42 points out that Grotius (*De jure praedae* (1868) 214 ff) refers to Fernandus Vazquez de Menchaca *Controversiarium illustrium aliarumque usu frequentium* (1564), reprint with notes and translation by Alcalde (1931-1934) cap 1 n 10, who might have drawn Grotius's attention to the relevant romanist literature, namely *D* 1 1 5, the gloss "Dominia distincta" on *D* 1 1 5; Paulus Castrensis on *D* 1 1 5; Decr Grat dist 1 c 7, where the possibility of individual ownership is mooted. See further Van der Walt "Der Eigentumsbegriff" (fn 1) 496 ff.

46 See the most important *D* 41 2 17 1: "Differentia inter dominium et possessionem haec est, quod dominium nihilo minus eius manet, qui dominus esse non vult, possessio autem recedit, ut quisque constituit nolle possidere. si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere."

of this very distinction, and must itself be interpreted in the context of the distinction.[47] This distinction between ownership and possession is, therefore, a fundamental one for the Roman-based legal tradition, and its continuation in pandectist theory is hardly surprising. It would be an overstatement to say that it was revived by the pandectists, since it was clearly of much importance right through the medieval period. In fact, it can perhaps be said that this distinction is the fundamental characteristic of Roman-based legal systems of ownership. In this sense it is justified to state that pandectist theory is still based upon a central notion of classical Roman law.

Windscheid's only positive explanation of the content of ownership is his statement that the owner can dispose of the object of his/her right freely. It is significant that this one positively formulated definition of the right of disposal is not of classical origin. Ownership was never defined in classical Roman law, and in fact Bartolus's was the first formal definition of ownership in the Roman tradition, and the medieval definition is, ultimately, the source of Windscheid's statement.[48] Ever since Bartolus formulated this influential definition in order to distinguish between ownership (*dominium: ius de re perfecte disponendi*) and possession (*possessio: ius rei insistendi*), Roman-based definitions of ownership have been modelled upon the basic right of an owner to dispose freely or completely over the object. A further related aspect of Windscheid's theory also derives from Bartolus's definition, namely the restriction of ownership (and real rights) to corporeal property. In Bartolus's case this restriction is made explicit in the definition itself: *dominium est ius de re corporali perfecte disponendi*, and it is explained with regard to a wider and a narrower concept of ownership.[49] It is clear that Bartolus preferred to define the narrower concept of ownership and to restrict it to corporeals because of his ultimate goal, which was to explain the difference between ownership and possession – obviously possession as actual physical control does not really apply to and cannot be explained in terms of incorporeals. Since Windscheid works with the same distinction between ownership and possession, he is forced to restrict his definition of ownership accordingly.

From the very brief and superficial discussion of these three examples it may be concluded that, while certain aspects of Windscheid's theory of ownership can indeed be related to classical Roman elements, it would be an oversimplification to say that he revived classical Roman law and rejected medieval novelties.

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47 See Bartolus on *D* 41 2 17 1 n 4: "Quaere dico 'perfecte disponendi'? Per legem In re mandata . . . et quoad differentiam possessionis, quae est ius insistendi rei." Compare Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtsgeleerd Magazijn Themis* 249 – 294; Coing "Zur Eigentumslehre des Bartolus" 1953 *ZSS (Rom Abt)* 348 – 371; Willoweit "Dominium und Proprietas: zur Entwicklung des Eigentumsbegriffs in der mittelalterlichen und neuzeitlichen Rechtswissenschaft" 1974 *Historisches Jahrbuch des Görres-Gesellschaft* 114; Van den Bergh *Eigendom: grepen uit de geschiedenis van een omstreden begrip* 44; Van der Walt "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" 1986 *THRHR* 305 – 321; Van der Walt "Der Eigentumsbegriff" (fn 1) 500 – 506.

48 Bartolus on *D* 41 2 17 1 n 4 defines *dominium* as the "ius de re corporali perfecte disponendi nisi lege prohibeatur".

49 See Bartolus on *D* 41 2 17 1 n 4; Coing 1953 *ZSS (Rom Abt)* 349; Landsberg *Die Glosse des Accursius und ihre Lehre vom Eigenthum* (1883) 87 92; Van der Walt "Der Eigentumsbegriff" (fn 1) 500 – 506.

Indeed, it is clear that certain elements of Windscheid's theory of ownership derive from medieval or even later developments. However, this fairly trite historical observation merely scratches the surface of the traditional concept of ownership, and it is still necessary to penetrate the veil of traditional concepts, words and formulations in order to get at the assumptions and values behind them. The question is: how substantial is the contribution of post-medieval developments to the creation of the traditional concept of ownership?

The importance of systematic innovations introduced by the pandectists or their post-medieval predecessors should not be overlooked. Pandectism is characterised methodologically by its incorporation and interpretation of rules of Roman law within the framework of a new general system of private law, consisting of a number of institutions, such as ownership, which are not treated in the same way in Roman law even if the detailed rules and principles look similar.[50] The place of an institution in a system of private law, for example, is a vitally important aspect of the assumptions and values underlying the whole system, and the question is how Windscheid's theory of ownership and the traditional concept of ownership were shaped by these underlying systematic and philosophical factors.

3 ANALYSIS

A number of aspects of the traditional concept of ownership illustrate the underlying assumptions and implications of Windscheid's theory of ownership, namely the position of ownership amongst the real rights, the relationship between ownership and limited real rights, the theoretical construction of "subjective" rights in general and the abstract nature and elasticity of ownership.

3 1 Ownership and limited real rights

The main importance of the relationship between ownership and the limited real rights is the fact that, as far as the traditional theory of ownership is concerned, ownership dominates the whole paradigm within which this distinction is made. Ownership is, in fact, much more than just one of the subcategories of real rights – it actually determines the description of the main category itself and the distinction between the subcategories. This becomes clear when Windscheid's definitions are analysed.

The definition of ownership as the right to enforce the owner's will with regard to the object in all its relations echoes the definition of a real right, and in such a way that ownership actually emerges as the perfect real right – the definition sets the standard to which all real rights should ideally conform. Real rights are defined as rights with regard to which the holder's will is decisive for an object in all its relations, and in effect only ownership can conform to this definition. By way of contrast all other real rights – the limited real rights – are defined only with reference to the ways in which they fall short of this standard. The limited real rights are rights with regard to which the holder's will

50 See Coing 1989 *Am JCL* 12.

is decisive for certain relations or purposes only, which falls short of the definition of a perfect real right. Ownership is presented as the ideal and normal perfect example of a real right, while the limited real rights are defined according to the ways in which they appear as limited exceptions to this rule.

Moreover, it is made clear that the full or unlimited version of ownership is held in high esteem, while the existence of numerous burdens upon ownership is regarded as unnatural, something to be avoided. In view of the fact that the creation of limited real rights is described as one of the main sources of limitations upon ownership, it becomes clear that limited real rights are not considered ideal or natural types of real right, especially if they create heavy and numerous burdens upon landownership. The ideal type of real right is and remains free and absolutely unlimited landownership – the *ius in re sua*. Ownership can accommodate the temporary existence of limitations and restrictions, but the normal and natural position is for such limitations to be absent, in other words for ownership to be unlimited. This means that limited real rights are fundamentally defined as unnatural and temporary exceptions to the rule of unlimited ownership; theoretically and systematically they never acquire an own nature or definition. Limited real rights are, in this system, regarded as temporary and exceptional instances of non-ownership.

3 2 Real rights and personal rights

Similar considerations apply to Windscheid's distinction between real and personal rights. Real rights are defined with reference to the holder's power to enforce his/her will regarding an object against everyone else, that is, absolutely. In terms of this theory, real rights are enforced universally, against any person (regardless of his/her individual identity) who happens to encroach upon or interfere with them; whereas personal rights are enforced only against specific individuals or groups of individuals bound to honour those rights in terms of an obligation.

It is interesting to note in this regard that ownership is the only real right which really allows its holder to enforce his/her will with regard to an object against everyone else, while the limited real rights are more limited in this respect. They pertain to the object only in certain of its relations, whereas ownership allows the owner to enforce his/her will with regard to the object in all its relations.

According to this view ownership is, once again, more than a subcategory of real rights. In all the modern Roman-based legal systems which distinguish between real and personal rights ownership actually provides the paradigm or muster for the definition of real rights and its distinction from personal rights. This is typical of nineteenth-century thinking. Unger[51] makes the point quite clearly:

> "In the high classicism of nineteenth century legal thought, the property right was the very model of right generally. The consolidated property right had to be a zone of absolute discretion. . . . It was natural that this conception of right should be extended to all rights. As the focus of wordly ambition, property has an obvious practical importance within the system of legal categories."

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51 "The critical legal studies movement" 1983 *Harv LR* 563 – 675 598.

3 3 Ownership as a subjective right

An important clue to the reasons why ownership has assumed such an extraordinarily important position in modern legal theory is provided by a third aspect of Windscheid's theory, namely the way in which he defines ownership as a right.[52] Windscheid defines rights in general in such a way that the definition has special significance for one particular right, namely ownership. This definition of ownership as a right embodies and guarantees the owner's right to enforce his/her will (and personal freedom) with regard to physical objects against other persons. The law provides every individual with a principle which allows him/her to enforce his/her will against other persons, thereby creating a specially protected sphere of personal freedom. From the theory it is clear that the aim is not simply to explain the owner's rights with regard to the object, but to explain the owner's rights against and relationship with other people in terms of his/her personal freedom – which means that this theory is not only a theory of ownership but also a philosophy of society. It is characteristic of this social philosophy that control over external objects provides the physical elbow room within which each individual can exercise his/her personal freedom – property rights create the conditions for the exercise of freedom. Through the exercise of his/her free will with regard to corporeal objects an owner is allowed to constitute and realise his/her own personal freedom *vis-à-vis* other persons, and therefore the law of property does not only control the use of property but also the provision and guarantee of personal liberty and freedom in a civil society. It is in this context that John Locke pleads for the constitutional protection and guarantee of life, liberty and property against interference by the sovereign,[53] and that the protection of life, liberty and property became enshrined as the most fundamental human right in the classic example of a bill of human rights, namely the American Constitution.[54]

The interesting aspect of this argument is that it creates a special bond between the person and his/her property.[55] In one sense property becomes a requirement for and guarantee of personhood, and in another sense personhood and the realisation of personal freedom and individuality become the justification for private property. Despite qualifications and amendments, this bond between property and personal freedom is still a fundamental aspect of the liberal western perception of property rights in general and, in the Roman-law tradition, of ownership in particular. It may be described as an instance of subjectivism in

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52 The general history and background of the theory of "subjective" rights in German law is not discussed here. See in general Kiefner "Das Rechtsverhaltnis" in Horn (ed) *Europaïsches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Geburtstag* (1982) 149 – 176.

53 Locke *Two treatises of government* (1698) ed Laslett (1960) Second Treatise par 27 – 28 (328 – 330).

54 See the fifth and fourteenth amendments to the Constitution, where it is provided that neither the federal nor any state government shall deprive anyone of life, liberty or property without due process of law. See in this regard Van der Walt "Comparative notes on the constitutional protection of property rights" 1993 *Recht en Kritiek* 263 – 297 267 – 270.

55 See further in this regard Cohen "Self-ownership, world-ownership, and equality" in Lucash (ed) *Justice and equality here and now* (1986) 108 – 135; Cohen "Self-ownership, world-ownership and equality: part II" 1986 *Social Philosophy & Policy* 77 – 96; and especially Munzer *A theory of property* (1990) ch 3.

that the (legal and moral) individual subject becomes the foundation and source of ownership, of all real rights and, in fact, of all rights. The subject and his/her needs and expectations determine not only the nature and content of rights, but even their definitions and the theoretical distinctions between them.

3 4 Abstract nature and elasticity of ownership

Two further aspects of Windscheid's theory of ownership deserve brief attention here, namely the abstract character and the elasticity of ownership. Windscheid explains that ownership is a totality of rights, and that the individual entitlements that can be identified are mere manifestations of the right, so that ownership as such cannot be regarded or explained as a compound or bundle of enumerable rights or entitlements – ownership as a totality is always more than the sum total of enumerable entitlements. In that sense ownership is sometimes described as an abstract right, which means that the right is more than a collection of enumerable entitlements. This theory of abstractness is new – even Grotius, whose work can in so many respects be regarded as the theoretical foundation of pandectism, regards ownership as a mere collection of individual entitlements.[56] In a way, the difference between these two approaches might be regarded as an example of a much older dispute,[57] but even then Windscheid's perception of the relationship between the right itself and its accompanying entitlements has a very modern flavour. This aspect deserves further attention.

A related aspect of Windscheid's approach is the so-called elasticity of ownership. According to this theory, ownership is essentially and fundamentally an unlimited right, although it can accommodate temporary restrictions such as those resulting from the creation of limited real rights. Because of the temporary and limited nature of these restrictions they will eventually fall away, and since ownership is not limited or bound to time limits it will then automatically resume its natural and original fullness. This is referred to as the elasticity of ownership: limited real rights do not imply that a certain entitlement or group of entitlements of the owner is separated from it and transferred to another, but rather that the owner's naturally full and complete right is temporarily restricted or indented (like a rubber ball) in some respect. When the restriction falls away, the indentation will disappear, like a dent in a rubber ball disappears when released. This fits in with Windscheid's definition of a right as a legally created and protected space for the free exercise of the owner's will towards the use and disposal of an object. Seeing that the principle provided by the law allows the owner freely to select whether or not to enforce his/her will with regard to disposal of the object, the owner is also allowed to decide not to enforce his/her will against a specific other person for a specified use of the property – the owner can decide to suspend his/her right temporarily to allow another person a limited use of the property. As soon as the limited right comes to an end the temporary suspension falls away.

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56 See *Inleidinge* II 33 1 – 6 (151 – 152), where Grotius explains the difference between full and diminished ownership in terms of the removal and transfer of certain entitlements.

57 The debate about the *partes dominii* and the *species dominii*; see in this regard the gloss "Pars dominii" on *D* 7 1 4.

This explanation of a limited real right is completely different from that of Grotius, who still regards it as the separation and transfer of certain entitlements to another person. According to Grotius,[58] full ownership is diminished when one or more of the owner's entitlements is separated and given to another, thereby actually leaving both the owner and the other person with diminished portions of ownership. The basis on which Grotius refers to the holder of the biggest remaining portion as the owner and to the other as the holder of a (limited real) right is value – the bigger portion is more valuable than the smaller. Even Van der Linden[59] still enumerates the owner's entitlements in the same way, without ever suggesting that there may be some sort of abstract residual right which characterises ownership in its essence. Windscheid's exposition of the abstract nature and elasticity of ownership must, therefore, be regarded as a novelty which was typical of his philosophical approach.

4 EVALUATION

4 1 Legal background: Grotius's classification of rights

The legal background to Windscheid's approach to the relationship between ownership and real rights is provided at least partially by Grotius. In his *Inleidinge tot de Hollandsche rechtsgeleerdheid*[60] Grotius divides the real rights into two categories, namely possession (defined as immediate factual control, in accordance with romanist tradition)[61] and ownership (defined as the right to claim or regain possession legally.[62] In a later section Grotius subdivides ownership into full ownership and limited ownership on the basis of the question whether ownership has been diminished through the creation of limited real rights.[63] If a limited real right has been created, both the remaining diminished portion of the original ownership and the portion of ownership transferred (the limited real right that has been created) are referred to as instances of limited ownership, but for the sake of clarity Grotius proposes to call the former (limited) ownership and the latter a (limited real) right.[64] This does not mean that Grotius invented the distinction between ownership and the limited real rights,[65] but it is significant how closely his explanation corresponds to Windscheid's theory. The main point is that ownership in its full or undiminished

58 *Inleidinge* II 33 1 (151).
59 *Koopmans handboek* (1806) 1 7 1.
60 See his discussion of "beheering" *Inleidinge* II 1 58 (48).
61 *Inleidinge* II 2 2 (48).
62 *Inleidinge* II 3 4 (53).
63 Which is the source of the South African courts' so-called "subtraction from the dominium-test"; see Van der Walt "Personal rights and limited real rights: an historical overview and analysis of contemporary problems related to the registrability of rights" 1992 *THRHR* 170 – 203 174 – 177.
64 See *Inleidinge* II 33 1 (151).
65 See in this regard Feenstra *Ius in re: het begrip zakelijk recht in historisch perspectief* (1979); Feenstra "Real rights and their classification in the 17th century: the role of Heinrich Hahn and Gerhard Feltmann" 1982 *The Juridical R* 106 – 120; Feenstra "Dominium and ius in re aliena: the origins of a civil law distinction" in Birks (ed) *New perspectives in the Roman law of property: essays for Barry Nicholas* (1989) 111 – 122.

form is the norm or standard which determines all other definitions – Grotius even uses the term "ownership"[66] for the main category of real rights (excluding possession, which is defined as mere factual control). Grotius goes even further, explicitly restricting the traditional definition of ownership[67] as the right of complete disposal over corporeal property to full ownership,[68] which underlines the fact that full and unrestricted ownership determines and dominates the whole paradigm within which real rights are described. This concept of full and unrestricted ownership presumes, by definition, the normal absence of limited real rights.

The systematic function of ownership *vis-à-vis* other real rights in the pandectist system of Windscheid must be seen against this background. The definition of ownership in its ideal undiminished form presupposes the normal absence of limited real rights, which are consequently never defined or described on their own merit, apart from ownership itself. Limited real rights enjoy a limited and temporary existence as negative theoretical mirror images of ownership; they therefore assume a somewhat unreal and unnatural character, and are defined negatively in terms of the ways in which they fall short of the ideal of full ownership.

This approach followed by Grotius and Windscheid is not of Roman origin. The very distinction between ownership as a *ius in re sua* and the limited real rights as *iura in re aliena* is of post-medieval origin, and its characteristics are typical of early modern rather than Roman reasoning. The distinction between full ownership and diminutions of it through the creation of limited real rights only became possible once the concept of divided ownership, which was still widely recognised and used in medieval legal theory, was abandoned during the seventeenth and eighteenth centuries.[69] Similarly, concern for the protection of an inviolate personal sphere of freedom created by individual ownership would have been inconceivable before the fifteenth century, since the perception of personal freedom and its guarantee against the threat posed by other individuals and society was unknown before that time. A theory of ownership based upon this view of the relationship between the individual and society is more than a legal theory; it becomes a normative choice for a specific political and social order characterised by a specific relationship between individuals and their private property.

Despite much controversy about the origin and historical development of the distinction between real and personal rights[70] it seems safe to accept that this distinction is not of Roman origin, and that it only assumed its modern form and characteristics in post-medieval jurisprudence. It is important for the interpretation of Windscheid's theory of real rights to notice that the paradigm

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66 "Beheeringe", which translates as "ownership" in view of the rest of his theory.
67 Deriving from Bartolus on *D* 41 2 17 1.
68 *Inleidinge* II 3 10 (54). Grotius translates this definition as follows: "Volle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefte ende t'sijnen bate dat by de wetten onverboden is." See in this regard Van der Walt "Der Eigentumsbegriff" (fn 1) 485 – 520.
69 See in this regard Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Visser (ed) *Essays on the history of law* (1989) 213 – 260; Van der Walt "Der Eigentumsbegriff" (fn 1) 518 – 519.
70 See Feenstra *Ius in re* (fn 65) for references.

for this distinction is dominated by a particular view of ownership, as was argued above with reference to Grotius. Analyses of the theories of Grotius, Apel and Donellus indicate that this distinction is determined by the definition and function of ownership rather than by any inherent characteristics of either category of rights as such. Feenstra[71] indicates that Apel, who was the first to make the traditional distinction between *ius in re* and *ius ad rem* the main division of private law,[72] based the distinction between real rights and personal rights upon a much simpler division between *dominium* and *obligatio*. Donellus, who must probably be regarded as the first to distinguish clearly between *dominium* and *iura in re aliena*,[73] uses the *proprium* aspect which is usually associated with *dominium* in order to identify partrimonial (real) rights.[74] These examples and Grotius's use of ownership as the main category for the distinction between and definition of all real rights as discussed above indicate a general theoretical tendency to cast ownership as the determining factor in the paradigm of rights in general.

4 2 Social background: nineteenth century developments

To a large extent the crucial link between property rights and the personal freedom of the legal subject was forged by the social and economic circumstances of the nineteenth century, and more particularly by social values which were accepted and protected at the time. Unger[75] describes these values as "a diluted version of the more common, conservative social doctrines that preceded the emergence of modern social theory", which claimed

> "to discover a canonical form of social life and personality that could never be fundamentally remade and re-imagined even though it might undergo corruption or regeneration".

The influence of these values on the theory and practice of ownership can be described as a process of individualisation, whereby ownership was gradually transformed into a social and legal institution destined to serve the individual by protecting and guaranteeing his/her sphere of personal freedom. Beutter[76] points out that the increasing individualisation of ownership during the second half of the nineteenth century went hand in hand with an increasing protection of individual ownership against encroachments. In the context of moral theology this implies a much stricter attitude towards theft, even in case of extreme hunger, which in church law used to be a valid defence against a charge of theft. Obviously other encroachments upon ownership were treated accordingly. This approach to the protection of private property must be seen against the background of the fact that property rights were regarded as so important to the individual that encroachments upon them were seen as delicts against the person, and not against property as such.[77]

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71 *Idem* 18 – 19.
72 The relevant work of Apel is *Methoda dialectices ratio ad jurisprudentiam accommodata* (1535); see Feenstra *Ius in re* (fn 65) 17 – 19 for references.
73 See Feenstra "Dominium and ius in re aliena: the origins of a civil law distinction" (fn 65) 111 – 112.
74 The relevant work of Donellus is *Commentarius de jure civili* (1590) lib 9; see Feenstra *Ius in re* (fn 65) 20 – 21 for references.
75 1983 *Harv LR* 576.
76 *Die Eigentumsbegründung in der Moraltheologie des 19. Jahrhunderts (1850 – 1900)* (1971) 147.
77 See 2 above.

According to Süss,[78] economic views changed dramatically during the nineteenth century. In the first two decades of the second half of the nineteenth century, the extreme liberalism of the Manchester school influenced German economic thinking, encouraging a view in terms of which it was expected that all economic problems would solve themselves in an economic system free from state interference. The state was perceived to have no social and economic policy at all. In the following decades the social and economic results of this policy, and the fact that liberalism had no answer to pressing social questions, was followed by the so-called historical school of thinking, which tended towards social politics. In the process certain social programmes and the position of workers were improved, but the fundamental socio-economic conflicts created and exacerbated by liberalism were not completely eradicated. This situation created a tension between the protection of private property rights on the one hand and the accommodation and promotion of programmes aimed at social equality and justice on the other.

These social and economic changes demonstrate a larger development which complemented and reinforced the transformation of ownership already referred to. Ownership acquired a special position in nineteenth-century society and law in that it justified the existence of and was responsible for the vigorous protection of individual freedom and the development of the individual person. To a large extent the reasons and motivations for this development must be found in the social and political philosophy of the eighteenth and nineteenth centuries.

4 3 Philosophical background: Kant's view of the legal subject

The philosophical background for the subjectivist view of the function of law in society is provided by Immanuel Kant, who describes law as the totality of conditions in terms of which the free will of one person can co-exist with the freedom of others under a general law of freedom.[79] This formulation of the nature of law presupposes the existence of civil society; the existence of ownership therefore also requires the existence of such a social institution,[80] but it also requires the existence of a society in which freedom of the individual and individual private ownership of property are regarded as closely related and highly esteemed values.[81]

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78 *Heinrich Dernburg – ein Spätpandektist im Kaiserreich: sein Leben und Werk* (1991) 189 ff. See further Winkel "Der Umschwung der wirtschaftswissenschaftlichen Auffassungen um die Mitte des 19. Jahrhunderts" in Coing and Wilhelm (eds) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* vol IV (1979) 3 – 18.

79 "Einleitung in die Rechtslehre" in Hartenstein (ed) *Metaphysik der Sitten, Sämmtliche Werke* (1868) vol 7 27: "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkühr des Einen mit der Willkühr des Anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann." See further Kiefner "Der Einfluss Kants auf Theorie und Praxis der Zivilrechts im 19. Jahrhundert" in Blühdorn and Ritter (eds) *Philosophie und Rechtswissenschaft: zum Problem ihrer Beziehung im 19. Jahrhundert* (1969) 3 – 25; Stelzer "Das Kantische Autonomieprinzip als Voraussetzung für den Begriff der Menschenrechte" in Dilcher *et al* (eds) *Grundrechte im 19. Jahrhundert* (1982) 29 – 43.

80 See Kant (fn 79) vol 7 part I ch 1 par 8 (54).

81 The link between freedom and ownership is highlighted by the fact that Kant starts his discussion of law with an analysis of private ownership. See further Grey "The disintegration of property" in Pennock and Chapman (eds) *NOMOS XXII: Property* (1980) 69 – 85 73.

The link between Kant and Windscheid must probably be found in Savigny, who is regarded as the creator of the modern civil-law system of private law based on personal autonomy as formulated by Kant.[82] Kiefner points out that the concepts "person", "freedom" and "will" run like a golden thread right through Savigny's system of law, based on the premise that a human being's destiny is determined by his/her inherent freedom to act morally.[83] This point of departure is derived from Kant's moral imperative: act in such a manner that the free exercise of your will can co-exist with everybody else's freedom according to a general law. According to Savigny, legal relations are the area where the individual will is exercised by way of a power called a right in the subjective sense.[84] The purpose of the legal relation and of the right (and of the law as such) is to serve and secure the independent development of personality.[85] Savigny construes real rights on this basis as rights with regard to corporeal parts of nature,[86] while personal rights are rights with regard to a certain act of another person.[87] Through ownership and personal rights a person acquires the possibility to attain his/her purpose, namely moral and personal independence and development.[88] In this way the moral purpose of humanity as formulated by Kant is transformed into a legal system of private-law rights, filled with details from Roman law.[89]

The similarities between Kant's view of the law and Windscheid's theory of ownership ultimately rest upon both authors' insistence that rights such as ownership are not relations between a person and an object, but between one person and another, with reference to their respective uses of an object.[90] This point is more than a mere theoretical nicety – it qualifies their definitions of ownership as a socio-political and philosophical rather than a mere legal or jurisprudential position: ownership is a function of the social relation between persons, and it determines the relative personal freedom of one person to enforce his will against others under a general law of freedom. Ownership in this view is a legal space, created and guaranteed by the law, within which the free will of one person can co-exist with the free will of others. Ownership of property therefore embodies and guarantees personal individual freedom against other persons and against civil society. In the final analysis, this view of property relations must be contrasted with a more direct or "primitive"[91] view in terms of which property rights are direct relations between a person and a thing, and the question arises whether the development which allows property rights to take the form of power over other people must not be attributed to the first, so-called "sophisticated", subjectivist approach.

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82 See in this regard Kiefner (fn 79) 4.
83 See Savigny *System des heutigen römischen Rechts* (1840–1849) vol I 331, vol II 2.
84 *System* vol I 7 334. See Kiefner (fn 79) 10.
85 Savigny *System* vol III 103.
86 *Idem* vol I 338.
87 Not with regard to the person as such, as that would make that person an object; see *idem* vol I 339.
88 See Kiefner (fn 79) 21.
89 *Idem* 23.
90 See Kant (fn 79) vol 7 part I ch 2 par 1 (60).
91 See Munzer *A theory of property* (1990) 16.

This subjectivist approach is profoundly political. It presumes that the guarantee of individual freedom is a necessary prerequisite for the preservation of civil society, and that the protection of individual private property is equally necessary for the preservation of individual freedom. It also assumes that the guarantee of the maximum individual freedom to dispose of private property requires legal sanctions which will allow an individual to enforce his/her will with regard to property against other persons, and that this will automatically benefit society – assumptions and presuppositions characteristic of early modern social theory. This paradigm and the whole discourse of social and philosophical values and assumptions underlying Windscheid's theory of ownership are products of liberal socio-political theory based upon the supremacy of the moral will of the individual subject.

5 CONCLUSIONS

It is clearly an oversimplification to state that Windscheid's theory of ownership amounts to a revival of Roman-law concepts. Quite a number of essential characteristics of this theory are of much later origin, and some of them are very much products of their own time and circumstances. The system of rights as perceived and explained by Windscheid gives new meaning even to those principles that can be traced back to classical Roman law. The question remains whether it makes any difference that this theory of ownership was shaped by nineteenth-century social philosophy rather than by classical legal learning.

A large part of the claim to classical authority must be seen as an effort to increase validity and credibility. By presenting their system of private-law rights as a revival of classical Roman law and a rejection of medieval vulgarism and feudalism, the pandectists attempted to increase the validity and value of their own system, not only as an historical legal product but also as a modern living system of law, by providing it with an aura of rationality, timelessness and universality.[92] This claim to universal validity also reflects the philosophical approach followed by Windscheid, because it presupposes the existence of universally valid categories and principles which can and should be made applicable to all modern legal systems. Ownership is regarded as such a category, which is characterised by the universal ideal of exclusive disposal over corporeal objects in order to establish personal freedom, moral subjectivity and social harmony.

This claim to universality also characterises Windscheid's theory of ownership as a theory of society and as a political philosophy, since it dictates the manner in which the law of ownership should provide room for the development of both individual personal freedom and social harmony. Windscheid does not merely describe the Roman law of ownership – he justifies the existence of private property in and towards a specific kind of civil society, in which personal freedom and the will of the individual are regarded as universal values

92 This effort is an example of what Unger 1983 *Harv LR* 655 describes as the "tacit identification of abstract institutional endeavours . . . with the concrete institutional forms that these endeavours happen to take in the contemporary world", except that the pandectists exercised the identification in two directions, historically with regard to the concrete institutions of Roman law and practically with regard to the institutions of contemporary German law.

to strive for. In short, Windscheid's theory of ownership is a highly political statement of the values of civil society in the nineteenth century.

Because of Windscheid's influence upon contemporary Roman-based legal systems the implications of his theory of ownership are considerable. Most of these legal systems have taken over pandectist terminology, definitions, explanations and, above all, the implicit value system concealed in the system of rights. Moreover, these aspects taken over from pandectist theory are regarded as neutral, technical and logical, which gives them a claim to universal validity. At a time when many traditional property relations and institutions seem to be changing to accommodate the shifting values of society, it becomes necessary to re-evaluate the theoretical system within which modern Roman-based legal systems of ownership are embedded, and particularly its hidden philosophical and socio-political values. A number of political, methodological and philosophical questions have to be raised in this regard. Is it acceptable to regard ownership (and other principles and institutions of the law) as universal and timeless, or should the influence and demands of time and place be accorded higher importance? Can ownership (and other property rights) be regarded as a guaranteed sphere for the free exercise of the individual will, in order to develop individual personality and potential, or does this approach accord too much importance to the individual and too little to the context? Is the link between ownership or property and personhood acceptable at all, and how should it be worked out and accommodated? Is it possible to regard property rights as the sphere where a proper balance between individual freedom and social interaction must be struck, and how should the tension between private property rights, individual freedom and social interests be accommodated in the legal system? Can Grotius's and Windscheid's theory of the relationship between ownership and limited real rights still be accepted, or is it time to play down the structural and dogmatic dominance of ownership within the system of real rights in order to allow other real rights room to develop in their own right?

A number of alternative theories of property have been put forward over the last decades. Some of these[93] still struggle to free themselves from the philosophical and theoretical ballast of liberalism and subjectivism, while others[94] attempt to solve the tension between individual property rights and social justice and equality.[95] At a time when fundamental social and legal institutions and traditions are about to change dramatically, South African lawyers need to consider the underlying assumptions and beliefs embodied in the theory of property very carefully so as not to burden the future with "mere survivals" – we should make up our minds dispassionately but intelligently whether the survivals which we used to enforce can answer any new purpose now that they so patently have ceased to answer the old.[96]

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93 Such as Munzer *A theory of property* (1990).

94 Such as Underkuffler "On property: an essay" 1990 *Yale LJ* 127 – 148; Nedelsky *Private property and the limits of American constitutionalism* (1990); Anderson "Takings and expectations: toward a 'broader vision' of property rights'" 1989 *Univ Kansas LR* 529 – 562; Rey "Dynamisiertes Eigentum" 1977 *Zeitschrift für Schweizerisches Recht* 65 – 80.

95 See further in this regard Van der Walt "The fragmentation of land rights" 1992 *SA Journal on Human Rights* 431 – 450; and compare Lewis "The right to private property in a new political dispensation in South Africa" 1992 *SAJHR* 389 – 430.

96 With apologies to Oliver Wendell Holmes jnr – see fn 7 above.

Adjudication styles in South African private law

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OPSOMMING

Regterlike style in die Suid-Afrikaanse privaatreg

Die Suid-Afrikaanse regsliteratuur oor die afgelope paar jare word gekenmerk deur 'n hele aantal bydraes oor die rol van ons regters in sogenaamde "politieke" sake. Hierdie debat is egter beperk tot die publiekreg en het ongelukkig nog nie tot die privaatreg deurgedring nie. Baie kommentators is blykbaar dan ook die mening toegedaan dat die strydvrae met betrekking tot die privaatreg nie baie omstrede of selfs belangrik is nie. In hierdie artikel word 'n poging aangewend om te onderskei tussen die verskillende opvattings betreffende regterlike verantwoordelikheid in beslissings van 'n privaatregtelike aard. Die uitdrukking "regterlike styl" word gebruik om die manier te omvat waarop 'n regter sy rol verstaan. Vier verskillende regterlike style word beskryf; voorbeelde van elke styl word dan gekies uit die uitsprake van vier hedendaagse Suid-Afrikaanse regters. Daar word afgesluit met die bewering dat 'n openlike debat oor die normatiewe implikasies van hierdie regterlike style die ontwikkeling van ons substantiewe privaatreg net kan bevorder.

1 INTRODUCTION

One of the peculiar features of South African legal literature is that the recent academic interest focused on the topic of the judicial process in overtly "political" cases occurring in the realm of *public* law has so noticeably failed to spark any parallel interest in the topic of the judicial role in matters of *private* law. No doubt the public/private divide is an elusive one, but by the use of these labels I intend to suggest nothing more contentious than that the role played by judges in cases concerning "security legislation" or "apartheid statutes" has become a focal concern in the legal literature at the same time as the responsibility of our judges for the development of run-of-the-mill private law has been largely ignored. Not to put too fine a point on it, this imbalance has now become so pronounced that it can cause severe discomfort to be forced to witness public lawyers working with increasingly sophisticated models of the judicial role in their academic writings whilst one suspects that the private lawyers on the other side of the tracks are still struggling to articulate the inarticulate premise. This article is a preliminary comment on the role played by South African judges in matters of private law, and may be read as a modest attempt to counteract the limping nature of the debate thus far.[1]

1 The discussion which follows elaborates on a number of themes which are rather sketchily outlined in my article "Substance and form in the South African law of contract" 1992 *SALJ* 42–43.

By way of introduction, it may be useful to remind ourselves briefly of the story as it has recently been told regarding the judicial process in the context of public law. A convenient starting point is John Dugard's inaugural lecture in 1971, which vigorously criticised the human-rights record of South African judges in a series of well-known administrative law cases that had been decided in the preceding decades.[2] This was followed by a number of publications which showed a similar willingness to subject the judicial role to the full rigours of critical scrutiny in their analyses of high profile decisions involving (in the main) security laws or apartheid legislation. Two full-length studies of the performance of the Appellate Division in this kind of case were published in the first part of the last decade,[3] and as the momentum increased, a host of publications appeared, ranging across the jurisprudential spectrum of legal positivism,[4] anti-positivism (broadly conceived),[5] legal realism,[6] Dworkin's rights model,[7] anti-formalism,[8] and marxism.[9]

It is true that we may be troubled by some niggling doubts as regards the intellectual rigour of the jurisprudential methodology which underpins much of this literature. But at a minimum this head-on confrontation with the sensitive issue of judicial responsibility in "political" cases has at least resulted in a broad consensus to the effect that judges operate in a zone of judicial space within which there exists room for creative manoeuvre. Significantly, this lowest common denominator does not seem to have trickled down to the literature on private law, which often seems to have remained fossilised in the timeless remains of a notion that judges simply "declare" the common law by means of a mechanical process of deduction from the frozen sources of law. We may be forgiven for assuming that the implications of the above-cited literature simply came to a halt at the frontiers set by some leading-light administrative law challenges to governmental action, and that, outside of those squalid pockets of inner-city blight, the world of hum-drum private-law cases continues to roll along in some leafy suburbia of self-contained serenity.[10]

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2 Dugard "The judicial process, positivism and civil liberty" 1971 *SALJ* 181. For a subsequent variation on the same theme, see Dugard *Human rights and the South African legal order* (1978) ch 11.

3 Corder *Judges at work* (1984); Forsyth *In danger for their talents* (1985).

4 Forsyth and Schiller "The judicial process, positivism and civil liberty II" 1981 *SALJ* 218.

5 Dugard "Some realism about the judicial process and positivism – a reply" 1981 *SALJ* 372; Dyzenhaus "Positivism and validity" 1983 *SALJ* 454; Davis "Positivism and the judicial function" 1985 *SALJ* 103.

6 Cameron "Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law" 1982 *SALJ* 38; Taylor "A comparative study of the judicial attitudes of DH Botha and AF Williamson" 1987 *THRHR* 28.

7 Wacks "Judges and injustice" 1984 *SALJ* 266; Mureinik "Dworkin and apartheid" in Corder (ed) *Essays on law and social practice in South Africa* (1988) 181; Dyzenhaus "The disappearance of law?" 1990 *SALJ* 227; Dyzenhaus *Hard cases in wicked legal systems* (1991).

8 Hoexter "Judicial policy in South Africa" 1986 *SALJ* 436; Herdegen "The activist judge in a 'positivistic' environment – European experiences" 1990 *Stell LR* 336; De Vos and Van Loggerenberg "The activism of the judge in South Africa" 1991 *TSAR* 592.

9 Nicolson "Ideology and the South African judicial process – lessons from the past" 1992 *SAJHR* 50.

10 The literature cited above does occasionally touch on matters of private law, but normally only in connection with the debate about what counts as a formal source of South African common law. See for example Forsyth *op cit* ch 4; Cameron 1982 *SALJ* 43 – 52.

It is precisely this sort of assumption which I wish to argue against as being misconceived. The point I wish to make in this article is that some model of the judicial role will inevitably underpin any interpretation of the law on a particular point and that there is in fact nothing "non-controversial" about the interpretive postulates which inform the process of judging in private-law matters. To adapt a statement of Northrop,[11] the only difference between a legal commentator "without a theory of judging" and a commentator "with a theory of judging" is that the latter is aware of what his/her theory is. It is in this spirit that I wish to devote the bulk of this article to the teasing out of four different "models of judging" which may be used to explain the judicial role in private-law matters. These differing models of judging I propose to call *adjudication styles*.

An adjudication style refers not simply to the literary style in which a judgment is written, but to the whole matrix of presuppositions that informs how a judge understands his or her role in the narration of points of substantive law. An adjudication style is the entire way of "going about the law job"; it is an *interpretive mode* which fixes on certain notions of what the responsibility of judges should be in deciding matters of law. The notion of adjudication style obviously owes much to Karl Llewellyn's[12] concept of a "period style", but I have resisted using the latter term inasmuch as its attendant implication that these styles necessarily reflect chronological shifts over time is one that I am anxious to avoid.

In the remainder of this article I hope to accomplish two tasks: first of all, to sketch the outlines of four distinctive adjudication styles; and secondly, to illustrate the operation of each adjudication style with reference to the private-law judgments of one contemporary South African judge. The first task is a fairly unambitious one, and must be read subject to the obvious rider that I do not claim that this four-fold categorisation is the *only* classification that may be used to divide up the available stylistic space. It is the second task that is pregnant with controversy, and I therefore need to be careful to enter a number of disclaimers in this regard. For reasons of space I have made no attempt to provide an exhaustive survey of *all* the judgments that might conceivably be said to approximate to the suggested adjudication styles, and I have chosen instead to restrict myself to the judgments of one contemporary South African judge in order to illustrate each style. This employment of examples is intended to be suggestive rather than predictive; it is simply a case of a rough-and-ready correspondence between selected judicial pronouncements (on the one hand) and my stylistic grid (on the other). It is no part of my claim that the particular judge should be "pigeon-holed" in one category of adjudication style across the board and for all purposes; nor do I claim that the judge would be willing to consciously endorse the label that I have pinned upon him. My only claim is the very modest one that the specific judgments cited in the text will serve to illustrate the suggested style. I have referred only to private-law cases where no construction of a statute was involved, since statutory interpretation raises different considerations.

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11 As quoted in MacCormick and Twining "Theory in the law curriculum" in Twining (ed) *Legal theory and common law* (1986) 23.

12 *The common law tradition* (1960) 35 – 36 and *passim* (hereinafter *CLT*). For a very helpful discussion of *CLT* see Twining *Karl Llewellyn and the realist movement* (1973) ch 10.

2 THE FORMAL STYLE

Goodrich[13] states:

> "The jurist's task was that of making sense of a series of texts which were objectively given and authoritatively laid down. No attempt was to be made to question the rationality, the utility or the historical and social conditioning of those legal or scriptural authorities. From its very beginnings in the twelfth century, the science of law was to treat its object as an autonomous body of written doctrine which was to be philologically reconstructed and handed down by an elite group of juristic exegetes, the first lawyers of post-classical Europe."

The first adjudication style that I wish to describe is one that I will call the formal style.[14] The formal style proceeds from the postulate that the judicial role is to select the applicable legal rule from the mass of pre-existing legal rules that constitute "The Law", and to apply that rule to the instant facts in an essentially non-controversial manner. Judgments written in the formal style "run in deductive form with an air or expression of single-line inevitability".[15] The rule of law (plucked from the infinitely rich resources of already-established law) constitutes the major premise; the proven facts form the minor premise; the conclusion seems to follow with the inevitability of a syllogism.[16] For this reason the formal style is sometimes regarded as a "mechanical" or "phonographic" model of judging.

While any model of formalism seems likely to be flecked with reductionist traces, this should not cause us to overlook the obvious intuitive appeal possessed by the formal style. Judges who reason in the mode of the formal style may claim to have successfully fenced off from their consideration those controversial matters of policy that are better dealt with by elected legislators. The refusal to unpack the rule of law which is said to be dispositive of the case and to subject it to critical analysis in terms of broader considerations of policy may be bolstered by arguments of institutional competence and democratic commitment.[17] *Judicis est jus dicere sed non dare.* To adapt a currently fashionable phrase, the formal style is all about "taking rules seriously".[18]

Thus the formal style seeks to extract a pre-existing rule of law from the corpus of authoritative legal texts and to privilege that text as the very embodiment of reason. Adherents to the formal style are therefore estopped from going behind the text by virtue of their antecedent commitment to the virtues of textualism; to pierce the veil of the textual rule and to examine the policy rationale behind that rule would involve the judge in the type of normative discourse which the formal style eschews. Now this reverence for the legal text as possessing canonical authority might attach either to decided cases or to the Roman-Dutch writers. Formalism in Anglo-American jurisdictions is usually said to

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13 *Legal discourse* (1987) 34.

14 This label derives from Llewellyn *CLT* 38. Cf Atiyah and Summers *Form and substance in Anglo-American law* (1987) 28–30; Adams and Brownsword "The ideologies of contract" 1987 *Legal Studies* 214.

15 Llewellyn *CLT* 38.

16 See Hahlo and Kahn *The South African legal system and its background* (1968) 307; MacCormick *Legal reasoning and legal theory* (1978) ch 2 (hereinafter MacCormick).

17 See generally Weinrib "Legal formalism: on the immanent rationality of law" 1988 *Yale LJ* 949; Edwards "The judicial function and the elusive goal of principled decisionmaking" 1991 *Wisconsin LR* 837.

18 Schauer "Formalism" 1988 *Yale LJ* 537.

describe an attitude towards case law, but South African judges have an additional ability to draw on the writings of the Roman-Dutch jurists as constituting part of "the text", and in South African practice the privileging of these writings forms a significant component of the formal style. Comparative lawyers might wish to claim that the Roman-Dutch tradition makes South African law rich in "principles" which are said to differ (somehow) from the barren hotchpotch of "rules" which comprise the English common law; but judgments written in the formal style show little sensitivity towards this distinction and tend to regard the Roman-Dutch texts as little more than a vast sea of potentially dispositive rules of law waiting to be trawled by the judicial net.

As an illustration of a kind of reasoning which corresponds (roughly) to the formal adjudication style, I wish to refer to some of the recent judgments of Joubert JA. Nothing turns on whether or not Joubert JA would endorse this particular label; my point is simply that his distinctive and erudite adjudication style is one which shares significant points of congruence with what I have chosen to call the formal style. What underpins many of Joubert JA's judgments is a confidence that hard cases can be decided without recourse to "forward-looking" considerations of policy. The "backward-looking" considerations which dictate the outcome in the case are typically composed of an exhaustive survey of our common-law writers; from this textual analysis is then extracted a rule of law, the merits of which are not open to second-guessing by the court, since consideration of policy issues is taken to be foreclosed by the canonical authority of the relevant text.

Consider, for example, Joubert JA's judgment in *Weber v Santam Versekeringsmaatskappy Bpk*.[19] The pre-existing law on the delictual liability of minors below the age of puberty had been widely criticised by commentators as operating unfairly on youthful tortfeasors as a matter of policy,[20] and a majority of the Appellate Division had previously indicated that the whole topic would need to be re-examined on a future occasion.[21] Yet when the matter came before the Appellate Division in *Weber's* case, the judgment of Joubert JA showed no willingness to tackle the policy issue raised – nor even to acknowledge that policy matters were involved in the decision. Joubert JA's endorsement of the distinction between *toerekeningsvatbaarheid* and *culpa* followed strictly from his analysis of the Roman-Dutch texts on the subject: he resolutely refrained from entering the terrain of policy in order to assess the merits of this distinction.[22]

This feature of the formal style is strikingly illustrated by Joubert JA's judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[23] In this *cause célèbre* Joubert JA buried the *exceptio doli generalis* "as a superfluous, defunct anachronism"[24] in South African law. He reached this conclusion by means of a learned examination of the common-law writers from which he inferred

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19 1983 1 SA 381 (A).
20 See eg Boberg *The law of persons and the family* (1977) 668 – 675.
21 *Roxa v Mtshayi* 1975 3 SA 761 (A) 771A – D.
22 *Weber's* case *supra* 403 – 411 (particularly 410 – 411). In this regard, cf the judgment of Jansen JA 388C – H 400C – 401C.
23 1988 3 SA 580 (A).
24 607B.

that the *exceptio doli generalis* was never part of Roman-Dutch law.[25] Now this style of argument may be able to establish that the *exceptio* was "defunct", but of itself it can do little to prove that the *exceptio* is "superfluous" as a matter of policy, since the latter contention could only be demonstrated by confronting head-on the question whether our modern community has a need for the *exceptio*. It is that latter issue, addressed by commentators[26] and also by the dissenting judge in the *Bank of Lisbon* case,[27] which the formal style of Joubert JA banishes from consideration.

It is worth comparing this case with the judgment of Joubert JA in *LTA Construction Bpk v Administrateur, Transvaal*.[28] On this occasion Joubert JA's analysis of the Roman-Dutch texts led him to the conclusion that the prohibition on interest *in duplum* had indeed been received into the modern South African law. He went on to opine that this was *not* a legal anachronism:

> "Die renteverbod *in duplum* is alles behalwe 'n anachronisme. Dit vorm deel van ons daaglikse ekonomiese lewe. Dit vervul 'n ekonomiese funksie om skuldenaars wat hulle in finansiële verknorsing bevind, te help."[29]

Now while this passage on the face of it departs from the formal style, it noticeably fails to provide any empirical or substantiated evidence in support of its conclusion and is hardly convincing as a policy-based justification for the retention of the rule in question. The bald statement that the prohibition on interest *in duplum* is *not* an anachronism stands opposed to the equally bald statement in the *Bank of Lisbon* case that the *exceptio doli generalis* is an anachronism: inasmuch as the policy rationale which transforms a legal doctrine into an "anachronism" is never articulated, both statements are linked by the assumption that the judge should not have to engage in wide-ranging normative argument in order to bolster those propositions.[30] What seems to characterise many of Joubert JA's judgments on important points of private law is a similar kind of textualism in which the Roman-Dutch texts are simply held to justify themselves and to dictate the correct outcome in an essentially unidirectional and non-controversial way.[31]

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25 605I.

26 See eg Van der Merwe, Lubbe and Van Huyssteen "The exceptio doli generalis: requiescat in pace – vivat aequitas" 1989 *SALJ* 240–242.

27 See the judgment of Jansen JA 616–617 (and cf the comments of Joubert JA 609–611).

28 1992 1 SA 473 (A).

29 482F. In the same vein, cf *Kahn v Volschenk* 1986 3 SA 84 (A) 100C–D.

30 In the *LTA Construction* case Joubert JA went on to indicate (482H) that it was a job for the legislature – rather than for the court – to abolish the prohibition on interest *in duplum*. As suggested in the text above, this judicial deference towards parliament in matters of "policy" is a defining feature of the formal style.

31 See *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) 56–64 (on the legal nature of a contract of service); *Tuckers Land and Development Corporation (Pty) Ltd v Strydom* 1984 1 SA 1 (A) 19–25 (dealing with the effect of a sale subject to a suspensive condition); *Harris v Assumed Administrator, Estate MacGregor* 1987 3 SA 563 (A) 572–575 (determining the date of vesting of an intestate estate); *Marais v Naude* 1987 3 SA 739 (A) 757B–759E (on the appointment of trustees); *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 1 SA 438 (A) 453I–454A (where Joubert JA expressed dissatisfaction about his inability to find any guidance in the common-law writers on the severability of contracts); *Reck v Mills* 1990 1 SA 751 (A) 759A–F (on the acquisition of physical control for the purposes of a spoliation order); *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) 746H 750–751 (dealing with the degree of certainty required in a rental clause); *Van der Merwe v Meades* 1991 2 SA 1 (A) 3C–8H (on the circumstances in which a seller will be deprived of the protection of a voetstoots clause).

It should be noted that what characterises the formal style is not the *nature* of the authorities referred to, but rather the *interpretive approach* adopted towards the constraining force of those authorities. In *Braun v Blann and Botha*[32] Joubert JA stated as follows:

> "It is one of the functions of our law to keep pace with the requirements of changing conditions in our society."

This is a commendable statement of principle, and it is noteworthy that Joubert JA was on occasion driven to address matters of policy in order to fulfil the promise contained in this passage.[33] But it is surely obvious that the thrust of this passage pulls in a radically different direction from the postulates that underlie the formal adjudication style, and the argument above has sought to suggest that on a number of occasions Joubert JA's adherence to the formal style of adjudication barred him from proceeding to consider what the "changing conditions in our society" required. Since this is the only point which I wish to make in the present context, I leave open the issues regarding Joubert JA's understanding of what constitutes the common-law sources of South African law,[34] as also the correctness of the specific conclusions which he drew from the Roman-Dutch writers in the cases cited above.[35]

3 THE PRAGMATIST STYLE

Lord Denning[36] said:

> "The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners and judges are faced with new situations, where the decision may go either way. No one can tell what the law is until the courts decide it. The judges do every day make law, though it is almost heresy to say so. If the truth is recognised, then we may hope to escape from the dead hand of the past and consciously mould new principles to meet the needs of the present."

The second model of adjudication style I wish to consider is one that, following Dworkin's lead, I will call pragmatism.[37] The pragmatist style shows an inclination to decide hard cases on the basis of what would be best for the community in a forward-looking sense. Pragmatism's scepticism of the claims made

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32 1984 2 SA 850 (A) 866H.

33 An outstanding example is *Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk* 1980 4 SA 775 (A) 792E – 793F, where Joubert JA rejected the relevant Roman-Dutch rule as "'n oortollige regshistoriese anachronisme . . . wat geen nuttige funksie in ons reg kan vervul nie" (793E). For other examples (aside from the *Braun* case itself), see *May v Udwin* 1981 1 SA 1 (A) 19H – 20E (on the qualified privilege enjoyed by judicial officers in the law of defamation); *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 330H – 332H (on the principles of cession in the modern law); *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433 – 435 (reformulating the duty of disclosure in insurance contracts); *Magida v Minister of Police* 1987 1 SA 1 (A) 12 – 15 (dealing with the circumstances in which a *peregrinus* should be required to furnish security for costs).

34 On this issue, cf Visser and Hutchison "Legislation from the Elysian fields: the Roman-Dutch authorities settle an old dispute" 1988 *SALJ* 627 – 632.

35 Other than to note in passing that many commentators have trawled the same textual sources only to reach divergent conclusions: cf eg Kerr *The principles of the law of contract* (1989) 483 – 488.

36 As quoted in Stevens *Law and politics* (1979) 490.

37 Dworkin *Law's empire* (1986) ch 5 (hereinafter *LE*). Cf the "grand style" of Llewellyn *CLT* 36 and the "realist style" of Adams and Brownsword 1987 *Legal Studies* 215 – 217. See generally Smith "The pursuit of pragmatism" 1990 *Yale LJ* 409.

by formalism and abstract theory is driven by a zeal to "make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake".[38] The pragmatist style exhibits a corrosive willingness to "unpack" the textual authorities, thereby exposing the policy rationale behind the historical rules of law and allowing for these to be re-assessed in terms of changed material conditions. Pragmatism need not deny that decided cases and Roman-Dutch authorities make claims on the judge; all that it asserts is that these texts dating from the past must be constantly and instrumentally evaluated in the light of contemporary needs.

This last point merits emphasis, since it is one that is often misunderstood by critics. For the pragmatist to deny that the doctrine of precedent applies in South African law would be facile, and to engage in a subversive trashing of established legal rules would amount to adjudicative *hara-kiri*. The pragmatist style internalises the rules of precedent as being in need of interpretation rather than self-announcing; it recognises that these rules leave an enormous amount of room for judicial manoeuvre within the "leeways of precedent".[39] No doubt there will be clear cases in which a binding rule of law can be extracted from a leading authority; but the pragmatist style finds that most cases which are judged worthy of litigation are decidedly *less* clear than this, and unceasingly plies the authoritative texts so as to expose gaps in the law.[40] Following the lead set by the more moderate wing of the American Realist movement, the pragmatist style can eschew the extremes of a frenzied "rule-scepticism" which seeks to deny the existence of *any* rules of law,[41] and need not even adhere to the indirect utilitarianism of "as-if rights"[42] in order to take seriously the claims of pre-existing legal rights. The pragmatist style merely works deftly within the leeways accorded by those authoritative sources so as to expose gaps and inconsistencies.

If the exposure of the leeways of precedent is one feature of the pragmatist adjudication style, the other feature is the reference to matters such as "policy",[43] "fairness"[44] and "practical convenience"[45] in the deciding of those cases where the authoritative sources are held to yield no determinate answer. It is difficult to be prescriptive about which of these forward-looking features will carry the day in any given case. The outcome may be a variant of preference utilitarianism, or of economic efficiency, or of common sense consequentialism. The common feature is an open acknowledgement of the law-making function and of the relevance of forward-looking policy assessments evaluating the effects which legal rules will have in the "real world".[46]

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38 Dworkin *LE* 151.
39 This phrase comes from Llewellyn *CLT* 62.
40 For an illuminating discussion of some "impeccable precedent techniques" used by judges, see *idem* 77 – 91; Llewellyn *The bramble bush* (1930) ch 4.
41 On the renunciation of the more extreme position, see Llewellyn *CLT* 508 – 512; Llewellyn *The bramble bush* 9 – 10.
42 Dworkin *LE* 152ff.
43 Eg *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 801D.
44 Eg *Essa v Divaris* 1947 1 SA 753 (A) 765 775.
45 Eg *Cape Explosives Works Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244 266.
46 Cf generally Henning "Reg, billikheid en in verband daarmee regterlike regsvorming" 1968 *THRHR* 242.

It is impossible to isolate any contemporary South African judge who explicitly adheres to a pragmatist adjudication style in the context of private law,[47] but for the purposes of illustration I would like to refer to some of the recent judgments of Van Zyl J. It would be misleading to characterise Van Zyl J as a pragmatist in any "across-the-board" sense: from his extra-judicial writings it is apparent that Van Zyl J favours judicial law-making only where there is no certain rule of law or where the enforcement of the existing law would be inequitable,[48] and an unspoken reluctance to engage in judicial law-making outside of these limits underpins some of his judgments.[49] With that caveat in mind, it is my contention that in certain of the judgments of Van Zyl J we can identify both the dextrous manoeuvering within the leeways of authority and the stress on forward-looking policy considerations which characterise the pragmatist style.

A remarkable illustration is provided in the recent case of *Van Erk v Holmer*.[50] In this case Van Zyl J was confronted by a recent line of cases (including a Full Bench decision of the Transvaal Provincial Division) which had consistently held that the father of an illegitimate child has no inherent right of access to that child.[51] Undeterred, Van Zyl J surveyed the authorities and concluded:

> "This is, to my mind, a case where the old authorities do not advert to the relevant legal issue and where there is no legislation, precedent or custom in point. It hence falls to the Judge to decide the case in accordance with the principles of reasonableness, justice, equity and, I would add, the *boni mores* or public policy, which cannot be ignored in these times of change."[52]

Having exposed the leeways of precedent in this way, Van Zyl J went on to hold that the father of an illegitimate child *did* have an inherent right of access to his child. Such a right, he suggested, flowed directly from "the precepts of justice, equity and reasonableness and . . . the demands of public policy".[53]

Van Zyl's judgment in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*[54] tracks this pragmatist style of reasoning in the sphere of delict. The question which arose for determination in this case was the extent of the duty of care owed by the defendant to a plaintiff whose property was under the control of the defendant by virtue of a contract between the defendant and a third

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47 Unlike, say, Lord Denning in English law – see the quotation above at fn 36; cf generally Stevens *Law and politics* 488 – 505.

48 Van Zyl "Aspekte van billikheid in die reg en regspleging" 1986 *De Jure* 128 – 131; Van Zyl "The significance of the concepts 'justice' and 'equity' in law and legal thought" 1988 *SALJ* 278 fn 28.

49 Eg *Engelbrecht v Nel* 1991 2 SA 549 (W); *Eksteen v Van Schalkwyk* 1991 2 SA 39 (T).

50 1992 2 SA 636 (W).

51 *Douglas v Mayers* 1987 1 SA 910 (ZH); *F v L* 1987 4 SA 525 (W); *F v B* 1988 3 SA 948 (D); *B v P* 1991 4 SA 113 (T). (The last case is the Full Bench judgment referred to in the text.)

52 648B.

53 649J. Van Zyl J's deployment of the pragmatist style in this case has attracted scathing judicial criticism directed at his alleged defiance of the principle of *stare decisis* and his overly cavalier reference to public policy (see *S v S* 1993 2 SA 200 (W); *B v S* 1993 2 SA 211 (W)).

54 1990 2 SA 520 (W).

party. Van Zyl J began again by clearing the decks of any binding authority and enunciated a classic pragmatist statement of intention:

> "As in other cases in which the Court is required to adjudicate on *res nova*, I believe that the aforesaid questions should be answered with reference to considerations of public policy."[55]

Having proceeded to an examination of "considerations of public policy and its concomitants, justice, equity and reasonableness",[56] Van Zyl J then concluded on this basis that the duty of care owed to the plaintiff by the defendant should not be limited by the terms of the contract between the defendant and the third party.[57]

Again, what characterises the pragmatist style is not the nature of the authorities referred to but the manner in which Van Zyl J is prepared to work with those authorities. Many of his judgments are of course replete with learned references to earlier case law and to Roman-Dutch writers, but his interpretive style prefers to see chinks and crevices where a formal adjudication style would see a solid wall of authority. Earlier cases are duly considered but are often made to appear innocuously malleable by virtue of Van Zyl J's willingness to question the authority of the particular precedent.[58] And Van Zyl J's extensive reference to the Roman-Dutch authorities rarely resorts to bare textualism, since the tendency to justify and to explain the texts seems to assume that they should *guide* but not necessarily *constrain* the interpretation of the law.[59] This interpretive attitude is well captured in the following pragmatist credo:

> "Die vraag kan miskien in hierdie verband opkom of dit nie juis die gemeenskapsopvatting of openbare beleid ('public policy'), in die sin van die gemeenregtelike *boni mores*, is wat 'n nuwe benadering tot lank gevestigde beginsels noop nie. Dit kan gebeur deur enersyds opnuut na gemeenregtelike bronne te kyk en nuwe waarde en betekenis daaraan te heg of andersyds heeltemal daarvan weg te breek en 'n nuwe beginsel te formuleer wat nader kom aan die opvatting van die gemeenskap wat dit dien."[60]

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55 527D.

56 529H.

57 See esp 528 – 530.

58 See eg *Sumatie (Edms) Bpk v Venter* 1990 1 SA 173 (T) 185 – 189 (reformulating the legal principles of *inaedificatio* after an examination of the authorities); *Mofokeng v General Accident Versekering Bpk* 1990 2 SA 712 (W) 715J – 717B (criticising and refusing to follow an earlier *dictum* which had appeared to fetter the court's discretion to make a costs order); *Blesbok Eiendomsagentskap v Cantamessa* 1991 2 SA 712 (T) 719D – E ("Ek is eerbiedig van mening dat die tyd inderdaad aangebreek het om aan 'n algemene verrykingsaksie erkenning te gee. Nie slegs is daar 'n mate van kunsmatigheid verbonde aan die vaskleef aan sogenaamde 'erkende verrykingsaksies' wat vir 'bepaalde omstandighede' daargestel is nie, maar die voortdurende uitbreiding van die verrykingsbeginsel om *ad hoc* vir nuwe gevalle voorsiening te maak, laat duidelik blyk dat daar 'n behoefte aan 'n algemene verrykingsaksie is."); *Lace v Diack* 1992 13 *ILJ* 860 (W) 865E – F ("Our law has not, however, developed to the point where the right to [legal] representation should be regarded as a fundamental right required by the demands of natural justice and equity. It may well be that, in time to come, public policy may demand the recognition of such a right. In my view, however, that time has not yet arrived.").

59 See eg *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T) 711 – 713 (examining the common-law authorities on the delictual liability of judicial officers); *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 1 SA 106 (W) 110H – 112C (interpreting the Roman-Dutch texts on the rights of lessees to extend also to urban tenements).

60 *Trust Bank van Afrika Bpk v President Versekeringsmaatskappy Bpk* 1988 1 SA 546 (W) 552G.

4 THE INTERSTITIAL LEGISLATOR STYLE

Holmes J said:[61]

> "I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

The third model of adjudication style is one which, adopting the terminology of John Bell,[62] I propose to call the interstitial legislator style. This style of reasoning runs the gauntlet between the extremes of formalism and pragmatism, eclectically seeking to occupy the middle ground by its positing of a distinction between "core" ("clear") cases and "penumbral" ("hard") cases. The interstitial legislator style accepts that in many core cases there will be a determinate rule of law inscribed in an authoritative source which disposes of the matter such that no judicial law-making is required, although even in these sorts of cases the interpretive style tends to be more self-consciously probing than the formal style. Moreover, the interstitial legislator style goes on to acknowledge that "gaps" exist in the fabric of the established law, and that in these hard cases the judge must exercise a discretion to make new law. Despite this nod in the direction of pragmatism, it should be emphasised that even in hard cases the interstitial legislator style is unlikely to mimic the free-floating ebullience of the pragmatist style. For the committed interstitial legislator will wish to stress that even when the rules of law "run out", there continue to exist a number of inhibiting factors within the law ("consistency", "coherence", "legal tradition") which will act to prevent the judge from occupying the position of some radically unfettered legislator.[63] These constraints drive an institutional wedge between the judicial function and the function of a full-blown legislator.

Inasmuch as the distinction between "core" and "penumbral" cases is by no means a self-announcing one, much will turn on the individual judge's characterisation of the case in hand. Notionally, it might be possible to conceive of an interstitial legislator style as shading at the margin into either the formal or the pragmatist adjudication style. For present purposes, however, I wish to stipulate that the interstitial legislator style tends to the view that the vast majority of cases fall within the settled "core" of the law, and regards as "unusual" and "exceptional" those hard cases where an exercise in judicial law-making is called for. This seems to give proper expression to the normative commitments of the interstitial legislator style, which are fundamentally premised on the value of judicial restraint. This stipulation has the added advantage that it captures the intuitions of a number of South African commentators.[64]

Perhaps this will also help to explain why so many South African commentators have been misled into assuming that *legal positivism* is committed to the adjudication style which I have earlier labelled "formalism".[65] In my view this

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61 In *Southern Pacific Co v Jensen* 244 US 205 (1916) 221.

62 *Policy arguments in judicial decisions* (1983) ch 9 (hereinafter Bell). Cf Dworkin *LE* ch 4.

63 See MacCormick ch 7; Bell 228–230.

64 See Steyn "Regbank en regsfakulteit" 1967 *THRHR* 104; De Vos "Vrye regsvinding?" 1967 *THRHR* 364; Hahlo and Kahn ch 9; Margo "Reflections on some aspects of the judicial function" in Kahn (ed) *Fiat Iustitia* (1983) 289–290; Zimmerman "Judges shall be independent and subject only to the law" 1985 *THRHR* 302–303.

65 See eg Dugard 1971 *SALJ* 183ff; Nicolson 1992 *SAJHR* 64. While I would regard this sort of assumption as being misconceived, a recent defence is offered in Dyzenhaus *Hard cases in wicked legal systems* (1991) ch 9.

assumption is erroneous, and the truly positivist view of the judicial function approximates much more closely to what I have termed the interstitial legislator style. Certainly it can be shown that none of the great legal positivists adhered to the formalist view that correct legal decisions can in all cases be deduced by logical means from predetermined legal rules without reference to other non-legal standards.[66] Indeed, some of the classical positivists took the view that in hard cases the judge should look *exclusively* outside of the law in order to find guidance from "extra-legal standards", and the history of modern positivism is partly an essay in retrieval which attempts to defuse the critique of Ronald Dworkin by identifying those legal ties that continue to bind the judge even in hard cases.[67]

Identifying the interstitial legislator style (and grasping how it differs from the formal and pragmatist styles by which it is conceptually flanked) is partly a matter of "feel" or "hunch". In order to illustrate its operation, I wish to refer to some examples of judgments penned by the most elegant contemporary exponent of the interstitial legislator style, Corbett CJ.

A good starting point is the recent judgment in *Bayer South Africa (Pty) Ltd v Frost*,[68] in which the Appellate Division held for the first time that a negligent misstatement may give rise to a delictual claim for damages even where the effect of the misstatement has been to induce the representee to enter into a contract with the representor. Corbett CJ characterised this as a matter devoid of any binding authority, since he found the well-known *dictum* in *Hamman v Moolman*[69] to be technically *obiter*,[70] and he explained away the *Lillicrap* decision[71] as being not in point.[72] *Administrateur, Natal v Trust Bank van Afrika Bpk*,[73] whilst expressly silent on the issue of delictual liability for misstatements in a contractual context, was then interpreted as providing oblique authority on this point by virtue of its having initiated a trend towards the expansion of the ambits of the delictual duty of care.[74] The final act of interstitial law-making followed as a matter of coherence within the parameters of the existing law, but was further justified by reference to "justice"[75] and "the realities of modern commercial life".[76] The knitting together of forward-looking and backward-looking justifications in this judgment makes it an outstanding illustration of the interstitial legislator style.

In some of Corbett CJ's other judgments in "hard cases" it is possible to find a similar willingness to develop private law within the leeway of authority

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66 See eg Postema *Bentham and the common law tradition* (1986) ch 12 13; Austin *Lectures on jurisprudence* (1911) 620–647; Hart "Positivism and the separation of law and morals" 1958 *Harv LR* 608–615; Hart *The concept of law* (1961) ch 7; Hart "Problems of legal reasoning" reprinted in Feinberg and Gross (eds) *Philosophy of law* (1986) 143; Kelsen *Pure theory of law* (1967) 348–356.

67 See the works cited in fn 63 above.

68 1991 4 SA 559 (A).

69 1968 4 SA 340 (A) 348D–H.

70 567F.

71 *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A).

72 570B–D.

73 1979 3 SA 824 (A).

74 566G–I 568B–F 569H–I.

75 568H–I.

76 569F.

and with reference to considerations such as "policy",[77] "common sense",[78] and the "consequences" of the decision.[79] But this is not some free-floating discretion to act as an unfettered legislator: even in hard cases Corbett CJ strives to rationalise his judgment in terms of consistency with other established principles of law.[80]

In a different vein, there are many judgments of Corbett CJ which proceed on the assumption that the legal issue is removed from the cutting edge of "legal policy" and can be settled with reference to backward-looking considerations of textual authority. Thus in *Du Plessis v Strauss*[81] Corbett CJ's reluctant finding of law flowed inexorably from his reading of the Roman-Dutch writers and from the premise that "the South African case law should not be permitted to override the law of Holland".[82] Typically Corbett CJ begins a judgment in a "core case" by succinctly formulating the relevant legal principles which can be extracted from the decided cases.[83] These discussions probe and ply the established case law with great resourcefulness,[84] and are significantly different in tone from the dogmatic "simple cites" which pepper the formal adjudication style.

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77 See eg *Johnston v Leal* 1980 3 SA 927 (A) 947C ("it seems to me that, as a matter of legal policy, extrinsic evidence should be allowed in a case such as the present"); *Borgin v De Villiers* 1980 3 SA 556 (A) 577G ("the court is guided by the criterion as to whether public policy justifies the publication and requires that it be found to be lawful"). See further Corbett "Aspects of the role of policy in the evolution of our common law" 1987 *SALJ* 52.

78 See eg *Minister of Police v Skosana* 1977 1 SA 31 (A) 37A and *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 918A 922F (both cases supporting a common sense approach to the delictual test for causation).

79 See eg *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 839G – 840G (citing hypothetical anomalies which militate against the "single cause of action theory").

80 See in particular *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 216 – 221 (developing principles to govern delictual liability for unlawful interference with trade); *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 3 SA 754 (A) 765A – G (determining the incidence of the onus of proof as regards an exclusion clause); *Nedbank Ltd v Van Zyl* 1990 2 SA 469 (A) 473 – 476 (settling a conflict about the validity of a suretyship undertaken by a wife married in community for the debts of her husband); *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 701F – G (positing the established test of causation as a method of limiting the new delictual cause of action for negligent misstatements).

81 1988 2 SA 105 (A).

82 150G (and cf 149G). See also the discussion of the Roman-Dutch authorities in *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) 307B – 308C (on whether a threat of criminal prosecution vitiates a contract).

83 See eg *Alfred McAlpine & Son (Pty) Ltd v TPA* 1974 3 SA 506 (A) 531 – 532 (on the distinction between "tacit" and "implied" terms); *Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola* 1976 4 SA 464 (A) 489G – 490H (stating the legal principles governing the passing of title in sale); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 683 – 691 (examining the liability for latent defects of a merchant selling goods of own manufacture); *Mhlongo v Minister of Police* 1978 2 SA 551 (A) 566D – 568C (summarising the case law on the liability of the state for the delicts of policemen).

84 See in particular the attempts to extract a *ratio decidendi* from the earlier case law in *Hirschowitz v Moolman* 1985 3 SA 739 (A) 758D – 762J, and *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 22D – 24D.

5 THE HERCULEAN STYLE

Dworkin[85] states:

> "We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require . . . I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules."

The fourth (and final) model of adjudication style which I wish to consider is one that derives from Ronald Dworkin's recent writings on the judicial function, and takes its name from Dworkin's mythical super-judge "Hercules". Space does not permit a full discussion of Dworkin's increasingly elaborate theory, and I wish to begin simply by cataloguing its most important features and suggesting how these might play themselves out in the Herculean adjudication style.

Dworkin rejects as misleading the conventional wisdom that judges must either "declare" or "invent" the law; in terms of Dworkin's revised scheme of meaning, judges do *both* and *neither*.[86] The Herculean style of judging is one that is relentlessly interpretive, for the law itself is described as an "interpretive concept".[87] The task of the judge is to subject the institutional record of the community to a process of "constructive interpretation", a matter of imposing purpose on the legal materials so as to make of the law the best that it can possibly be.[88] This process of interpretation occurs at the intersection between an axis of *fit* (the interpretation must not be flatly inconsistent with the existing legal materials) and an axis of *justification* (of all the eligible interpretations which surmount the threshold requirement of fit, the preferred interpretation is the one which makes the law as good as it can be from the standpoint of political morality).[89]

The "early Dworkin" drew a distinction between an argument of *policy* (which justifies a collective goal) and an argument of *principle* (which secures some individual right), and employed this as a substantive filter in order to preclude the judge from considering arguments of policy (in that idiosyncratic sense of the term).[90] The "recent Dworkin" seems content to put the policy/principle distinction on the back burner,[91] and prefers to speak in terms of the language of *integrity* – conceived as a commitment to principled consistency valued for its own sake.[92] The judicial role, we are now told, is to be true to law as integrity by perceiving that the law consists of not only the explicit rules which float on the surface of legal texts, but also a submerged scheme of principles which justify and explain those surface rules. The judge's task is to give that interpretation which best fits and justifies the explicit rules and the principles which lie submerged within the legal record of the community. By doing so,

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85 *Taking rights seriously* (1977) 105 (hereinafter *TRS*).
86 Dworkin *LE* 228.
87 *Idem* 45ff.
88 *Idem* 52.
89 *TRS* 340; *LE* 255.
90 *TRS* ch 4.
91 Cf *LE* 244.
92 See generally *idem* ch 6.

the judge will be enforcing a pre-existing right of one of the litigants to win the case, and will be "taking rights seriously".[93]

Thus the hallmarks of the Herculean adjudication style will be its preference for broad principles over rigid rules; its willingness to engage in the discourse of political morality in the process of constructive interpretation; and its founding assumption that only in the record of the past can we find the justification for future acts of state coercion. Nor should one be misled by Dworkin's (in-)famous "one right answer" thesis[94] into presuming that the Herculean style will be some arid variant of formalism, since the interpretive turn in Dworkin's theory makes the Herculean style the most resolutely anti-formalist of all.

The language of Dworkin is foreign to most lawyers, and it is not possible to point to any South African judge who expressly mimics the Herculean style. However, I would like to suggest that in the judgments of Jansen JA we will be able to find some significant resonances of the Herculean style.[95] It is, of course, extremely unlikely that Jansen JA has been *consciously* working in the Herculean tradition, but nothing turns on that, since my only point is that an examination of some of Jansen JA's judgments will serve to illuminate aspects of this style.

One Dworkinian theme which echoes resoundingly in the judgments of Jansen JA is the emphasis on legal "principles". In Dworkinian terms, "rules" have hard edges and an all-or-nothing character about them, while "principles" are open-ended standards which grow out of a sense of appropriateness developed in the legal community over time.[96] An outstanding example of recourse to such a Dworkinian principle is provided by the judgment of Jansen JA in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*,[97] where the acceptance of the doctrine of anticipatory breach into South African law was expressly justified on the basis of the principle of *bona fides* which was said to underlie contractual relations in our law. The notion of legal principles lying submerged beneath the surface rules; the stress on a sense of appropriateness developed over time; the element of weight which attaches to conflicting principles – all these Dworkinian themes emerge clearly in Jansen JA's reasoning:

> "It could be said that it is now, and has been for some time, felt in our domain, no doubt under the influence of the English law, that in all fairness there should be a duty upon a promisor not to commit an anticipatory breach of contract, and such a duty has in fact often been enforced by our Courts. It would be consonant with the history of our law, and also legal principle, to construe this as an application of the wide jurisdiction to imply terms conferred upon a court by the Roman law in respect of the *judicia bonae fidei* . . . It should therefore be accepted that in our law an

93 *TRS* 81.
94 *Idem* ch 13; Dworkin *A matter of principle* (1985) ch 5.
95 This is an aspect that is not canvassed in Lewis "Towards an equitable theory of contract: the contribution of Mr Justice EL Jansen to the South African law of contract" 1991 *SALJ* 249.
96 *TRS* ch 2.
97 1980 1 SA 645 (A).

anticipatory breach is constituted by the violation of an obligation *ex lege*, flowing from the requirement of *bona fides* which underlies our law of contract."[98]

Another distinctive Herculean theme is a willingness to straddle the traditional divisions of the law. Since the Herculean interpretive process seeks to make the law *as a whole* more coherent, it exhibits a tendency to break through those compartments into which conventional legal thought packages the law.[99] A striking illustration is provided in *Ranger v Wykerd*,[100] where Jansen JA wished to recognise a *contractual* measure of damages for the *delict* of misrepresentation inducing a contract despite the fact that this fudging of the contract/delict boundary ran "contrary to fundamental legal theory".[101] Similarly, the judgment of Jansen J (as he then was) in *Meskin v Anglo-American Corporation of SA Ltd*[102] dealt with delictual liability for omissions while expressly taking account of the legal principles relating to omissions in the related spheres of contract[103] and criminal law.[104]

On the Herculean axis of "fit", Jansen JA's judgments demonstrate a close reading of the Roman-Dutch texts and of decided cases in order to identify a principle which survives the threshold of consistency.[105] But this does not halt at any sterile textualism, since typically Jansen JA proceeds further to what Hercules would term an axis of "justification" in which he seeks to make of the existing law the best that it can be. This willingness to subject established legal doctrines to a relentless process of justificatory interpretation is famously illustrated by his analysis of the theoretical basis of contract law in *Saambou-Nasionale Bouvereniging v Friedman*,[106] but many of his other judgments could equally be cited to illustrate the point.[107] This interpretive process

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98 652D – G. For other examples of Jansen JA's willingness to exploit legal standards which may qualify as Dworkinian "principles", see *Novick v Benjamin* 1972 2 SA 842 (A) 853H 857G 858D (applying the "fundamental principles" of contractual damages to the novel form of anticipatory breach); *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 770 – 772 (on the operation of the principle of good faith in the law of cession); *Chetty v Naidoo* 1974 3 SA 13 (A) 19H – 20E 23G – H (settling a dispute in the authorities by the stating of "general principles" of ownership and the extracting of a "general pattern"); *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 953E ("the answer to the present enquiry [regarding termination after fundamental breach] should be sought in the basic principles of our own law").

99 *LE* 250 – 254.

100 1977 2 SA 976 (A).

101 989H.

102 1968 4 SA 793 (W).

103 802 – 807.

104 799E 800C – D.

105 See eg the discussion of the authorities in *Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders* 1976 3 SA 1 (A) 10H – 12H (on whether *dignitas* is an objective or subjective concept in law); *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 392 – 399 (on the delictual liability of *impuberes*); *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) 415 – 437 (on the *exceptio non adimpleti contractus*).

106 1979 3 SA 978 (A) 993 – 997. Cf also *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp* 1979 4 SA 74 (A) 78F – H.

107 See in particular *Nel v Cloete* 1972 2 SA 150 (A) 169 – 177 (interpreting the principles of *mora debitoris*); *Smit v Saipem* 1974 4 SA 918 (A) 927 – 932 (on the right of the lawful occupier to claim damages for diminution in the value of the land); *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 1 SA 671 (A) 676 – 678 (on

includes a doctrine of error[108] in terms of which an established principle may be modified or abandoned if it is found to be no longer consistent with the best possible interpretation.[109]

6 CONCLUSION

Austin[110] states:

> "What hindered [Blackstone] from seeing this, was the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges."

This article has attempted to describe in a rather stylised manner the layout of the land in so far as it concerns the judicial function in matters of private law. I have distinguished between four different adjudication styles (although of course there is no *numerus clausus* in this regard) in order to suggest that different judges understand and justify their roles in profoundly divergent ways. None of these conceptions of the judicial role is patently irrational or obviously erroneous; the nature of the judicial task seems to be an essentially contestable issue.

It has been my contention that a model of what is to rank as the preferred adjudication style will necessarily inform any private lawyer's understanding of what the substantive law on a particular point is (or, by way of critique, what the law should be). The character of this subtext is not always explicitly articulated, but its existence is evidenced by the way in which lawyers identify and criticise the rules of private law.[111] Perhaps this provides one explanation why South African commentators on private-law issues seem to be at cross-purposes so often: unwilling to come clean over their tacit presuppositions regarding the judicial role, these commentators seem destined to shout their differing interpretations of points of substantive law across the vacuum that

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continued from previous page

the cedability after *litis contestatio* of the right to institute an action); *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 672C – D 675C (regarding ways of necessity); *Marais v Richard* 1981 1 SA 1157 (A) 1166E – 1168E (on the defence of "fair comment" in defamation); *Weber's case supra* 400F – H; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 7A – H (rejecting the existence in law of "damages as surrogate for specific performance"); *Minister of Police v Rabie* 1986 1 SA 117 (A) 134H – 135B (enunciating a principle of "risk-creation" in the context of vicarious liability); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 613B – 615D 616C – 617H (on the *exceptio doli generalis*).

108 Dworkin *TRS* 121 – 123.

109 See in particular Jansen JA's comments in *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 3 SA 468 (A) 476A – D (criticising the "expedition theory"); *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 1 SA 796 (A) 805E – H (on the possible need for a new approach to the admissibility of evidence of "surrounding circumstances" in the interpretation of contracts); *SAAN Ltd v Samuels* 1980 1 SA 24 (A) 30 – 31 and *Demmers v Wyllie* 1980 1 SA 835 (A) 840A – C (both judgments criticising the use of the "reasonable man" test in the law of defamation); *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 825A – C (suggesting a possible need to re-examine the "once and for all rule" in delict).

110 *Lectures on jurisprudence*.

111 Cf Hart *The concept of law* 98 – 99.

divides them. If legal interpretation is always underpinned by unspoken postulates which define the judicial role and place restraints on judicial creativity, and if those postulates are never "obvious" or "uncontroversial", then commentators must be prepared to argue for their preferred notion of adjudication style. In the result, legal discourse – even in the supposedly rarified realms of "private law" – is transported onto a terrain of normative conflict, and is revealed to be far more open-ended than many commentators on private law might wish it to be.

Space does not permit any detailed assessment of the relative desirability of these adjudication styles, other than to make the following brief (and largely polemical) observations. A full-blown adherence to what I have termed the *formal* adjudication style does strike me as being normatively threadbare, and the attempt to simply "read off" the law in a unidirectional way from the canonical authorities is rarely intellectually satisfying. With regard to the Roman-Dutch texts, one might paraphrase Oliver Wendell Holmes and suggest that a better justification must surely be found for a legal rule than the brute fact that this is the way it was in the days of Voet.[112] With regard to case law, one might suggest that what is required is a willingness to explain the rationale of the earlier cases rather than a persistent recourse to "simple cites" and the dogmatic assertion of a *ratio decidendi*. In my view, a candid acknowledgment of the law-making function within the leeways of authority would do much to promote the development of our private law.

All this is not to overlook the elementary point that there are "formal sources" of South African private law. What distinguishes the four adjudication styles is not the *nature* of the sources referred to (for in this regard all the styles are remarkably uniform) but the *interpretive attitude* which is adopted towards those very sources. Recognition of the variety of interpretive modes on offer may well have a spin-off benefit in shedding some light on the dark debate regarding what should be recognised as a formal source of South African private law.

As a community we give enormous power to our judges. High-profile "political" cases in public law tend to attract the attention of newspaper headlines and of those articles in law journals constructed around a "soft centre" of jurisprudence, but judicial power is as pervasive in private-law matters. Unless commentators are prepared to defend their normative presuppositions as to how that power should be exercised, and unless judges are prepared to articulate their own concealed premises in this regard, we run the occupational risk that the private-law debate in this country may become an increasingly dismal science of textual exegesis.

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112 Llewellyn *CLT* 187: "Many of the bailments cases remind of Holmes' own dictum that it is disgusting to have no better reason for a rule than that thus it was in the time of Henry IV."

The contribution of the Alexander von Humboldt Foundation to the development of the South African legal system and literature

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OPSOMMING

Die bydrae van die Alexander von Humboldt-Stiftung tot die ontwikkeling van die Suid-Afrikaanse regstelsel en -literatuur

Soos alle ander stelsels is die Suid-Afrikaanse reg vir sy ontwikkeling in 'n groot mate afhanklik van navorsing oor die teorie en praktiese implementering van die reg. Weens sy histories-gewortelde hibride karakter, hoofsaaklik Romeins-Hollands en Engels, is die Suid-Afrikaanse reg uiters geskik om by regsvergelyking te baat. Van die kontinentale stelsels het dié van Nederland en Duitsland 'n wesenlike invloed in die verband uitgeoefen, nie alleen binne die Republiek van Suid-Afrika nie maar ook buite sy grense. Die oogmerk met hierdie artikel is om die kollig te plaas op die bydrae wat een spesifieke instelling, die Alexander von Humboldt-Stiftung, gelewer het om regsgeleerdes van Suid-Afrika in staat te stel om toegang tot die Duitse regstelsel te verkry en die diepgaande en uitgebreide navorsing wat dit voortgebring het.

1 INTRODUCTION

To a large extent, South African law, like all systems of law, depends for its development on research about the theory and the practical implementation of law. To its very roots a hybrid of common-law traditions, mainly Roman-Dutch and English, South African law is ideally suited to receive the fruits of legal comparison. Of the continental legal systems, those of the Netherlands and Germany have exerted substantial influence in this regard, not only within the Republic of South Africa, but also outside its borders. The object of this article is to highlight the contribution that one particular institution, the Alexander von Humbolt Foundation, has made towards enabling legal scholars from South

Africa to gain access to the German legal system and the body of profound and extensive research which it has generated.

2 THE ALEXANDER VON HUMBOLDT FOUNDATION

The Alexander von Humboldt Foundation ("die Alexander von Humboldt-Stiftung" as it is called in German) honours the name of the renowned German scientist and scholar Alexander von Humboldt (1769 – 1859). Following a call for its establishment on 28 June 1859, the "Alexander von Humboldt Foundation for Nature Research and Travel" was established in Berlin on 19 December 1860 with the express mission

> "to support outstanding talent, wherever this may be manifest, in all those areas in which Alexander von Humboldt unfolded his scientific gifts, to enable these scholars to carry out scientific work and undertake extensive travel".[1]

The Foundation was administered by the Prussian Academy of Science, and by 1861 it had assets to the amount of 40 000 Taler. In 1923 the Foundation was obliged to cease its sponsorship of scholars as a result of the ravages of inflation. On 2 April 1925 the Alexander von Humboldt Foundation was established in order to sponsor foreign scholars at German universities and other institutes of higher education. Again its seat was in Berlin. Having lost its records during the Second World War, the Foundation ceased its activities in 1945.

The spirit of the Alexander von Humboldt Foundation lived on, however. On 10 December 1953, the Foundation was re-established in Bonn by the new Federal Republic of Germany, with the aim of awarding fellowships to young academic scholars in order to help them improve their academic proficiency by means of a sojourn in Germany. The physicist Professor Dr Werner Heisenberg was appointed president of the Foundation. Frau Dr Ruth Tamm took up the position of executive director, and was succeeded in 1956 by Dr Heinrich Pfeiffer, who is still the chief executive officer of the Foundation.

The Alexander von Humboldt Foundation is a non-profit organisation which mainly awards scholarships to foreign scholars under the age of 40 years to do research in Germany and to German scholars younger than 38 years to work in their fields of expertise abroad with Humboldt fellows (the Feodor Lynen programme which was established in 1979). In 1972, a separate programme was introduced to invite experienced foreign scholars acclaimed in their respective fields, for a sojourn at a German academic or other research institution. The Foundation places a high premium on remaining in contact with its "Stipendiaten" and provides a number of continuing supportive actions, including donations of books and equipment. The Foundation is controlled by a board of governors and has its seat in Bad Godesberg. Its annual budget is in the region of DM 80 million, the principal sources of income being the German federal government (about 90%) and private donors. The staff numbers around 80. More than 1 000 scholarships are awarded each year to scholars from all over the world.

Scholarships and other awards are made on the basis of individual merit and in open international competition, although the general state of research in a

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1 *Alexander von Humboldt Foundation 1952 – 1983* 220.

particular country may be taken into acount to the extent that it may be regarded desirable to further the level of research by making an award. Political neutrality is a fundamental guideline when scholarships are awarded. The results of research undertaken by Humboldt scholars are published widely, the total number of publications being approximately 2 000 every year.

The discipline in the humanities which attracts the largest number of scholars is that of law. Given the state of development and theoretical refinement of the German legal system, this is hardly surprising. This is all the more relevant to South African legal scholars, when the roots which are common to the two systems of law are taken into account.

3 INSTITUTIONS VISITED

Over a period of 25 years Humboldt scholars have visited 11 universities, five Max Planck institutes and another research institution. The universities which have accommodated scholars are Augsburg (1), Bonn (1), Cologne (8), Frankfurt (1), Freiburg (1), Göttingen (1), Hamburg (1), Münster (1), Regensburg (2), Saarbrücken (2) and Tübingen (2). The following Max Planck institutes (MPIs) have been visited: the Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg (10); the Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg (9), the Max Planck Institut für ausländisches und internationales Privatrecht, Hamburg (4), the Max Planck Institut für europäische Rechtsgeschichte, Frankfurt-am-Main (1) and the Max Planck Institut für ausländisches und internationales Patent-, Urheber und Wettbewerbsrecht, Munich (1). The International Council of Environmental Law, Bonn (ICEL) (1) has also been visited.

4 INDIVIDUAL SCHOLARS

The first Humboldt scholarship to a South African jurist was awarded in 1967 and by the middle of 1992, 36 jurists had obtained such scholarships. These stipendiaries are listed below, together with information about their present position, the approximate duration of their periods of research and the institutions which they visited. The years during which the visits occurred are furnished in footnotes. The numbers which precede the names of particular scholars are used in a subsequent section to identify their publications.

(1) TW Bennett – professor, University of Cape Town; 6 months, MPI Heidelberg;[2] 4 months MPI Hamburg;[3]

(2) H Booysen – professor, University of South Africa; 19 months, MPI Heidelberg;[4]

(3) WHB Dean – legal practitioner, London, England; 12 months, MPI Heidelberg;[5]

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2 1987.
3 1988.
4 1980–1981, 1986–1987.
5 1985–1986.

(4) NL Joubert – professor, Rand Afrikaans University; 11 months, University of Saarbrücken;[6]

(5) DG Kleyn – professor, University of Pretoria; 12 months, University of Cologne;[7]

(6) JMT Labuschagne – professor, University of Pretoria; 8 months, MPI Heidelberg;[8] 8 months, MPI Freiburg;[9]

(7) FR Malan – professor, Rand Afrikaans University; 19 months, University of Cologne;[10]

(8) DW Morkel – professor, University of the Orange Free State; 10 months, University of Augsburg;[11]

(9) J Neethling – professor, University of South Africa; 9 months, MPI Munich;[12]

(10) AN Oelofse – professor, University of South Africa; 10 months, University of Cologne;[13]

(11) WH Olivier – advocate, Bloemfontein; 18 months, MPI Heidelberg;[14]

(12) JL Pretorius – professor, University of the Orange Free State; 6 months, MPI Heidelberg;[15]

(13) MA Rabie – professor, University of Stellenbosch; 7 months, MPI Freiburg;[16] 3 months, ICEL;[17]

(14) IM Rautenbach – professor, Rand Afrikaans University; 9 months, MPI Heidelberg;[18]

(15) S Scott – professor, University of South Africa; 6 months, University of Cologne;[19]

(16) TJ Scott – professor, University of Pretoria; 7 months, University of Cologne;[20]

(17) CR Snyman – professor, University of South Africa; 17 months, MPI Freiburg;[21] 2 months, University of Regensburg;[22]

(18) JC Sonnekus – professor, Rand Afrikaans University; 28 months, University of Münster;[23]

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6 1989.
7 1991 – 1992.
8 1981.
9 1987, 1989, 1990.
10 1977, 1983.
11 1980.
12 1982, 1993.
13 1986 – 1987.
14 1982, 1992.
15 1987.
16 1975, 1990.
17 1975.
18 1980.
19 1986.
20 1986 – 1987.
21 1976 – 1977, 1982.
22 1988 – 1989.
23 1981 – 1983, 1988 – 1989.

(19) CG van der Merwe – professor, University of Stellenbosch; 9 months, University of Tübingen;[24] 8 months, MPI Hamburg;[25]

(20) D van der Merwe – professor, Rand Afrikaans University; 6 months, MPI Frankfurt;[26]

(21) SWJ van der Merwe – professor, University of Stellenbosch; 40 months, University of Hamburg;[27] 2 months, University of Cologne;[28]

(22) JD van der Vyver – professor, University of the Witwatersrand/Emory University, Atlanta, Georgia, USA; 7 months, MPI Heidelberg;[29]

(23) AJ van der Walt – professor, University of South Africa; 12 months, University of Cologne;[30]

(24) JC van der Walt – professor and vice-principal, Rand Afrikaans University; 9 months, Universities of Bonn and Cologne;[31]

(25) JV van der Westhuizen – professor, director, Centre for Human Rights, University of Pretoria; 21 months, MPI Freiburg;[32]

(26) BvD van Niekerk – deceased, formerly professor, University of Natal; 11 months, MPI Freiburg;[33] 3 months, University of Saarbrücken;[34]

(27) FFW van Oosten – professor, University of Pretoria; 7 months, MPI Freiburg;[35] 3 months, University of Göttingen;[36]

(28) ADJ van Rensburg – advocate, Cape Town; 8 months, University of Frankfurt;[37]

(29) JCW van Rooyen – professor, University of Pretoria; 2 months, MPI Freiburg; 7 months, MPI Hamburg;[38]

(30) JH van Rooyen – professor, University of South Africa; 6 months, MPI Freiburg;[39]

(31) AH van Wyk – professor and principal, University of Stellenbosch; 8 months, MPI Hamburg;[40]

(32) DD van Zyl Smit – professor, University of Cape Town; 13 months, MPI Freiburg;[41]

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24 1973.
25 1980, 1991.
26 1985.
27 1967 – 1968, 1972, 1974, 1982, 1983, 1989.
28 1983, 1989.
29 1985 – 1986.
30 1989 – 1990, 1992.
31 1978, 1984, 1987.
32 1982 – 1983, 1984, 1990 – 1991.
33 1977.
34 1977 – 1978.
35 1985, 1988, 1991.
36 1985.
37 1975.
38 1974, 1992.
39 1984.
40 1981 – 1982.
41 1986, 1991.

(33) F Venter – professor, University of Potchefstroom; 24 months, MPI Heidelberg;[42]

(34) DP Visser – professor, University of Cape Town; 6 months, University of Tübingen;[43] 6 months, University of Regensburg;[44]

(35) PJ Visser – professor, University of Pretoria; 6 months, University of Freiburg;[45]

(36) M Wiechers – professor and principal designate, University of South Africa; 12 months, MPI Heidelberg.[46]

Humboldt scholars have occupied chairs at various South African universities, and 33 are currently attached to the following academic institutions: University of South Africa (8), University of Pretoria (7), Rand Afrikaans University (6), University of Stellenbosch (4), University of Cape Town (3), University of the Orange Free State (2), University of the Witwatersrand (1), University of Potchefstroom (1) and the University of Natal (1), while three are legal practitioners, one an attorney in London and two advocates, in Bloemfontein and Cape Town respectively. The scholars who are attached to universities are all full professors and many of them are present or past heads of departments, or deans of law faculties. One is the principal of a university, one a principal designate and one a vice-principal. Together they hold several master's degrees and some 40 doctor's degrees.

5 BENEFITS DERIVED FROM SCHOLARSHIPS

5 1 Moulding influence

Humboldt scholarships have played a major role in moulding South African legal scholars by exposing them at a comparatively early stage to a highly developed legal system and to an international debate on their particular areas of research. The positive and lasting impact of such exposure can hardly be overestimated. Humboldt scholarships have enabled stipendiaries to gain access to legal sources, to identify research options and to gain perspectives which may otherwise not have been open to them. This has been reflected in numerous publications, in the teaching of students – at both undergraduate and postgraduate level – and in papers read at conferences. Some scholars have based their inaugural lectures directly upon their research in Germany.

Many scholars have derived further assistance through the programme of "Wiederaufnahme" which enables them to return to Germany at a later stage to continue their research. This has served to consolidate the influence of German legal science on South African legal scholars.

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42 1979–1980, 1983, 1989.
43 1990.
44 1990–1991.
45 1987.
46 1974, 1992.

5 2 International academic ties

A benefit of the scholarships, enjoyed by all, is the forging of ties with the international academic and research community. This has resulted in an invaluable exchange of materials and ideas which was particularly valuable during the time of South Africa's academic isolation.

In this way many lasting personal contacts were established, contacts which have often proved to be as valuable as the particular projects which were undertaken during the sojourns in Germany. In several instances these contacts have led to invitations to scholars from Germany and elsewhere to pay reciprocal visits to South Africa. On several occasions, the Humboldt Foundation also arranged for South African scholars to receive prominent German public figures, such as parliamentarians and diplomats.

5 3 Publications

One of the main aims of Humboldt scholarships is to stimulate academic research. Humboldt-aided research has resulted in numerous publications – articles in law journals, books, encyclopaedias, research reports and related materials – dealing with the subjects listed below. To a large extent these publications may be said to represent the direct influence exercised by the Foundation. The indirect influence of the Foundation as it is evidenced by way of publications reaches even further, in so far as many other publications, not listed here, rely at least partly upon perspectives and insights gained during research sojourns in Germany. The influence of the Foundation in this respect is of an on-going nature and should continue to be expressed in future publications.

5 3 1 Private law, mercantile law, customary law and legal history

Publications relate to the following subjects (the number between brackets referring to the number which corresponds with the name of a particular scholar in paragraph 4 above): contract: general principles (21);[47] possession (5),[48] (18);[49] acquisition of ownership (18);[50] cession (15);[51] real security in movables

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47 "Die duiwel, die hof en die wil van 'n kontraktant" in Gauntlett (ed) *JC Noster 'n Feesbundel* (1973) 13; "Improperly obtained consensus" (with Van Huyssteen) 1987 *THRHR* 445; "The exceptio doli generalis: requiescat in pace – vivat aequitas" (with Lubbe and Van Huyssteen) 1989 *SALJ* 235; "Good faith in contract: proper behaviour amidst changing circumstances" (with Van Huyssteen) 1990 *Stell LR* 244; "The Soviet Union on its way to a 'Rechtsstaat'" (translation of lecture by Brunner) 1991 *Stell LR* 15; "Bona fides and public policy in contract" (with Lubbe) 1991 *Stell LR* 91; *Contract: General principles* (with Van Huyssteen and others) (1993).

48 "The concept and the protection of possession" in Feenstra and Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 541.

49 "Besit van serwituutbevoegdhede, mandament van spolie en logika" 1989 *TSAR* 429.

50 "Attornment as leweringsvorm by sekerheidstelling en regsekerheid" 1988 *THRHR* 534; "Besitsverkryging oor 'n skeepswrak as res nullius" 1989 *TSAR* 720; "Regsgevolge van natrekking en die formulering van aanhegtingsmaatstawwe" 1990 *TSAR* 320; "Opbou van motorwrakke, accessio en specificatio" 1991 *TSAR* 706.

51 "Sessie en factoring in die Suid-Afrikaanse reg" 1987 *De Jure* 15; "Algehele sekerheidsessies" 1988 *De Jure* 367; *The law of cession* (1991).

and immovables (15),[52] (18);[53] lease (18);[54] personal servitudes (18);[55] real rights and personal rights: general aspects (18);[56] sectional titles (19);[57] landownership (23);[58] land law reform (23);[59] fragmentation of land rights (23);[60] registrability of rights (23);[61] squatting (23);[62] environmental land-use control (13),[63]

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52 "Verpanding van vorderingsregte: uiteindelik sekerheid?" 1987 *THRHR* 175; "Pledge of personal rights and the principle of publicity" 1989 *THRHR* 458.

53 "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97 230; "Enkele opmerkings na aanleiding van voorrangs- en sekerheidsregte op roerende sake in die Nederlandse reg" 1983 *De Jure* 244, 1984 *De Jure* 101; "Die publisiteits- en paritas creditorum-beginsel by mobiliêre sekerheidsregte in die Duitse reg" 1984 *TSAR* 53 105; "Besitlose pand – ideale sekerheidsreg op roerende goed ook met inagneming van die beginsels van die insolvensiereg?" 1989 *TSAR* 523; "Retensieregte – nuwe rigting of misverstand par excellence?" 1991 *TSAR* 462; "Bloot retensiereg of eiendomsverkryging op geabandonneerde saak?" 1991 *TSAR* 511.

54 "Herklassifikasie van die aard van die huurder se reg?" 1987 *TSAR* 223.

55 "Oordraagbaarheid en abandonnering van persoonlike diensbaarhede" 1987 *TSAR* 370.

56 "Saaklike regte of vorderingsregte? – tradisionele toetse en 'n petitio principii" 1991 *TSAR* 173.

57 "The Sectional Titles Act and the Wohnungseigentumsgesetz" 1974 *CILSA* 165; "Die Wet op Deeltitels in die lig van ons gemeenregtelike saak- en eiendomsbegrip" 1974 *THRHR* 113; "Saakdeeleiendom" 1974 *De Rebus* 53; "The Sectional Titles Act and Israeli condominium legislation" 1981 *CILSA* 129; "Beheerde aandeleblokskemas v deeltitelskemas" 1982 *THRHR* 109 274; "Sectional titles" in Joubert (ed) *The law of South Africa* vol 24 (1986); "The Sectional Titles Act in the light of the Uniform Condominium Act" 1987 *CILSA* 1; "The allocation of quotas in a sectional title scheme" 1987 *SALJ* 7; "Nuwe gesigspunte oor die ontwikkeling van 'n deeltitelskema in fases" 1987 *TRW* 43; "Die belangrikste wysigings van die nuwe Wet op Deeltitels vanuit die oogpunt van die deeleienaar" 1988 *THRHR* 415; "Die vestiging van uitsluitlike gebruiksgebiede deur 'n ontwikkelaar in 'n deeltitelskema" 1988 *De Rebus* 829; *Sectional titles, share blocks and time-sharing* (with Butler) (1989); "Enkele praktyksprobleme in verband met die statutêre verkoopsreg van huurders by die omskrywing van 'n huurwoonstelblok in 'n deeltitelskema" 1991 *TSAR* 372; "Apartment ownership" in *International Encyclopaedia of Comparative Law* (1993 – 1994); "Law of property" in *Annual Survey of South African Law* (1976 – 1992).

58 *Land reform and the future of landownership in South Africa* (ed) (1991); "Introduction" in *Land reform and the future of landownership in South Africa* (1991) 1; "The future of common-law landownership" in *Land reform and the future of landownership in South Africa* (1991) 21; "Der Eigentumsbegriff" in Feenstra and Zimmermann (eds) *Das römisch-höllandische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 485.

59 "Land law without the Land Acts: predicaments and possibilities" 1991 *THRHR* 738; see also the references in the previous note.

60 "The fragmentation of land rights" 1992 *SAJHR* 431.

61 "Personal rights and limited real rights: an historical overview and an analysis of contemporary problems related to the registrability of rights" 1992 *THRHR* 170.

62 "De onrechtmatige bezetting van leegstaande woningen en het eigendomsbegrip: een vergelijkende analyse van het conflict tussen de privaat eigendom van onroerend goed en dakloosheid" 1991 *Recht en Kritiek* 329; "Squatting and the right to shelter" 1992 *TSAR* 40; "Informal housing and the environment: land rights in transition" 1992 *SA Public Law* 201.

63 "The influence of environmental conservation on private landownership" in Van der Walt (ed) *Land reform and the future of landownership in South Africa* (1991) 81.

(23);[64] *bona vacantia* (18);[65] unjustified enrichment (18),[66] (34);[67] delictual liabilty (24);[68] risk liability (24);[69] liability for shock (24);[70] state liability (24);[71] delictual damages (35);[72] unlawful competition (9);[73] consent to sterilisation (18);[74] family law: general principles (18),[75] (31),[76] (35);[77] matrimonial property law (18),[78] (31);[79] wills (18);[80] legal history (20);[81] methodology of law-making

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64 "Roman-Dutch law and environmental land-use control" 1992 *SA Public Law* 1.

65 "Enkele opmerkings na aanleiding van bona vacantia as sogenaamde regale reg" 1985 *TSAR* 121; "Bona vacantia en 'vergete' mineraalregte by deregistreerde of ontbinde maatskappye" 1989 *De Jure* 167.

66 "Algemene vordering gebaseer op ongeregverdigde verryking in heroorweging" 1992 *THRHR* 301.

67 "Das Recht der ungerechtfertigten Bereicherung" in Feenstra and Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 369; "Rethinking unjustified enrichment – a perspective of the competition between contractual and delictual remedies" 1992 *Acta Juridica* 203; "Responsibility to return lost enrichment" 1992 *Acta Juridica* 175.

68 "Delict" in Joubert (ed) *The Law of South Africa* vol 8 (1979); *Delict: principles and cases* (1979); "Aspects of the South African law of delict" 1984 *Zeitschrift für vergleichende Rechtswissenschaft* 222.

69 *Risiko-aanspreeklikheid uit onregmatige daad* (LLD-proefskrif Unisa 1974); "Die opkoms van die risikoleer" in *Essays in honour of Ben Beinart* vol 3 (1979) 207; "Risiko-aanspreeklikheid in die Anglo-Amerikaanse reg" 1979 *De Jure* 324, 1980 *De Jure* 96 274; "Risiko-aanspreeklikheid in die Franse reg" in Joubert (ed) *Petere Fontes: LC Steyn-gedenkbundel* (1982) 226; "Risiko-aanspreeklikheid: erkenning in die regspraak" 1984 *TSAR* 211; "Die Elektrisiteitswet en risiko-aanspreeklikheid" 1986 *TSAR* 235; "Actio de pauperie: die vereiste van contra naturam sui generis" 1988 *De Jure* 336.

70 "Skoktoediening: wie sal die aftreksom maak?" 1988 *TSAR* 542.

71 "Die staat se aanspreeklikheid vir onregmatige polisie-optrede" 1988 *THRHR* 615.

72 "Genoegdoening in die deliktereg" 1988 *THRHR* 468; "Some thoughts on delictual damages for the loss of the use of property in terms of South African and German law" 1990 *De Jure* 347; *Deliktereg* (1992)/*Law of Delict* (1994) (with Neethling and Potgieter); *Law of damages/Skadevergoedingsreg* (with Potgieter) (1993).

73 *Die reg aangaande onregmatige mededinging* (with Van Heerden) (1983); "Die aanwending van 'n mededinger se bedryfsidees: onregmatige mededinging?" 1983 (1) *Codicillus* 24; discussions of cases 1985 *THRHR* 233; 1986 *THRHR* 231; 1987 *THRHR* 229; 1990 *THRHR* 578; 1991 *SALJ* 33 (with Potgieter); 1992 *THRHR* 134; 1993 *SALJ* 9; *Onregmatige mededinging/Unlawful competition* (ed) (1990); "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 204 554; *Deliktereg* (1992)/*Law of Delict* (1994) (with Potgieter and Visser); "Competition law" in *The Law of South Africa* vol 2 (1993).

74 "Sterilisasie – toestemming deur nie-pasiënt-gade?" 1986 *De Rebus* 369.

75 "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" (with Van Westing) 1992 *TSAR* 235.

76 *Family, things and succession* (with Erasmus and Van der Merwe) (2 ed 1983 of Lee and Honoré); "Familiereg in tye van inflasie" 1984 *MB* 18; "The application of Roman-Dutch law in contemporary Southern Africa" 1985 *Lesotho LJ* 217; "Enige Probleme des internationalen Eherechts im südlichen Afrika" in Holl and Klinke (eds) *Internationales Privatrecht, Internationales Wirtschaftsrecht* (1985).

77 "Aspects of the reform of German (and South African) private international family law" (with Stoll) 1989 *De Jure* 330.

78 "Legitieme porsie of verlengde onderhoudsaanspraak?" 1984 *De Rebus* 199; "Artikel 36 van die Wet op Huweliksgoedere 88 van 1984 – enkele opmerkings oor 'n hof se diskresie ten aansien van 'n billike deel en onderhoudsaansprake" 1985 *De Rebus* 327; "Insolvensie by huwelike in gemeenskap van goed" 1986 *TSAR* 92; "Deliktuele aanspreeklikheid en gades" 1986 *De Jure* 150; "Egskeiding en kwantifisering van die bydrae tot die ander gade se boedel – a 7(3)–(5) van Wet 70 van 1979" 1986 *SALJ* 367; "Die grondslag van aanspreeklikheid van gades inter se (getroud buite gemeenskap van goed) vir huishoudelike benodigdhede" 1986 *De Jure* 325; "Kwantifisering van huweliksopofferings" 1988

(20);[82] insurance (21),[83] (18);[84] financial leasing contracts (4);[85] book debt financing (4);[86] franchising (4);[87] new commercial contracts (4);[88] simulation

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TSAR 120; "Onderhoud na egskeiding" 1988 *TSAR* 440; "Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoënsregtelike konteks" 1989 *TSAR* 202 326; "Verlengde onderhoudsaanspraak van die langslewende gade – 'n aanvaarbare ondergrawing van beskikkingsbevoegdheid?" 1990 *TSAR* 491.

79 "Matrimonial property systems in comparative perspective" 1983 *Acta Juridica* 53; "Pensioenverwagtinge en diskresionêre bateverdeling by egskeiding" 1988 *THRHR* 228.

80 "Vereistes vir testamentsherroeping" 1982 *TSAR* 110 230; "End van testament" 1986 *TSAR* 378; "Videotestamente naas skriftelike testamente" 1990 *TSAR* 720.

81 "The medieval student university of Bologna" 1986 (1) *Codicillus* 17; "Regsopleiding in die Middeleeuse regskool van Bologna en die betekenis daarvan vir regsvorming" 1987 *Middeleeuse Studies/Medieval Studies* 90; "Regsmetodologie: 'n terreinverkenning in historiese perspektief" 1987 *TSAR* 129; "Regulae iuris and the axiomatisation of the law in the sixteenth and early seventeenth centuries" 1987 *TSAR* 286; "Ramus, mental habits and legal science" in Visser (ed) *Essays on the history of law* (1982) 32; "Making light of heavy weather: Francois Rabelais's deconstruction of scholastic legal science" 1992 *TSAR* 437; "Grundlagen des Nachbarrechts" in Feenstra and Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts in 17. und 18. Jahrhundert* (1992) 597.

82 "Verhoorbevoegdheid oor 'n ontvoerde beskuldigde: besoedelde regsprosesse en gemeneregsvinding – S v Ebrahim" 1991 *TSAR* 673; "Van 'internalistiese' na 'eksternalistiese' gemeneregsvinding of: hoe 'n mens bepaal wat die wat en hoe van die gemeneregis" 1992 *TSAR* 730; "A moral case for lawyer's law" 1992 *SALJ* 619.

83 "The helping hand" 1968 *CILSA* 447; *Versekeringsidee en versekeringskontrak* (1970); "The concept of insurance and the insurance contract" 1970 *CILSA* 149; "Aspekte van die risikobegrip in die versekeringsreg" 1973 *THRHR* 371; "Insurance" in Copeling (ed) *Students casebook on mercantile law* (1975) 292; *Die juridiese versekeringsbegrip met besondere verwysing na die risiko* (LLD-thesis Unisa 1975); "Uberrima fides en die beraming van die risiko voor sluiting van 'n versekeringskontrak" 1977 *THRHR* 1; "Die ontstaan van versekering gerig op winsbejag" 1977 *TSAR* 34 150 220; "Die herkoms van onderlinge versekering" in Joubert (ed) *Petere fontes LC Steyn-gedenkbundel* (1981) 177; "Insurance and the providers of services in South African law" *AIDA VI* (1982) 46 246; "Insurance and good faith: exit uberrima fides – enter what?" 1985 *THRHR* 456; "Insurance" (with Reinecke and others) in Joubert (ed) *The law of South Africa* vol 12 (1988); *General principles of insurance* (with Reinecke) (1989); "Openbaarmaking van wesenlike inligting: die inhoud van Pandora se kissie" (with Reinecke) 1989 *TSAR* 693; "Supervision of insurers in South African law" (with Reinecke) *AIDA VII* (1990); "When can an insurer cancel a contract on the ground of misrepresentation or breach of warranty?" (with Reinecke) 1991 *TSAR* 681.

84 "Beskikking deur die versekeraar oor versekerde goed wat gesteel is" 1987 *TSAR* 267.

85 "Die regsaard van die finansiële huurkontrak" 1989 *TSAR* 568; "Die verhuurder se aanspreeklikheid vir verborge gebreke en inhoudskontrole oor finansiële huurkontrakte in die Duitse reg" 1990 *TSAR* 353; "Which financial leasing contracts are subject to the Usury Act and the Credit Agreements Act?" 1991 *SALJ* 333; "Die betalingsverpligting van 'n huurder ingevolge 'n finansiële huurkontrak" 1991 *De Jure* 151; *Die finansiële huurkontrak* (1991); "Die insolvensieregtelike hantering van finansiële huurkontrakte ingevolge waarvan roerende sake verhuur word" 1992 *De Jure* 434.

86 "Die geoorloofdheid en skeibaarheid van bedinge in boekskuldfinansieringstransaksies" 1990 *TSAR* 302; "Die voortduring van sekerheidsbelange en boekskuldfinansiering" 1990 *TSAR* 527.

87 "Die ontstaan en ontwikkeling van fransering" 1990 *TSAR* 622.

88 "Die klassifikasie van nuwe verskyningsvorme van kontrakte" 1991 *TSAR* 250; "Regsontwikkeling by nuwe verkeerstipiese kontrakte" 1992 *TSAR* 213; "Simulasie, fraus legis en nuwe verkeerstipiese kontrakte" 1992 *SA Merc LJ* 137.

(4);[89] cession for collection (4);[90] bills of exchange (7),[91] (10);[92] the option (29);[93] customary law: general aspects (1),[94] (11);[95] and electronic information systems and the law (28).[96]

5 3 2 Constitutional law, administrative law, medical law, environmental law, press law

The following subjects have been addressed: public-law relationship (33);[97] public-law rights (33);[98] the role and scope of the concept "public interest" (12);[99] constitutional options (22),[100] (36);[101] conventions in constitutional law (14);[102] problems surrounding public holidays (12);[103] local government (14);[104] race discrimination (22);[105] influx control (11);[106] right of assembly (14);[107]

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89 "Artikel 21 van die Insolvensiewet: tyd vir 'n nuwe benadering" 1992 *TSAR* 699; "Asset-based financing transactions, contracts of purchase, sale and simulated transactions" 1992 *SALJ* 707.

90 "Groter duidelikheid oor sessie ter invordering" 1992 *TSAR* 494.

91 "Share certificates, money and negotiability" 1977 *SALJ* 245; "The liberation of the cheque" 1978 *TSAR* 107 201; "Professional responsibility and the payment and collection of cheques" 1978 *De Jure* 326, 1979 *De Jure* 31 363; "The rule in *Price v Neal*" 1978 *CILSA* 276; "The forged indorsement and the draft uniform law on international bills of exchange" 1979 *SA Bankier* 112; *Wisselreg en tjekreg* (with De Beer) (1981); *Bills of exchange, cheques and promissory notes in South African law* (with De Beer) (1983); *Collective securities depositories and the transfer of securities* (1985); "Depositories, nominees and the uncertified security" 1987 *MB* 73; "Brokers, their customers and the transfer of securities" (with Oosthuizen) 1988 *TSAR* 29; "The safe deposit of securities" (with Oosthuizen) 1989 *TSAR* 29; "Die aard van die onderlinge verhoudinge geskep deur die Johannesburgse effektebeurs" (with Oosthuizen) 1989 *TSAR* 29; "Moontlike hervorming van die wisselreg" 1991 *TSAR* 201; *Final report on the reform of the Bills of Exchange Act, 1964* (1991).

92 "Rektawissel en rektatjek, verhandeling en sessie in die Duitse en Suid-Afrikaanse reg" 1987 *MB* 129; "Die onvoltooide wissel in die Duitse reg" 1988 *MB* 92; *Die wisselverrykingseis en die eurotjek in die Duitse reg* (1988); "Pledging and security transfer of bills of exchange and cheques in German and South African law" 1989 *SA Merc LJ* 23.

93 "Aspekte van die opsie" 1974 *De Jure* 120.

94 "The position of customary law in South Africa" 1989 *Internationales Jahrbuch für Rechtsanthropologie* 27; *A sourcebook of African customary law for Southern Africa* (1991).

95 "Swartes en die reg" 1984 *De Jure* 313.

96 *Elektroniese regsinligtingstelsels* (LLM-dissertation RAU 1980).

97 *Die publiekregtelike verhouding* (1985).

98 "Publieke subjektiewe regte: 'n beskouing oor die regsverhouding tussen staat en burger" *Wetenskaplike bydraes van die PU vir CHO* reeks H: Inougurele redes 74 (1980).

99 "Die plek en funksie van die openbare belang in die regshandhawingstaak van die staat" 1989 *TRW* 88.

100 "Constitutional options for post-apartheid South Africa" 1991 *Emory LJ* 745.

101 "Grondslae vir politieke ontwikkeling in Suid-Afrika" in Coetzee (ed) *Gedenkbundel HL Swanepoel* (1976) 102.

102 "Konvensies: nou nog nodig?" 1988 *SA Public Law* 248.

103 "Openbare vakansiedae. 'n Probleem vir die staatsreg?" 1989 *SA Public Law* 83.

104 "Plaaslike owerhede – quo vades?" 1986 *SA Public Law* 9.

105 "Rassediskriminierung, Verfassungsreform und Unruhe in Südafrika" 1986 *Liberal* 39.

106 "Swartes in voorgeskrewe gebiede: 'n nuwe wending" (with Olivier) 1983 *De Jure* 267.

107 "Vrye vergadering in Bophuthatswana" 1990 *TSAR* 767; "Oorsig van die reg op vergadering in die Federale Republiek van Duitsland" (with Watney) 1990 *TSAR* 641.

minority rights (12);[108] human rights in general (14),[109] (22),[110] (25);[111] extradition (22);[112] comparative constitutional law (11),[113] (33);[114] administrative law: general aspects (36);[115] medical law (27);[116] environmental law (13);[117] and publications control (29).[118]

5 3 3 International law, conflict of laws, interpretation of statutes

Publications deal with the following: international law: general aspects (2);[119] treaties and state agreements in international law (2);[120] arbitration and the settlement of disputes in international law (2);[121] the international *lex mercatoria* (2);[122] *res iudicata* in international law (2);[123] aggression in international

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108 "Minority rights in ideological perspective. The legacy of ethno-nationalism" 1991 *TRW* 1; *A theory of ideology and minority rights* (with Visagie) (1993).

109 "Menseregte-aktes: 'n vergelykende oorsig" in Van der Westhuizen and Viljoen (eds) *A bill of rights for South Africa* (1983) 35; "Grondwetlike bepalings ter beskerming van die wese van menseregte" 1991 *TSAR* 403.

110 "Sovereignty and human rights in constitutional and international law 1991 *Emory Int LR* 321.

111 "The protection of human rights and a constitutional court for South Africa; some questions and ideas, with reference to the German experience" 1991 *De Jure* 1 245.

112 "The Coventry four: another perspective" 1985 – 1986 *South African Yearbook of International Law* 157.

113 "Die Duitse konstitusionele hof: 'n riglyn vir 'n nuwe Suid-Afrikaanse bestel?" 1992 *TSAR* 667.

114 *Comparative constitutional law from a Third World perspective* HSRC Research Report (1991).

115 *Administratiefreg* (1984); *Administrative law* (1985).

116 *The doctrine of informed consent in medical law* (LLD-thesis Unisa 1989); "Informed consent: patient rights and the doctor's duty of disclosure in South Africa" 1989 *Medicine and Law* 443; "Die leerstuk van ingeligte toestemming in surrogaatmoederskapsgevalle" 1990 *De Jure* 340; "The so-called 'therapeutic privilege' or 'contra-indication': its nature and role in non-disclosure cases" 1991 *Medicine and Law* 31; "The doctor's duty of disclosure and excessive information liability" 1992 *Medicine and Law* 633; *The doctrine of informed consent in medical law* (1991).

117 *The criminal sanction and alternative remedies for environmental conservation* HSRC Research Report (1991); "A constitutional right to environmental integrity: a German perspective" 1991 *SAJHR* 208; "Environmental law in search of an identity" 1991 *Stell LR* 202; "Nature and scope of environmental law" in Fuggle and Rabie (eds) *Environmental management in South Africa* (1992) 93.

118 *Publikasiebeheer in Suid-Afrika* (1977).

119 *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (1989).

120 "The South African homelands and their capacity to conclude treaties" 1982 *South African Yearbook of International Law* 58; "A survey of legal relations flowing from state agreements" 1984 *South African Yearbook of International Law* 56.

121 "The application of the New York Convention to Arbitration to which a state is a party" 1987 *Vorträge, Reden und Berichte aus dem Europa-Institut* (nr 88, Universität des Saarlandes); "The municipal enforcement of arbitration awards against states in terms of arbitration conventions with special reference to the New York Convention – does international law provide for a municipal law concept of an arbitratable act of state?" 1986 – 1987 *South African Yearbook of International Law* 73; "Judicial developments relating to the Convention on the Settlement of Investment Disputes between States and Nationals of other States" 1987 – 1988 *South African Yearbook of International Law* 169.

122 "Die internationale *lex mercatoria*: Das Erfordernis ihrer Umgestaltung zu einer rechtswissenschaftlichen Synthese und ihr Verhältnis zum Völkerrecht" 1992 *Archiv des Völkerrechts* 43.

123 "Res iudicata and ICSID" 1988 – 1989 *South African Yearbook of International Law* 208.

law (1);[124] statehood in international law (22);[125] conflict of laws (1);[126] the dynamics of the legislative process and the formation of legal rules (6);[127] and interpretation of statutes (6).[128]

5 3 4 Criminal justice

The following topics have been covered: criminal law: general principles (17);[129] process of individualisation (6);[130] principle of legality (6);[131] finalistic theory on the nature of an act (17);[132] private defence (8);[133] defence of superior orders (6);[134] right of chastisement (6);[135] fault (8),[136] (17);[137] monomanias and determinism (6);[138] conspiracy (17);[139] incest (6);[140] paedophilia (6);[141] rape (6);[142] contempt of court (6),[143] (26);[144] desecration of corpses and tombs (6);[145] punishment in general (13);[146] sentencing (30);[147] the death penalty (6),[148] (30);[149]

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124 "A linguistic perspective of the definition of aggression" 1988 *German Yearbook of International Law* 48.
125 "Statehood in international law" 1991 *Emory Int LR* 9.
126 "Cumulation and gap: systemic problems in the conflict of laws" 1988 *SALJ* 444; "Choice of law in claims of unjust enrichment" 1990 *ICLQ* 136.
127 "Die strafregnorm" 1982 *THRHR* 312; "Regsdinamika: opmerkinge oor die aard van die wetgewingsproses" 1983 *THRHR* 420.
128 "Regsakkulturasie en wetsuitleg" 1985 *THRHR* 64; "Die leemtebegrip by wetsuitleg" 1985 *TSAR* 55.
129 *Strafreg* (1992)/*Criminal law* (1993).
130 "Die paradoks van die individualiseringsproses in die strafreg" 1991 *THRHR* 116.
131 "Die sekerheidsbasis van die strafreg" 1988 *SACJ* 52.
132 "The 'finalistic' theory of an act in criminal law" 1975 *SACC* 3 136.
133 "Oor die bedoeling om te verdedig by noodweer" 1981 *TRW* 73.
134 "Sosiale stratifikasie en die strafregtelike effek daarvan op menslike outonomie" 1991 *Stell LR* 252.
135 "Tugtiging van kinders: 'n strafregtelik-prinsipiële evaluasie" 1991 *De Jure* 23.
136 "Die Grenze zwischen vorsätzlicher und fahrlässiger Straftat als ungelöstes Problem" 1981 *Neue Zeitschrift für Strafrecht* 178; "The distinction between dolus eventualis and advertent negligence" 1981 *SACC* 162; "Dolus eventualis en kleurlose roekeloosheid" 1981 *TRW* 101; *Towards an integrated policy of criminal fault* (LLM-dissertation Pretoria 1981). "On the distinction between recklessness and conscious negligence" 1982 *American Journal for Comparative Law* 325.
137 "Normatiewe skuld en redelik verwagbare gedrag" 1991 *THRHR* 4.
138 "Monomanieë, determinisme en strafregtelike toerekening" 1991 *TRW* 82.
139 "Die misdaad sameswering" 1984 *SACC* 3; "The history and rationale of criminal conspiracy" 1984 *CILSA* 65.
140 "Teoretiese verklaring van die bloedskandeverbod" 1990 *TSAR* 415.
141 "Ouderdomsgrense en die bestraffing van pedofilie" 1990 *SACJ* 10.
142 "Die penetrasievereiste by verkragting heroorweeg" 1991 *SALJ* 156; "Verkragtingsfantasieë en toestemming in die strafreg" 1992 *SACJ* 72.
143 "Minagting van die hof: 'n strafregtelike en menseregtelike evaluasie" 1988 *TSAR* 329.
144 "The uncloistering of virtue" 1987 *SALJ* 362 534; *The Cloistered Virtue* (1987).
145 "Menseregte na die dood? Opmerkinge oor lyk- en grafskending" 1991 *De Jure* 141.
146 "Die strafteorieë: 'n oorsig" 1976 (2) *Crime, Punishment and Correction* 33; *Punishment. An introduction to principles* (with Strauss) (1993).
147 "Doelgerigte straftoemeting: 'n regsvergelykende ondersoek na wyses om straftoemetingsdiskresie te reguleer" 1992 *THRHR* 386 575.
148 "Die doodstraf: 'n penologiese evaluasie" 1989 *SACJ* 164.
149 "A perspective on the Criminal Law Amendment Bill" 1990 *SACJ* 162; "Die NG Kerk en die doodsvonnis" 1990 *THRHR* 161; "South Africa's new death sentence: is the bell tolling for the hangman?" 1991 *SACJ* 69; "The criminal judge and the death sentence" 1991 (2) *Codicillus* 4; "Capital punishment revisited" 1992 4(8) *CSD Bulletin* 18.

prisons (32);[150] criminalisation and decriminalisation (6),[151] (13);[152] comparative criminal law (25);[153] and criminal law research (6),[154] (13).[155]

5 4 Law reform

Research conducted by Humboldt scholars has rendered an important contribution to law reform in South Africa. The most manifest examples of this contribution are the several instances in which Humboldt-assisted research stimulated submissions to the South African Law Commission which eventually influenced reform legislation with regard to, *inter alia*, transactions of lease in credit legislation, aspects of matrimonial property law and citizenship of national states. Research reflected in publications, lectures and written submissions has also indirectly exercised an impact on law reform and should continue to do so.

Over an extended period of time, support rendered by the Foundation to South African jurists, especially those involved in research into constitutional, administrative and international law has enriched our public law. The critical analysis of constitutional (*rechtsstaatliche*) developments in post-war Germany – and because of the excellence of German libraries and facilities, of other Continental systems as well – currently exerts a substantial influence on South Africa's search for a new constitutional dispensation and, in fact, a new public-law order. Fundamental issues such as the recognition and protection of human rights, *Rechtsstaatlichkeit*, constitutionalism, federalism, judicial control of administrative actions, the maintenance of a defensible democracy and many others, are characterised in our current public-law debates by regular references to German experience, theory and practice.

It can justifiably be concluded that the Alexander von Humboldt Foundation has, through its support – especially in times when most other sources of support were closed to South Africans – not only nourished and enriched our

150 "'Normal' prisons in an 'abnormal' society? A comparative perspective on South African prison law and practice" 1987 *Criminal Justice Ethics* 37 (also in 1987 *SAJHR* 147); "Leave of absence for West German prisoners. Legal principles and administrative practice" 1988 *British Journal of Criminology* 1; "South African prisons and international law" 1988 *SAJHR* 21; "England: Streitpunkt Lebenslänglich" 1991 *Neue Kriminalpolitik* 19; *South African Prison Law and Practice* (1992); "Is life imprisonment constitutional? – the German experience" 1992 *SA Public Law* 263; Dünkel and Van Zyl Smit (eds) *Imprisonment today and tomorrow – international perspectives on prisoners' rights and prison conditions* (1993).

151 "Dekriminalisasie van eutanasie" 1988 *THRHR* 167; "Dekriminalisasie van meineed" 1991 *TRW* 20; "Menslike outonomie en staatlike majestas: opmerkinge oor die dekriminalisasie van hoogverraad" 1992 *SACJ* 117.

152 "The need for decriminalization" 1977 *CILSA* 200; "Criteria for the identification and creation of crime" 1977 *SACC* 93; "Effectiveness as a criterion for criminalization" 1977 *SACC* 253; "Crimes, offences and administrative contraventions" 1987 *SACC* 20; "Decriminalization of the law – ideal and reality" in Sanders (ed) *Southern Africa in need of law reform* (1981) 99.

153 "Amerikaanse dogmatiek, Duitse kasuïstiek en die Suid-Afrikaanse posisie: nabetragting van 'n strafregvergelykingsimposium" 1984 *De Jure* 369.

154 "The influence of the German Max Planck Institute for criminal law on the development of the South African criminal justice system and literature" (with Rabie) 1991 *SACJ* 288.

155 *Ibid.*

science of public law, but simultaneously rendered a decisive contribution to the construction and establishment of a future South African democratic *Rechtsstaat* to replace the colonial foundations of our constitutional law.

In matters of a private and commercial nature, the influence of the Foundation has been especially prominent in respect of property, family and matrimonial relations, contract, delict, insurance and banking.

The Foundation may be regarded as the most important foreign institution which served to provide and keep open channels for comparative research to South African jurists during the difficult years of ever-increasing academic isolation. Accordingly, many South African jurists have come to rely less heavily on Anglo-American law for comparative analysis and there has been a marked positive influence by German law on South African law reform.

5 5 Other benefits

Humboldt scholarships have had many other positive effects: Humboldt-aided research has been referred to favourably by the courts; it has often been relied upon by scholars in the presentation of papers at conferences; and it has been relied upon to support the contributions made by scholars as members of administrative bodies and a variety of associations. The establishment of research centres such as the Centre for Human Rights at the University of Pretoria and the Criminal Justice Research Unit at the University of South Africa is due in large measure to the experience gained by Humboldt scholars. Stipendiaries have also made German legal science more accessible to others by translating German publications into English.

6 CONCLUSION

Over almost three decades, the Alexander von Humboldt Foundation has contributed substantially to the personal development and growth of a number of jurists who have, in turn, exercised a significant influence on both the theory and the practice of South African law. This the Foundation has achieved without endeavouring to transplant German legal doctrine onto its South African counterpart. Rather, scholars have been enabled to develop their own legal thought and theory, and so to be part of the evolution of their legal system as they consider appropriate. Such an approach is in the true spirit of Alexander von Humboldt, as it is propagated by the Foundation and for which the Foundation deserves the highest measure of gratitude and appreciation.

Our Courts have not been generous in their awards of solatia. *An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches* (*per* EM Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 590).

Property rights in the new constitution: an analytical framework for constitutional review

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OPSOMMING

Eiendomsregte in die nuwe grondwet: 'n analitiese raamwerk vir grondwetlike hersiening

Die huidige debat oor eiendomsreg in Suid-Afrika, wat weerspieël word in die standpunte van die Suid-Afrikaanse Regskommissie en die ANC, vertoon 'n gebrek aan diepgaande analise van die potensiële rol wat eiendomsreg in 'n nuwe grondwet kan speel. Hierdie artikel put uit die Europese, Kanadese and Indiese ervaring en kom met 'n model vorendag waardeur grondwetlike hersiening van regeringsprojekte wat met die ekonomie inmeng met verwysing na eiendomsregte kan plaasvind.

Die kern van die hersiening aangaande eiendomsregte bestaan, soos in die geval van alle menseregte, uit die versoening van wedywerende maatskaplike en individuele eise. Vir sover eiendomsreg ter sprake is, is die doel van hierdie proses om 'n regverdige balans te verkry tussen die gemeenskap se kollektiewe behoeftes en die versekering van die maksimum individuele outonomie en vryheid in die ekonomiese sfeer. Daar sal beslis van 'n hof verwag kan word om omsigtig te werk te gaan wanneer die geldigheid van die doelwitte van staatsinmenging beoordeel word. Die howe se gulde geleentheid vir aktivisme lê egter in die aanwending van die beginsel van proporsionaliteit, wat bepaal dat daar 'n rasionele verband moet bestaan tussen die doel wat bereik moet word en die middels wat aangewend word om daardie doel te bereik. In gevalle van onteiening en nasionalisering is vergoeding die ideale wyse waardeur die gemeenskap en die individu se belange versoen kan word. 'n Grondwet behoort egter die voorskriftelikheid van 'n onbuigsame vergoedingsklousule te vermy. Die internasionale regstandaard, wat op "genoegsame" vergoeding aandring, is in dié verband die aangewese standaard.

Die voorstel dat grondhervormingsmaatreëls nie aan grondwetlike toetsing onderwerp moet kan word nie, moet ook oorweeg word. 'n Blywende gevolg van apartheid is die honger na grond. Indien 'n eiendomsklousule dus in die pad van grondhervorming staan, loop dit die risiko om die potensiële rol wat dit in legitieme mediasie in gevalle van veel ernstiger inbreukmaking op regte kan speel, te ondergrawe.

INTRODUCTION

Among the more contentious topics of the constitutional debate under way in South Africa, is the matter of entrenching property rights in a bill of rights. To understand the value of fundamental property rights, one has to see them

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* I record my debt to Prof David Beatty of the University of Toronto for his illuminating insights into the nature of constitutional review and for pointing me in the right direction.

as the institutional means of resolving deadlocks over wealth distribution in a society in transformation. The constitutional protection of property rights permeates civil society and reflects a vision of the essential values underpinning a nation's political culture. These rights depict "the medium through which struggles between individual and collective goals have been refracted".[1]

A property clause is certain to be included in a bill of rights for a democratic South Africa. Both the ANC and the Law Commission have published proposals in this regard. In this article I shall be examining the practical workings of property rights under a bill of rights and offering an alternative to the clauses recommended by the ANC and the Law Commission. The right to property, like all fundamental entitlements, presupposes a theory of the separation of constitutional powers. Any comment on property rights must therefore be predicated on an awareness of the process of constitutional review. The model relied on here sees investigation into the proportionality of the *means* of government policy as the principal function of constitutional review. When evaluating the *ends* or objectives of policy, judges ought to observe a measure of deference towards the legislative will. Before turning to these questions, however, it may be instructive to discuss the proposals already put forward and the context in which they have been made.

THE LAW COMMISSION'S PROPERTY CLAUSE

Article 22 of the Commission's Bill of Rights published in the Interim Report[2] reads:

> "(a) Everyone has the right individually or jointly with others to be or to become the owner of private property or to have a real right in private property or to acquire such right or to be or to become entitled to any other right.
>
> (b) Legislation may authorise the expropriation of any property or other right in the public interest and against payment of just compensation, which in the event of a dispute shall be determined by a court of law."

The article's protection of *any other* rights suggests that the Commission intends the concept of property to be a wide one, including not only ownership, possession and lesser real rights, but also contractual rights.

The property clause must be read with the relevant portion of the circumscription clause in article 34(1), which reads:

> "With the exception of the rights, procedures and institutions referred to in Articles . . . 22(b) . . . the rights, procedures and institutions set forth in this Bill may be circumscribed by legislation of general force and effect: Provided that such circumscription –
>
> (a) shall be permissible only in so far as it is reasonably necessary for considerations of state security, the public order and interest, good morals, public health, the administration of justice, public administration, or the rights of others or for the prevention or combatting of disorder and crime; and
>
> (b) shall not derogate from the general substance of the right in question."

The right to acquire, hold and dispose of property in all its forms is therefore subject to circumscription allowing government to impose reasonable restrictions on property as it deems necessary for the public interests stipulated. The

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1 Underkuffler: "On property: an essay" 1990 *Yale LJ* 128.
2 SA Law Commission Interim Report *Group and human rights* project 58 (1991).

procedures and rights intrinsic to the limitations upon the power of eminent domain, however, are not. Article 34(1), by excluding article 22(b) from its ambit, intends all restrictions on property which assume the quality of expropriation to attract liability for just compensation, regardless of whether they are reasonably necessary for the listed considerations in article 34(1)(a) or not.

THE ANC'S PROPERTY CLAUSE

The ANC's proposed property clause is found in article 11 of *A bill of rights for a new South Africa – a working document* published by the ANC Constitutional Committee in October 1990. It comprises eleven detailed sub-articles. The key provisions read:

> "11.1 Legislation on economic matters shall be guided by the principle of encouraging collaboration between the State and the private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.
>
> 11.2 All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.
>
> 11.7 No persons or legal entities shall be deprived of their possessions except on grounds of public interest or public utility, including the achievement of the objectives of the Constitution.
>
> 11.8 Any such deprivation may be effected only by or pursuant to a law which shall provide for the nature and the extent of compensation to be paid.
>
> 11.9 Compensation shall be just taking into account the need to establish an equitable balance between the public interest and the interest of those affected.
>
> 11.10 In the case of a dispute regarding the amount of compensation or its mode of payment, provision shall be made for recourse to a special independent tribunal, with an appeal to the courts.
>
> 11.11 The preceding provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in any democratic society for the control, use or acquisition of property in accordance with the general interest, or to preserve the environment, or to curtail monopolies or to secure the payment of taxes or other contributions or penalties."

Article 11.11 is the cardinal provision. It allows circumscription of the rights according to what is deemed necessary in any democratic society and for the interests stated. Whilst at first blush article 11.11 appears to override the requirement of just compensation in article 11.9, the principle of proportionality inherent in the standard of *necessary in a democratic society* operates to protect dispossessed owners from disproportionate interference. The limiting factor is in the prerequisite of a pressing social need and the specification of proportional means which the provision by implication entrusts to the courts for determination. Police power deprivations or controls on property which exceed the legitimate bounds of necessity in a democratic society by being disproportionate become constructive eminent domain takings. They can be variously described as *de facto*, disguised or creeping expropriations.[3] As such, they will attract liability for compensation.

The ANC property clause indicates an inclination on the part of the ANC not to leave the power of constitutional review to a set of general standards

3 See Weston "Constructive takings under international law: a modest foray into the problem of creeping expropriation" 1975 *Virg J of Int L* 103.

and abstract principles. It would appear to favour the "detailed rules" approach. When one considers the arid tradition of literalism in the interpretation of statutes in South Africa, together with the ANC's concern not to leave eventual freedom entirely to the subjective judgment of an elitist group of judges, the stance taken by the ANC is perfectly understandable. I, on the other hand, do not see any benefits enuring to constitutional review from an excessive peering at language. Provided an appropriate theory of review is articulated at the outset and the bill of rights expressly permits reference to the *travaux preparatoires*, the drafters can feel safe to formulate the right to property as a general standard.

STATE ECONOMIC INTERVENTION AND THE BILL OF RIGHTS DEBATE

The debate on property rights in South Africa has concentrated largely upon the problems connected with land rights and nationalisation. Less effort has been devoted to unraveling the possibilities for the constitution to deliver social justice in the form of the "new property". Similarly, not much thought has been spared for the social benefits a property clause may hold by compelling high profile adjudication of the issues presented by the need to redistribute investment through anti-trust legislation. Instead, justifiably perhaps, the debate has been haunted by apartheid's enduring legacy of land hunger and a virtually irrational fear of a command style of economic policy attributed to the ANC.

Generally, the ANC's stated wish to nationalise as a means to bring about desirable social change stresses the need for a more equitable distribution of wealth. Greater public control is seen as the response to a dysfunctional market mechanism. It also aims at political equity in trying to disperse ownership with the object of diluting the power base of apartheid capitalism. In addition, because land ownership, especially productive farm land, is concentrated in the hands of a tiny minority, the land question is a national grievance calling for immediate redress.

Many commentators have cautioned against the natural tendency of judges to interpret property rights as a conservative blocking mechanism designed to prevent government interference with the *status quo*. Such an approach towards wealth issues in South Africa would mean entrenching white privilege. If a future judiciary wants to make a lasting contribution to building social cohesion it should endeavour to strike a fair balance between the competing interests of social justice and individual freedom. Judges accomplish a fair balance by the application of a model of review which tests the proportionality of the means of government intervention and not one which tries to second-guess the popular legislature on the objectives of social policy. Eminent South African lawyers share this concern. Judge Didcott[4] puts it with typical eloquence:

> "What a bill of rights cannot afford to do here, I put it to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African Government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably. The pressure to tackle the problem is likely to prove irresistible. No government which ignores it has much chance of retaining popular support. Should a bill of rights obstruct the

4 "The practical workings of a bill of rights" in Van der Westhuizen and Viljoen (eds) *'n Menseregtehandves vir Suid Afrika* (1988) 60.

> government of the day when that direction is taken, should it make the urgent task of social or economic reform impossible or difficult to undertake, we shall have on our hands a crisis of the first order, endangering the bill of rights itself as a whole and the survival of constitutional government itself."

Opinions along these lines are not, as the Law Commission would have it,[5] justifications for nationalisation without compensation; rather they advocate a model of review structured by proportionality. The principle of proportionality seeks a fair balance between the rights of individuals on the one hand, and the attainment of reasonable social objectives on the other.

The perspective embraces a social democratic concept of property which highlights the socialisation of ownership. Government has a legitimate responsibility to determine, through legislation, the content and limits of ownership and to balance it with the promotion of social interests. Absolute property rights and ownership exist nowhere in the world today. The ANC's attempt to find that balance in its property clause is, therefore, entirely legitimate. It strikes a fair balance comparable with human rights standards throughout the world.

At the same time, leaders of the ANC have watered down their pro-nationalisation rhetoric. They apparently concede the validity of some criticisms made by the anti-nationalisation lobby. The opportunity cost of compulsory purchases in many instances will be too high. And nationalisation without compensation invariably leads to a flight of skill and capital.

Influential social democrats do not favour wholesale and indiscriminate nationalisation. Gelb,[6] for instance, identifies the task of state intervention in a democratic economy to be the development of sectorial policies and not a knee-jerk generalised strategy of nationalisation across the board. Nationalisation would be appropriate in only a limited number of situations; for example, where a key enterprise supplying an essential product is about to go out of business. Instead, the state would intervene in the investment process to ensure that resources were channelled in directions beneficial to growth. A redistribution of investment is not carried out by nationalisation. Rather, the state by the implementation of competition legislation disperses ownership, not to the state, but within the private sector in accordance with principles of fairness well established in comparative legal systems. Undoubtedly, the strategy anticipates a showdown between the government and the monopoly interests controlling the economy. It is inevitable. Still, competition legislation and other adjustive mechanisms are preferable to nationalisation because they vest control over productive efficiency and output where it belongs – in the hands of the producers and not the government.

Consequently, one would have thought the fear of nationalisation would have diminished. It appears, not – irrational fears die hard. In its Interim Report,[7] the Law Commission has conducted virtually its entire analysis of the ANC property clause in the spirit of a vendetta against the ANC's supposed hidden agenda to effect nationalisation without objectively testable norms of compensation. The wide and diverse spectrum of issues normally coming for adjudication under fundamental property rights, regrettably, are simply ignored.

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5 SA Law Commission Working Paper 25 *Group and human rights* project 58 (1989) par 14.120.

6 "Democratising economic growth: crisis and growth models for the future" 1991 *Social Justice* 253 – 256.

7 361 – 362.

THE NATURE OF PROPERTY

The enunciation of the guarantees denoted by fundamental rights take different forms in different constitutions. All, within limits, protect the individual against state interference. Most are formulated as explicit declarations of a guaranteed right. Others are expressed as a delimitation of the authority of the state from which the guaranteed freedom arises as a necessary implication. Property rights are crafted in both forms. Many constitutions contain abstract assurances that both rich and poor are free to acquire, hold and dispose of their property. The right is a negative entitlement to enjoy ownership once one has the economic capacity to obtain it. Such a right does not positively ensure that citizens will necessarily acquire a minimal level of property ownership. The bone of contention usually involves determining the extent of the freedom implied by the delimitation of the state's power to take property. Where do these powers begin and end?

The starting point is to determine what is meant by property. The existence of a cognisable property interest is the threshold question which frequently determines the outcome of the claim. Property in the constitutional and human rights sense is generally not confined to corporeals. An unqualified right to property in a bill of rights opens constitutional protection to an indefinite number of incidents of ownership and use of an indeterminate number of tangible and intangible things.[8] The range includes real estate, intellectual property, goodwill, labour power, rights of action, participation in social insurance schemes and other welfare entitlements.

Baumann[9] suggests that an undelineated constitutionally protected property right is liable primarily to protect business against government and that many desirable types of social legislation will be dangerously exposed to constitutional attack. Some validity is added to his concern by the Fifth Amendment jurisprudence of the US Supreme Court which has mainly protected the interests and power of the propertied at the expense of egalitarian values and protections for the disadvantaged.[9]

However, one should ask: would the absence of a distinct property provision in the US Constitution not merely have meant review of the same issues under other clauses leading to the same consequences? The expropriation of land without compensation equally violates life and liberty. An unfair tax infringes the guarantee of equal protection. One can conjure up a host of examples.

Apprehension about entrenching property rights ignores the true policy function of constitutional review. It presumes a right of fixed content exists out there somewhere: all one has to do, is to discover it by a process of judicial ingenuity. A theory of review which frankly and openly acknowledges the policy function of constitutional review perceives an expansive concept of property as sustaining a mediating function between individual economic interests and government power. Those favouring a narrow formulation do not adequately admit the assumption of a collective or social role for property which implies limitations

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8 Baumann "Property rights in the Canadian constitutional context" *Land and Property Rights Conference Papers* (CALS Univ of Witwatersrand 1992) 82.

9 *Idem* 94 – 102.

upon property rights within the social context of their exercise and realisation. Underkuffler[10] explains it well:

> "Property is not simply that which describes and protects individual autonomy; rather, it is a complex concept that includes a broad range of human liberties understood within a collective context of both support and restraint."

Explicit recognition of the mediating function moves us away from a portrayal of property, and the right to it, as a factually and interpretively discoverable truth. It candidly directs the exercise to finding the socially desirable limits of collective interference with individual economic activities. If we accept review as a worthwhile mechanism of consensus organisation, then all the better if we can apply it to a broader sweep of interests. Moreover, the desired restraint upon judicial subjectivity lies not in attempting a linguistic limitation of the threshold question about the range of interests falling within the definitional boundaries of property. The solution is rather to be found in an appropriate theory of judicial deference to legislative policy.

But we cannot simply leave it there. Nor should we. A broad compass of activities and interests does not mean an unlimited range. Some clarity has to be found on which interests, rights and activities deserve the label "property", thereby enjoying constitutional protection. Lewis,[11] drawing largely upon the work of Thomas C Grey, argues that the notion of excludability gives a better understanding of the inner logic of property than does the traditional emphasis on the criteria of transferability and permanence. According to Grey, an economic resource can be "propertised" only if it is "excludable". He concludes:

> "A resource is 'excludable' only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource."[12]

Grey conceptualises property with reference to the social choices around the exercise of the power to regulate that access. He defines it thus:

> "'Property' is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources. If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no 'property' in that resource and for that matter can lose no 'property' in it either. Herein lies an important key to the 'propertiness' of property."[13]

Lewis specifies several conclusions which follow from an acceptance of Grey's definition.[14] The most important are:

(a) Property is a relative concept, since the notions of physical, legal and moral excludability alter from time to time and from society to society.

(b) There are moral limits to property. These are of significance when dealing with limited commodities which must be preserved for the benefit of all, and of future generations.

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10 1990 *Yale LJ* 141.

11 "The right to private property in a new political dispensation in South Africa" *Land and Property Rights Conference Papers* (CALS Univ of Witwatersrand 1992) 165; Grey "The disintegration of property" NOMOS XXII: Property 1980 *Yearbook of the American Society for Political and Legal Philosophy*.

12 Lewis *idem* 178.

13 *Idem* 181.

14 *Ibid*.

(c) Property is a term with a very wide ambit if it is conceived as control over access: if it is not a thing but a power relationship, then the range of resources in which property can be claimed is greater than is traditionally thought.

(d) Property is assimilable within consensual theory: the divide between property law and contract law becomes blurred.

(e) Property is never absolutely private: all property has a public-law character.

The nature of a democratic society and its institutions alters as it evolves. The criterion of excludability achieves flexibility by building variable temporal and moral considerations into property. In relation to bills of rights, it opposes the idea of elaborating a specific or rigid definition of property because too precise an elaboration will stultify the bill's organic growth and inhibit the development of the "new property".

STATE POWER IN RELATION TO PRIVATE PROPERTY

Collective state power in relation to property has three dimensions: the power of eminent domain, the police power and the taxing power. The expressions derive from American doctrine, but their descriptiveness of universal aspects of constitutional power has gained them recognition in international tribunals and in municipal systems governed by bills of rights.

Eminent domain comprises the power to take property for public purposes against payment of compensation. By implication it contains an immunity against expropriation without compensation. The police power also entails deprivations of property but ordinarily it limits rights between citizens in relation to their property. It establishes a system of internal regulation for the intercourse of citizens with citizens.

While the eminent domain power sets out to fulfil a state obligation to the people, when exercising police power, the state invades private property not on its own account for the implementation of its own public purpose, but for protecting the interests of the community. The police power aims to protect, and prevents people from using their own property to injure others. In such instances there is less of a legitimate claim, if any, for compensation for the deprivation.[15] The police power over property is not limited to the protection of public health, morals and safety. It is a broad power directed at promoting the public convenience and the greatest welfare of the state. It implies a social interest of wider import than the social interest of preserving individual liberty. The primary objective of the police power is protection or prevention.

A constitutional court overseeing the new bill of rights will have to define precisely the ambit and scope of the state's police power over and in relation to property and to draw the dividing line between it and eminent domain. In practical terms, courts review the two powers on different grounds. In India, all police power deprivations of and restrictions on property were eventually subjected to a test of substantive and procedural reasonableness, whereas eminent domain takings had to comply with the requirements of compensation,

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15 For a full discussion of the distinction between the power of eminent domain and the police power, see the decision of the Indian Supreme Court, especially the minority judgment of Das J in *State of West Bengal v Subodh Gopal Bose* [1954] SCR 587.

public purpose and legislative authority. Considerations for determining the reasonableness of a restriction on property in constitutional law are: the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied and the disproportion of the imposition.[16]

To sum up: property rights concern an individual's right to acquire, use and dispose of a vast medley of corporeal and incorporeal things. Government interference with those rights is often described *prima facie* as a "taking" or "deprivation". Under this analysis virtually all government redistributive measures, whether they be nationalisations, taxation or competition legislation, are "takings". If the taking is a reasonable exercise of police power or is a reasonable tax or penalty it is not compensable; if it is not, it becomes an act of eminent domain and must be done for a public purpose, and against payment of compensation.

Most bills of rights concede some shift from the rights of the individual to the interests of the community. The onerous task of holding the scale between social control and individual rights rests with the court and the delicate interpretation of the Constitution. In bills of rights the police power and eminent domain are contained in the restrictions, limitations or derogations written in to qualify property rights either specifically (as in article 22(b) of the Law Commission's bill) or in a general circumscription clause (as in article 34(1) of the Law Commission's bill).

A PREFERRED MODEL OF REVIEW

Fundamental rights delineate the distribution of government power. Consequently, a theory or model of review is essential to define the proper role of the courts in relation to the decisions taken by a freely elected legislature. In the absence of an *a priori* model of review, we may anticipate unsatisfactory results for the separation of powers. Uncertain parameters of judicial power lead to judges meddling in matters political; and judicial forays into politics can impact adversely upon the legitimacy of the Constitution. A judicial distance from politics is best accomplished by a constitutional review process which primarily limits the task of judges to an assessment of the means rather than the ends of government policy.

Much can be learnt from the Canadian experience. Section 1 of the Canadian Charter of Rights and Freedoms provides for circumscription through a general clause. It reads:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

That the circumscription clause enjoys position as first place in the Canadian Charter indicates a mature appreciation of its centrality to the whole scheme of review. The section has two functions: first of all, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, secondly, it outlines explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured.[17]

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16 *State of Madras v VG Row* AIR 1952 SC 196 200 cited in Tripathi 233 fn 11.
17 *Regina v Oakes* 26 DLR (4th) 200 224–225.

Any inquiry under the circumscription clause proceeds on the basis that the impugned interference violates one of the guaranteed rights and freedoms. From this it follows that all constitutional review involves a two-stage inquiry: it has to be established first that the guaranteed right or freedom has been violated; and secondly that the violation is reasonably justifiable in terms of the foundational values of a free and democratic society.

In the first phase the claimants impugning the constitutionality of the law bears the onus of showing that one of their rights guaranteed by the Charter has been infringed. The violation has to be established as a matter of law and fact. In essence, the petitioners need to demonstrate that the interest or activity sought to be protected falls within the guarantee and the impugned measure violates that guarantee.[18] A *prima facie* case ought to be sufficient, because once past the initial hurdle, we get to the second stage which, in truth, forms the core of the review process. Here the objectives and means of the impugned law are evaluated in order to establish that the limit on freedom is reasonable and demonstrably justified in a free and democratic society.

The onus of proving that a restriction on a guarantee is reasonable and demonstrably justified rests on the government.[19] Two central criteria must be satisfied.[20] First of all, the *objective* which the measure is designed to serve must be of sufficient importance to warrant overriding the guarantee. Before it will be characterised as sufficiently important, the objective must at the least relate to concerns which are pressing and substantial in a free and democratic society. Secondly, once the social need is acknowledged, the body defending the intrusive measure must show that the *means* chosen are proportional to the attainment of the objective, that is, they are reasonable and demonstrably justified.

In *Regina v Oakes*, Dickson CJC posited three important components of the proportionality test:

(a) The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. They must be rationally connected to the objective.

(b) The means should impair the right or freedom in question as little as possible.

(c) There must be a proportionality between the *effects* of the measures and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

Beatty[21] names his streamlined version of the analytical framework the "social critic" model. Because the social critic model perceives the core of review as the proportionality principle, it contemplates a wider range of activities or interests as falling within the spheres of freedom guaranteed in a bill of rights. Greater emphasis is placed on justification of government action and less on

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18 *Idem* 208 – 224.
19 *Idem* 225.
20 *Idem* 227 – 228.
21 "The end of law: at least as we have known it" in Devlin (ed) *Canadian perspectives on legal theory* (1991) 394.

seeking the alleged true content of inherent freedoms as supposedly expressed in the mythical intent of the drafters. It follows that the courts can be less demanding about the evidential and interpretive requirements during the first phase of constitutional review, for instance whether or not a particular interest falls within the idea of property. Most cases can get through and a balancing of collective interest against the celebrated individual freedoms can take place in accordance with the principles of proportionality. If this happens the courts engage in their rightful review function, namely, organising and managing the highest level of consensus in society.

The focus then is on finding the least intrusive means of giving effect to government policies. Only laws which restrict freedom unnecessarily are constitutionally invalid. As such the model is sensitive to the tension that exists between the judiciary and other branches of government. Other than embarking on a preliminary examination of the social desirability of the legislative objective, the courts shy away from second-guessing the policy agenda of government. And when a court is faced with the political task of determining the sufficient importance of an objective, the social critic model demands that it should observe the utmost deference towards the popular legislative will.

Proportionality expects government to *justify* the means it employs to effect its policy and asks whether other policy means may have achieved the desirable objectives in a less obtrusive fashion. General human rights standards concede a spectrum of choices for implementing social policies. The task facing government is to select the least burdensome.

An acceptance of the social critic model gets one away from "excessively peering" at language when it comes to drafting bills of rights. The model favours the use of general standards rather than detailed rules which strain the bounds of linguistics in the hope of covering every conceivable eventuality. Open-textured clauses allow for evolutive interpretation and organic constitutional growth. Detailed rules as evident in the ANC property clause reflect a fear that abstract general standards lead to greater subjectivity on the part of judges. An amorphous text is seen as an "empty vessel into which he can pour anything he will".[22]

No legal text, no matter how detailed, can have a wholly precise meaning or a determinate range of application. Since time immemorial, judges have displayed remarkable dexterity at turning a phrase to advance their chosen interpretation in a given case. By separating textual interpretation from social justification, the social critic model approaches the text extensively. The limits of government power are not found in the language in which the freedoms are carried in the text; they reside in the teleological constraints of reasonableness and proportionality brought to bear in the justificatory phase. In this respect, a great deal turns on judicial choices around restraint (minimalist incrementalism) and activism (evolutive interpretation to take account of changing conditions in society). That is not to say the text should be ignored; techniques of evolutive interpretation allow it to be given effective meaning in our time.

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22 The quotation is taken from Learned Hand "Sources of tolerance" 1930 *Univ Penn LR* 12 cited in Mahoney "Judicial activism and judicial self-restraint in the European court of human rights: two sides of the same coin" 1990 *Human Rights LJ* 63.

In any event, general standards must be interpreted with reference to the bill of rights context ordinarily spelt out in the attendant preamble. The European Convention on Human Rights spells out as its primary objective "the *maintenance and further realisation* of human rights and fundamental freedoms".

Forward and dynamic movement is an irreversible feature of all bills of rights.[23] Furthermore, to guard against downward evolution or the misuse of general standards, a bill of rights can expressly make allowance for recourse to teleological aids of interpretation such as comparative policy developments and the *travaux preparatoires*.

Obviously judicial subjectivity can never be ruled out entirely. As mentioned, advocates of the social critic model see the objective criteria intrinsic to proportionality, and not the text, as the true constraints on subjectivity. But even in the interpretation of general standards in the interpretive phase of review, the universal nature of the freedom, the original (substantive) purpose (as evident in the *travaux preparatoires*) and the identification of guiding foundational values or aids to interpretation, all operate externally to the narrow personal world of the judge. Clearly, underlying ideals attributable to the "free and democratic society" formula are not neutral or espouse one or other political philosophy. Yet, whatever opinions a judge might harbour, those ideals are objectively determinable and are capable of normative transposition.

Where judges do give general standards an updated or more contemporaneous content, they cannot presume to do so willy-nilly. Evolving standards must be informed by empirical evidence. In giving content to a general standard, whether it be an abstract entitlement guaranteed in the charter or the social concept underlying the parameters of circumscription, a judge will look at empirical evidence of the practical operation of the impugned measure in the domestic legal order as well as the approach to the problem in other democratic societies. These constraints combine to infuse the process with the desirable degree of objectivity.

THE SOCIAL CRITIC MODEL AND PROPERTY RIGHTS

The full import of the social critic model of review as it applies to nationalisation and property rights is best illustrated with reference to the European Convention on Human Rights.

Article 1 of Protocol 1 to the European Convention on Human Rights reads:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties."

Article 1's passage into legal existence was not uncontroversial. The fact of its enshrinement in a protocol adopted subsequent to the Convention is testimony to the lack of consensus on property rights among the representatives of the

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23 Mahoney 1990 *Human Rights LJ* 66–68.

contracting parties during the deliberations preceding the adoption of the Convention.[24]

The differences of opinion revealed a conspicuous absence of unanimity on an acceptable definition of the concepts of ownership and property. The arguments mirror those currently under way in South Africa. United Kingdom and Swedish members of the Consultative Assembly of the Council of Europe, in particular, argued that it would make for a lack of balance if the right to the protection of private ownership but not social rights were included in the proposed Convention. Some argued that the concept of property should be limited to objects in personal use, whereas others wanted the formulation to stress the social function of ownership.[25]

Another contentious issue was whether the clause should explicitly include a general principle of a duty to pay compensation for the expropriation of private property in the public interest. One of the earlier drafts had used the expression "subject to compensation", which was later replaced by the words "and subject to the conditions provided for by law and by the general principles of international law".[26] The switch was intended as a compromise in that it was thought to give greater leeway to contracting governments on the requirement of compensation for nationalisation and expropriation measures affecting their own nationals, since the reference to international law implies guaranteed rights to compensation only for aliens.[27]

In line with an idea of judicial review being primarily an exercise in testing the proportionality of means, the Strassbourg institutions base their reasoning upon a broad concept of property. A wide interpretation of the expression "possessions" is justified by the international complexion of the Convention as well as the use of the term *property* in the second paragraph of the article. Modern international law perceives property in the widest possible sense as including incorporeals and not being limited to rights *in rem*.[28] It embraces the "new property" spawned by the advent of the welfare state.[29] Thus the European institutions accept participation in a social insurance scheme based on compulsory contributions as grounding a recognisable claim of a proprietary nature.[30]

Most governmental economic regulation therefore has the potential to violate the guaranteed entitlement part of the article. The pivotal concern is to establish the extent to which *prima facie* violations are justifiable under the circumscription provisions of the clause.

The eminent domain circumscription is located in the second sentence of the article, for it is here that we find the implicit reference to a requirement of compensation. If we read it with the second paragraph, it means that all encroachments on property which are not penalties, taxing measures or are not justified as police power controls upon the use of property necessary in the general

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24 For a full discussion of article 1's passage into existence see Peukert "Protection of ownership under article 1 of the First Protocol to the European Convention on Human Rights" 1981 *Human Rights LJ* 38 – 42.
25 *Idem* 39.
26 *Idem* 41 – 42.
27 See generally White *Nationalisation of foreign property* (1961).
28 *Idem* 47 – 50.
29 See Reich "The new property" 1964 *Yale LJ* 733.
30 Peukert 1981 *Human Rights LJ* 45 – 50.

interest, fall within its ambit. The distinction between eminent domain and police power regulatory interferences can be explained only if one assumes that there is a duty to pay compensation for the former. Otherwise the requirements of valid deprivations under the second sentence of the first paragraph and those under the second paragraph are substantially the same: they have to be justified in the public or general interest.

But that does not assist us to devise criteria for distinguishing acts of eminent domain from curbs on the use of property. The answer must, it seems, lie in the second principle of proportionality, namely, that the means should impair the right or freedom in question as little as possible. Disproportionate curbs on the use of property become constructive acts of eminent domain and thereby become compensable.[31] The practice of the Swiss Federal Court is to regard a statutory limitation on use as an act of eminent domain if the prohibition restricts the use of the property to an unusually high degree or in such a way that a single owner or a few owners are exceptionally affected and at the same time required to make a disproportionate sacrifice for the benefit of the community to the extent of receiving no compensation. Relevant considerations include:

(a) the nature of the harm caused by the regulated activity and the manner of interference;

(b) the magnitude or extent of the interference;

(c) the character of the interference;

(d) the effect of government action on the economic value of government resources and enterprises; and

(e) the extent of the public interest being protected.[32]

The first principle of the justificatory phase in the analytical framework followed in *Regina v Oakes* – a sufficiently important objective to warrant overriding the freedom – may be equated with the requirements of a "public" or "general" interest stipulated by article 1 in connection with the two kinds of power. Curbs on use of property must be in the "general interest", expropriations must be in the "public interest". The difference between the two concepts, if any, is negligible. Although the existence of the pre-condition is objectively justiciable, in keeping with the principle of judicial deference, governments enjoy a margin of appreciation when it comes to deciding what is in the best interests of the public in structuring the economic and proprietorial system. Provided the goal falls within a spectrum of reasonable policy choices, the court will not intervene on this count.[33]

The most significant issue which faced the European institutions in the leading case on nationalisation, *Lithgrow*,[34] concerned the duty to pay compensation and the extent of the duty. On 17 March 1977 the United Kingdom

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31 Cf *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

32 Peukert 1981 *Human Rights LJ* 59–60 fn 86.

33 *A, B, C and D v United Kingdom* AD YB 10 506 518. See also Mahoney 1990 *Human Rights LJ* 78–85; Peukert 1981 *Human Rights LJ* 62.

34 102 Eur Ct HR (ser A) (1986). The analysis of the British nationalisations is drawn largely from Mendelson "The United Kingdom nationalisation cases and the European Convention on Human Rights" 1987 *BYIL* 33; and "Judicial decisions" 1987 *AJIL* 425.

Parliament enacted the Aircraft and Shipbuilding Industries Act of 1977 whereby the shares of some 31 companies in the two industries passed into the ownership of two new public corporations, British Aerospace and British Shipbuilders, on the "vesting days" of 29 April and 1 July 1977 respectively.

The legislation provided that securities quoted on the Stock Exchange were to be valued at their average price during a six-month period ending on 28 February 1974 (the date the new Labour government came to power), whilst unquoted securities were to be valued, by agreement or arbitration, as if they had been quoted during the same reference period.

With the Conservative party's accession to power in 1979, the government continued to implement the nationalisation policy. The government compensation scheme was seen by many to be grossly disproportionate to the true value of the assets taken. The dispute related to the valuation of unquoted shares during the reference period.

A settlement was reached with most of the nationalised companies. In seven cases, however, the shareholders were sufficiently aggrieved to file complaints against the United Kingdom, alleging violation of article 1 of the First Protocol and the non-discrimination provision, article 14 of the Convention. The applicants did not contest the government's right to nationalise property; their complaint was that the compensation they had received was grossly inadequate and discriminatory. The government had offered a total of 128 million pounds sterling for the seven companies, while the applicants claimed that the value of their companies at vesting days totalled 445 million pounds.

It will be recalled that the original draft of article 1 of the First Protocol had inserted the expression "subject to compensation" in the second sentence of the first paragraph and that this was later replaced by the reference to the general principles of international law. International law merely prescribes a duty to pay compensation for the expropriation of *alien* property.

The British government argued that the *travaux preparatoires* supported the view that article 1 was not intended to extend the applicability of the principles of international law to cover the expropriation of the property of nationals. The government had initially argued before the Commission that the clause meant that nationals had no right at all to compensation under the Convention. The revised argument conceded some entitlement to compensation, but asserted that the international-law principles were not decisive in that regard.[35]

According to the applicants, the object of the oblique reference to international law was to make *all* takings subject to the requirements of international law. In their view, all nationals of the contracting states were protected by the international standard of "prompt, adequate and effective compensation" (the Hull formula); the reference to international law would otherwise be redundant, since aliens in any event enjoyed the protection granted by international law.

The court rejected the applicants' submissions. It concluded that it was

> "more natural to take the reference to the general principles of international law in Article 1 of Protocol No 1 to mean that those principles are incorporated into that

35 Mendelson 1987 *BYIL* 45–47.

> Article, but only as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals".[36]

The court's finding released it from the necessity of ruling on whether the highly contested Hull formula – prompt, adequate and effective compensation – was the applicable standard of compensation required by international law.[37] The court felt that the discrimination between nationals and aliens resulting from this interpretation was a species of permissible discrimination. It pointed to a number of good reasons for distinguishing between nationals and aliens in the context of expropriation.[38]

The court's decision on this point is easily justifiable with reference to both the language and context and must be considered correct, especially in light of its further findings in relation to compensation. And it is here that we encounter a discerning grasp of the "social critic" model of review.

Besides the oblique reference to compensation for aliens, there is no other mention of a requirement of compensation in article 1. Relying on another decision of the court handed down during the course of the hearing,[39] the applicants put to the court an evolved model of review in which they defined the court's role as being "*to determine whether a fair balance was struck between the general interests of the community and the requirements of the individual's fundamental rights*". Moving away from a literalist analysis of the text, they claimed that the concept of fair balance was found in the structure of article 1 as a whole.

Taking a broad view of the interests protected by the entrenched freedom, they asserted that even in the absence of a reference to compensation, a taking without payment of an amount reasonably related to the value of the property violated the right to peaceful enjoyment of possession. Therefore, *prima facie*, there was a violation which required justification along the lines of fair balance or proportionality.

It followed then that the British government would have to show:

(i) the aim of the interference was to meet the needs of the general interest of the community – the sufficiently important objective principle; and

(ii) there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised, with the payment of compensation normally being an essential means of reconciling the competing interests in expropriation – the proportionality principle.

The court endorsed the model and proceeded to apply it. On the question of the legislation's objective, the applicants contended that a taking for which grossly unfair compensation was paid, could never be in the general interest as it was an unjust enrichment of the state. The government pointed to the decline

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36 "Judicial decisions" 1987 *AJIL* 426.

37 For an illuminating debate on the status of the Hull formula see Robinson "Expropriation in the restatement (revised)" 1984 *AJIL* 176; Schachter "Editorial comment: compensation for expropriation" 1984 *AJIL* 121; Mendelson "What price expropriation?" 1985 *AJIL* 414; Schachter "Compensation cases – leading and misleading" 1985 *AJIL* 420.

38 "Judicial decisions" 1987 *AJIL* 426.

39 *Sporrong and Lonnroth* case 1982-09-23, Series A no 52 cited and discussed in Mendelson 1987 *BYIL* 48.

in the industry and stressed the need to increase the public accountability of an industry unusually dependent on public funds. By reason of the government's direct knowledge of society and its needs and resources, the court felt it should be granted a wide margin of appreciation to determine which measures were appropriate. The aim of the legislation was legitimate, and attention therefore had to be focused on whether the decisions on compensation fell outside the wide margin of appreciation.

The court turned to the techniques of valuation to test their proportionality. The applicants identified two central elements of unfairness. They claimed that the only fair compensation standard applicable in the present case was one based on a willing buyer-willing seller standard as at the date of taking. The government had used a single retroactive reference period of six months, terminating some three-and-a-half years before the actual date on which the shares vested in the new corporations. Backdating is normally used as a method to protect the deprived owner from falling values on the announcement of the scheme. In this case it had operated to the applicants' detriment because the companies had displayed high growth during a period marked by high inflation. Secondly, the hypothetical stock exchange quotation as the method for evaluating the unquoted shares was an inappropriate and arbitrary method, since it did not make allowance for the fact that a substantial premium is customarily paid for a total acquisition of shares not on the open market.

The court split on the issue 13:5, holding that these methods were well recognised, and that the government was entitled to resort to them as one of the alternatives within a range of options falling within its margin of appreciation.[40] Here we immediately notice a dissimilarity between the application of the social critic model under a regional charter as compared to its action under a national bill of rights. Under the Canadian Charter, the court conceptualises the alternative means aspect of proportionality to be a requirement on government to employ the means least intrusive on the guaranteed freedom. The Convention operates supra-nationally and on that account the court imposes it with greater circumspection. The doctrine of the margin of appreciation gives the contracting parties a spectrum of choices for implementing the general standards of the Convention. An infringement occurs only when the national authorities stray beyond the range of justifiable options. Provided the means adopted to advance the public interest fall within the options allowed by a margin of appreciation, the government action will be sustainable even if a less intrusive means were available to it.

Apart from this distinction, explicable with reference to the regional nature of the Convention, the two approaches to review coalesce in principle and pragmatism seems to be the correct method of judicial review under fundamental rights.

A STANDARD OF COMPENSATION

As we have just seen, the social critic model experiences minimal discomfort in reading in an obligation to compensate the victims of eminent domain in

40 The minority felt the measures failed to make allowance for the changes in profitability of the companies in the long interval between the 1974 reference period and the 1977 vesting day. The interval created an unreasonable and disproportionate distortion even allowing for a wide margin of appreciation (see Mendelson 1987 *BYIL* 62).

the absence of any express stipulation to that effect. Because the court was able to skirt the question of the applicability of the Hull formula, it invoked a requirement that the amount of compensation must bear a reasonable relation to the property taken. Many formulae or qualifying adjectives have been used to describe the compensation criterion in bills of rights. Some provisions speak of *just* compensation. Others use expressions like *appropriate*, *fair*, *reasonable* or *adequate*. Whichever is adopted, the meaning of the qualification depends ultimately on judicial interpretation.

The expression *appropriate* as interpreted in international law, I suggest, accords with the social critic model. Dolzer's doctrine of *legitimate reliance* is one of the more convincing theories supporting an international standard of *appropriate* compensation. The doctrine proceeds on the assumption of a basic international legal principle of *bona fides*. Good faith entails a treatment of a foreigner bringing his property into the host country that will not unduly frustrate the *legitimate reliance* he placed upon the host state's decision to allow the import of foreign property into its territory. Where the import of capital has been allowed, international law expects, at the very least, good faith dealing. Looked at from the angle of the host state the principle of legitimate reliance can be formulated as follows:

> "No reasonable ground exists for an investor to expect a more favourable scheme of compensation from a host country than is indicated by representative standards accepted by those countries with both the highest standards of property protection and the highest level of capital exports."[41]

The formulation stresses reliance upon a comparative standard based on a survey of property protection in municipal legal systems. The single most important deduction to be made from a comparative survey is that expropriation schemes generally envisage a balancing of interests between the deprived owner and the nationalising state. A standard of *appropriate* compensation based on "legitimate reliance" operates in three important ways in the international arena. In the first place, adjudicative tribunals may take account of the impact of the compensatory obligations on the economy of the expropriating state. Some consideration must be given to the needs and fiscal capabilities of the host state. Secondly, weight is given to the original reasonable expectations of the investor in deciding to invest his capital. In the modern world, "*legitimate* reliance" implies that an alien investor should place less reliance upon colonial-type arrangements than upon a human-rights environment that reflects well-considered development strategies on the part of the host country. An international adjudicator reviewing an expropriation scheme in terms of legitimate reliance may well decline to protect forcefully an arrangement of "manifestly nondevelopmental investment", for example, if the investment involves technology inappropriate to the developmental process of the host, and also closes the capital and distribution markets to domestic competitors. Thirdly, the reliance factor may lead to varying results, depending on the scope and nature of the expropriatory actions.[42]

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41 Dolzer "New foundations of the law of expropriation of alien property" 1981 *AJIL* 581–582.

42 Dolzer 1981 *AJIL* 582–585.

The last point was enlarged upon by the US Court of Appeals in *Banco Nacional de Cuba v Chase Manhattan Bank*[43] as follows:

> "It may well be the consensus of nations that full compensation need not be paid in all circumstances . . . and that requiring an expropriating state to pay '*appropriate compensation*' – even considering the lack of precise definition of that term – would come closest to reflecting what international law requires . . . But the adoption of an '*appropriate*' *compensation* requirement would not exclude the possibility that in some cases full compensation would be appropriate."

LESSONS FOR SOUTH AFRICA

If it were accepted that constitutional review of property rights should proceed on this basis, it should be possible for the main actors to reach agreement quite easily. One of the important lessons of the European experience is that even where there is no reference to a duty to pay compensation in the circumscription of eminent domain, a substantial taking without it will be construed in many cases as a disproportionate imposition on the individual. On the other hand, the cases show that in many instances of more generalised interference, judicial determinations of quantum should yield with prudent deference to the legislative will.

The essential difference between the Law Commission's bill and that of the ANC is that article 34(1) of the Law Commission's bill seeks to limit the manoeuverability of the testing court in applying the principle of proportionality. It accomplishes this in two ways. First of all, the Law Commission, it seems to me, by not allowing any reasonable circumscription of the just compensation requirement, wants to give the judiciary an activist power to second-guess the legislature in its policy ends. Assuming the expression *just compensation* means market value, as it has been interpreted in the USA, once a taking acquires the character of an expropriation, full compensation will have to be paid. In US constitutional law "just compensation" means the full amount of a fair evaluation based on the price a willing buyer would pay to a willing seller.[44] The court will have less opportunity to weigh social needs against individual needs in accordance with proportionality. This interpretation is strengthened by an additional rule in article 34(1)(b) which requires that other circumscriptions shall not derogate from the substance of the property right.

The ANC provision (articles 11.7 – 11.11) is more flexible and on a par with the jurisprudence of the European Convention and article 14 of the German Basic Law. Article 11.9 aims at achieving the necessary balance between the collective and the individual by allowing the court to take account of the need "to establish an equitable balance between the public interest and the interest of those affected". The equitable balance concept encapsulates the international-law standard of "appropriate compensation". Additionally, article 11.11 permits a proportionate circumscription of the requirement of just compensation by enacting (in the wording of the circumscription provisions of the European Convention) a restriction standard of "*deemed necessary in any democratic society*".

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43 658 F 2d 875 (2d Cir 1981) cited by Schachter 1984 *AJIL* 128 fn 39.

44 The authority relied on for the interpretation of the expression "just compensation" in the 5th Amendment to the US Constitution is *Monongahela Navigation Co v United States* 148 US 312 (1893); and *Kirby Forest Indus v United States* 104 S Ct 2187 (1984).

In my submission, were the Law Commission's clauses to be enacted, the only casualty, ultimately, would be the process of judicial review itself. Nowhere is this more evident than in India. There the judges embarked upon a frolic of the most dubious kind of literalist interpretation to upset interventionist legislation. In their minds there was one enquiry in cases of substantial deprivation: Was the compensation on a par with market value? If it was not, the measure was invariably struck down.[45] In the process they unwittingly abdicated their review function. It would have been far better had they weighed the competing interests to find the least intrusive means of giving effect to government policies of intervention. Instead, because they disagreed with the ends of the policy, they refused to defer to it and upset the means without pointing to any alternatives. With hindsight, the consequence was inevitable. By a string of unedifying constitutional amendments the review power was curtailed to allow the social legislation to proceed unimpeded. Property rights were eventually removed from the list of fundamental rights in 1978. In the course of events the concept of private property and the constitutional review process were brought into considerable disrepute.

CONCLUSION AND RECOMMENDATIONS

Taking into account the considerations flowing from the aforegoing analysis, namely:

- the proportionality principle's emphasis on balancing social and individual interests as the core of review;
- the desirability of formulating substantive guarantees of freedom as general standards;
- the value of an extensive interpretation of the concept property in determining the threshold question; and
- the concept of "appropriate compensation" as reflecting an internationally accepted standard of compensation

it is possible to recommend the following property clause:

(1) Everyone has the right to the enjoyment of his or her property.

(2) No-one shall be deprived of his or her property except in the public interest, with due process and against payment of appropriate compensation.

Naturally, the property clause must be read in conjunction with the circumscription clause. In this regard it is suggested that we should borrow section 1 of the Canadian Charter of Rights and Freedoms in its entirety.

The emotive quality of the debate surrounding the land issue, however, may make those advocating reform reluctant to leave the fate of land legislation to the vagaries of proportionality. A compromise may be found by excluding land legislation from constitutional review under property rights and the equality

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45 See *West Bengal v Banerjee* [1953] SCR 558; *Mudaliar v Special Deputy Collector* [1965] 1 SCR 614; *Metal Corporation of India v Union* [1967] 1 SCR 255; *RC Cooper v Union* [1970] 3 SCR 530 (*The Bank Nationalisation* case).

clause. Entrenched rights to natural justice and reasonableness in the administrative sphere will guarantee that the reform is conducted fairly in a manner conforming to a human-rights order.

Redistributive land reform of some kind seems set to be a component of affirmative redress in a future South Africa. Already there is discussion about the creation of a Land Claims Court to adjudicate competing claims to land. In addition, legislation is called for to redistribute land based on the need resulting from the denial of fair and free access to land by virtue of apartheid land legislation. Some go as far as calling for nationalisation of the entire land stock. Land hunger is apartheid's enduring legacy. There are great symbolic and political benefits to be had by a new government that is seen to be redressing the problem. A property clause which thwarts the government's intervention to address the land and housing crisis will deliver a harmful blow to its own legitimacy. It will be construed in the popular imagination as a sheet-anchor of vested land interests.

Moreover, were the land issue placed outside the scope of the clause, I believe that added force may be given to the other potential of property rights. Subjecting the regulatory police power over property to a test of reasonableness is a good idea. One suspects the hard issues about property will be fought on this terrain. The adjudicative process is best equipped to resolve them. Yet if we allow the same provision in the constitution to be seen to be defeating or impeding the pressing need for land reform, we may very well lose the opportunity for a legitimate resolution of the hard issues related to tackling the conglomerates and the redistribution of investment. The land reforms, in my view, should be allowed to proceed unimpeded by anything except the political process.

This kind of thinking, in part, forms the true justification for the ANC's affirmative action clause in article 13 of its Bill of Rights. The logic, morality and good common sense of the argument is compelling. It advocates the retention of legislative sovereignty in the affirmative action arena in order to eliminate the abuses of legislative sovereignty by past minority illegitimate regimes. Without question, article 13 is a sweeping provision. So much so that one doubts whether it will survive the rigours of debate in a Constituent Assembly. It overrides all rights for an indefinite period of affirmative redress. However, its underlying rationale to limit the power of the courts in such matters is both pragmatic and defensible.

A constraining factor would be a time limit upon the operation of the scheme. Land reform legislation enacted within a set time before or after the commencement of the Constitution could be exempted from judicial scrutiny. Article 31A of the Indian Constitution similarly insulated land reform. It differs in two important respects from article 13 of the ANC bill. The contrast between them points to a workable compromise. In the first place, article 31A, unlike the affirmative action clause, specifically identifies the rights from which derogation is permissible in the interests of affirmative action, namely, property rights and equality. Secondly, through interpretation, article 31A was restricted to agrarian reform. In this sense it is more specific than the ANC clause *a propos* the interests in respect of which derogation is allowed. On this basis the following provision may be recommended:

> "Notwithstanding anything contained in article . . . (the enforcement provision), no law enacted within five years of the commencement of this Constitution with the purpose

> of affirmatively reforming land tenure and access to land shall be held void on the grounds that it is inconsistent with or takes away or abridges any of the rights conferred by articles . . . (property and equality rights)."

Additionally, in genuflection to history, some movement towards a right to shelter will be accomplished by adopting article 10(10) of the ANC bill. It provides that no evictions may take place without a court order which shall have regard to the availability of alternative accommodation.

Were this route to be followed, we ought not to discount the political. After all, the legislature in a democratic society is answerable to the people. In calling for a model of review based on proportionality and a temporary larger degree of legislative sovereignty in the sphere of land reform, one does not advocate a mindless scramble to dispossess. In the final analysis, our protection against legislative tyranny lies in a free and intelligent public opinion which eventually must assert itself.

Man is by nature a social animal whose well-being depends upon his association with others. Recluses who voluntarily seek seclusion are known, but they are the exception to the rule. In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time and it is mirrored in the Correctional Services Act and the regulations thereunder (*per* Hoexter JA in *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145).

AANTEKENINGE

OORLAS: GRONDSLAG VAN AANSPREEKLIKHEID?

Die vraag na die grondslag van aanspreeklikheid op grond van sogenaamde oorlas is in die Suid-Afrikaanse reg nog steeds omstrede (sien Price "Nuisance: the Canarvon municipality case" 1949 *SALJ* 377; Matthews en Milton "An English backlash?" 1965 *SALJ* 31; Boberg "Oak tree or acorn" 1966 *SALJ* 150). Aan die een kant word beweer dat ons positiewe reg insake oorlas suiwer op die Engelsregtelike leerstuk van "nuisance" gebaseer is, en aan die ander kant word die Aquiliese beginsels as grondslag voorgehou. Die implikasies is dat die Suid-Afrikaanse reg in verband met oorlas enersyds deur 'n Engelsregtelike deliksvorm *sui generis* beheers word of andersyds deur die omvattende beginsels van Aquiliese aanspreeklikheid. Die kenmerkende van eersgenoemde benadering is dat die aanspreeklikheid vir die vergoeding van skade nie op skuld gebaseer word nie, terwyl in laasgenoemde geval die skuld van die verweerder by uitstek as die basis van aanspreeklikheid dien.

Hierdie onsekerheid en tweeslagtigheid kom weer sterk na vore in *Flax v Murphy* 1991 4 SA 58 (W). Die eiser en verweerderes was buureienaars van twee stukke grond wat deur 'n muur geskei is. Die muur is deur 'n onafhanklike kontrakteur opgerig in opdrag van die verweerderes in 'n stadium toe sy nog die eienaar van beide grondstukke was. As gevolg van konstruksiewerk op die verweerderes se grondstuk, het grond 600 tot 700 mm hoog aan haar kant teen die muur opgebou. Die druk van hierdie grond het 'n deel van die muur laat instort en die res daarvan onstabiel en gevaarlik gemaak.

Die hof bevind dat die onstabiele toestand van die muur inbreuk maak op die eiser se eiendomsbevoegdhede en dat die verweerderes se optrede dus oorlas daarstel. Daar was met ander woorde 'n aantasting van die eiser se eiendomsreg op sy grond.

Die regspunt voor die hof was die vraag of skuld, hetsy in die vorm van opset (*dolus*) of nalatigheid (*culpa*), 'n vereiste is vir die aanpreeklikheid van die verweerderes vir die koste om die muur weer te herstel.

Die hof ag hom gebonde aan die uitsprake in *Bloemfontein Town Council v Richter* 1938 AD 195 en *Graham v Dittman & Son* 1917 TPD 228 en verwerp skuld as 'n vereiste vir aanspreeklikheid in hierdie geval. Regter Marais verklaar (64D – E):

> "In my view I am bound by the judgements of the Appellate Division in *Bloemfontein Town Council v Richter* (1938 AD 195) and of the Transvaal Provincial Division in *Graham v Dittman & Son* (1917 TPD 288) to hold that nuisance caused by the owner of property in occupation thereof, . . . is actionable irrespective of any proof of negligence or intent."

Die hof vind dus dat die verweerderes op grond van oorlas teenoor die eiser aanspreeklik is vir die redelike en noodsaaklike uitgawes om die muur te herstel.

Die onsekerheid oor die grondslag van aanspreeklikheid laat veral twee vrae ontstaan: wat is die werklike posisie en, veel belangriker, in welke rigting behoort die toekomstige ontwikkeling plaas te vind? Die opvatting dat ons reg aangaande oorlas op die Engelse reg gebaseer is, het sy ontstaan te danke aan die ou uitspraak in *Holland v Scott* 3 EDC 307. Sonder werklike ondersoek van ons gemeenregtelike grondslae het die hof, op grond van die gemeenskaplikheid van die stelreël *sic utere tuo ut alienum non laedas* aan sowel die Engelse as ons gemenereg, tot die slotsom gekom dat ons reg aangaande oorlas identies is met die Engelse reg. In verskeie uitsprake daarna is op hierdie uitspraak voortgebou (*Graham v Dittman & Son* 1917 TPD 288; *Bingham v City Council of Johannesburg* 1934 WLD 180; *Kirsch v Pincus* 1927 WLD 199; *Rivas v Premier Diamond Mining Co* 1928 WLD 1; *Leith v Port Elizabeth Museum Trustees* 1934 EDL 211; *Van der Merwe v Carnarvon Municipality* 1948 3 SA 613(K)).

Die toonaangewende saak is egter *Bloemfontein Town Council v Richter supra*. 'n Analise van die betrokke uitsprake in dié saak dui daarop dat die skuldbeginsel as aanspreeklikheidsgrondslag nie versaak is nie. Dit word behou deur die aanvaarding van 'n vermoede van skuld aan die kant van die verweerder (228 230 236).

In 1963 het die appèlhof in *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) (vgl ook *Moller v South African Railways and Harbours* 1969 3 SA 374 (N)) dit duidelik gestel dat die aanspreeklikheid vir skadevergoeding op grond van oorlas op die Aquiliese skuldbeginsel, *dolus* of *culpa*, berus.

Dit is duidelik dat die oorspronklike motivering vir die aanvaarding van Engelsregtelike beginsels in verband met oorlas, naamlik die gemeenskaplikheid van die stelreël *sic utere tuo ut alienum non laedas*, hoogs aanvegbaar is. Die stelreël verteenwoordig geen substantiewe regsbeginsel nie. Aan die latere uitsprake waarin die *Holland*-saak nagevolg is, kan dus nie veel gewig verleen word nie. Hulle het op 'n "foundation of sand" gebou (Price 378).

Die vooropstelling van die Aquiliese grondslag in geval van oorlas laat die vraag ontstaan of dit in ooreenstemming met ons gemenereg is. Anders as wat in uitsprake te kenne gegee is, is ons gemenereg besonder uitvoerig aangaande die afbakening van die regte van buureienaars as 'n geheel van norme wat die regte van buurreghebbendes onderling reël. Die behandeling van die buurreg as 'n geheel van norme wat die regte van buurreghebbendes onderling reël, is egter kasuïsties en fragmentaries. Die uiteensetting van die betrokke norme hou verband met gemeenregtelike remedies en prosedures wat in die moderne reg grootliks gelding verloor het. Die betrokke norme self behou egter in die moderne reg hul belang en relevansie as maatreëls ter afbakening van die regte en bevoegdhede van buurreghebbendes (*Regal v African Superslate* (*Pty*) *Ltd supra* 106 ev).

Die belangrikste Romeinsregtelike remedies was die volgende (sien in die algemeen Van Oven *Leerboek van Romeinsch privaatrecht* (1948) 105 – 109): die *actio negatoria* (*D* 8 5 2*pr*; *D* 7 6 5 *pr*), *actio finium regundorum* (*D* 10 1 13), *actio aquae pluviae arcendae* (*D* 39 3), *cautio damni infecti* (*D* 39 2), *operis novi nuntiato* (*D* 39 1), *interdictim quod vi aut clam* (*D* 43 24), *interdictum de arboribus caedendis* (*D* 43 27), en *interdictum de glande legenda* (*D* 43 28). Hierdie regsmiddels het elkeen 'n besondere aspek van buurregtelike verhoudings gereël. Hulle is in die Romeins-Hollandse reg oorgeneem (vgl Voet 8 5 2; 8 5 5; 7 6; 10 1 12; 39 3; 39 2; 39 1; 43 24; 43 27; 43 38; 19 2 20; Price 383).

Wat was die aard en grondslag van die betrokke remedies? Die regsmiddels was basies saaklik van aard; hulle was in beginsel gerig op die herstel van die besit en gebruik van 'n saak. Die verhaal van skadevergoeding was egter toepaslik by sommige remedies, byvoorbeeld die *actio aquae pluviae arcendae*, *actio negatoria* en die *interdictum quod vi aut clam* (Van Oven 105 – 109; Jörs-Kunkel-Wenger *Römisches Privatrecht* (1949) 142; Voet 39 2 1). Dit staan egter vas dat skuld, hetsy *dolus* of *culpa*, geen vereiste was vir die inwerkingstelling van hierdie gemeenregtelike remedies nie. In geen van die *Digesta*-tekste kon ek enige aanduiding van so 'n vereiste vind nie. Dit sou strydig wees met die basies saaklike aard van die remedies. Die skuldlose grondslag van die gemeenregtelike remedies is van besondere belang by die toekomstige ontwikkeling van ons reg aangaande oorlas.

Alhoewel enkele van die gemeenregtelike remedies in onbruik verval het (bv die *cautio damni infecti: Central SAR v Geldenhuis Main Reef GM Co Ltd* 1907 TH 270 291; *Regal*-saak *supra* 109 – 110 121) geld die substantiewe beginsels daarvan onveranderd (*Regal*-saak *supra* 110). Daarbenewens geld enkele van die ou remedies nog by name in ons positiewe reg: byvoorbeeld die *actio aquae pluviae arcendae* en die *interdictum quod vi aut clam* (sien Van der Walt *Risiko-aanspreeklikheid uit onregmatige daad* (LLD-proefskrif Unisa 1974) 370 ev). Die positiefregtelike gelding van die betrokke gemeenregtelike remedies, en ook die aksie op grond van skade veroorsaak deur die onttrekking van laterale grondstut, laat die vraag ontstaan waarom die ander verskyningsvorme van oorlas in ons reg deur die Aquiliese beginsels beheers moet word. Dit skep 'n onverantwoorde en onlogiese benadering tot 'n prinsipieel eenselwige verskynsel, naamlik onregmatige aantasting van regte op onroerende goed deur gebruikmaking van aangrensende grond. Enersyds word die substantiewe beginsels waarop die remedies berus het, in die praktyk benut om tussen regmatige en onregmatige optrede te onderskei (*Regal*-saak *supra* 106 – 109), maar die beginsel van skuldlose aanspreeklikheid, ook eie aan die betrokke gemeenregtelike remedies, word sonder meer geïgnoreer. Die skuldlose grondslag word deur die Aquiliese skuldbeginsel vervang. As regverdiging hiervoor word onder andere na die verouderde gemeenregtelike elemente van die remedies verwys (*Regal*-saak *supra* 121C).

Soos in die geval van die *actio aquae pluviae arcendae* en die *interdictum quod vi aut clam* (sien Van der Walt 374), behoort sowel die skuld- as die risikobeginsel deliktuele aanspreeklikheid op grond van oorlas te grondves. In gevalle waar die skade voortvloei uit 'n buurmansaktiwiteit wat 'n besonder hoë risiko van benadeling vir die buurreghebbende meebring, behoort die risikobeginsel te geld. Die toepassing van die risikobeginsel kan positiefregtelik geknoop word aan die gemeenregtelike beginsel van skuldlose aanspreeklikheid wat by buurregtelike verhoudinge van toepassing was. In die lig van hierdie gemeenregtelike beginsel en die besonder groot en intensiewe wrywingsvlak wat tussen buurreghebbendes bestaan, kan in baie gevalle geredelik tot die gevolgtrekking gekom word dat die besondere optrede van 'n buurreghebbende normaalweg 'n buitengewone risiko van benadeling teenoor die buurman geskep het. Waar 'n buurreghebbende deur sy optrede so 'n risiko geskep het, voel 'n mens dit as uiters onbillik aan dat hy deur bewys van skuldloosheid aan sy kant die skade op sy buurman laat rus: "[j]ustice is better served by throwing the risk of potentially dangerous activity upon the doer and by narrowing down the grounds of exemption from

liability'' (Mathews en Milton 40). Daar bestaan genoegsame regverdiging vir skuldlose aanspreeklikheid: die potensieel groot en intensiewe konfliksvlak, die riskante aktiwiteit en die onredelik en dus onregmatige gebruikmaking van sy grond deur die verweerder. In die geval van handelinge wat normaalweg nie *a priori* as buitengewoon riskant bestempel kan word nie, behoort die (Aquiliese) skuldbeginsel te geld.

Die uitspraak van regter Young in *Cosmos (Pvt) Ltd v Phillipson* 1968 3 SA 121 (R) 128 – 130 bevestig die moderne behoefte aan 'n tweeslagtige grondslag vir aanspreeklikheid in geval van oorlas. Die hof gee te kenne dat billikheidsoorwegings die toekenning van skadevergoeding, sonder aanwesigheid van *dolus* of *culpa*, kan regverdig. Daar is sterk aanduidings in die uitspraak dat die regverdiging vir sodanige skuldlose aanspreeklikheid in die grondgedagte van die risikobeginsel, naamlik buitengewone risikoverhoging, geleë is.

In die onderhawige saak sou 'n mens die uiteindelike uitspraak met verwysing na die risikobeginsel kon regverdig. Die beheer oor aktiwiteite wat 'n redelike groot hoeveelheid grondmassa teen 'n gemeenskaplike muur laat opbou, skep 'n duidelike risiko van benadeling. Dit het klaarblyklik die potensiaal om die betrokke muur onstabiel te maak en 'n instortingsgevaar te skep. Onstabiliteit en instorting is ook die tipiese gevare verbonde aan die verweerders se optrede.

So 'n regverdiging van die uitspraak vereis egter die beginselerkenning van die risikobeginsel as 'n aanspreeklikheidsgrondslag. In enkele uitsprake is daar wel sterk aanduidings van die erkenning van die beginsel (sien Van der Walt ''Risiko-aanspreeklikheid: erkenning in die regspraak'' 1984 *TSAR* 211). Daar is egter nie sekerheid nie.

Net soos in die Duitse reg oor ''Gefährdungshaftung'', word skuldlose of risiko-aanspreeklikheid in ons reg, op grond van ou Romeinsregtelike remedies en moderne wetgewing, kasuïsties gereël (sien oor die Duitse reg veral Deutsch *Unerlaubten Handlungen, Schadensersatz und Schmerzensgeld* (1993) 172 ev en oor die Suid-Afrikaanse reg Neethling, Potgieter en Visser *Deliktereg* (1992) 353 ev). In die Duitse reg word reeds die afgelope twee dekades aanvaar dat daar 'n behoefte bestaan om die ''Gefährdungshaftung'' fundamenteel te hervorm (sien veral Von Cämmerer *Reform der Gefährdungshaftung* (1971); Deutsch ''Das neue System der Gefährdungshaftungen'' 1992 *NJW* 73; Kötz ''Haftung für besondere Gefahr'' 1970 *AcP* 1; Koziol ''Umfassende Gefährdungshaftung durch Analogie'' *Festschrift für Wilburg* (1975) 173; en Will *Quellen erhöhter Gefahr* (1980)). Oor die vorm en inhoud van 'n ''Generalklausel'' vir risiko-aanspreeklikheid bestaan daar egter meningsverskil. Die akademiese gesprek gaan voort.

Die Suid-Afrikaanse reg het dieselfde behoefte aan die erkenning van 'n algemene risikobeginsel. Ons sal dit noodwendig deur wetgewing moet invoer. Dit beteken 'n omvattende wet wat ou kasuïstiek in hierdie opsig vervang deur 'n omvattende, prinsipiële reëling. Dit sal uiteraard diepgaande navorsing vereis. Dit kan die basis bied vir 'n ''sprong'' wat ons reg en regswetenskap op die voorposte van aanspreeklikheidsontwikkeling kan plaas.

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THE SOUTH AFRICAN LAW OF JURISDICTION OR: CAN A LEGAL CLASSIC BE UPDATED?

[A review article on *Pollak on jurisdiction* (second edition) by David Pistorius Juta & Co Ltd, Cape Town, Wetton, Johannesburg 1993]

Introduction

Pollack on jurisdiction follows 56 years after the first edition, which carried the title *South African law of jurisdiction* (Hortors, Johannesburg, 1937). The first edition by Walter Pollak QC (see Kahn "In Memoriam Walter Pollak QC" 1971 *SALJ* 280) was a well-written and finely researched book. In a most scholarly manner, its author set out for the first time the then South African law on the complex subject of the civil jurisdiction of the supreme court. Over the years since its publication, the first edition has been cited in almost every important case concerning the jurisdiction of the supreme court. It has become a legal classic. Copies of the first edition have become, as Farlam AJ has stated, "as rare as *hoendertande*". I, and indeed many other colleagues, are not ashamed to admit that for research purposes we have only photostatic copies of that edition. If, as I understand, there is no original copy of the first edition in the Orange Free State Provincial Division library, there is certainly no need for embarrassment. I shall return to the value of the first edition in the conclusion (below).

Where the first edition of a law book has stood the test of both time and judicial comment, an author, or would-be author, of a second edition must realise that he has undertaken or is about to undertake a daunting task. Such a task has been undertaken by David Pistorius, a senior attorney of Durban. He has been assisted, albeit to limited extent, by Advocate DJ Shaw QC of the Durban Bar, who has written chapter 4 "Attachment to found jurisdiction". If the standard of a second edition of a legal classic is to be judged – especially if it has been produced by another author – it will in the first instance be measured against the first edition. The essential question then is: how does the second edition of *Pollak on jurisdiction* compare with the first?

In the Preface the author tells us that the first edition "required updating in order to deal with the new case law and legislative changes". He says it was not possible to achieve this without alteration to the original text. This is, of course, understandable. However, he states that it was his intention to concentrate on the second edition

> "[as] a book for practising lawyers and to leave debate on some of the more philosophical questions which arise to those more able than I to deal with them" (vii).

What does he mean by a book for practising lawyers? I would have thought that a book on the civil jurisdiction of the supreme court must be a book primarily for practising lawyers. Of concern, too, is the comment that he avoided some of the more "philosophical questions". By this I presume that Pistorius means "jurisprudential or academic" questions relating to the subject. Thus

it would appear that he wanted to produce an elementary textbook on the subject of jurisdiction. It can hardly be suggested that the first edition was written as an elementary text book for practitioners. Further, Pollak did not avoid philosophical or jurisprudential questions – on the contrary, he addressed them! In an early review of the first edition, the then editor of the *South African Law Journal*, Graeme Duncan, himself a legal giant, said of Pollak (1937 *SALJ* 318):

> "The author does not hesitate to express his opinions, and these are supported by clear and concise arguments."

An elementary monograph on the jurisdiction of the supreme court for the average practitioner, candidate attorney, pupil and indeed law student, is not in itself a bad thing. However, to be of value, such a monograph must be well structured and contain no serious errors or omissions.

Unfortunately the book under review is not free of errors or omissions and the most important part of the book, namely the introduction dealing with the essential basic aspects of the subject, is poorly structured. A suggested structured approach will be considered below.

An examination of some erroneous aspects of the book under review

As neither time nor space permits a lengthy review of the various errors and omissions in the whole book, only the following important aspects will be considered:

- The total jurisdiction of the supreme court
- Arrest/attachment to found/confirm jurisdiction
- *Forum non conveniens*
- The inherent jurisdiction of the supreme court

The total jurisdiction of the supreme court

Pistorius has not made it clear that the total (civil) jurisdiction of the supreme court is made up of three separate components, namely statutory jurisdiction, common-law jurisdiction and the court's inherent jurisdiction (cf his *excursus* on inherent jurisdiction at 26). Each of these factors is separate and distinct from the other, save that in a sense, common-law jurisdiction and the inherent jurisdiction may be seen to owe their continued development to the court's statutory jurisdiction (s 19(3) of the Supreme Court Act 59 of 1959).

The court's statutory jurisdiction may be described as that jurisdiction which emanates from an act of parliament (eg s 19 of the Supreme Court Act 59 of 1959). The court's common-law jurisdiction is that jurisdiction possessed by the superior courts of the Province of Holland before 1806 and which has not been abrogated by disuse. The following description of the inherent jurisdiction of the court was accepted by the supreme court, namely

> "those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason" (*M v R* 1989 1 SA 416 (O) 423G).

The significance of the trichotomy of the jurisdiction of the supreme court lies in the ease in which the subject may be structured for simple and quick reference and understanding. Further, the advantage of examining each of the components separately would enable an author to have considered the various aspects of each component under the appropriate heading or sub-heading and not in

the random manner adopted by the present author in the book under review. (See, eg, the position of inherent jurisdiction "wedged" between convenience (23) and classifications of actions (31).) The subject of inherent jurisdiction, a separate and distinct component of the court's total jurisdiction, should be considered separately from the other components. It is through this trichotomy of the jurisdiction that the suggested structured essential introduction will be suggested in the conclusion below.

Arrest/attachment to found/confirm jurisdiction

Before the Supreme Court of South Africa (acting as a court of first instance) may be said to have jurisdiction over a claim sounding in money against a *peregrinus* of the Republic, such court is required not only to enjoy jurisdiction over the cause but also it must be able to give effect to its judgment (*Steytler v Fitzgerald* 1911 AD 295 346; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 2 SA 295 (A) 307; *Venta Minerva Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 4 SA 883 (A) 893F; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 1 SA 482 (A) 499E – F).

The court may be seen to enjoy jurisdiction over the cause where this is provided by the common law, for example by the *actor sequitur forum rei* doctrine (*Sciacero v CSAR* 1910 TS 119) or by the arrest of the defendant who is a *peregrinus* of the Republic or by the attachment of his property to found jurisdiction at the instance of a plaintiff who is an *incola* of the court (*Estate Brownstein v CIR* 1957 3 SA 512 (A) 524). In regard to arrest/attachment to found jurisdiction, such remedy will be granted only if the defendant or his property is within the territorial jurisdiction of the court.

Arrest/attachment to confirm jurisdiction is a judicial development of the law. Confirmation of jurisdiction is necessary only in cases where the court has jurisdiction over the cause (a *ratio jurisdictionis*) and in addition the defendant is a *peregrinus* of the Republic. In order to give effect to its judgment, the court requires arrest of a defendant who is a *peregrinus* of the Republic or the attachment of his property (*Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd supra* 305 *et seq*). In other words, where there is a *ratio jurisdictionis* the court requires such arrest/attachment to strengthen its effectiveness (cf *Murphy v Dallas* 1974 1 SA 793 (D) 796C – D). As with arrest/attachment to found jurisdiction, the court will not order the arrest/attachment to confirm jurisdiction unless the defendant or his property is within the territorial jurisdiction of the court.

A *ratio jurisdictionis* must be decided on the individual cause of action, including the relief sought. While there is little difficulty regarding a cause of action which arose within the territorial jurisdiction of the court, for example *ex delicto* or *ex contractu*, the inquiry is not always as simple. For example, if the court enjoys jurisdiction over a particular cause of action, would other claims which may be heard by the court by reason of the *causa continentia* rule (*Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd* 1962 4 SA 326 (A)), be regarded also as *rationes jurisdictionis*?

The subject of arrest/attachment to found or to confirm jurisdiction is considered in chapter 4, "Attachment to found jurisdiction", by Shaw. However, there is no reference in the title of the chapter to "arrest" nor to "confirmation of jurisdiction". In this chapter Shaw fails to distinguish clearly between

"arrest/attachment" on the one hand and between "founding and confirmation of jurisdiction" on the other. In the sub-section headed "Procedure" (85) no reference whatsoever is made to the allegations necessary to obtain an order for arrest either to found or to confirm jurisdiction. In an application where the arrest of the defendant or the attachment of his property (either to found or confirm jurisdiction) is sought, it is essential that the applicant establish that the defendant or his property, as the case may be, is within the territorial jurisdiction of the court (see *inter alia* Harms *Civil procedure in the Supreme Court* (1990) 91). Shaw omits to mention these essential requirements. Further, he does not indicate the facts that must be established on the return day (*loc cit*).

If, as stated (vii), the book under review was intended for "practising lawyers", the subject of arrest/attachment to confirm jurisdiction and the subject of arrest of a *peregrinus* defendant either to found or to confirm jurisdiction and the procedure for the grant of these remedies should have been fully considered, together with the leading decisions in point. It is noted that *Estate Brownstein v CIR* 1957 3 SA 512 (A), perhaps the leading Appellate Division authority on the subject of attachment to found jurisdiction, has been omitted.

According to the general index, the only references to arrest/attachment to confirm jurisdiction are to be found at 82 and 84. The texts relating to these references are as follows:

(a) At 82 the following single sentence appears:

> "[I]t was established at an early stage by the Appellate Division that attachment to found or confirm jurisdiction was necessary where the Defendant was a peregrinus."

However, there is no reference to arrest to found or to confirm jurisdiction at this appropriate point (cf the text headed "Arrests of the person" at 88), where Shaw states *en passant* that

> "[i]n general the same rules apply with regard to arrests of the person save that the discretion with regard to the amount of security may well be more extensive".

(b) The second mention of the subject is contained in two sentences at 84:

> "*Where attachment is competent, but another ratio jurisdictionis exists*, the attachment is usually referred to as an attachment to confirm jurisdiction. Where no ratio jurisdictionis exists, and jurisdiction may be founded on attachment alone, then the attachment is properly referred to as an attachment to found jurisdiction" (my emphasis).

The text in emphasis (above) is, at best, misleading. Surely attachment to confirm, however competent, is not, as appears to be suggested, a *ratio jurisdictionis*.

Apart from the somewhat scant treatment of the important area of law dealing with arrest/attachment to found or confirm jurisdiction, it is most unfortunate that neither Pistorius nor Shaw appears to have been aware that the South African Law Commission was in the process of examining the effect of section 26(1) of the Supreme Court Act of 1959. This was done by the commission with a view to seeking an amendment to the law to permit a court to arrest/attach the defendant or his property to confirm jurisdiction in cases where the defendant or the property is within the territorial jurisdiction of another division of the supreme court (Project 87). Since the publication of the book under review, the South African Law Commission has published a valuable working paper (*Jurisdictional lacuna in the Supreme Court Act 59 of 1959* Working Paper 47). If the proposed legislation contained in the working paper is passed by parliament,

the decision in *Hare v Bonimar Shipping Co SA* 1978 4 SA 578 (C) and indeed *Ewing McDonald and Co Ltd v M & M Products Co* 1991 1 SA 252 (A) will have been overtaken by such legislation and rendered nugatory – as will portions of the book under review.

Forum non conveniens

Pistorius is of the view that section 9(1) of the Supreme Court Act of 1959 provides for the principle of law referred to as *forum non conveniens*. Section 9(1) merely provides that one of the parties may seek a removal of the matter to another division, where it may be heard more conveniently. *Forum non conveniens*, properly so called, goes far beyond section 9(1), since the latter merely provides for a removal of the matter within the Republic, by way of application.

In a proper *forum non conveniens* situation, the court initially seised of the case may, either *mero motu* or by way of special plea, decline jurisdiction in favour of a competent court elsewhere. Although the court to which the matter is referred, may be beyond the Republic, it must be a competent court, that is, a court enjoying jurisdiction in regard to the particular matter. It would appear that the division which hears an application in terms of the section 9(1) of the Supreme Court Act must have jurisdiction over the cause before it may order the removal to another division (*Welgemoed v The Master* 1976 1 SA 513 (T) 523).

In *Estate Agents Board v Lek* 1979 3 SA 1048 (A) the Appellate Division appears to have introduced into our law the doctrine of *forum conveniens* (see "Jurisdiction and forum conveniens – a new approach" 1980 *THRHR* 187 and "Jurisdiction and forum conveniens – a reply" 1981 *THRHR* 372).

Forum conveniens has been defined as follows:

> "[T]he state or judicial district in which an action may be most conveniently brought, considering the best interests of the parties and the public" (*Blacks legal dictionary* 5 ed 589).

In *Lek's* case the Appellate Division found that the TPD, the WLD and CPD all enjoyed jurisdiction in a particular matter. However, by applying the convenience factor (or the doctrine of *forum conveniens*) the court found that the balance of convenience was in favour of the CPD. The inherent jurisdiction of the supreme court made possible the introduction of the doctrine of *forum conveniens* (see 1981 *THRHR* 379; cf Forsyth *Private international law* 2 ed 158). If this view is correct, then the court may equally decline jurisdiction on the ground of *forum non conveniens*.

Inherent jurisdiction of the supreme court

Pistorius correctly found it necessary to consider the inherent jurisdiction of the supreme court (26 – 31).

However, despite his avowed intention to avoid the more philosophical questions concerning jurisdiction (vii), he enters what may be regarded as the jurisprudential arena in his *excursus* on inherent jurisdiction. This he does in an ambivalent manner, soon becoming bogged down in the morass created by judicial interpretations based on conservative formalism, which he fails to distinguish from factual situations.

It is trite that the supreme court possesses an inherent jurisdiction, that is unwritten powers, which enable it to function with justice and good reason (see

M v R 1989 1 SA 416 (O) 423F). The inherent jurisdiction may be innate in the sense that the court was possessed of that jurisdiction when it was established (28; cf Forsyth 155 *et seq*). However, to refer to that jurisdiction as its "common law jurisdiction" or its "general jurisdiction" is erroneous (28; cf *Chunquete v Minister of Home Affairs* 1990 2 SA 836 (W) 844F – H). First of all, as indicated above, the term common law refers to the common law of South Africa and may be described as the Roman-Dutch law as acknowledged and practised by the superior courts of the Province of Holland before 1806 (and which law has not been abrogated by disuse). The inherent jurisdiction of the court owes nothing to Roman-Dutch law (see Taitz *Inherent jurisdiction of the supreme court* (1985) 10). Perhaps Pistorius, who appears to place this in contention, should have presented facts in support of his view – something he has not done. Secondly, to refer to the inherent jurisdiction as being the "general jurisdiction" of the supreme court, is equally erroneous. The very term "general" jurisdiction implies the "total" jurisdiction of the court of which the inherent jurisdiction is only a part, albeit one of the three major components (see above).

Further, the statement that the inherent jurisdiction of the court is mainly procedural (28) is also incorrect (see below). It is not suggested that the inherent jurisdiction may be used to create substantive law (cf *Universal City Studios Inc v Video Network (Pty) Ltd* 1986 2 SA 734 (A) 754) or even to do simple justice between man and man (cf *Wright v St Mary's Hospital, Melmoth* 1993 2 SA 226 (D) 233G). It is submitted that the court enjoys inherent jurisdiction to create or to modify remedies, where justice and good reason requires this. A remedy may be classified as either substantive or procedural law. An examination of the statement by Corbett JA (as he then was) in *Universal City Studios Inc v Network Video (Pty) Ltd supra*, clearly indicates that it is often not possible to distinguish between substantive law and adjectival (or procedural) law. *In casu* his Lordship held:

> "There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice . . . It is probably true that, as remarked in the *Cerebos Food* case . . . the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw . . . Salmond (*Jurisdiction* 11 ed at 504) states that:
>
> > 'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.'"

At this stage, rather than to join issue with Pistorius over the subject of the inherent jurisdiction of the court, it is appropriate merely to summarise the major aspects of the subject and in support to refer to recent cases in point (these are not exhaustive):

(a) The inherent jurisdiction of the supreme court should be seen as those (unwritten) powers, ancillary to its common-law and statutory powers, without which the court would be unable to act in accordance with justice and good reason (*M v R supra* 423F – G);

(b) The inherent jurisdiction of the supreme court owes its origin to English law (*Hossain v Attorney-General, Cape* 1988 4 SA 142 (C) 148F);

(c) The court is not obliged to exercise its inherent powers, which are discretionary (*Wright v St Mary's Hospital, Melmoth supra* 233);

(d) The court has used its inherent powers:

(i) to regulate its proceedings (*Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 2 SA 366 (C) 368B);

(ii) to prevent an abuse of its process (*Althmaram v Singh* 1989 3 953 (D) 956B; *Whitfield v Van Aarde* 1993 1 SA 332 (E) 335 339);

(iii) to protect its dignity, repute and authority and to compel the observance of its lawful order (*Van der Berg v Schulte* 1990 1 SA 500 (C) 507A);

(iv) to control and supervise its officers (*Law Society of the Cape of Good Hope v C* 1986 1 SA 616 (A) 638B *et seq*);

(v) to restrain irregularities in the proceedings of inferior courts (*Smit v Seleka* 1989 4 SA 157 (O) 164G);

(vi) to restrain irregularities in the proceedings of administrative (and like) authorities (*Nell v Raad vir Eiendomsagente* 1986 4 SA 605 (T) 610B); and

(vii) to create or modify a remedy (*inter alia: Johannesburg Consolidated Investments v Johannesburg Municipality* 1903 TS 111 114 – 115; *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 1 SA 13 (A) 41G; *Shifidi v Administrator-General for SWA* 1989 1 SA 631 (SWA) 648I *et seq*). While the supreme court has no power to create substantive law, this should not apply to remedies, which as indicated above may be classified as either substantive or procedural law (see the *Universal City Studios* case *supra* 754).

In his *excursus* on inherent jurisdiction, Pistorius would also appear to have overlooked a vital aspect regarding the subject, namely that such jurisdiction is also available to the court in respect of criminal causes, more particularly to grant bail (*Veenendal v Minister of Justice* 1993 2 SA 137 (T) 141); to permit the piecemeal hearing of an appeal (*S v Malinde* 1990 1 SA 57 (A) 67); to set aside a sentence and conviction following the disappearance of trial records (*Mlauzi v Attorney-General Zimbabwe* 1993 1 SA 207 (ZS); to review the proceedings of an inquest (*In re Klein's inquest* 1992 2 SA 658 (C) 663); and to review the proceedings of inferior criminal courts (*S v Shezi* 1984 2 SA 577 (N)).

The very fact that the inherent jurisdiction enables the court in certain circumstances to do justice and good reason, is indicative of its importance in our law. It is not an insignificant sub-section of the court's jurisdiction merely to be glossed over in the "Introduction", where it is wedged between "Convenience" (1.7) and "Classification of actions and nature of relief claimed" (1.9).

Conclusion

While certain aspects of jurisdiction contained in the book under review and presented by Pistorius and Shaw in an erroneous or inadequate manner, have been considered in this review article, they are not exhaustive. As indicated above, constraints of space and time limit a full consideration of the whole book. None the less, it is important to point out that there are also unfortunate omissions such as a section detailing and explaining the situation of persons who are beyond the jurisdiction of the court (cf Forsyth 150 *et seq*). Pistorius has also included all too few references to academic articles. Of further concern is the dearth of relevant foreign judgments, *a fortiori* of recent foreign decisions.

It is also unfortunate that many well-known law books, especially those emanating from the golden period of Roman-Dutch law, are incorrectly cited in the bibliography (xi – xii). Pistorius should be aware that no book, Roman-Dutch legal authority or otherwise, should be cited without reference to the exact title, date and a reference to the edition, if there is more than one edition. The following is a list of some of the incorrectly cited Roman-Dutch authorities (the correct title etc, follows in parenthesis):

1 Grotius H *Hollandsche consultatien* (Grotius did not write such a book; is Pistorius perhaps referring to DP de Bruyn *The opinions of Grotius: as contained in the Hollandsche consultatien en advijsen en appendix IV*? (see Wouter de Vos *Regsgeskiedenis* (1992) 180));

2 Kersteman *Recht woordeboek* (Kersteman FL *Hollandsch rechtsgeleerd woordenboek*);

3 Van der Keesel *Praelectiones ad Grotii* (Van der Keesel DG *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam*);

4 Van der Linden *Institutes of Holland* (Van der Linden did not write a book with this title, either in English or Dutch. Is Pistorius referring to H Juta *Institutes of Holland* (or *Manual of law practice and mercantile law*) (1904) or perhaps to J Henry *Institutes of the laws of Holland by Johannes van der Linden* (1828), both of which are translations of Van der Linden's well-known *Rechtsgeleerd, practicaal en koopmans handboek*?)

It is doubtful whether these errors were misprints. The only explanation for such serious errors is either that Pistorius is unaware of the correct manner of citation or that he has not seen the actual books. It must also be pointed out that there are not two separate writers Gail and Gaill (Bibliography xi). There is only Andreas von Gail also known as Von Gaill, Von Geyl, Von Gayllor, Gaillius) (see Roberts *A South African legal bibliography* (1942) 126). One of a number of more venial errors is the author's reference to an article by Ranchod in the 1970 *Acta Juridicia* (xii): the journal intended is *Acta Juridica*, the journal of the Faculty of Law, University of Cape Town.

Perhaps I may be permitted to refer the author to an incident which is said to have occurred at Oxford during the middle of the last century. Dr Routh, the President of Magdalen College, when nearly 100 years old, was asked by the Dean of Chichester for one axiom or precept as a rule for life. The venerable scholar replied:

> "I think, Sir, since you come for the advice of an old man, Sir, you will find it a very good practice *always to verify your references*, Sir!" (Morris *Oxford* (1979) 182 – 183).

It remains to set out the suggested structured approach to the essential introduction, which should be a separate part of any book on jurisdiction. As pointed out above, the total jurisdiction of the court consists of statutory jurisdiction, common-law jurisdiction and inherent jurisdiction. Each of these components should be set out in a separate section and be subject to separate explanations, under relevant headings and sub-headings. Such a structured introduction will assist legal practitioners and students to understand the essential basic rules of jurisdiction fully.

In fine, it is appropriate to answer the question posed in the introduction to this review article: "How does the second edition of *Pollak on jurisdiction* compare with the first edition?" While the second edition has a number of

positive features and will certainly be of value to practitioners as it contains up-to-date judicial decisions and current legislation, I believe that it is not in the class of the first edition which I have referred to as a legal classic. Although the book under review may be up to date with its references, I should advise those lawyers, practising and academic, who have a copy of the first edition not to dispose of it – it might still be cited in the courts.

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KLEIN LENINGS EN DIE WOEKERWET

1 Algemeen

Die Woekerwet 73 van 1968 (hierna die Woekerwet) is van toepassing op alle geldlenings-, krediet- en huurtransaksies waar die hoofskuld minder as R500 000 beloop (sien reg 5 van GK R3273 in *SK* 14438 van 1992-12-04). Op enkele uitsonderings na moet alle persone wat transaksies aangaan soos hierbo bedoel, aan die Woekerwet se beperkings- en bekendmakingsvereistes voldoen (sien Grové *Gemeenregtelike en statutêre beheer van woekerrente* (LLD-proefskrif UP 1989) 352 ev 366 ev). Die Woekerwet geld nie slegs waar geld of krediet in die gewone loop van besigheid uitgeleen of verskaf word nie, maar vind selfs aanwending waar 'n persoon op 'n eenmalige basis transaksies van dié aard aangaan (bv geldleningstransaksies tussen familielede onderling). Nie-nakoming van die wet se beperkings- en bekendmakingsvereistes het sowel straf- as privaatregtelike gevolge. So begaan 'n skuldeiser 'n misdryf as hy te hoë finansieringskoste hef (sien a 17). Aan die privaatregtelike kant weer kan 'n skuldeiser selfs verhinder word om enige finansieringskoste te verhaal op bedrae wat uitgeleen of krediet wat verskaf is, waar die finansieringskoste wat deur die skuldenaar betaalbaar is nie in 'n skuldakte geopenbaar is nie (sien a 2(9)).

Die Woekerwet in sy huidige vorm het tot gevolg dat die meeste persone wat 'n besigheid as 'n uitlener van klein bedrae bedryf, bykans noodwendig die bepalings van die wet moet oortree om 'n bestaan te kan maak. Uitleners van dié aard se netto opbrengs op hulle kapitaal is te klein as hulle aan die voorskrifte van die Woekerwet moet voldoen. Die redes hiervoor is tweërlei van aard, naamlik dat

(a) genoemde persone geld uitleen maar nie deposito's neem nie – hulle moet derhalwe hulle kapitaal teen relatiewe hoë koerse by erkende finansiële instellings leen;

(b) die oorhoofse koste by klein lenings basies dieselfde is as by groot lenings, wat die reële winsgrens op 'n klein lening ernstig knou as rentekoerse deurgaans dieselfde vir klein en groot lenings sou wees (sien die bespreking in par 2 2 hieronder).

(Sien in die algemeen Otto en Grové *Die Woekerwet en verwante aangeleenthede: Nuwe kredietwetgewing vir Suid-Afrika* Suid-Afrikaanse Regskommissie Projek 67 Werkstuk 46 (1993) 222 (hierna "Otto en Grové *Werkstuk*").)

Bogenoemde skep die teelaarde vir die vestiging en groei van 'n informele finansiële mark. Dit is 'n erkende feit dat daar so 'n mark buite om die Woekerwet se beheermaatreëls bestaan (sien Fothergill *The Sunday Star* 1988-06-19 4). Gewoonlik is die koerse waarteen finansiering in dié mark beskikbaar is veel hoër as wat die formele sektor mag beding (*ibid*). Alhoewel geldopnemers in die informele mark hulle regtens wel op die Woekerwet se beskermingsmaatreëls mag beroep, geniet hulle *de facto* geen beskerming nie omdat beskerming teen koersuitbuiting 'n skuldenaar nie veel van hulp is as toekomstige toegang tot krediet nie verseker kan word nie (sien *National commission on consumer finance: Consumer credit in the United States* (voorsitter IM Milstein) (1972) 104).

Benewens die feit dat die Woekerwet *de facto* geen beskerming bied nie, verwyder die wet mededinging uit die mark. Gelduitleners in die informele sektor kan nie met verloop van tyd in die formele sektor opgeneem word nie vanweë die onwettige aard van hulle besigheid. Die formele sektor daarenteen kan nie met die informele sektor meeding nie solank eersgenoemde groep aan formele sektor-beperkinge onderworpe is (Grové 355).

Die aangeleentheid het ernstige ekonomiese en politieke gevolge. Die ekonomiese afdeling van Standard Bank Bpk het hulle in getuienis voor die Suid-Afrikaanse Regskommissie soos volg hieroor uitgelaat ("Memorandum on economic considerations relative to usury legislation" aangehaal in Otto en Grové *Werkstuk* 223):

> "It is a regrettable fact that the existence of maximum interest rates, defined as absolute annual percentages by existing legislation and regulations, has precluded an entire class of potential borrowers from having access to credit from official financial intermediaries. Instead they are forced to rely on a very narrow unofficial and underground 'curb' market, where interest rates charged are usually very much higher and where no effective legal protection exists regardless of the Usury Act's existence. This has severely hindered the broadening and deepening of the financial sector, and it has inhibited the development of the informal sector . . . Political tensions have arisen from the charge that finance from the official or organized market is not available to these people or sectors, and this is attributed to all manner of motives – racial and other prejudices being the most prominent amongst them. In practice, the problem stems from bankers and other lenders in the formal economy having adopted the position that their lending should be secure, cost effective and remunerative . . . Finite limits imposed by usury legislation have prevented this requirement from being accommodated."

Watter oplossings bestaan daar vir dié probleem?

2 Teoretiese oplossings

2 1 Aparte wet vir klein lenings

Teoreties sou dit moontlik wees om klein lenings buite die toepassingsgebied van die Woekerwet te plaas en genoemde lenings deur 'n aparte wet te reguleer wat gelduitleners sou magtig om klein lenings teen relatief hoë koerse te finansier. Die Amerikaanse "small loan law" kan hier 'n aanknopingspunt bied (sien Alperin en Chase *Consumer law sales practices and credit regulation* 2 (1986) 1991 ev). Dit sou waarskynlik beteken dat gelduitleners van klein bedrae gelisensieer moet word soos wat die geval in die VSA is. Daar word egter aan die

hand gedoen dat so 'n stelsel nie 'n werklike oplossing bied nie. Soos Littlefield 1971 *Denver LJ* 22 tereg opmerk, skep bepalings van dié aard 'n "oligarchy of lenders who uniformly charge the . . . maximum". 'n Stelsel van lisensiëring van klein leners sal ook 'n verdere burokrasie met 'n gepaardgaande koste vir die belastingbetaler meebring (sien Otto en Grové *Werkstuk* 227).

2 2 Hoër koerse ingevolge die Woekerwet

'n Moontlike alternatief om die probleme rondom klein lenings op te los, sou wees om steeds die Woekerwet by klein lenings te laat geld met 'n drastiese verhoging in die maksimum finansieringskostekoerse vir klein lenings.

Tans maak die Woekerwet wel 'n onderskeid tussen "klein" en "groter" lenings. So kan geldlenings tot en met R6 000 teen 'n koers van 28% per jaar gefinansier word. Die maksimum koers vir lenings bo R6 000 daarenteen is 25% per jaar (sien GK R385 in *SK* 14644 van 1993-03-12). Genoemde onderskeid word gemaak omdat die Woekerwet skuldeisers verplig om hulle oorhoofse uitgawes (administrasiekoste) as finansieringskoste te verhaal. Dit moet dus in die finansieringskostekoers *ingewerk* word. In dié verband is daar egter 'n probleem. Die verskil in die werklike administrasiekoste tussen 'n groot lening en 'n klein lening is gering. Waar klein lenings dus teen dieselfde koers as groter lenings gefinansier word, sou dit klein lenings uit die oogpunt van die skuldeiser onekonomies maak. Anders gestel, 'n enkele groot lening van R100 000 teen 25% per jaar is veel meer betalend as honderd klein lenings van R1 000 elk teen 25% per jaar. Die Franzsen-komitee (*Verslag van die komitee van ondersoek na die Wet op Beperking en Bekendmaking van Finansieringskoste* (voorsitter DG Franzsen) (1977) 20) formuleer hulle siening soos volg:

> "A large part of the finance charges represents fixed amounts which do not vary with the size of the principal debt, so that the cost per Rand will be considerably higher for smaller than for larger loans."

Bogenoemde benadering bied nie werklik 'n antwoord vir die probleme rondom klein lenings nie. Die verskil tussen 28% en 25% per jaar is te klein. Neem die geval van 'n persoon wat R100 vir 'n enkele week leen. Aan die einde van die week moet hy R105 terugbetaal. Op die oog af lyk die transaksie nie juridies ongeoorloof nie. As die bedrag van R5 teruggewerk word na 'n koers beloop dit 5% per week. Indien genoemde koers omgewerk word na 'n nominale jaarkoers, beloop dit 260% per jaar wat veel hoër is as die 30% per jaar wat regtens toegelaat word.

Reeds in *Reuter v Yates* 1904 TS 855 863 het regter Mason die volgende gesê:

> "There may be cases in which the nature of the transaction will render a special rate on interest usurious on the face of it; but I am not prepared to say that in a case of a small loan of this kind for a short period, without security, the amount of interest, even though exceeding 90 per cent, is so unreasonable that the Court ought to interfere without any evidence to guide it as to what interest would be right and reasonable in this transaction." (Sien ook *Ndletyi v Whittle* (1905) 19 EDC 26.)

Selfs waar besluit sou word om die maksimum koerse verhaalbaar ingevolge die Woekerwet drasties te verhoog, sal daar nog probleme wees. Skuldeisers in die informele sektor sal steeds aan die bekendmakingsvereistes van die Woekerwet moet voldoen wat 'n hoë vlak van regs- en administratiewe kundigheid vereis. In dié verband is dit veral die bepalings van artikel 3 (inhoudsvereistes vir skuldaktes) en die staatvereistes van artikel 10 wat probleme kan gee. Genoemde vereistes op sigself sal weer die skaal in die guns van die onwettige sektor swaai.

2 3 Geen koersplafonne vir klein lenings

In die regskommissie se verslag oor die Woekerwet en verwante aangeleenthede word die kwessie van klein lenings behandel (Otto en Grové *Werkstuk* 227). Die navorsingskomitee is van mening dat alle vastesomgeldleningstransaksies (in teenstelling met wentelkredietgeldleningstransaksies) van R2 000 en minder van statutêre maksimumkoersplafonne vrygestel moet wees (sien kl 2(3)(c) van die Kredietwetsontwerp; Otto en Grové *Werkstuk* 432). Partye moet in dié betrokke gevalle by magte wees om by wyse van ooreenkoms 'n koers te bepaal. Geen maksimumkoersplafonne behoort dus te geld nie.

Beteken dit dat geldopnemers wat transaksies van dié aard aangaan geheel en al onbeskerm gelaat word? Die antwoord is "nee". Die navorsingskomitee stel voor dat 'n hof, in ooreenstemming met die bepalings van die gemenereg (sien Grové 1989 *De Jure* 233; 1990 *De Jure* 118), oor die bevoegdheid moet beskik om 'n ooreengekome koers afwaarts aan te pas waar die koers, met inagneming van alle omstandighede, buitensporig bevind word. In ooreenstemming met genoemde voorstel word 'n statutêre bevoegdheid van dié aard in klousule 11 van die konsepwet vervat.

Wanneer is 'n ooreengekome koers buitensporig? Klousule 11 van die konsepwet bevat 'n aantal aanduidings in die verband. Daar is nie 'n *numerus clausus* faktore wat deur 'n hof in aanmerking geneem moet word nie. Sommige van die faktore is die volgende (kl 11(2)):

(a) die bedrag uitgeleen;

(b) die heersende rentekoerse in die mark in die algemeen;

(c) die beskikbaarheid van finansiering vir soortgelyke gevalle en die koste daarvan;

(d) die bedinge in die kontrak (waaronder die effektiewe finansieringskostekoers per jaar; die datum van terugbetaling; die verpligting om reëlmatig te betaal; die moontlikheid van vervroegde skulddelging; remedies in geval van kontrakbreuk; bepalings met betrekking tot wisselende koerse en so meer);

(e) die persoonlike omstandighede van die kredietnemer (dit sluit faktore in wat kredietwaardigheid raak soos vaste adres, vaste werk, kredietrekords en so meer); en

(f) die vraag of finansieringskoste in die kontantprys, koste, premies of ander bedrae verskuil word.

Die blote feit dat die partye by 'n klein lening op 'n hoër koers ooreengekom het as die maksimum koers wat vir transaksies bo R2 000 geld, beteken nie dat die ooreengekome koers *per se* buitensporig is nie (sien kl 11(3)).

Indien 'n hof van mening is dat 'n vastesomgeldleningskontrak wel teen 'n buitensporige koers gefinansier word, beskik dit oor die bevoegdheid om die geldopnemer van sommige of al sy verpligtinge vry te stel; die gelduitlener te verplig om die geheel of gedeelte van die bedrag wat deur die geldopnemer betaal is, terug te betaal; bevele te maak om sekuriteitsobjekte vry te stel; en die bedinge van die geldleningskontrak te wysig.

Bogenoemde bevoegdhede is ingrypend van aard. Die konsepwet maak egter daarvoor voorsiening dat 'n hof slegs van dié bevoegdhede gebruik mag maak *in die mate waarin dit nodig* kan wees om 'n posisie te bewerkstellig dat 'n ooreengekome effektiewe finansieringskostekoers per jaar nie buitensporig is nie (sien kl 11(4)).

Waarom het die navorsingskomitee op 'n bedrag van R2 000 besluit? Genoemde komitee is van mening dat die vrystellingsperk gekoppel moet word aan die jurisdiksieplafon van die Hof vir Klein Eise (Otto en Grové *Werkstuk* 228). Die vraag of 'n besondere koers buitensporig is al dan nie, kan derhalwe goedkoop en vinnig bereg word.

Dit is belangrik om daarop te let dat voorgestel word dat bogenoemde bepalings slegs van toepassing is op *vastesomgeldleningskontrakte*. Dit geld nie vir wentelkredietkontrakte nie. Oortrokke lopende tjekrekeninge en kredietkaarte is voorbeelde van wentelkrediettransaksies. Vir wentelkrediettransaksies word daar wel vir maksimum koersplafonne voorsiening gemaak selfs waar die kredietlimiet R2 000 of minder beloop.

3 Vrystellings ingevolge artikel 15A van die Woekerwet

Nadat die regskommissie se werkstuk oor die Woekerwet en verwante aangeleenthede voltooi is (Oktober 1991) maar voor publikasie daarvan (Maart 1993), het die Minister van Handel en Nywerheid 'n kategorie geldleningstransaksies ingevolge artikel 15A van die Woekerwet van dié wet se bepalings vrygestel (sien GK R3451 in *SK* 14498 van 1992-12-31).

Vir vrystellingsdoeleindes moet daar aan die volgende vereistes voldoen word, naamlik dat

(a) die geldopnemer 'n natuurlike persoon of 'n "vereniging van natuurlike persone" moet wees (reg 1(a));

(b) die lening nie meer as R6 000 per persoon beloop nie (in die geval van 'n vereniging van natuurlike persone word dit beperk tot R6 000 per lid) (reg 1(b));

(c) die geld geleen en finansieringskoste daarop binne 'n termyn van drie jaar terugbetaal moet word (die partye kan ooreenkom oor hoe die terugbetalings moet geskied (bv 'n enkele lompsombetaling, reëlmatige betalings, onreëlmatige betalings en so meer)) (reg 1(c));

(d) die gelduitlener aan die geldopnemer 'n afkoelperiode van drie dae verskaf het. Gedurende dié drie dae mag die gelduitlener geen bedrag aan die geldopnemer beskikbaar stel nie. Die geldopnemer daarenteen mag gedurende die drie dae die kontrak eensydig beëindig sonder om kontrakbreuk te pleeg. Die drie dae word bereken met uitsluiting van die dag waarop die kontrak aangegaan is, as ook enige Saterdag, Sondag of openbare vakansiedag wat in die termyn val (reg 2(a) en (b));

(e) geen finansieringskoste deur die gelduitlener van die geldopnemer verhaal word voordat die voorgeskiete geld nie aan die geldopnemer *oorbetaal* is nie (reg 2(c)); en

(f) die gelduitlener aan die geldopnemer by die aangaan van die kontrak 'n skriftelike dokument gegee het waarin die bedrag wat uitgeleen word, die finansieringskoste as 'n randbedrag en alle ander koste verbonde aan die transaksie uiteengesit is (reg 3).

Die vrystelling geld nie vir geldleningskontrakte ingevolge 'n oortrokke lopende rekening by 'n finansiële instelling nie (reg 1(d) (i)). Dit is ook nie van toepassing waar geld geleen, aankope gemaak of dienste bekom word ingevolge 'n "kredietkaartskema" nie (reg 1(d) (ii)).

Indien 'n afkoelperiode byvoorbeeld nie verleen word nie, of geld gedurende die afkoelperiode aan die geldopnemer oorbetaal word of finansieringskoste

gehef word voordat enige geld aan die geldopnemer betaal is, geld die vrystelling nie en sal geldleningstransaksies van dié aard binne die toepassingsgebied van die Woekerwet val.

4 Evaluering van artikel 15A-vrystellings

Dit is onduidelik waarom die artikel 15A-vrystellings, waarna hierbo verwys is, slegs gebruik mag word waar natuurlike persone of "vereniging[s] van natuurlike persone" as geldopnemers optree. Die algemene rigting wêreldwyd is om regspersone buite die toepassingsgebied van verbruikerskredietwetgewing te plaas. Met die vrystelling onder bespreking word egter presies die teenoorgestelde bewerkstellig. Natuurlike persone geniet geen beskerming nie, regspersone wel. (Sien Otto en Grové *Werkstuk* 160–161 oor die kwessie of verbruikerskredietwetgewing op regspersone van toepassing moet wees al dan nie.)

Die vraag ontstaan vervolgens of geldopnemers wat minder as R6 000 leen, geheel en al onbeskermd is wat koersuitbuiting betref. Die antwoord is dat dit nie die geval is nie. Daar word aan die hand gedoen dat die gemenereg weer sal geld in die plek wat deur die Woekerwet oopgelaat is. Gemeenregtelik is daar geen *certum modum usurarum* nie maar is rente toegestaan "na gelegenheyt van tyden, plaatsen en persoonen" (Loenius *Decisien en observatien* (1735) *casus* 21). In *Dyason v Ruthven* 3 Searle 282 kom die hof tot die gevolgtrekking dat daar geen gemeenregtelike maksimum rentekoers is nie. Regter Bell formuleer sy siening soos volg (305):

> "I am prepared to go further, and lay it down, upon the authorities referred to, that the Placaat of Charles V. has become totally obsolete. . .that this law having become obsolete, it by no means follows that the Justinian law is to be regarded *as fixing the rate of interest*, that fixing of interest being from its very nature *fluctuating* and not belonging to the class of laws fixing principles of right and wrong which are to govern future laws."

Die partye kan dus op enige koers ooreenkom. Wat staan 'n geldopnemer te doen as hy van mening is dat die koers wat hy betaal, te hoog is? Regter Watermeyer in die *Dyason*-beslissing hierbo formuleer sy siening soos volg (312):

> "[A]nd that if any stipulation of interest be attacked as *liable to reduction*, on the ground of usury or extortion, this can only be done by offering proof of the usury and extortion in the particular case" (my kursivering).

Daar word aan die hand gedoen dat die faktore wat 'n hof in so 'n geval moet oorweeg die volgende is: Die rentekoers-patroon wat in die ekonomie geld; die aard van die risiko wat die gelduitlener loop en die omstandighede waarin die geldleningskontrak gesluit is; hoe vinnig die geldopnemer die fondse verlang het; die grootte van die uitgeleende bedrag; die terme waarop finansiering verskaf word; die vraag of sekuriteit verskaf is en die aard daarvan; die beskikbaarheid van finansiering in die algemeen vir soortgelyke gevalle; die persoonlike omstandighede van die geldopnemer; en die "ander kostes, gelde en heffings" betaalbaar buite om die ooreengekome koers (sien Grové 141). Indien genoemde inligting voor 'n hof geplaas word, sal die hof 'n beslissing maak "not lightly setting aside a stipulation, but in like manner not permitting extortion" (*Dyason v Ruthven* hierbo 310; *Ndletyi v Whittle* hierbo).

In *Taylor v Hollard* (1885–1888) 2 SAR 78 beslis regter Kotzé dat buitensporige rentekoerse verminder kan word, nie soseer om die geldlener te beskerm nie, maar omdat praktyke van dié aard teen die goeie sedes indruis (85). Volgens

hom is koerse van dié aard nie in die openbare belang nie omdat dit in stryd met beleidsoorwegings is (*ibid*). (Sien in die algemeen Grové 1989 *De Jure* 233; 1990 *De Jure* 118.)

Uit bogenoemde is dit duidelik dat buitensporige koerse nie nietigheid van die kontrak tot gevolg het nie. 'n Hof is bevoeg om die ooreenkoms met betrekking tot finansieringskoste slegs gedeeltelik af te dwing. Gemeenregtelik is dit dus wel moontlik om buitensporige koerse geregtelik afwaarts aan te pas. Gegewe die vernietigende koste-implikasies van enige vorm van litigasie (uitgesonderd litigasie in die Hof vir Klein Eise) sal bogenoemde slegs 'n teoretiese moontlikheid bly. Genoemde feit hou myns insiens direk verband met die ernstigste beswaar teen die artikel 15A-vrystellings wat op 31 Desember 1992 gepubliseer is: die vrystellingsbedrag van R6 000 is te hoog.

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ONREGMATIGHEIDSKRITERIUM IN DIE STRAF- EN DELIKTEREG: 'N REGSEVOLUSIONÊRE BESKOUING

1 Inleiding

In 'n onlangse saak, *Clarke v Hurst* 1992 4 SA 630 (D), was die feite kortliks soos volg: C het in 1988 'n hartaanval ("cardiac arrest") gehad. Hy was sederdien in 'n voortdurende en onomkeerbare vegetatiewe toestand en is kunsmatig aan die lewe gehou. Aansoek is by die hof gedoen om 'n bevel dat die kunsmatige aan-die-lewe-hou gestaak word. Dit was ook die voordoodse wens van C. Die hof staan die aansoek toe (sien ook *British Chemicals and Biologicals (SA) (Pty) Ltd v South African Pharmacy Board* 1955 1 SA 184 (A) 192). Deur hierdie beslissing gee die hof 'n tree die toekomsgemeenskap in. Die hof gee naamlik in effek voorkeur aan bewussyns- of interaksiedood bo biologiese dood as doodskriterium (658 – 659; sien ook *S v Williams* 1986 4 SA 1188 (A) 1195; Labuschagne "Dekriminalisasie van eutanasie" 1988 *THRHR* 183). Die hof kom tot dié konklusie deur aanwending van die "dinamies-objektiewe redelikheidskriterium" by bepaling van onregmatigheid (650 – 653).

In 'n onlangse artikel kom Kerr, na 'n hoofsaaklik regshistoriese ondersoek, tot die konklusie dat die woorde "unlawful" en "wrongful" by die Aquiliese aksie dieselfde betekenis het ("Unlawfulness and wrongfulness in the Aquilian action: some terminological and conceptual problems" 1992 *THRHR* 533). Hierdie sienswyse is in ooreenstemming met 'n standpunt wat ek by vorige geleenthede ingeneem het, naamlik dat wederregtelikheid of onregmatigheid nie 'n misdaad- of delikselement is nie, maar 'n beskrywing van die resultaat van die teenwoordigheid van al die misdaad- of delikselemente; dit is 'n sinoniem vir *aanspreeklikheid* ("Noodweer teen 'n regmatige aanval?" 1974 *De Jure* 114;

"Misdaadelementologie" 1977 *De Jure* 317 – 318; "Misdaadelementologie en indoktrinasie. 'n Teelaarde vir stagnasie?" 1993 *SAS* 76; sien ook Burchell en Milton *Principles of criminal law* (1991) 106).

Na aanleiding van bogenoemde onlangse ontwikkelinge word kortliks ingegaan op die aard en omvang van die begrip wederregtelikheid (onregmatigheid) in die straf- en deliktereg, meer spesifiek in die lig van die evolusieprosesse wat in die reg werksaam is.

2 Terminologie

Daar bestaan uiteenlopende (en soms wesenlik onversoenbare) teorieë oor die inhoud van die begrip "onregmatigheid" (sien Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* (LLD-proefskrif UP 1979) 437 – 489). Wat merkwaardig is, is dat die begrip "onregmatigheid" desnieteenstaande behoue gebly het. Dit is asof dié begrip 'n heilige status het.

In Suid-Afrika word die wese of substansie van (on)regmatigheid met alternatiewe maar wesenlik inhoudsgelyke begrippe vasgevat, naamlik objektiewe redelikheid, *boni mores* (goeie sedes), gemeenskapsopvatting, regsoortuiging of regsgevoel van die gemeenskap, sosiaaladekwant en regspolitiek (Pauw "Aspekte van die begrip onregmatigheid" 1980 *De Jure* 273; Snyman *Strafreg* (1992) 102 – 103; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 58; *Clarke v Hurst supra* 652). Die grootste voordeel van die aanwending van hierdie vae begrippe is geleë in die feit dat dit 'n inherente dinamiek het en derhalwe by veranderde omstandighede aangepas kan word. So verklaar regter Mostert in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387:

> "Onregmatigheid word basies aan die hand van die *boni mores* bepaal. Deur die maatstaf van die 'regsoortuiging van die gemeenskap' toe te pas, verkry die regstelsel die voordeel van die wisselwerking tussen die ethos en geregtelike voorbeeld, en 'n soepelheid wat by meer presedentgebonde stelsels ontbreek."

3 Historiese evolusiebasis

Uit 'n histories-antropologiese beskouing van die strafreg blyk dat aanspreeklikheid aanvanklik bestaan het uit die bloot sintuiglik-waarneembare veroorsaking van 'n sekere gevolg of nadeel (Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 38 – 40). Aangesien die deliktereg die bestaan van regte (van individue of groepe) voorveronderstel en dit nie aanvanklik in primigene of rudimentêre regstelsels bestaan het nie, is dit onvermydelik dat afgelei word dat die deliktereg uit die strafreg ontwikkel het (Labuschagne en Van den Heever "Die oorsprong van en die onderskeid tussen die fenomene misdaad en delik in primigene regstelsels" 1991 *Obiter* 95). Daderen subjektiewe aspekte van strafregtelike en deliktuele aanspreeklikheid is van latere oorsprong. Soos by 'n ander geleentheid aangetoon is, is daar ten minste vier universele evolusieprosesse in die strafreg en in 'n meer beperkte mate ook in die deliktereg aan die werk, naamlik die prosesse van dereligiëring (en deritualisering), individualisering, dekonkretisering en humanisering (1992 *TRW* 41). Hierdie prosesse sou ook as die dinamiek onderliggend aan die *boni mores* beskryf kon word (vgl ook Mayer-Maly "The boni mores in historical perspective" 1987 *THRHR* 61). Elke norm (en subjektiewe reg) het, daarbenewens, 'n eie inherente dinamiek (Labuschagne "Die strafregnorm" 1982 *THRHR* 312; "Relatiewe kante van die subjektiewe reg" 1988 *THRHR* 378).

4 *Boni mores*: 'n prinsipieel-evolusionêre perspektief

Hedendaags word onregmatigheid as 'n afsonderlike deliks- en misdaadelement beskou en die inhoud daarvan word bepaal aan die hand van die objektiewe redelikheid of *boni mores* (sien bv Bergenthuin *Provokasie as verweer in die Suid-Afrikaanse strafreg* (LLD-proefskrif UP 1985) 568; Van der Walt *Delict: Principles and cases* (1979) 21; Pauw "Aantasting van vorderingsregte en die onregmatige daad" 1979 *De Jure* 64; Van Rooyen "Die rol van wederregtelikheid" 1978 *TSAR* 66; vgl egter Bertelsmann "Probleme met vakterme in die strafreg" 1982 *THRHR* 414–416). Dit is ook die benadering van ons howe. So verklaar appèlregter Jansen in *Marais v Richard* 1981 1 SA 1157 (A) 1168:

> "Vandag word die grense van onregmatigheid by ons gesoek in die toepassing as grondnorm van wat die 'algemene redelikheidsmaatstaf' genoem kan word . . . Dit volg dat by die bepaling van wat 'billike' kommentaar is, die grondnorm die regsoortuiging hier te lande moet wees en nie die in Engeland nie. Dat regsoortuigings nie universeel dieselfde is nie, blyk bv daaruit dat in die Verenigde State daar in sommige gevalle groter vryheid van kommentaar is as selfs in Engeland."

Die bepaling van onregmatigheid (in die deliktereg) behels beleidsoorwegings

> "and the Court has to evaluate and balance the conflicting interests of all concerned parties, with due regard *inter alia* to social consequences of recognising or denying the existence of liability in a given case" (*Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 4 SA 749 (N) 753–754; sien ook Van der Merwe en Olivier 57–58; Boberg *The law of delict* (1984) 33 en veral Neethling, Potgieter en Visser *Deliktereg* (1992) 34–36).

4 1 Gemeenskaps- of regsprekersoortuiging?

In *Schultz v Butt* 1986 3 SA 667 (A) 679 word opgemerk dat die regsgevoel van die gemeenskap opgeneem moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos regter en wetgewer. Hierdie siening word deur verskeie skrywers onderskryf (Van Wyk en Morkel "Die begrip 'gemeenskap' en die *boni mores*" 1984 *TRW* 202; Van Wyk "Die bewys van *boni mores*" 1975 *THRHR* 386; Van der Merwe en Olivier 58 vn 99). Die wetgewer het egter die bevoegdheid om die howe se opvatting omver te werp. Dit het hulle byvoorbeeld gedoen met die beslissing *S v Chretien* 1981 1 SA 1097 (A). (Sien ook Labuschagne "Strafregtelike aanspreeklikheid van die beskonkene" 1987 *SASK* 21; Visser, Vorster en Maré *General principles of criminal law through the cases* (1990) 360.)

Neethling, Potgieter en Visser 37–38 kwalifiseer egter die voorgaande soos volg:

> "Nietemin verhef die regter in sy rol as vertolker van die gemeenskap se regsgevoel nie eenvoudig sy persoonlike standpunt aangaande reg en verkeerd tot onregmatigheidsmaatstaf nie. 'n Regter wat dit sou doen, *skep* reg op ontoelaatbare wyse terwyl dit sy taak is om reg te *spreek*. Soos gestel, is die *boni mores*-maatstaf 'n *objektiewe* maatstaf. Dit is derhalwe die taak van die regter om die gemeenskapsoortuiging in 'n besondere geval te vertolk en te bepaal met inagneming van regsreëls en hofbeslissings waarin die gemeenskapsgevoel reeds uitdrukking gevind het, aangevul deur die getuienis en die inligting wat hy self ingesamel het, en om dié vertolking op die betrokke probleem toe te pas met inagneming van die omstandighede van die geval."

Vir hierdie sienswyse bestaan daar ook aanknopingspunte in die regspraak (sien bv *Clarke v Hurst supra* 652–653). Dit blyk duidelik dat die regspreker wye bevoegdhede in dié verband het. Solank hy binne die toleransiegrense van die gemeenskap optree, het hy prakties gesproke bykans 'n vrye hand. Die toleransiegrense van die gemeenskap is baie wyd. So is die doodstraf in baie lande ten

spyte van die gemeenskapsgevoel afgeskaf en het daar niks gebeur nie (sien Labuschagne "Die doodstraf: 'n penologiese evaluasie" 1989 *SAS* 175). Die regsprekende gesag (en die wetgewer) het ook 'n taak (en soms 'n plig) om die gemeenskapsgevoel na 'n hoër vlak van geregtigheid te lei.

4 2 Dinamiese aard van die boni mores

In die deliktereg het die *boni mores* tot gevolg dat die trefkrag van aksies uitgebrei kan word (sien bv *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 796). Neethling, Potgieter en Visser 37 verklaar in dié verband tereg:

> "By die toepassing van die *boni mores*-maatstaf in die deliktereg gaan dit om die vraag of die gemeenskap die betrokke gedrag as *deliktueel* afkeurenswaardig ag en nie om byvoorbeeld die sosiale, morele, sedelike of godsdienstige laakbaarheid van die optrede nie. Desnietemin kan optrede wat aanvanklik slegs as byvoorbeeld moreel (maar nie juridies nie) afkeurenswaardig beskou is, met verloop van tyd ook deliktueel veroordeel word."

'n Goeie voorbeeld in dié verband word aangetref in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597. Die ontwikkeling van die *boni mores* kan ook tot gevolg hê dat sekere optredes buite die trefkrag van die deliktereg geplaas word (sien bv Labuschagne "Deïnjuriëring van owerspel" 1986 *THRHR* 336 en "Deïnjuriëring van verlowingsbreuk: opmerkinge oor die morele dimensie van deliktuele aanspreeklikheid" 1993 *De Jure* 126; Bekker *Die aksie weens seduksie* (LLD-proefskrif Unisa 1977) 499). Die *boni mores*-beginsel is ook na die mededingingsreg uitgebrei (sien bv *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 189; Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 218). Die reeds uitgekristalliseerde regverdigingsgronde in die deliktereg en die strafreg is die resultaat van die ontwikkeling van die *boni mores* (sien bv Snyman 104; Jescheck *Lehrbuch des Strafrechts* (1988) 211; Van der Merwe "Die aard en rol van redelikheid by aanspreeklikheid *ex delicto*" 1975 *SALJ* 178; Potgieter "Persoonlikheidsregte en immaterieelgoedereregte van 'n universiteit – belang van die leer van subjektiewe regte vir die deliktereg – *boni mores* as onregmatigheidskriterium" 1978 *THRHR* 330–331).

Kragtens die sekerheidsbasis van die strafreg (legaliteitsbeginsel) kan strafregtelike aanspreeklikheid, anders as in die deliktereg, nie deur die howe uitgebrei word nie (Labuschagne "Die sekerheidsbasis van die strafreg" 1988 *SAS* 67–70). In die strafreg gaan dit, sover dit die howe aangaan, wesenlik oor die uitbreiding van verwere (Rabie "Statutory defences in criminal law" 1985 *SASK* 223; De Wet *Strafreg* (1985) 70; *Clarke v Hurst supra* 652–653). Selfs misdade kan as sodanig deur die *boni mores* afgeskaf word (*Green v Fitzgerald* 1914 AD 88).

4 3 Dadersubjektiewe faktore

Skrywers aanvaar dat sekere slagoffer- en dadersubjektiewe faktore deel uitmaak van die onregmatigheidsvraag en gevolglik die *boni mores* (sien bv Neethling, Potgieter en Visser 38–39; Van Oosten "Wederregtelikheid – 'n skuldtoets? 1977 *THRHR* 90). Die dadersmotief kan hiervolgens by die onregmatigheidsvraag relevant wees, maar nie die dader se wilsgerigtheid of wederregtelikheidsbewussyn nie. Om een deel van die dader se gees by een element en ander dele by ('n) ander element(e) te plaas, is kunsmatig en werklikheidsversteurend,

aangesien genoemde dele aspekte van dieselfde geestesproses vorm (sien Labuschagne "Misdaadelementologie" 1977 *De Jure* 317 – 320). Opset was byvoorbeeld aanvanklik nie 'n misdaadvereiste nie. As gevolg van bogenoemde evolusieprosesse in die strafreg wat die *boni mores* onderlê, is opset tans 'n (uitsluitlike) vereiste van verskeie misdade. Skuld (opset of nalatigheid) het, as algemene reël, as gevolg van die werking van dieselfde prosesse 'n deliksvereiste geword. Die *boni mores*, beoordeel vanuit die regsevolusionêre prosesse, onderlê die ganse misdaad- en deliksinhoud (sien ook Dednam "Privilegie by laster in die Suid-Afrikaanse reg" 1977 *Meditationes Medii* 21; Boberg 39). Dat die *boni mores* ook ten aansien van die sogenoemde skuldvereiste relevant is, blyk uit die feit dat nalatige brandstigting nie meer in ons reg strafbaar is nie (Labuschagne "Die strafregtelike begrensing van vuuraanwending" 1977 *De Jure* 52 56; *R v Kewelram* 1922 AD 213 216; *R v Shein* 1925 AD 6 12). Trouens, dit is nie uitgesluit dat die bestraffing van nalatigheid in die toekoms geheel en al kan verdwyn nie (Labuschagne "Dekriminalisasie van nalatigheid" 1985 *SASK* 213; Urowsky "Negligence and the general problem of criminal responsibility" 1972 *Yale LJ* 949).

5 Konklusie

Ten slotte kan bloot herhaal word dat die *boni mores*, in die lig van 'n regsevolusionêre beskouing, na die deliks- en misdaadinhoud as geheel verwys. Dit volg hieruit dat onregmatigheid nie 'n afsonderlike deliks- of misdaadelement kan wees nie, in elk geval nie as dit eksklusief op die *boni mores* aanspraak maak nie. (Vir 'n alternatiewe beskouing van die elementologie sien Labuschagne 1977 *De Jure* 319 – 320.) Kerr se siening, hierbo genoem, is derhalwe in 'n algemene sin wetenskaplik gefundeer en onderskryfbaar.

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DIE NEUTRALISERING VAN ARTIKEL 36 VAN DIE MAATSKAPPYWET

1 Inleiding

Artikel 36 van die Maatskappywet 61 van 1973 lui soos volg:

> "Handelinge ultra vires die maatskappy nie nietig nie.
>
> Geen handeling van 'n maatskappy is nietig nie slegs vanweë die feit dat die maatskappy sonder vermoë of bevoegdheid was om aldus te handel, of omdat die direkteure geen magtiging gehad het om daardie handeling namens die maatskappy te verrig slegs vanweë die gemelde feit, en, behalwe tussen die maatskappy en sy lede of direkteure, of tussen sy lede en direkteure, kan nóg die maatskappy nóg 'n ander persoon in 'n regsgeding sodanige gebrek aan vermoë of bevoegdheid of magtiging aanvoer of daarop steun."

Daar word algemeen aanvaar dat hierdie artikel slegs die maatskappy en derdes bind indien eerstens die vermoë van die maatskappy oorskry is en tweedens die

volmag van die direkteure gebrekkig is net omdat die vermoë van die maatskappy oorskry is (Fourie "Die wisselwerking tussen Suid-Afrikaanse maatskappyeregleerstukke" 1988 *THRHR* 220). Fourie merk ook tereg op dat die effek van hierdie artikel is dat die derde se werklike of toegerekende kennis van die doelstellingsklousule van die maatskappy irrelevant word.

2 Uitsluiting van die werking van artikel 36

Naudé "Company contracts: the effect of section 36 of the new act" 1974 *SALJ* 334 toon oortuigend aan dat die werking van artikel 36 wel vooraf absoluut uitgeskakel kan word deur in die statute van die maatskappy te bepaal dat die direksie nooit volmag sal hê om 'n *ultra vires* handeling aan te gaan nie. Indien die direksie dan 'n *ultra vires* handeling met 'n derde sou aangaan, sal die direksie nie slegs gebrekkige volmag hê omdat die handeling die vermoë van die maatskappy oorskry nie, maar ook omdat hulle hul volmag ingevolge die statute oorskry het. Die leerstuk van toegerekende kennis sou dan die maatskappy beskerm omdat dit 'n addisionele faktor daarstel.

Fourie 1988 *THRHR* 221 argumenteer dat Naudé se benadering nie korrek is nie. Hy voer aan dat elke maatskappy 'n beperkte vermoë het en dat die statute derhalwe nie aan die direksie die reg kan gee om *ultra vires* handelinge aan te gaan nie. Met hierdie stelling wil die skrywer nie verskil nie, maar die blote feit dat die statute nie aan die direksie regtens volmag mag verleen om *ultra vires* handelinge aan te gaan nie, beteken tog nie dat die statute daarom ook nie die direksie uitdruklik kan verbied om *ultra vires* handelinge aan te gaan nie.

Fourie argumenteer verder dat aangesien die statute in elk geval nie volmag aan die direksie mag verleen om 'n *ultra vires* handeling aan te gaan nie, 'n verbod te dien effekte in die statute *ex abundanti cautela* sal wees.

In sy bespreking van die *ex abundanti cautela*-reël wys Steyn *Die uitleg van wette* (1981) 20–21 daarop dat indien duplikasie van 'n voorskrif juis opsetlik is om te verseker dat 'n bepaalde wilsinhoud bo alle twyfel gestel word, 'n uitleg wat daarop gemik is om oortolligheid van woorde te vermy, nie gevolg kan word nie. In die lig hiervan is Fourie se beroep op die *ex abundanti cautela*-reël myns insiens nie geregverdig nie, aangesien 'n uitdruklike verbod teen *ultra vires* handelinge in die statute van die maatskappy juis spesifiek daarop gemik is om dit bo alle twyfel te stel dat alle *ultra vires* handelinge, insluitende dié wat as gevolg van die werking van artikel 36 geldig en bindend sou wees, inderdaad ongeldig sal wees.

Aangesien daar algemeen aanvaar word dat by die interpretasie van die statute van 'n maatskappy daar as algemene reël uitvoering aan die bedoeling van die opstellers, soos uitgedruk in die statute, gegee moet word (Cilliers, Benade, Botha, Oosthuizen en De la Rey *Korporatiewe reg* (1987) 53), sou dit myns insiens absoluut verkeerd wees om die uitdruklike wil van die opstellers van die statute te negeer, naamlik dat alle *ultra vires* handelinge ongeldig is, insluitende dié wat as gevolg van die werking van artikel 36 geldig sou wees.

Fourie 1988 *THRHR* 222 se verdere beswaar teen Naudé se benadering is dat 'n derde wat die statute gelees het waarin die direksie verbied word om *ultra vires* handelinge aan te gaan, nie sal kan vasstel of die direksie hul volmag oorskry het sonder om die hoofdoelstellingsklousule van die maatskappy te lees nie. Hiermee kan daar nie verskil word nie; Fourie gaan egter verder en beweer dat aangesien die wetgewer met betrekking tot die vraag of *ultra vires* handelinge

geldig is, werklike of toegerekende kennis van die doelstellingsklousule by implikasie as irrelevant beskou, die derde gevolglik nie onder enige wetlike verpligting staan om die hoofdoelstellingsklousule te lees nie. Hierdie argument kom daarop neer dat selfs indien die statute die derde na die hoofdoelstellingsklousule verwys deur te bepaal dat die direksie nie *ultra vires* handelinge mag aangaan nie, die derde dit inderdaad kan ignoreer aangesien daar geen wetlike verpligting op hom rus om die hoofdoelstellingsklousule te lees nie.

Myns insiens is hierdie argument nie houdbaar nie. Daar is in elk geval ook geen uitdruklike statutêre bepaling dat 'n derde in die reël maar die hoofdoelstellingklousule van 'n maatskappy kan ignoreer sodra 'n *ultra vires* handeling ter sprake is nie.

Fourie se siening gee aanleiding tot die absurde gevolg dat 'n derde wat weet dat die statute van 'n maatskappy bepaal dat die direksie nie *ultra vires* handelinge mag aangaan nie, en boonop kennis van die inhoud van die hoofdoelstellingsklousule dra, bloot op grond van die irrelevansie van sy kennis van die hoofdoelstellingsklousule enige bepaling in die statute wat die werking van artikel 36 neutraliseer, kan vryspring. So 'n oorbeskerming van die derde ten koste van die maatskappy kan beswaarlik strook met die algemene billikheidsgevoel.

Myns insiens is dit 'n onontbeerlike gevolg van die neutralisering van artikel 36 deur middel van 'n uitdruklike bepaling in die statute dat die direksie nie *ultra vires* handelinge mag aangaan nie, dat die derde se werklike of toegerekende kennis van die hoofdoelstellingsklousule weer relevant word. Sodra die volmag van die direksie nie slegs gebrekkig is omdat hulle die maatskappy se vermoë oorskry nie, maar ook omdat hulle 'n bepaling in die statute oortree, behoort artikel 36 heeltemal geneutraliseer te wees. Gevolglik behoort die irrelevansie van die derde se werklike of toegerekende kennis van die hoofdoelstellingsklousule ook nie meer aanwending te vind nie.

'n Verdere vraag wat nie deur Fourie aangeraak word nie, is of die neutralisering van artikel 36, soos hierbo beskryf, nie dalk as *in fraudem legis* beskou kan word nie. Na my mening is dit nie die geval nie, en wel op gesag van die volgende *dictum* in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 560:

> "It is perfectly legitimate however, for persons to evade a statute by deliberately keeping outside of its provisions and by doing something which affects their purpose equally well, but without bringing themselves within the scope of the law."

3 Gevolgtrekking

Daar moet aanvaar word dat artikel 36 self 'n skuiwergat skep waardeur die werking daarvan regsgeldig heeltemal geneutraliseer kan word deurdat een van die voorvereistes vir die werking van artikel 36, naamlik dat die volmag van die direkteure SLEGS gebrekkig is omdat die maatskappy se vermoë oorskry is, die agterdeur wyd ooplaat vir die effektiewe ontwyking van die artikel.

Ek doen aan die hand dat daar nie te veel in die bewoording van artikel 36 gelees behoort te word nie. Die huidige bewoording regverdig nie die afleiding dat die werking daarvan hoegenaamd nie in die statute van die maatskappy geneutraliseer mag word nie.

Daar bestaan geen rede waarom die derde sodanig oorbeskerm moet word dat die uitdruklike wil van die opstellers van die statute om die werking van

artikel 36 uit te sluit, totaal geïgnoreer moet word nie. Indien die wetgewer werklik so 'n ingrypende inbreuk op die wil van die oprigters van die maatskappy wil plaas deur hulle vrye diskresie om die inhoud van die statute te bepaal, aan bande te lê, sou daar verwag word dat dit uitdruklik (en nie slegs by implikasie nie) deur middel van wetgewing gedoen word.

DP VAN TONDER
Departement van Justisie, Wynberg

ONDERHOUDSVERPLIGTINGE VOORTSPRUITEND UIT 'N GEBRUIKLIKE HUWELIK

1 Inleiding

In hierdie ondersoek word kortliks gekyk na die vraag of die boedel van 'n oorlede swartman regtens verplig is om die weduwee met wie hy in 'n gebruiklike huwelik gestaan het, asook die kinders daaruit gebore, te onderhou. Daar word na sowel die gemeenregtelike as die gewoonteregtelike posisie verwys.

2 Gemeenregtelike posisie ten opsigte van onderhoud

2 1 Kinders

In *Carelse v Estate De Vries* (1906) 23 SC 532 beslis die hof dat die plig om kinders te onderhou op die boedel van die oorlede ouer oorgaan. Hierdie reëling geld ook vir onwettige kinders mits die boedel groot genoeg is om vir die wettige kinders wat eerste aanspraak het, onderhoud te voorsien. Die reg van kinders op onderhoud uit die bestorwe boedels van hulle ouers is gevestigde reg in Suid-Afrika (Beinart "Liability of a deceased estate for maintenance" 1958 *Acta Juridica* 106; Bouwer *Die beredderingsproses van bestorwe boedels* (1978) 327; Hahlo *et al The law of succession in South Africa* (1980) 34 ev; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1987) 625 ev; *Glazer v Glazer* 1963 4 SA 694 (A) 706 707).

Die feit dat kinders uitdruklik onterf is, ontneem hulle nie van hierdie preferente reg op onderhoud nie (Hahlo *et al* 35; *In re Estate Visser* 1948 3 SA 1129 (K)).

Die reg van die minderjarige kind op onderhoud word nie beëindig as sy eis na die afhandeling en verdeling van die bestorwe boedel ingestel word nie (De Vos "Die *condictio indebiti* van eksekuteurs, skuldeisers en bevoordeeldes in die hedendaagse praktyk" 1968 *Acta Juridica* 220 ev; Van der Merwe en Rowland 626; *Bank v Sussman* 1968 2 SA 15 (O) 17).

2 2 Vrouens (eggenotes)

Artikel 5(6) van die Wet op Onderhoud 23 van 1963 bepaal soos volg:

> "By die bepaling of 'n Swarte . . . regtens verplig is om 'n persoon te onderhou, word hy geag die eggenoot te wees van enige vrou wat deur 'n gewoonteverbintenis aan hom verbind is."

Die onderhoudsverpligtinge van swartes in 'n gebruiklike huwelik en na die ontbinding daarvan deur egskeiding is dus volgens bogenoemde artikel dieselfde asof hulle 'n siviele of kerklike huwelik gesluit het.

Die vraag is vervolgens of daar 'n soortgelyke onderhoudsverpligting ten opsigte van die langslewende deelgenoot (eggenoot) na die dood van een van die partye bestaan. Gemeenregtelik het die verpligting tussen gades om mekaar te onderhou, uit die bestaan van die huwelik voortgespruit. Die verpligting het slegs bestaan solank as wat die huwelik geduur het (Van der Vyver en Joubert *Persone- en familiereg* (1991) 677; *Glazer v Glazer* 1962 2 SA 548 (W) 552; *Glazer v Glazer* 1963 4 SA 694 (A) 706 707). Volgens artikel 5(6) van die Wet op Onderhoud 23 van 1963 geld 'n soortgelyke reëling ten opsigte van swartes in 'n gebruiklike huwelik.

Die Wet op Onderhoud van Langslewende Gades 27 van 1990 wat op 1 Julie 1990 in werking getree het, bepaal egter soos volg in artikel 2(1):

> "Indien 'n huwelik na die inwerkingtreding van hierdie Wet deur die dood ontbind word, het die langslewende 'n vordering teen die boedel van die afgestorwe gade vir die voorsiening in sy eie redelike onderhoudsbehoeftes tot by sy dood of hertroue vir sover hy nie uit eie middele en verdienste daartoe instaat is nie."

Volgens hierdie wet kan die langslewende gade dus wel in bepaalde omstandighede op onderhoud teen die boedel van die eerssterwende aanspraak maak. Myns insiens behoort hierdie wet teen die agtergrond van artikel 5(6) van die Wet op Onderhoud gelees te word. Laasgenoemde wet maak uitdruklik vir gades in 'n gebruiklike huwelik voorsiening. Die Wet op Onderhoud van Langslewende Gades bevat dus 'n duidelike oorsig in die sin dat daar nie vir gades in 'n gebruiklike huwelik voorsiening gemaak word nie. Daar kan egter aangevoer word dat laasgenoemde wet ook op gades in 'n gebruiklike huwelik van toepassing behoort te wees omdat die Wet op Onderhoud spesifiek vir 'n "gewoonteverbintenis" voorsiening maak. Dit is wel so dat 'n gewoonteregtelike huwelik nie noodwendig deur die dood van een van die partye ontbind word nie. In KwaZulu en Natal word die verbinding egter wel deur die dood van een van die partye ontbind (a 36(1) Natalse Wetboek van Zoeloereg, PR 151 van 1987 *SK* 10966 van 1987-10-09).

3 Gewoonteregtelike posisie ten opsigte van onderhoud

3 1 Kinders

Die gewoonteregtelike huwelik word nie deur die Suid-Afrikaanse reg as "wettige" huwelik erken nie. Volgens die *gewoontereg* is dit egter wel 'n wettige huwelik. Die onderhoudsverpligtinge van beide biologiese ouers word onder andere statutêr deur artikel 5(6) van die Wet op Onderhoud 23 van 1963 gereël. Die kinders uit so 'n gebruiklike huwelik gebore, word deur die Suid-Afrikaanse reg as onwettige kinders bestempel. Dit doen egter geen afbreuk aan hulle reg op onderhoud nie (Beinart 1958 *Acta Juridica* 106; Bouwer 327; Van der Merwe en Rowland 625 ev; *Carelse v Estate De Vries* (1906) 23 SC 532; *Glazer v Glazer* 1963 4 SA 694 (A) 706 707). Die eis van die kinders, onwettig al dan nie, vir onderhoud teen die boedel van die ouer is 'n preferente eis (De Vos 1968 *Acta Juridica* 220 ev; Van der Merwe en Rowland 626; *Bank v Sussman* 1968 2 SA 15 (O) 17). Kinders uit 'n gebruiklike huwelik gebore het dus deurgaans 'n reg op onderhoud, ook na die afsterwe van 'n ouer.

Volgens die gewoontereg het ouers in 'n gebruiklike huwelik ook 'n verpligting tot onderhoud ten opsigte van minderjarige kinders. Hierdie verpligting bly na die afsterwe van die vader (familiehoof) voortbestaan want dit gaan op sy erfopvolger oor (Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 293 ev). Labuschagne (293) stel dit soos volg:

> "Navorsing wys daarop dat ouers wat volgens die inheemse reg getroud is, 'n onderhoudsplig teenoor hulle kinders het. 'n Vader wat nie sy onderhoudsplig teenoor sy kinders nakom nie, kan deur sy vrou by die liniehof aangekla word wat hom sal berispe of selfs beboet. Die appèlhof vir kommissarishowe het bevestig dat die vader van kinders uit 'n inheemsregtelike huwelik 'n plig het om hulle te onderhou."

(Vgl *Muru v Muru* 1980 ACCC (S) 39; *Mviti v Mviti* (1912) 3 NAC 159 (Nqamakwe).)

3 2 Vrouens

Artikel 117(2) van die Natalse Wetboek van Zoeloereg (PR 151 van 1987) bepaal soos volg:

> "Iedereen wie se natuurlike plig dit is om iemand anders behoorlik van lewensbehoeftes te voorsien en wat versuim of nalaat om sodanige lewensbehoeftes te verskaf, is skuldig aan 'n misdryf."

Volgens die tradisionele gewoontereg rus daar 'n plig op die man om sy vrou en kinders te onderhou (Bekker *Seymour's customary law in Southern Africa* (1989) 74 ev; Bennett *A sourcebook of African customary law for Southern Africa* (1991) 230; Olivier *Die privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 138; *Williams v Mgole* 1931 NAC (C & O) 3 (Queenstown)).

By die afsterwe van die familiehoof gaan sy onderhoudsverpligting op sy erfopvolger oor. Die weduwee is dus na die man se dood steeds op onderhoud geregtig. Indien die vrou egter die oorlede man se familie verlaat en na haar eie familie terugkeer en daardeur te kenne gee dat sy die huwelik as ontbind beskou, is sy nie verder op onderhoud van haar oorlede man se familie geregtig nie (sien oa Bennett 230; *Sijila v Masumba* 1940 NAC (C & O) 42 44 – 47). Wanneer die man trou, kom daar 'n nuwe huis tot stand. Aan hierdie huis word 'n bepaalde vermoë, die sogenaamde huisvermoë, toegeken waaruit die huis onderhou word. Indien die huiseiendom nie voldoende vir onderhoudsdoeleindes is nie, word dit uit die familie-eiendom (kraalvermoë) aangevul (Bekker 71 ev; Bennett 228 ev).

4 Swart Administrasie Wet

Volgens artikel 23(1) van die Swart Administrasie Wet 38 van 1927 kan 'n familiehoof nie huiseiendom by wyse van 'n testament bemaak nie. Dit bly die vermoë van die betrokke huis en die onderhoud van die huis word daaruit voorsien. Die artikel bepaal soos volg:

> "Alle roerende goedere wat aan 'n Swarte behoort en wat hy toegewys het of wat kragtens Swart reg of gebruik toekom aan 'n vrou met wie hy in 'n gebruiklike verbinding geleef het of aan 'n huis, gaan na sy dood oor en word beredder volgens Swart reg en gebruik."

Die opvolger van die oorledene as familiehoof in die betrokke huis verkry beheer oor die huiseiendom. As familiehoof is hy dan verantwoordelik vir die onderhoud van die weduwee en die minderjarige kinders.

5 Samevatting

Solank die weduwee in die oorledene se familiewoning of op 'n aangewese woonplek woon, is sy volgens die gewoontereg altyd op onderhoud geregtig. Indien sy egter die oorledene se familiewoning verlaat, verbeur sy haar reg op onderhoud.

Volgens die gemenereg is vrouens op onderhoud van die man ingevolge die Wet op Onderhoud, 1963 geregtig solank as wat die huwelik bestaan. Myns insiens is die Wet op Onderhoud van Langslewende Gades, 1990 ook op 'n gebruiklike huwelik van toepassing sodat 'n weduwee na haar man se afsterwe steeds op onderhoud geregtig bly.

Kinders is en bly geregtig op onderhoud van beide biologiese ouers. Dit maak geen verskil of hulle uit 'n gebruiklike huwelik of 'n gemeenregtelike huwelik gebore is nie.

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Judges do not take part in politics, and few of them did so before their appointment to the Bench. If a "political" defamation action comes before a Judge he would not be required to take decisions on the merits of the political programmes of political parties. He would have to decide whether a case of defamation has been made out. If he has personal connections with one or other of the parties it might be undesirable for him to sit, and in practice he would be replaced without difficulty. This would, I consider, rarely be necessary (*per* EM Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 591).

VONNISSE

MARITAL RAPE, JUDICIAL INERTIA AND THE FATAL ATTRACTION OF THE ROMAN-DUTCH LAW

S v Ncanywa 1993 1 SACR 297 (Ck A)

"Mrs Bertram: 'That sounds like nonsense, my dear.'
Mr Bertram: 'May be so, my dear; but it may be very good law for all that.' "
(Sir Walter Scott *Guy Mannering* (1815) ch 9)

1 Introduction

In bygone days, moral conviction held that men had by nature authority over women (given, so Ulrich Huber tells us, "by the laws of nature, of God and of all nations . . . in all things which do not clearly conflict with honour and virtue" (*Heedendaegse rechtsgeleertheyt* 1 10 1)). This meant that a husband could "take" his wife as a natural consequence of his manhood and that, therefore, in brief and crude terms, if a man had sexual intercourse with his wife, with or without her consent, it was none of the law's business.

One would have thought that the enlightened moral sense in sexual matters and in civil libertarian considerations of the late twentieth century would have come to prevail to the extent that non-consensual sexual intercourse would be deemed so clearly in conflict with notions of human dignity and virtue that a man's "taking" of his wife without her consent would be very much the law's business. One would, however, be wrong, at least if the decision of the Ciskei Appellate Division (Galgut, Diemont and Rabie JJA) in the above case is anything to go by. Three considerations influenced the court in reaching its decision that a man cannot be convicted of raping his wife:

(i) In Roman-Dutch law it is deemed "a consequence of marriage" that a man has power over his wife's body (301c – f).

(ii) In three South African Appellate Division decisions (in 1938, 1958 and in 1960) it was assumed without comment and *obiter* that sexual intercourse by a husband with his wife without her consent does not constitute the crime of rape and therefore, because of "the persuasiveness of the fact that the assumption in question was so generally made without challenge . . . there is some probability that so general an assumption is well-founded" (quoting Schreiner JA in *Commissioner for Inland Revenue v Lazarus' Estate* 1958 1 SA 311 (A) 322B) (304i – 305c).

(iii) Confronted with a statement of the law in sources as authoritative as the old authorities of the Roman-Dutch law and judgments of the South African

Appellate Division, "it would not be proper for this Court to change the law . . . [t]hat is a task for the authorities . . ." (305d).

This decision is wrong. It is palpably at odds with prevailing social mores and overwhelming jurisprudential opinion. This case note will attempt to seek an explanation for a conception of the judicial function so parsimonious as to reduce the judge in a court of appeal to a mere transmitter of received legal wisdom in a spirit of deferential acquiescence.

2 The facts

The facts of this case were the following: In March 1990 the accused had visited his wife's house (they were separated at the time and divorce proceedings were under way) and found her with another man in her bedroom. An altercation ensued and he assaulted both his wife and her friend. He then ordered them to undress and to have intercourse. The friend was unable to. The accused then undressed and had intercourse with his wife, who had remained lying on the bed, naked. She did not consent to the act, but did not resist him as she was afraid of him and as she felt that she (as his wife) was not entitled to resist.

The accused was charged with the rape of his wife and, by forcing the friend to attempt to rape his wife, with the attempted rape of his wife. He was found guilty on both counts in the Ciskei General Division and sentenced to eight years' imprisonment, conditionally suspended for five years. The accused appealed against the convictions to the Ciskei Appellate Division. In that court his appeal against the conviction on the charge of rape succeeded, but the finding of the court *a quo* on the second count was upheld and the sentence reduced to two years' imprisonment, conditionally suspended for three years. This note will focus only on the successful appeal against the conviction on the charge of rape.

As the judgment is essentially a refutation of the reasons put forward in the court *a quo* for denying the validity of the rule that a man cannot be found guilty of raping his wife, it is necessary to refer in some detail to the judgment in the court *a quo*.

3 The decision of the court *a quo*

In the Ciskei General Division (see *S v Ncanywa* 1992 2 SA 182 (Ck GD)) Heath J embarked upon a thorough comparative analysis of the origin of and rationale for the rule that it is lawful for a man to have sexual intercourse with his wife without her consent.

He found that in Roman-Dutch law both the husband and the wife were under a duty to submit to the "right of coition" of the other party. The husband was entitled to enforce his right to coition (ie, to exercise self-help) by virtue of the marital power the husband exercised not only over his wife's property, but also over her person,which enabled him to demand her obedience to his will. His marital power derived from the authority "the laws of nature, of God and of all nations" (quoting Huber – see above) had granted man over woman (186C – 188F).

In English law the rule that a husband cannot be convicted of raping his wife derived from a view expressed by Sir Matthew Hale in his *History of the pleas of the Crown* (1736). In the opinion of the law lord, a man and a woman, upon marriage, enter into a contract, one of the terms of which is that the woman

gives herself up to her husband for the purposes of sexual intercourse, a submission which she cannot retract. Therefore the husband cannot be guilty of a rape committed by himself upon his lawful wife.

The Hale doctrine was subjected to judicial consideration in subsequent years and had a somewhat chequered career. Some judges supported the doctrine, some questioned its authority and its validity. Others alleviated its harshness by recognising exceptions to the intractability rule. Eventually, in 1991, the House of Lords found in *R v R* ((1991) 155 JP 989 (HL)), that no justification existed for the continued recognition of the marital exception in rape as encapsulated in the Hale doctrine. The following passage from the court of appeal judgment was quoted with approval (as referred to by Heath J 202B):

> "The . . . question is whether . . . this is an area where the Court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common-law fiction which has become anachronistic and offensive and we consider that it is our duty, having reached that conclusion, to act upon it."

Heath J also referred to the law of Scotland. An eighteenth-century treatise on Scottish criminal law contained the statement that a man cannot rape his wife because she had "surrendered her person to him" for the purposes of sexual intercourse. When the tenability of such a proposition was submitted to judicial scrutiny in the 1980s, it was rejected. In a 1989 decision by the high court of justiciary (*cS v HM Advocate* 1989 SLT 469) part of the judgment reads as follows (as referred to by Heath J 202F – G):

> "A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances."

In his discussion of South African case law, Heath J pointed out that in cases in which reference had been made to the rule that a husband cannot commit the crime of rape on his wife, its existence in South African law had been merely assumed without consideration having been given to its origin or merits, such consideration not being called for by the facts of any of these cases. He also consulted academic opinion on the rule, which varies from serious doubt about the validity of the rule, to expressions of strong disapproval such as the extracurial description of the rule by Milne JA as "a barbaric piece of nonsense that should be discarded without further ado" (quoted by Heath J 206J).

Heath J also discussed the judgment of Nienaber J in *S v H* 1985 2 SA 750 (N), in which he assumed the existence of the rule and made highly critical *obiter* comments on it. In this case the accused was charged with indecent assault upon his estranged wife, in that he used force to attempt to have sexual intercourse with her. He was found guilty of assault. Nienaber J assumed that the rule did form part of South African law (although expressing the opinion that "[t]he rationale for the rule is, to say the least, suspect, its support in authority is thin, and it offends against contemporary conceptions of morality" (as quoted by Heath J 207H). He considered the motivation for the rule in English law, namely that a wife consented irrevocably to intercourse against her will, as "errant adult fiction" (quoted by Heath J 208A) and suggested that a more rational motivation for such a rule ("if the principle is to be recognised at all") was that "it has become one of the invariable consequences of marriage that, as a rule, sexual intercourse between husband and wife can never be unlawful" (quoted by Heath J 208A).

Nienaber J's judgment provided Heath J with confirmation (albeit *obiter*) that the rule did not enjoy explicit curial support. Nienaber J's unenthusiastic assumption of its validity in South African law (on the basis of "scant" Roman-Dutch authority, apparent acceptance of the rule by textbook writers and "some scattered *obiter dicta*") led to one final consideration in Heath J's judgment. This was the question whether the weight to be given to the rule should reside not so much in the doctrine of *stare decisis*, but rather in "the persuasiveness of the fact that the assumption in question was so generally made without challenge until the present case", because "it is permissible . . . to hold, that there is some probability that so general an assumption is well-founded" (210F, quoting from *Commissioner for Inland Revenue v Lazarus' Estate* 1958 1 SA 311 (A) 322B – see above). In the opinion of Heath J the assumption was not generally made, nor was it made without challenge (witness Nienaber J's judgment). Nor was there any evidence to support a contention that the rule had been widely accepted and practised in the broader legal community.

Heath J concluded that the rule that a husband cannot rape his wife was never introduced into South African law, its existence at most being assumed in only a few cases and then *obiter* at that. There is no justification for the existence of the rule, which "offends against the *boni mores* of any civilised society" (212C). Even if it were contrary to the marital obligation for a wife unilaterally to withhold consent to coition, this does not entitle the husband to take the law into his own hands by forcing her, against her will, to have intercourse with him (212D – E).

4 The decision of the appeal court

Galgut JA delivered the judgment on behalf of the appeal court. Whereas Heath J's judgment takes up 29 pages of the law reports, Galgut JA was able to dispose of the case on behalf of the court in a judgment taking up only eight pages of the criminal law reports. The reasons cited by Galgut JA may be reduced to three basic arguments:

4 1 The ancient wisdom of the Roman-Dutch law

Galgut JA found direct authority for the proposition that a man cannot be found guilty of raping his wife in Damhouder (*Practycke in crimineele sake* (1650)), who justifies the rule on the basis that a man has "vol Recht in den Persoon van synen Wijwe daer hy Huwelijck mede gheconsummeert heeft" and in Moorman (*Verhandelinge over de misdaden en de selver straffen* (1764)), who states the rule (of the canon and the civil law) to be the result of the fact that "den man volkomen recht heeft over sijn huysvrouwe en persoon desselfs". From these statements, quoted in academic writings referred to by the judge, he concluded that "the basis of the rule . . . is that it is a consequence of the marriage" (301c – f; also see 304i).

4 2 The assumed wisdom of the Appellate Division

Heath J, in the court *a quo*, had been at pains to point out that curial reference to the rule had at all times been *obiter* and that its validity in South African law had always simply been assumed, but never subjected to judicial scrutiny. Galgut JA brushed aside any inference that a source of law as important as

an appeal court judgment could ever contain anything other than a considered, rather than an assumed, statement of the law (304i – j):

> "The fact is the Judges were defining rape [to include the rule]. The judges who delivered the judgments were eminent Judges of the Appeal Court. They, and the Judges who sat with them, would not place a wrong definition of a crime on record."

Heath J considered, but rejected as unpersuasive, the notion (based on Schreiner JA's opinion in the *Lazarus* case referred to above) that the assumption of the rule's validity has been so generally made without challenge in the courts that it is probably well-founded. For Galgut JA this notion constituted "[t]he strongest argument in favour of this Court not deviating from what was said in the above three Appeal Court cases" (305a). Not only do appeal court judgments not contain ill-considered assumptions, but if they do, and do so every now and again, they constitute unimpeachable authority!

4 3 The imputed wisdom of the legislature

The high authority (as perceived by Galgut JA) of the common law and the case law made it improper for the court to change the law. And even if it were inclined to do so, "[i]t would in any event be difficult for this Court to decide whether in the Ciskei the rule should be varied or totally rejected. That is a task for the authorities in the Ciskei" (305d. The authorities in South Africa approved a Prevention of Family Violence Act 133 of 1993 in October 1993, s 5 of which provides that "a husband may be convicted of the rape of his wife". This act has however not yet become operative.). Difficult, apparently, because it would involve a court in the consideration of the moral substratum within which the rules of society's common law are embedded. This project is supposedly extra-legal and best left to the legislature. Such a constricted, rigidly positivist, vision of the judicial function (and of the common law) is routinely condemned in modern legal theory.

Fuller, for example, describes this view as one which treats law as "a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become" and contrasts it with an insistence that law has an inner morality, that it is "a purposeful enterprise, dependent for its success on the energy, insight, intelligence and conscientiousness of those who conduct it" (*The morality of law* (1969 ed) 145).

Dworkin calls it the "plain-fact view" ("law is always a matter of historical fact and never depends on morality": *Law's empire* (1986) 9). He contrasts it with a view of law as an "interpretive concept" (*idem* 86 410), which requires the judge to engage in constructive interpretation of the law, an interpretation that strives to promote the integrity of the legal system by applying and formulating only those rules that are consistent with those fundamental legal principles reflective of society's moral values of justice and fairness (see *idem* esp ch 2 ch 7).

For Unger, this approach would be the prototype of the sin of formalism, defined as "a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life", a commitment that seeks refuge in "the more determinate rationality of legal analysis and the less determinate rationality of ideological contests" ("The critical legal studies movement" 1983 *Harv LR* 565). An unwillingness to engage the legal source material with the basic terms of social life (as demonstrated by Galgut JA) makes of the

adjudicative process no more than "a collection of makeshift apologies" (*idem* 573).

Where a positivist conception of the judicial function seeks to protect the judge from tilting at moral windmills, these (and many other) legal theorists demand that judges expose and hold up to critical scrutiny the moral and social values that justify and entrench the legal rules they are called upon to apply.

In any event, in matters of criminal morality I much prefer the critical, reflective attitude of the true jurisprudent engaged in the process of dispensing justice to the contingent moral posturing inherent in the political process.

5 Critique

The judge rejected submissions made by counsel for the state to the effect that such Roman-Dutch authority should no longer be followed, since it reflected the social mores of an age incompatible with modern notions and that, in any event, the South African law of rape was substantially influenced by English law, where, as in Scotland, the rule had been abolished as it was deemed offensive to morality (301g – 302a).

His dismissal of the contention that the Roman-Dutch authors lacked relevance (and therefore authority) in matters of contemporary matrimonial morality was not based on an affirmation of timeless truths contained within the hallowed pages of these venerable authors. It was based on a blunt statement of plain fact: "[t]he fact remains there is such authority" (304g). The implication is therefore that English law must yield to the explicit authority of the Roman-Dutch law.

He did admit that the reasons for the abolition of the rule in England and in Scotland, chief among which was the fact that a rule formulated in academic writings in England and in Scotland in the eighteenth Century was now regarded as anachronistic and offensive, "cannot be faulted" (304h). However, lest his admission be deemed inconsistent with his unquestioning acceptance of Roman-Dutch authority even further removed in time from modern society than the English and Scottish authorities, Galgut JA was at pains to point out that there is a difference in the theoretical underpinnings of the rule in English and in Roman-Dutch law. In English law the rule is based on a common-law fiction that the wife upon conclusion of the marriage irrevocably consents to her husband's "right to intercourse", whereas in Roman-Dutch law the rule was a consequence of marriage (303h 304i).

The distinction the judge made here is more putative than real. The construction that a wife consents for the duration of the marriage to submit to sexual intercourse with her husband is as much a consequence of the marriage as is the construction that a man, upon marriage, attains "vol Recht in den Persoon van synen Wijwe". The fiction of irrevocable consent is merely a convenient shorthand for expressing the notion that a wife is, by operation of law, obliged to grant her husband the marital privilege of sexual intercourse conferred upon him by operation of law at the time of marriage. This is simply another way of saying that a man, by reason of marriage, has conferred upon him, by operation of law, a complete right to the person of his wife. In fact, a number of *dicta* exist in English and in Scottish law to the effect that the husband's right to coition is (or was) the result of an obligation on the wife imposed by law (see the *dicta* referred to by Heath J 195D 197D 202G).

Is it not, however, possible to grant Galgut JA the validity of the distinction on the basis that the rule in English law was concerned with law in the subjective sense, whereas in Roman-Dutch law the rule was concerned with law in the objective sense? That is to say, in English law the marriage was, in effect, a formalised private agreement between the parties, one of the terms of which was that the wife granted the husband the personal right to demand her submission to sexual intercourse for the duration of the marriage and the wife acquired a corresponding duty to submit whenever the husband exercised his right to demand this. The rule was then simply an expression of the principle of non-intervention by which the law gave effect to such an agreement.

In Roman-Dutch law, on the other hand, the lawful conclusion of a marriage by a man means, in law (as a "consequence of marriage"), that the man has the status of "husband", one feature of which is his capacity (ie, his competence, what he can be or do) to engage in the act of sexual intercourse with his wife. This capacity constitutes the source of his "vol Recht in den Persoon van synen Wijwe". Conjecturally, given the fact that this right was premissed on the notion that husbands have natural and divine authority over their wives (see the quotation from Huber in 1 above), this right may be translated into a modern idiom as a personality right, the object of the right being something akin to sexual self-expression as a facet of the husband's dignity. The husband's capacity in law to engage in coition with his wife is also the source of his wife's correlative obligation to afford him the opportunity to exercise his right, whether she wishes to or not. This obligation of the wife finds expression in the marital exemption rule.

The relevance of this distinction, thus conceived, seemingly (Galgut JA nowhere makes this explicit) lies in the fact that judges have a well-established capacity to intervene and declare unconscionable and therefore invalid agreements or terms of agreements (such as the irrevocability of consent to coition) that offend against the *boni mores* of society, but are not in a position to refuse to apply authoritatively established law (such as the husband's right to intercourse as a consequence of marriage) even if it offends their sense of justice.

This conception of the distinction does not, however, survive close scrutiny. For the notion of a marriage as a formalised private arrangement creating, *inter alia*, rights and duties in respect of sexual intercourse *inter se* is conditional upon the parties to the contract having the capacity to so arrange their marital relations, as expressed in their legal status of "husband" and "wife", a capacity conferred by operation of law. In the final analysis, therefore, the fictional irrevocability of the wife's consent is also a "consequence of marriage". This consideration apart, there are *dicta* in English and in Scottish law (referred to by Heath J – see above) to the effect that the wife's submission to coition once and for all is *not* by virtue of a consensual arrangement, but is an obligation imposed by law, an incident of marriage.

One must conclude, therefore, that English and Scottish judges were willing, and regarded themselves as able, to refuse to apply an authoritatively established rule of law (and not merely to intervene in an unconscionable private arrangement) because it offended their conception of the community's sense of justice as it had evolved in the intervening centuries since the first formulation of the rule. This the Ciskeian appeal court found itself unable to do.

I venture to suggest that the true reason for this reluctance lies not in artificial dogmatic constructs, but rather in differing conceptions of the *nature* of the common law in civil-law and in common-law countries. This difference was formulated as follows by Sir Henry Maine (*Ancient law* (1891 ed) 1):

> "[T]he expositors of Roman law consistently employed language which implied that the body of their system rested . . . on a basis of written law . . . The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours."

Based as it is on the Roman law, the Roman-Dutch law is applied on the basis that it is *stated* law, its sources admittedly maddeningly diffuse, but posited, historically traceable nevertheless, its application a matter of plain fact. The marital exemption rule is expressly formulated in recognised Roman-Dutch sources and in case law of the highest authority, which then is the law and a judge, having established the statement of the law, must do no more than apply the law to the facts.

The English common law, on the other hand, reflects the unwritten traditions of the community as expressed by judges in their judgments. Judges are the spokespersons of the community, representatives of a collective legal wisdom, and as such the judge is "neither individual creator of law nor mere restator of ancient truths, but representative of an evolving legal consciousness" (Cotterrell *The politics of jurisprudence* (1989) 30 and see generally 21 – 51). As the representative of a legal consciousness that deemed the marital exemption rule anachronistic and offensive, the House of Lords in *R v R supra* was duty bound to express the common law as no longer containing the rule.

6 Wanted: an adequate theory of common-law adjudication

There is something badly wrong with the theoretical foundations of a legal system that allows Mr Ncanywa to avoid the sanction of the criminal law for the act of barbarism perpetrated upon his wife, purely because an appeal court finds itself compelled to apply an archaic and morally offensive common-law rule that permits such barbarity.

Many legal theorists have developed theoretical models of common-law adjudication that aim, ultimately, to dispel the notion of adjudication as the application of law that exists "out there", as a "brooding omnipresence in the sky" (Howe (ed) II *Holmes-Laski letters* (1953) 822). These models all seek to broaden the scope of legitimate judicial enquiry to include the moral substratum of the law. One such model that I find particularly appealing is the so-called "institutional theory" of MacCormick and Weinberger (see esp *An institutional theory of law* (1986) and Weinberger *Law, institution and legal politics* (1991)). The appeal of this theory lies in the fact that it amounts essentially to a refinement of the notion that the civil law is *stated* law, a matter of existing fact and as such would not introduce totally alien theoretical constructs.

Space allows only the broadest of brushstrokes to sketch the essential features of the theory (I have described the theory in more detail elsewhere: see "Juridical institutions in the civil law: towards a theory for common-law adjudication" 1993 *TSAR* 580 – 596). According to this theory, law comprises "thought objects", entities that exist in time but not in space as part of the facts of social existence. They are the institutions of law (of which marriage, contract and rape

are examples), existing because of the social world and in order to make sense of the social world. They are brought into existence as a result of lawyers taking a particular view of a particular social relationship. This particular view consists of those rules, standards and doctrines of common law and statute law that determine how and when the institutions come into being (institutive rules), what the consequences of the existence of the institutions for the people involved are (consequential rules) and how and when the institution ceases to exist (terminative rules).

These rules are the frameworks of reference for lawyers that enable them to constitute the institutions. They exist only for as long as lawyers are in substantial agreement about their worth in guiding the constitution of institutions that grow with and are guided by the societal relationships they reflect. When substantial agreement no longer exists on the institution's adequacy to reflect the values of society, then the institution needs to be "unpicked", its constitutive rules varied.

The value of this theory is that it would have enabled the appeal court to establish the continued existence of the marital exemption rule not by reference to its mere existence in the sources, but by an interpretive approach that focused on the marriage institution. This theory holds the court responsible for a conceptualisation of the institution that accords with substantially-agreed criteria for the adequacy of the institution-constituting rules to reflect the values of society. Particularly at issue is the continued validity of the marital exemption rule as one of the consequential rules of the institution of marriage. *As a matter of judicial responsibility*, therefore, the court would need to investigate the value of the rule. This it would do by reference to, and an evaluation of, those moral and ideological considerations that provide the fabric of the modern marriage relationship. Fundamentally at stake is the protection of a legal institution by the social institution best equipped, in terms of its immersion in the received traditions and learning of the common law, to do so.

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BEMAKINGS AAN 'N KLAS PERSONE

Els v Els 1993 2 SA 436 (OK)

In hierdie saak het die testateur 'n derde van sy helfte van 'n gesamentlike boedel aan sy kleinkinders, synde die kinders van sy seun Johannes Karel Els, bemaak. Enige voordeel wat 'n begunstigde onder die ouderdom van vyf en twintig jaar sou toekom, moes in trust vir daardie begunstigde gehou word. Ten tyde van die testateur se dood het Johannes Karel vier kinders gehad. Twee van hulle was reeds vyf en twintig jaar oud, die derde een was meerderjarig maar nog nie vyf en twintig nie en die vierde kind was nog nie mondig nie. Die applikante

in die saak was Johannes Karel, sy drie meerderjarige kinders en twee ander kinders van die testateur wat ook begunstigdes ingevolge die testament was. Die respondente was Johannes Karel se minderjarige kind en die Meester van die Hooggeregshof. Die hof moes onder andere beslis wanneer die klas kleinkinders gesluit het. Met ander woorde, was die klas by die dood van die testateur bepaal sodat net bogenoemde vier kinders kon erf, of moes daar met die verdeling van die boedel gewag word omdat Johannes Karel moontlik nog kinders kon hê? Die hof beslis dat daar nie op 'n oorwig van waarskynlikheid bewys is dat Johannes Karel nie meer kinders sou hê nie, en dat dit nie die testateur se bedoeling was om net sy kleinkinders wat by sy dood in lewe was, te bevoordeel nie. Die boedel kon gevolglik nie in hierdie stadium tussen net hierdie vier kinders verdeel word nie.

Klasbemakings het nog altyd moeilikheid opgelewer. Die probleem is dat as 'n testateur 'n klas persone in die algemeen bevoordeel, soos wat in hierdie saak gebeur het, dit baie moeilik kan wees om vas te stel of net die lede van die klas mag erf wat by die dood van die testateur reeds in lewe was en of ook lede wat later gebore word in aanmerking mag kom. Voet 28 5 12, 13 sê onomwonde dat ook kinders wat na die testateur se dood gebore word, mag erf; hierdie standpunt is in verskeie sake gevolg (bv *Wentzel v Brink's Executors* (1892) 9 SC 328; *Ex parte Estate Cronjé* 1941 CPD 123 127; *Ex parte Rossouw* 1951 1 SA 28 (O); *Reichenberg v Bader* 1977 2 SA 1045 (W)). Die probleem met hierdie standpunt is vanselfsprekend dat sommige bevoordeeldes jare later eers gebore kan word, wat beteken dat niemand intussen mag erf nie en dat die boedel ook nie afgehandel kan word nie. (Sien oor die administratiewe probleme *Storm's Estate v Milne* 1956 3 SA 250 (N); *Ex parte Standard Bank of SA Ltd* 1966 4 SA 414 (N); Murray 1966 *Annual Survey* 250; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 540.) Dit hou verder in dat persone mag erf wat die testateur glad nie geken het nie. Dit is daarom maklik verstaanbaar waarom daar ook uitsprake is waarin die testateur se testament so uitgelê is om net lede van die klas te bevoordeel wat by die testateur se dood in lewe was (bv *Ex parte Standard Bank of SA Ltd* 1966 4 SA 414 (N); *Ex parte Chapman* 1975 1 SA 441 (O); *Ex parte Mitchell* 1976 1 SA 412 (K); *Ex parte Standard Bank of SA: in re Estate Martin* 1977 3 SA 750 (W); *Smit v Estate Smit* 1982 4 SA 529 (K)).

Die appèlhof het hom tot dusver nie spesifiek oor die aangeleentheid uitgelaat nie, maar volgens die uitspraak in *Ex parte Burger* 1957 3 SA 644 (A) blyk duidelik dat dit ook hierdie hof se standpunt is om lede van die klas te bevoordeel wat na die testateur se dood gebore word tensy 'n teenstrydige bedoeling uit die testament blyk.

Weens die probleme wat klasbemakings in die verlede opgelewer het, het skrywers soos Murray jare gelede reeds aangevoer dat net die persone moet erf wat by die dood van die testateur in lewe is, tensy 'n ander bedoeling uit die testament blyk (1957 *Annual Survey* 145 ev; 1969 *Annual Survey* 203 ev; 1970 *Annual Survey* 236 ev; 1977 *Annual Survey* 284 ev; sien ook Van der Merwe en Rowland 539–540; Corbett, Hahlo, Hofmeyr en Kahn *The law of succession in South Africa* (1980) 534 ev; Lee and Honoré *Family, things and succession* (1983) deur Erasmus, Van der Merwe en Van Wyk par 606). Die aangeleentheid het intussen ook die aandag van die Suid-Afrikaanse Regskommissie geniet; die resultaat van hulle ondersoek is vervat in artikel 2D(1)(c) van die Wet tot Wysiging van die Erfreg 43 van 1992. Die artikel bepaal dat 'n voordeel wat

aan die kinders van 'n persoon, of die lede van 'n klas van persone, bemaak word, vestig in die kinders van daardie persoon of die lede van die klas wat op die tydstip van die oorgang van die voordeel leef, of wat op daardie tydstip reeds verwek is en later lewend gebore word, tensy 'n teenstrydige bedoeling uit die testament blyk. Hierdie wet het op 1 November 1992 in werking getree terwyl die *Els*-saak reeds in Mei 1991 vir die eerste keer by die hof aanhangig gemaak is. In dié saak is voor regter Mullins aansoek gedoen dat die testateur se bemaking van 'n derde van sy boedel aan sy kleinkinders net na die vier kinders van Johannes Karel verwys wat by die dood van die testateur in lewe was. Daar is ook om ander regshulp aansoek gedoen wat nie vir doeleindes van hierdie bespreking van belang is nie. Die ander regshulp is toegestaan maar wat die identiteit van die kleinkinders betref, is die applikante verlof toegestaan om die hof later weer te nader. Dit is hierdie latere aansoek voor regter Kroon, wat basies net oor die vasstelling van die kleinkinders se identieit gehandel het, wat hier ter sprake is. Hierdie aansoek het op 21 Oktober 1992 voor die hof gedien en uitspraak is op 7 Januarie 1993 gegee. Dit is dus duidelik dat Wet 43 van 1992 ten tyde van hierdie saak nog nie in werking was nie, maar dit is tog jammer dat glad nie na die standpunt van die regskommissie in die saak verwys word nie.

Om nou na die feite van die *Els*-saak terug te keer. Dit is natuurlik so dat 'n mens nie op grond van die woorde "[bemaak ek 'n] derde deel, in gelyke dele aan my kleinkinders synde die kinders van my seun Johannes Karel Els" kan sê dat die testateur net die kinders van Johannes Karel wat by sy dood in lewe was, wou bevoordeel nie. As 'n mens egter na die omringende omstandighede van die saak kyk, meen ek tog dat die beslissing anders kon gewees het.

Johannes Karel se ouderdom word weliswaar nie in die saak aangedui nie maar aangesien hy twee kinders gehad wat ouer as vyf en twintig jaar was, kan die afleiding seker gemaak word dat hy reeds in sy vyftigerjare was. Hy en sy vrou was gelukkig getroud sodat die moontlikheid van 'n egskeiding eintlik nie bestaan het nie. Boonop het sy vrou ongeveer vyf jaar voor verlyding van die testament 'n histerektomie ondergaan. Die testateur was van al hierdie omstandighede bewus sodat dit baie onwaarskynlik was dat hy sou gemeen het dat Johannes Karel nog kinders sou hê.

Na die eerste aansoek voor regter Mullins het Johannes Karel boonop 'n vasektomie ondergaan. Die operasie is eers deur 'n algemene praktisyn gedoen maar dit was nie heeltemal suksesvol nie waarop dit suksesvol deur 'n spesialis uitgevoer is. Ook hierdie omstandigheid het die hof nie oortuig nie. Regter Kroon het toegegee dat Johannes Karel en sy vrou nie nog kinders kon hê nie. Dit was egter nie die geval vanweë die vasektomie wat op Johannes Karel uitgevoer is nie maar weens die histerektomie wat sy vrou ondergaan het. Daar was naamlik getuienis voor die hof waarin die spesialis wat die vasektomie uitgevoer het, meegedeel het dat die operasie deur middel van 'n vaso-vasostomie omkeerbaar is en dat die kans dat die herstellende operasie suksesvol sal wees "somewhat less than 50%" is. Die feit dat Johannes Karel en sy vrou se huwelik gelukkig was, het die hof ook nie beïndruk nie. Die regter stel dit soos volg:

> "Regretfully, however, these considerations fall far short of any guarantee that their matrimonial ship will continue to sail through calm waters and will not encounter stormy conditions such as to cause it to flounder on the rocks" (443H).

Boonop kon Johannes Karel se vrou hom ook deur die dood ontval, hetsy as gevolg van siekte of 'n ongeluk.

Die vraag was met ander woorde nie of Johannes Karel en sy huidige vrou nog kinders kon hê nie. Dit het vasgestaan dat hulle nie kon nie omdat sy vrou as gevolg van die histerektomie steriel was. Die hof het egter rekening gehou met die moontlikheid dat sy huidige huwelik deur die dood of egskeiding ontbind kon word, dat Johannes Karel dan weer kan trou en dat sy tweede vrou dan kinders by hom sou wou hê.

In die *Els*-saak word na die beslissing in *Ex parte Harmse* 1917 TPD 585 verwys. In hierdie saak moes die hof beslis oor die vraag of 'n vrou wat ses of sewe en veertig jaar oud was nog kinders kon hê, en of die klas gesluit kon word sodat net die kinders kon erf wat in daardie stadium in lewe was. Die hof het mediese getuienis aanvaar dat die vrou reeds verby haar oorgangsjare was en dat dit uiters seldsaam was dat 'n vrou na hierdie gebeurtenis nog kinders in die wêreld kon bring. Die regter verwys dan na 'n ou Kaapse saak, *In re Estate of N Meyer* (1896) 13 SC 2, waarin beslis is dat as 'n vrou ouer as vyftig is minder getuienis nodig is om te bewys dat sy nie meer kinders kan hê nie. Die regter in die *Harmse*-saak meen egter dat ons bronne 'n oplossing vir die aangeleentheid bied. Hy verwys na die *Codex*-teks 6 58 12 waarin Justinianus sê "that it would be wonderful, and happens very rarely, for a woman over fifty to have issue . . ." Uit die teks lei die regter dan af "that the rule of our law is that when a woman has completed her fiftieth year the presumption is that she will not have any more children". Daar word dan verder vermeld dat dit ook Gothofredus se standpunt was. Aan die ander kant, gaan die regter voort, rus die bewyslas op die persoon wat beweer dat 'n vrou wat nog nie haar vyftigste lewensjaar voltooi het nie, nie meer kinders kan hê nie. In die onderhawige saak is bevind dat die persoon hom nie van hierdie bewyslas gekwyt het nie. Daar word met ander woorde bevind dat die klas persone nie gesluit kan word nie omdat die vrou moontlik nog kinders kan hê, ten spyte daarvan dat een dokter getuig het dat daar net van vier of vyf gevalle in mediese handboeke melding gemaak word waar 'n vrou na haar oorgangsjare nog kinders in die wêreld gebring het.

Die uitspraak in die *Harmse*-saak is na my mening ook nie bo verdenking nie. In elk geval is dit vandag onaanvaarbaar om op die menings van Justinianus en Gothofredus te steun ten einde te bewys of 'n persoon nog vrugbaar is al dan nie. Per slot van sake was hulle kennis in die verband so gebrekkig dat hulle 'n vrou se vermoë om nog kinders in die wêreld te bring aan 'n arbitrêre ouderdom van vyftig jaar gekoppel het. Vandag behoort ons net van moderne mediese kennis gebruik te maak en in die *Harmse*-saak was daar myns insiens voldoende mediese getuienis voor die hof om te kon aantoon dat die betrokke vrou nie meer kinders sou hê nie.

Wat die *Els*-saak betref, moet 'n mens jouself afvra wat die betrokkenes nog kon doen ten einde net die kleinkinders te laat erf wat by die testateur se dood in lewe was. Daar moet in gedagte gehou word dat Johannes Karel nie 'n vasektomie ondergaan het om te verhoed dat hy en sy huidige vrou nog kinders sou hê nie. Sy vrou was immers reeds steriel as gevolg van die histerektomie. Hy het die operasie twee keer ondergaan, uitsluitlik om die klas kleinkinders gesluit te kry. Wat meer kon hy doen? Totale amputasie sou darem seker te veel gevra gewees het!

Om saam te vat: as in ag geneem word dat Johannes Karel al in die vyftig was, dat die partye gelukkig getroud was en dat albei 'n steriliteitsoperasie

ondergaan het, meen ek dat wel op 'n oorwig van waarskynlikheid bewys is dat net die vier kleinkinders wat by die testateur se dood in lewe was, op 'n derde van die boedel geregtig was. 'n Mens moet in gedagte hou dat as die afleiding korrek is dat Johannes Karel om en by die vyftig jaar oud is, hy nog iets soos dertig jaar kan leef. Dit beteken dat die kleinkinders tot dan sal moet wag voordat hulle mag erf. Of dit die bedoeling van die testateur kon gewees het, lyk vir my twyfelagtig.

Aan die ander kant moet 'n mens daarop wys dat 'n bemaking aan 'n klas persone grootliks 'n kwessie van formulering is. Om 'n testateur tot versigtige formulering te maan, is egter nie altyd so maklik nie. As 'n testateur byvoorbeeld sy kleinkinders by name aandui, kan daaruit afgelei word dat hy net spesifieke kinders wil bevoordeel. Die probleem is egter dat as 'n persoon al sy kleinkinders wil bevoordeel en sy seun en die kleinkinders is nog baie jonk, hulle juis nie by name aangedui kan word nie omdat almal waarskynlik nog nie gebore is nie. Die eenvoudigste sou natuurlik wees om die kleinkinders by name aan te dui en as 'n verdere kind gebore word, net sy naam in die testament by te voeg. Maar nou is dit eenmaal so dat baie mense nooit hulle testamente hersien nie sodat ook hierdie moontlikheid nie juis 'n oplossing bied nie.

Vroeër is melding gemaak van artikel 2D(1)(c) van Wet 43 van 1992. Soos hierbo daarop gewys is, bepaal die artikel dat by 'n klasbemaking nou vermoed word dat die klas net bestaan uit die persone wat by die oorgang van die voordeel leef, tensy die testament 'n teenstrydige bepaling bevat. Die wet sal vermoedelik in sake soos die onderhawige verligting bring. 'n Mens kan egter net hoop dat die howe nie te maklik "'n teenstrydige bedoeling" in die testament sal inlees nie.

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CESSION *IN SECURITATEM DEBITI* AND MERGER

Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd 1992 2 SA 807 (A)

The recent decision of the Appellate Division in *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd*, as well as Reinecke's review of this judgment ("Sessie *in securitatem debiti* en skuldvermenging" 1992 *TSAR* 677), raise some very interesting issues pertaining to cession in general and, in particular, illustrate once again the necessity to distinguish clearly between a plege of claims and an out-and-out security cession.

The facts of the case are the following: On or about 7 March 1985, appellant, the Roman Catholic Church (hereinafter referred to as the Church) made a loan to Interfund and on or about 10 April 1985 a cession of Interfund's rights

in an insurance policy ("the first policy") was made to the Church as security for the loan. The first policy was issued by respondent, the Southern Life Association Ltd (hereinafter referred to as Southern) and the date of commencement was 1 April 1985. It was a "Mastersave 5 × 5 policy" in terms of which Interfund as holder was to pay an annual premium of R500 000 for five successive years. The first policy would have matured ten years from its commencement date, or on the prior death of the surviving assured life. The lives assured under the first policy were those of the directors of Interfund, Schendel and Fritzler. Interfund was the "owner and beneficiary" of the first policy. Upon payment of the first annual premium the first policy acquired a "cash value", and Interfund immediately became entitled to apply for a cash loan against security of the first policy.

On 2 April 1985, Interfund paid the first instalment, and shortly thereafter Southern gave Interfund a cheque of R300 000 as a loan under the first policy. Interfund signed the first acknowledgement of loan which recorded the fact that Interfund had ceded its rights under the first policy to Southern as security for the loan. The date of this cession is uncertain but it was definitely effected before the cession of Interfund to the Church on 10 April 1985. Southern also retained the first policy.

On 12 April 1985, the Church and Interfund concluded a second loan agreement in terms of which the Church lent and advanced R350 000 to Interfund. As security for repayment of this loan, the Church contended "that it was once again 'prevailed upon', on some unspecified date, to accept a cession of Interfund's rights under an insurance policy ('the second policy')". The second policy was issued by Southern to Interfund with commencement date 1 April 1985. Its terms were the same as those in the first policy, but the annual premium was R350 000. On 16 April 1985, Interfund handed to Southern its application for the second policy, together with a cheque for R350 000 and a further acknowledgement of loan on the policy signed in blank. The second acknowledgement of loan was dated 16 April 1985. Interfund signed a further document, also dated 16 April 1985, in terms of which it ceded its rights under the second policy to the appellant.

The appellant brought an application in the Witwatersrand Local Division for an order setting aside the refusal of the Master of the Supreme Court to sustain its objection to the Master's second liquidation and distribution account relating to Interfund Finance (Pty) Ltd (in liquidation). Appellant maintained that the full proceeds of the two insurance policies should have been awarded to it, and sought an order directing the Master to amend the account accordingly. This application was dismissed by the court and the appellant appealed to the Appellate Division, but failed to comply with the Rules of the Appellate Division relating to the filing of the notice of appeal and the lodging of the record on appeal. The appellant accordingly applied for condonation of its failure to comply with the rules. The outcome of the application was dependent upon whether the appellant had reasonable prospects of success on appeal.

On appeal, the Church contended that the terms of the agreement of the first acknowledgement of loan had been left blank and that it was therefore inchoate and unenforceable. The court held that this was not so and that the first acknowledgement of loan was valid and enforceable. The court also held that this acknowledgement of loan recorded that Interfund had ceded its rights to

Southern and that this cession was probably concluded before 3 April 1985, but definitely before 10 April, the date of the cession to the Church.

At this stage the court made a very interesting and relevant remark which cannot be discarded as an *obiter dictum*, since it had a direct bearing on the outcome of the case. FH Grosskopf JA referred to the fact that Southern retained possession of the first policy and held:

> "Delivery to the cessionary of a written instrument evidencing the ceded right is required for the proper completion of a cession, and it is of particular relevance in determining the rights of competing cessionaries of the same right of action" (813C).

Bearing in mind the authority referred to by the judge, this statement to my mind is a clear indication by the Appellate Division that, probably in all cessions, but at least in the case of competing cessionaries, delivery of the document evidencing the right is a prerequisite for the validity of the cession. This is borne out by the fact that the court chose to confirm the widely criticised *obiter dictum* in *Labuschange v Denny* 1963 3 SA 538 (A) 543H – 544B pertaining to the requirements for the validity of a cession in the case of competing cessionaries. (For criticism of this case, see Scott *The law of cession* (1991) 35 *et seq*; Oelofse "Lewering van die dokument waaruit die reg blyk as geldigheidsvereiste vir sessie" 1990 *THRHR* 61; De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 252 vn 4.) The court, however, went even further and, by referring to *Jeffery v Pollak and Freemantle* 1938 AD 1 22 and *Trust Bank of Africa v Standard Bank of South Africa* 1968 3 SA 166 (A) 184H – 186B, it actually indicated that it regarded delivery of the document as a prerequisite for validity in any event. This seems to me to be the only logical conclusion to be drawn from the judgment, seeing that the court referred to my extensive discussion of the matter in *The law of cession* 39 *et seq*, where I refer to the different views of most of the authors on this subject. Apart from Lubbe ("Die oordrag van toekomstige regte" 1980 *THRHR* 117) and Joubert (*Die regsbetrekkinge by kredietfaktorering* (LLD thesis RAU 1986) 435 – 437), none of the other authors accepts this approach and it causes serious problems in practice. (For criticism of the views of Lubbe and Joubert and a discussion of the problems that would be experienced in practice if the view expounded by Grosskopf JA were to be followed, see Scott "Sessie en *factoring* in die Suid-Afrikaanse reg" 1987 *De Jure* 25; Oelofse 1990 *THRHR* 69; Scott 51 52 265.)

In spite of all this, however, it seems to be settled law, after this decision, that delivery of the document evidencing the right to be transferred is a requirement for the validity of the cession. Apparently the court does not regard the theoretical objections to such an approach, the fact that it was incorrectly introduced into South African law, and the practical effect it has on day-to-day commercial dealings, as of a too serious nature.

Reinecke (1992 *TSAR* 677 679) seems to be of the opinion that this requirement was invoked by the court in order to conform to the principle of publicity which is a requirement for the creation of a limited real right such as the one under discussion. From the context, and bearing in mind the authority referred to by the judge, I am of the opinion that these remarks were made in a far wider context and that it referred to the validity requirements of cession in general. A distinction should be made between the requirements for the validity of all cessions and the means of adhering to the principle of publicity in the case of real security (see Scott 237).

The appellant therefore did not succeed in its reliance on the cession of the first policy, but contended further that the rights under the second policy had been ceded to it on 16 April 1985 in terms of the cession document. The court found, however, that both the original and the duplicate of the deed of cession by Interfund to the appellant were retained by Southern and that they were never forwarded to the appellant. The court therefore held that there was nothing to show that the appellant had by then already agreed to accept the cession by Interfund (813G – H). The court in fact found on the facts that the cession of Southern took precedence to that of the appellant, a fact which was in law confirmed by the fact that

> "the Southern retained possession of the instrument evidencing the ceded right (the second policy) showed that it had the better right" (814A).

The court therefore again relied on the *obiter dictum* in *Labuschagne v Denny supra* to determine the rights of competing cessionaries.

The court further had to decide whether Southern was in fact obliged to rely on the two cessions to it in view of the fact that it was entitled to deduct the amount of the loan from the proceeds of the policy in precedence to any other claim. The terms of both policies made provision for this, as such indebtedness was regarded as "a first charge against any moneys or other benefit payable by the Southern in terms of the said policy" (814C).

As to the meaning of the term "first charge", the court referred to *Irwin v Davies* 1937 CPD 442 and held that the effect of such a first charge was that the proceeds of the policy were curtailed so that the right of Southern enjoyed precedence to all other claims. The effect of this was held to be the following:

> "Interfund's right to claim the full proceeds in terms of the two policies was accordingly curtailed to the extent that the Southern had a right, in priority to all other claims, to deduct the amount of the loan as well as interest from the proceeds of the particular policy. It should, however, be borne in mind that the loan could not be deducted until such time as it became due and payable. When Interfund ceded its right under each of the policies to the appellant, the latter could not acquire any better right; its right remained subject to the right of the Southern to set off the amount of the loan once it became due and payable" (814H – I).

Although the judge did not discuss the effect of such a so-called "first charge" in detail, he correctly held that it has the effect that set-off operates *ipso iure* once the earliest of the three events mentioned in each of the acknowledgements of loan materialises. Since none of these events had taken place at the time of Interfund's liquidation, the winding-up order established a *concursus creditorum*. The first charge, however, does not afford the person in whose favour it was made precedence over all other claims in the event of insolvency. Grosskopf JA held that set-off could not operate thereafter as

> "there was no mutuality between the respective claims of the Southern and Interfund prior to liquidation inasmuch as neither the loan nor the policy had become due and payable as at the date of the winding-up order" (815C).

In passing, it may be remarked that the court here followed the normal approach to set-off and not the one propagated by De Wet and Van Wyk 278).

The court therefore found that inclusion of this first charge in the agreement between Interfund and the Southern did not sufficiently protect Southern in the event of insolvency and that Southern had to fall back on its security, that is, the real rights created by the cessions (815D – E).

Although it is not clearly spelt out in the judgment, the situation prevailing in the case of a so-called "first charge" is the following: the first charge cannot be established with effect against third parties by means of the mere agreement between Southern and Interfund. For this first charge to operate against third parties, such as the appellant in the case under discussion, something more than the mere agreement is required, which in this case is the pledge of the claim by means of a cession (as was also held in *Irwin v Davies supra* 447:

> "Sweet, *Law Dictionary*, says that a 'charge' on property 'signifies that it is security for the payment of a debt or performance of an obligation. It is a general term, and therefore includes mortgages, liens, writs of execution, etc.'")

The contractual agreement has to be perfected for the first charge to take effect against third parties, and this is exactly what happened in the case under discussion: with the cession of Interfund's claim arising out of the policy, a pledge was constituted in favour of Southern, Interfund remaining the holder of the right (it retained *dominium*). Interfund could, therefore, establish a second pledge on the right by means of a cession *in anticipando* to the appellant (see Scott 148). The effect of this procedure is that Southern acquired the power to realise the right in the event of non-payment of the loan by Interfund, or to rely on its real right of pledge in the event of insolvency (see *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 2 SA 761 (A) 771D).

As to the respondent's reliance on the cession, the appellant contended that Southern and Interfund never contemplated a cession "in the real sense of the word", inasmuch as Interfund's debt was already regarded as a first charge against the proceeds of the policy. The judge correctly rejected this argument and indicated that this first charge could not be exercised once Interfund was placed in liquidation; in other words, the first charge had no real (in the sense of effect against third parties) effect. In order to obtain real security, a cession *in securitatem debiti* had to be effected and that is exactly what the parties did.

In answer to this, it was contended on behalf of the appellant that such a cession had the effect of a merger, since Southern would thereby have become its own creditor. Here the court again correctly held that this cession was not an absolute cession, but was merely intended to provide security in the event of Interfund's liquidation, and therefore amounted to a cession *in securitatem debiti* (815H – I).

Up to this point I thoroughly agree with the judge, but I cannot agree with his explanation why a merger does not take effect in these circumstances. The following statement is to my mind open to criticism:

> "It was a cession *in securitatem debiti* and it was not intended to give the Southern the right forthwith to claim payment of the proceeds of the policy from itself so as to bring about a *confusio* or merger. In my opinion the cession could not at that stage result in a merger since there was not yet any obligation on the part of the Southern (as debtor) to pay the proceeds of the policy, and the Southern (as creditor) had no right to claim payment thereof until such time as it became due and payable" (815I – 816A).

This statement is open to criticism because, although the court probably had the pledge construction in mind (Reinecke 1992 *TSAR* 678 seems to be in doubt which form of security cession the court had in mind, but as will appear from the rest of this paragraph, it could only have been a pledge), the judge misinterpreted the nature of the pledgee's right in such a case. The reason why a merger could not take effect is not the fact that Southern could not claim

payment forthwith, but rather that it did not become creditor at all, but merely acquired the power (entitlement, capacity, "bevoegdheid") to realise the right on non-payment of the loan. The right itself remained with the pledgor. He was therefore still the creditor and merger could not take effect.

The position would be completely different if the principles pertaining to an out-and-out security cession were to be applied, as was done recently in *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 2 SA 739 (C) and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A). In terms of that construction, the appellant could have relied on merger because the cessionary becomes holder of the right; in other words he becomes creditor, and merger can operate.

In his review of this case, Reinecke (1992 *TSAR* 678) is prepared to accept the pledge construction, but submits a totally new interpretation of it, which to my mind is wholly untenable. Without going into the detail of his viewpoint, I should like to refer to the following: Where Reinecke discusses the true meaning of the retention of the *dominium* by the pledgor, he makes the following observation:

> "Die howe se opvatting dat die sekerheidsgewer 'eienaar' van die vorderingsreg bly (vgl bv *Bank of Lisbon and South Africa v The Master*), beteken net eenvoudig dat die sekerheidsgewer steeds *reghebbende ingevolge die vorderingsreg is net soos 'n persoon eienaar van 'n saak bly ondanks die feit dat hy die saak verpand het*" (678; my italics).

However, where he explains the content of the pledgee's right, he states:

> "Die reg van die sekerheidsnemer ooreenkomstig die pandkonstruksie het betrekking op 'n prestasie . . . en *sy reg is dus niks anders as 'n vorderingsreg nie*" (679; my italics).

Reinecke concludes:

> "Indien 'n verpanding beoog word, word 'n nuwe vorderingsreg geskep [what is the source of this right?] en wel ten opsigte van dieselfde prestasie waarop die sekerheidsgewer se vorderingsregte betrekking het."

With this view of a pledge as a basis, Reinecke comes to the conclusion that the appellants should have succeeded with their argument that a merger took effect. I cannot agree with him and support the view of Grosskopf JA in the case under discussion.

It is clear that Reinecke is very reluctant to accept this "dogmatically somewhat suspect" phenomenon of a pledge of a personal right (claim, creditor's right, "vorderingsreg"), but that the courts' approach to the issue has forced him to look at it afresh. It is, however, difficult for him to take the drastic leap and forget the dogmatically "pure" views on ("subjective") rights. This burdens him with the above argument that the pledgor and the pledgee both have a personal right ("vorderingsreg") to the same performance at the same time. He does not limit the "claim" to anything less than the full right ("vorderingsreg"). If one is to accept the idea of a pledge of claims at all, one has to forget the dogmatic objections to this phenomenon, as the Germans had to concede in the *Bürgerliches Gesetzbuch*, and apply the principles of pledge as far as possible. The Dutch also opted for the latter approach in their *Nieuw Burgerlijk Wetboek*, and it is for the academics to give a sound theoretical explanation for the phenomenon, as was also suggested by Lubbe ("Sessie *in securitatem debiti* en die komponente van die skuldeisersbelang" 1989 *THRHR* 485).

After discarding the contention that there was a duty on Southern to disclose their prior cession, Grosskopf JA held that the appeal had no reasonable

prospect of success and dismissed with costs the application for condonation and reinstatement of the appeal.

This case once again clearly indicates the difference between a pledge of personal rights and an out-and-out security cession and, in particular, that the latter does not make sufficient allowance for the fact that the parties intended the cession merely to serve a security purpose. By choosing a pledge and carefully drawing up the deeds of cession to reflect their intention correctly, parties can avoid the difficulties which have been encountered in the out-and-out security construction.

In recent years, serious problems have arisen in cases on security cessions, in particular in connection with *locus standi* (*Spendiff v JAJ Distributors* 1989 4 SA 126 (C); *Springtex Ltd v Spencer Steward and Co* 1990-11-16 case no 6135/88 (C); *Simonsig Landgoed Coastal Wines (Edms) Bpk v Theron Van der Poel Brink Roos* case no 1991-08-15 case no 14131/89 (C); *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 2 SA 739 (C)), insolvency, attachment, tax matters and, very recently, the cedent's right of lien against his debtor (*Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A)). In the last-mentioned case Nienaber JA adopted the dogmatically pure approach to cessions *in securitatem debiti* and applied the principles pertaining to out-and-out security cessions with the result that the cedent, who had transferred all his claims to the bank *in securitatem debiti*, could no longer rely on his debtor and creditor lien against his debtor, since he no longer had a claim ("vorderingsreg") against his debtor. The bank, on the other hand, could also not rely on the debtor and creditor lien, since it had no control over the property which formed the object of the lien!

Although I have previously suggested a limited measure of law reform in this field of the law, I think that the time is now ripe for codification of the entire law of cession, but in particular, and very urgently, of cession *in securitatem debiti*.

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JURISDICTIONAL FACTS: THE LABOUR RELATIONS ACT 28 OF 1956

Food and Allied Workers Union v Regional Director, Western Cape Department of Manpower 1991 12 ILJ 543 (C); Beukes v Director-General, Department of Manpower 1993 1 SA 19 (C)

Upon compliance with certain formalities set out in section 35 of the Labour Relations Act 28 of 1956 (hereafter the act), the "inspector defined by regulation" (s 35(1)) shall "establish a conciliation board" (s 35(4)). In the exercise

of the statutory powers and duties of the inspector, the following questions, *inter alia*, arise:

- Is the inspector obliged to establish a conciliation board once the formal statutory requirements have been met?
- Must/can the inspector first/also enquire into the existence of objective jurisdictional prerequisites (that is jurisdictional facts) as the condition precedent to his establishing a conciliation board notwithstanding apparent compliance with the formal statutory requirements? If the inspector is not competent to decide the issue concerning the jurisdictional facts, then who is and what is the basis for this?

These questions are considered in the light of the two decisions under discussion. As far as jurisdictional facts are concerned, the position in our law may be stated as follows:

> "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as 'jurisdictional facts' . . . which must objectively exist before the tribunal has power to act; consequently a determination on the jurisdictional facts is always reviewable by the Courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it . . ." (per Leon J in *Pinetown Town Council v President of the Industrial Court* 1984 3 SA 173 (N) 179A – C).

In the *FAWU* case the applicants had applied for the establishment of a conciliation board in terms of section 35 of the act. However, a dispute arose over whether the applicants were employed in the "meat processing industry" or in farming operations. If the applicants fell within the latter category, then in terms of section 2(2) of the act, they were excluded from the ambit of the act. The first respondent (the Regional Director of Manpower), in assuming jurisdiction to decide this dispute, refused to establish a conciliation board because the applicants were deemed to have been employed in farming operations. For the court, the jurisdictional issue which had to be resolved, was whether a labour dispute existed in any undertaking, industry or occupation as defined in section 2 of the act. Adopting a purposive approach to statutory interpretation, the court read section 2(2) within the context of section 76(1)(a)*bis*, 76(3) and 76(4) and set aside the first respondent's decision not to establish a conciliation board. The court also set out the inspector's powers and duties as follows (548C – E):

> "[T]he only reasonable inference in my view is that the legislature intended that a s 35 application should in such circumstances be deferred pending the determination of the s 2 dispute and that the minister should be requested to act in terms of s 76(1).
>
> When a dispute referred to in s 76(1) becomes apparent upon the receipt of a s 35 application, the inspector may not make a decision to grant or refuse the application. He must defer the establishment of a conciliation board until the question has been determined by the industrial court in terms of s 76 and advise the parties accordingly. To this end, the inspector should forthwith request the minister to refer the question in terms of s 76(1) to the industrial court for determination."

In the *Beukes* case the jurisdictional fact which had to be established was whether the applicant was a teacher at a college maintained wholly or partially from public funds. Such persons are also excluded from the ambit of the act in terms of section 2(2). Although the applicant conceded that he was a lecturer at a college, he nevertheless asserted that he was an "employee" and that the third respondent was an "employer" in terms of the act. As such, he was

not employed by the college. Under these circumstances it was contended that the second respondent (the inspector) was obliged to establish a conciliation board once the application was formally in order. Moreover, the inspector's statutory powers and duties precluded him from considering and deciding whether the act applied to an applicant for a conciliation board. In assuming jurisdiction to decide this issue, the second respondent concluded that a conciliation board could not be established because the applicant was excluded from the scope of the act in terms of section 2(2). In finding that the second respondent had acted regularly, the court set out the inspector's powers and duties thus (26D – E):

> "[H]e [the second respondent – inspector] would be determining an objective jurisdictional fact, i.e. a fact the existence of which is contemplated by the legislature as a necessary prerequisite to the exercise of the statutory power. If the jurisdictional fact does not exist, then the power may not be exercised . . . In this case, a conciliation board could not have been established by the inspector if the applicant fell within one of the exclusions contained in s 2(2) of the Act. Whether he did or not was the objective jurisdictional fact that the inspector had to determine as a prerequisite before he could have established a conciliation board."

The court went further and stated (26H – I):

> "[T]he inspector is, in my view, not merely a rubber stamp who must, without more, establish a conciliation board if the requirements of s 35 have been met. He must first determine if he has the power to establish a board, i.e. if the applicant falls within the ambit of the Act . . . He has, in my view, the power to determine the question of fact and does not have to have it decided by some other tribunal, such as the industrial court."

At first glance these two decisions appear to have arrived at opposite conclusions about the same issue in dispute: in the *FAWU* decision it was held that it was the industrial court and not the inspector which had jurisdiction, whereas in the *Beukes* decision the court concluded that the inspector had the power to determine the issue and was not obliged to have it decided by the industrial court. However, as will be observed below, there are differences which, it is submitted, support both decisions. It should be noted first of all, though, that both decisions agree on the following: the jurisdictional fact that had to be objectively established before the conciliation process could be invoked, was whether or not the employee fell within the ambit of the act as defined in section 2; that where the parties dispute the fact that an employee falls within the ambit of section 2, the resolution of that dispute is a jurisdictional prerequisite before any conciliation board can be established in terms of section 35; and that the inspector merely fulfilled an administrative function and had no discretionary power or jurisdiction.

If one compares the approach of the court in the *FAWU* decision with that in the *Beukes* decision, the following differences emerge:

(a) In the *FAWU* decision the decisive sections of the act applicable to the issue for determination were sections 2(2), 76 and 35. In the *Beukes* decision, although the court did refer to section 2(2), the relevant and decisive section for interpretation was section 35.

(b) In the *FAWU* decision the nature of the dispute was decisive and had the following consequences: first of all, section 76(1)(a)*bis* specifically reserved disputes of this nature to be determined by the industrial court: secondly, the dispute was also the jurisdictional fact which had to be established. For the court in the *Beukes* decision, the decisive issue was the powers and duties of the inspector,

the circumstances under which, the manner of and the conditions for its exercise. In other words, the court in the *FAWU* decision concluded that the inspector's powers and duties in terms of section 35 did not extend so far as to determine a dispute reserved by the act to be specifically determined by the industrial court. On the other hand, in the *Beukes* decision the inspector, in exercising his powers and duties in terms of section 35, had as a matter of course to establish the objective existence of jurisdictional facts which were a condition precedent to the exercise of his powers and duties. Accordingly, given the context and the nature of the dispute in the *FAWU* decision, it was in answer to the question,

> "What procedure is to be followed then when an inspector is confronted, after receipt of a s 35 application, with a dispute in regard to the jurisdictional prerequisites of employment qualification in terms of s 2?" (548B – C)

that the court, correctly it is submitted, decided that the inspector had unlawfully assumed authority to decide the particular dispute between the parties. It therefore also follows, as was pointed out in the *Beukes* decision, that the *FAWU* decision did not lay down a general principle concerning the inspector's powers and duties but was limited to that particular context only.

(c) The two cases also differ materially as far as the facts are concerned. In the *Beukes* decision the jurisdictional fact which had to be established (ie whether the employee was referred to in section 2(2) of the act) was admitted by the employee/applicant. On the other hand, in the *FAWU* decision the very status of the employees (which incidentally was also the jurisdictional fact which had to be established) was central to the dispute.

Per saldo, the *Beukes* decision concluded that the inspector could, and in fact was obliged, to determine whether objective facts existed for the exercise of his statutory powers and duties while the *FAWU* decision concluded that the inspector's powers and duties did not include that of determining a particular dispute reserved by the act for determination by the industrial court. The issues in dispute were therefore different.

In conclusion, it is also interesting to note that in the *FAWU* decision the court rejected the submission that

> "the inspector must by necessary implication be empowered to resolve it [the dispute referred to in s 76(1)] . . . so as to establish the jurisdictional fact" (548A).

In terms of section 76(1) of the act

> "[t]he Minister may, if he deems it expedient to do so, refer any question to the industrial court for determination as to",

whereafter certain specific categories of disputes are set out.

One notes here that the minister is vested with discretionary power. The possibility therefore exists that the minister may well conclude that it is not expedient to refer the matter to the industrial court for determination. In this event, in terms of section 76 of the act, the following courses are possible:

Section 76(3) provides that any registered trade union, employer's organisation, industrial council or employer concerned in the matter may apply to the industrial court for determination of the question; where the question arises in any court of law, the court shall, in terms of section 76(4), if the question raised has not previously been determined by the industrial court and the determination thereof is necessary for the purposes of the proceedings, adjourn the proceedings and refer the matter to the industrial court for determination.

An apparent lacuna in the possible courses available exists where *the applicant/employee is not a member of a registered trade union*, and where the minister decides not to refer the matter to the industrial court, or the matter has not arisen in a court of law or where the industrial council, employer's organisation or the employer concerned decide not to apply to the industrial court for determination of the question. Under these circumstances should it be taken that the inspector has implied power to resolve the section 76 dispute so as to establish the jurisdictional fact prior to the exercise of his statutory powers and duties?

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DIE VADER VAN DIE BUITE-EGTELIKE KIND SE TOEGANGSREG

S v S 1993 2 SA 200 (W)

1 Inleiding

Een van die mees kontroversiële onderwerpe in die hedendaagse Suid-Afrikaanse privaatreg is waarskynlik die sogenaamde "toegangsreg" van die vader ten opsigte van sy buite-egtelike kind. Die huidige regsposisie is dat die moeder alleen ouerlike gesag oor haar buite-egtelike kind het en dat die vader nie 'n inherente toegangsreg tot so 'n kind het nie (sien oa *F v L* 1987 4 SA 525 (W); *B v P* 1991 4 SA 113 (T); *S v S*). Die vader kan egter – soos enige ander derde party – aansoek doen om 'n bevel wat aan hom toegang tot die kind verleen.

Ons bespreek vervolgens die ontwikkeling in die regspraak tot en met *S v S*, die standpunte van regskrywers, en die Suid-Afrikaanse Regskommissie se aanbevelings oor die toegangsreg van 'n vader tot sy buite-egtelike kind.

2 Onlangse ontwikkeling in die regspraak

Ten spyte van 'n vroeëre toegeneentheid in die regspraak tot die vaders van buite-egtelike kinders (bv *Wilson v Ely* 1914 WR 34, *Davids v Davids* 1914 WR 142 en *Matthews v Haswari* 1937 WLD 110 waarin vaders se aansoeke vir redelike toegang tot hul buite-egtelike kinders toegestaan is), het die howe sedert 1987 'n ander rigting ingeslaan.

In *Douglas v Mayers* 1987 1 SA 910 (Z) het die applikant en die respondent vier maande lank 'n fisiese verhouding gehad; daarna het die respondent swanger geraak en later aan 'n seun geboorte geskenk. Die applikant het onderhoud vir die kind betaal. Ten spyte van die applikant se versoeke om toegang tot die kind, het die respondent sedert die kind se geboorte geweier om enige toegang aan die applikant te verleen. Die applikant het gevolglik in die hooggeregshof van Zimbabwe 'n aansoek om redelike toegang tot die minderjarige kind gebring

– volgens hom sou dit in die beste belang van die kind wees. Die respondent het die aansoek teengestaan. Sy het aangevoer dat sy nog baie jonk is, dat sy waarskynlik weer sal trou en dat sy dan graag die voogdyskap van haar seun aan sy stiefvader sal wil oordra.

Die hof ontleed van die vroeëre beslissings hierbo vermeld en kom tot die gevolgtrekking dat die vader van 'n buite-egtelike kind geen inherente toegangs- of bewaringsreg het nie. Die vader het soos enige ander buitestander die reg om 'n toegangsreg te eis, wat toegestaan sal word indien die vader die hof kan oortuig dat die toestaan van hierdie reg in die beste belang van die kind is. Regter Muchechetere sê dat die hof gewoonlik nie sal inmeng nie tensy daar "some very strong ground compelling it to do so" teenwoordig is. Daar moet egter aan dieselfde vereistes en voorwaardes voldoen word as in gevalle waar daar met die regte van die vader van 'n binne-egtelike kind ingemeng word. *In casu* beslis die hof dat die applikant nie die hof oortuig het dat daar hoegenaamd enige rede bestaan waarom die hof in belang van die kind met die respondent se bewaringsregte moet inmeng nie. Die applikant se aansoek word gevolglik van die hand gewys.

In *F v L supra* het die applikant aansoek gedoen om 'n verklarende bevel dat hy die natuurlike vader van 'n sekere kind is omdat hy gedurende die tyd waarin bevrugting kon plaasvind, geslagsverkeer met die eerste respondent gehad het en dat hy daarom redelike toegang tot die kind behoort te verkry. Die eerste respondent, wat drie weke voor die kind se geboorte met die tweede respondent getroud is, het erken dat sy gedurende die tyd waarin bevrugting kon plaasvind, met die applikant geslagsverkeer gehad het, maar beweer dat sy gedurende dié tyd ook met die tweede respondent geslagsverkeer gehad het en dat laasgenoemde die vader van haar kind is.

Regter Harms kom ook tot die gevolgtrekking dat die vroeëre beslissings nie regtig gesag is vir die standpunt dat vaders 'n inherente reg van toegang tot hul buite-egtelike kinders het nie. Volgens hom sal die hof slegs met die moeder se ouerlike gesagsregte oor haar buite-egtelike kind inmeng as die welsyn van die kind in gevaar is. Die hof beslis verder dat 'n moeder die reg het om 'n vader vir haar buite-egtelike kind te kies in omstandighede soos hier ter sprake en dat dit in die openbare belang is dat die applikant nie toegelaat word om met die eerste respondent se keuse in te meng nie. Die applikant se aansoek word gevolglik van die hand gewys.

In *F v B* 1988 3 SA 948 (D) het die applikant sedert die kind se geboorte vir twee jaar lank 'n ouer-kindverhouding met sy buite-egtelike seun gehad. Daarna het hy vir nog vyf maande redelike toegang tot die kind uitgeoefen totdat die respondent skielik geweier het dat hy verdere kontak met die kind het. Die applikant het gevolglik aansoek gedoen om 'n bevel om die kind die eerste en derde naweek van elke maand by hom in te neem. Die respondent, wat intussen met 'n ander man getroud is, het die aansoek geopponeer.

In sy uitspraak steun regter Kriek sterk op die beslissing in *Douglas v Mayers supra*. Die hof bevestig dat daar slegs in uitsonderlike gevalle met die *de jure* posisie (naamlik dat daar geen regsband tussen die vader en sy buite-egtelike kind bestaan nie) ingemeng sal word, en dan net indien die belange van die kind dit vereis. Regter Kriek sê dat hoewel dit moontlik is om die band te herstel wat tussen die applikant en sy seun bestaan het, dit vir die hof blyk dat die respondent en haar man geensins tot sodanige herstelling sal saamwerk nie.

Indien 'n redelike toegangsreg aan die applikant toegestaan sou word, sou die kind die slagoffer van die bitterheid tussen die partye word. Die respondent se man het in ieder geval 'n vaderfiguur vir die kind geword en aansoek gedoen om die kind aan te neem. Dit is gevolglik nie in die beste belang van die kind om enige toegangsreg aan die applikant te verleen nie en sy aansoek word van die hand gewys.

Uit die drie beslissings waarna tot dusver verwys is, blyk dit duidelik dat dit bykans onmoontlik geword het vir 'n vader om in die afwesigheid van uitsonderlike omstandighede enige toegangsreg tot sy buite-egtelike kind te verkry.

In *B v P supra* het die appellant en respondent as man en vrou saamgewoon toe hul buite-egtelike kind in 1979 gebore is. In 1984 is die partye uitmekaar maar die respondent het vir vier jaar daarna 'n redelike toegangsreg tot die kind aan die appellant verleen. Sedert 1989 het die respondent geweier dat die appellant enige kontak met die kind het. Die appellant het in die mosiehof aansoek gedoen om 'n bevel wat aan hom redelike toegang tot sy buite-egtelike kind sal verleen. Die hof *a quo* weier die bevel omdat daar geen dwingende redes vir die verlening daarvan was nie. Die appellant het teen hierdie beslissing geappelleer.

In appèl kom die hof tot die gevolgtrekking dat *Matthews v Haswari supra* nie gesag vir die standpunt bied dat die vader van 'n buite-egtelike kind 'n reg op toegang het nie. Daar word egter geïmpliseer dat die vader wel bewaring oor sy buite-egtelike kind kan verkry as dit in die beste belang van die kind is. Die hof beslis derhalwe dat die vader van 'n buite-egtelike kind wel die hof in sekere omstandighede kan nader om 'n bevel wat aan hom 'n toegangsreg sal verleen en dat die hof selfs in gepaste omstandighede die moeder haar bewaring kan ontneem. Die primêre oorweging is die beste belang van die kind, sonder om enige kwalifikasies daarby te voeg. Die toetse wat in *Douglas v Mayers supra* en *F v B supra* toegepas is, kan dus nie gebruik word wanneer daar oor die toegangsreg van die vader van 'n buite-egtelike kind besluit word nie. 'n Applikant moet op oorwig van waarskynlikheid bewys dat die bevel in die beste belang van die kind sal wees en dat dit nie die bewaringsreg van die moeder onbehoorlik sal aantas nie. *In casu* het die hof bevind dat die appellant 'n *prima facie* saak uitgemaak het wat wel die gevraagde regshulp staaf, maar dat die saak vir die aanhoor van mondelinge getuienis verwys moet word.

Uit hierdie beslissing blyk dat dit darem weer moontlik is vir vaders om toegangsreg tot hul buite-egtelike kinders te verkry mits sodanige reg in die beste belang van die kind is en nie onbehoorlik op die moeder se bewaringsreg inbreuk maak nie.

Daarna het *Van Erk v Holmer* 1992 2 SA 636 (W) gevolg. Die applikant en die respondent het vir ongeveer drie jaar saamgewoon. Uit hierdie verhouding is 'n seun gebore. Toe die kind twee jaar oud was, het die respondent die applikant verlaat en by haar ouers ingetrek. Hierna het die respondent enige kontak tussen die applikant en die kind geweier. Die applikant het gevolglik aansoek gedoen om 'n bevel ingevolge waarvan hy 'n reg van redelike toegang tot die betrokke kind sal verkry. Die hof het die aangeleentheid na die gesinsadvokaat verwys en sy het 'n omskrewe reg op toegang voorgestel. Die hof het die aanbeveling aanvaar en die aansoek toegestaan. Hierna het die partye redes vir die hof se beslissing aangevra.

Regter Van Zyl bevind dat alhoewel die gemenereg niks oor 'n vader se reg van toegang tot sy buite-egtelike kind vermeld nie, dit nie die afleiding regverdig dat so 'n reg nie bestaan of kan bestaan nie. Net soos openbare beleid vereis dat daar geen onderskeid tussen 'n buite- en 'n binne-egtelike kind gemaak moet word nie, bestaan daar vandag ook geen regverdiging om enige onderskeid tussen die vaders van sulke kinders te maak nie. 'n Vader is verplig om sy buite-egtelike kind te onderhou en dit is onregverdig dat hy nie toegelaat word om sy kind te besoek of te sien nie, ten spyte daarvan dat hy bereid is om hom ten volle aan die belang van die kind te onderwerp.

Regter Van Zyl beslis verder dat die tyd aangebreek het dat ons howe 'n inherente reg op toegang aan die natuurlike vader van 'n buite-egtelike kind moet erken, en wat slegs ontsê moet word as die toegang nie in die beste belang van die kind is nie.

Alhoewel regter Van Zyl gelukgewens kan word met hierdie stap in die regte rigting, kan die beslissing regtens nie gevolg word nie. Volgens die beginsels van *stare decisis* moet die volbankbeslissing van die Transvaalse Provinsiale Afdeling in *B v P supra* gevolg word. In *S v S*, wat hieronder breedvoerig bespreek word, en in *B v S* 1993 2 SA 211 (W) was dit dan ook die geval. In laasgenoemde saak sê regter Spoelstra dat hy nie bewus is van een enkele saak waarin die *Van Erk*-beslissing gevolg is nie. Hy beklemtoon verder dat die Transvaalse howe verplig is om *B v P supra* te volg totdat die parlement of die appèlhof die bestaande regsreël, naamlik dat daar geen inherente reg van toegang of bewaring vir die vader van 'n buite-egtelike kind bestaan nie, omverwerp. Dit is egter jammer dat regter Spoelstra "a very strong and compelling ground" vereis voordat toegang aan die vader verleen sal word (214G) ten spyte van die verwerping van hierdie streng toets in *B v P supra*.

3 Beslissing in *S v S*

In hierdie beslissing het die applikant aansoek gedoen om 'n bevel wat aan hom toegang tot sy buite-egtelike kind sal verleen. Die applikant en respondent het 'n verhouding aangeknoop terwyl albei nog in ander verhoudings betrokke was, en die respondent het swanger geraak. Die applikant het aanvanklik vaderskap betwis en geweier om 'n bydrae tot die onderhoud van die kind te maak. Hy het die kind slegs per geleentheid gesien, en versoeke van sy kant af om toegang tot die kind was sporadies. Ten tyde van die aansoek het die respondent saam met haar vorige kêrel gewoon wat vir alle doeleindes vir die kind 'n vader was. Die applikant was werkloos maar het wel die kind onderhou.

Adjunk-regterpresident Flemming wys die aansoek van die hand in 'n uitspraak waarin hy die beslissing in *Van Erk v Holmer supra* deeglik onder die loep neem en weens die volgende twee hoofredes kritiseer:

Die hof beslis eerstens dat hy nie van die volbankbeslissing in *B v P supra* mag afwyk nie (203I) en dat die *stare decisis*-reël in die *Van Erk*-saak verbreek is (205B). Regter Van Zyl het in die *Van Erk*-saak beslis dat hy nie glo dat toegang tot 'n kind altyd of noodwendig as 'n insident van ouerlike gesag beskou moet word nie. Regter Flemming wys egter in *S v S* daarop dat daar juis in *F v L supra* beslis is dat toegang 'n insident van ouerlike gesag is, en dat regter Van Zyl nie in sy beslissing aangetoon het waarom *F v L supra* verkeerd is nie. Regter Flemming vra die volgende vraag:

> "[O]n what authority can it be said that alongside the mother's uncurtailed rights the father, like a divorced father, has a concurrent and to some extent competing right?"

Hy voeg by dat dit voor die *Van Erk*-saak gevestigde reg was dat die vader van 'n buite-egtelike kind geen inherente toegangsreg het nie, hoewel daar tans baie gedebatteer word oor wat die regsposisie behoort te wees (204F – H).

Tweedens kritiseer regter Flemming die aanvaarding in die *Van Erk*-saak van die beginsel dat 'n hof die reg kan wysig om geregtigheid te laat geskied wanneer daar geen bindende wetgewing, presedente of moderne gebruike is nie (205C – D). Volgens regter Flemming is hierdie beginsel nie hier toepaslik nie aangesien daar wel presedente is (205D). Hy voeg by dat die feit dat geen gemeenregtelike gesag gevind kan word vir die uitgangspunt dat die vader 'n toegangsreg tot sy buite-egtelike kind het nie, 'n sterk aanduiding is dat so 'n reg nie bestaan nie. Hiermee verskil hy van die *Van Erk*-saak waarin regter Van Zyl aanvaar het dat die afwesigheid van gesag daarop dui dat die aangeleentheid glad nie oorweeg is nie (205E – F).

Regter Flemming gaan dan voort om enkele opmerkings te maak oor oorwegings van openbare beleid wat regterlike diskresie kan beïnvloed (206A – 207I):

(a) Indien die vraag is of die reg moet bly soos dit is, is daar nie plek vir regterlike inisiatief nie. Die reg moet toegepas word selfs al glo 'n regter dat dit hersien moet word (206B – C).

(b) Die manier wat aangewend word om die openbare mening te bepaal, is volgens regter Flemming 'n proses wat 'n groot risiko inhou om foute te begaan. Hy sê dat "[r]isks are increased by relying on magazines striving for circulation, persons who represent the fringes of opinion, etc" (106E – F).

(c) Die probleem raak volgens regter Flemming die gemeenskap. Die huidige regsposisie kan dui op druk wat vanuit die gemeenskap op die natuurlike vader uitgeoefen word om die situasie, en veral die "plight of the (expecting) mother", ernstig te oorweeg (206I – J).

(d) Volgens regter Flemming het regter Van Zyl in die *Van Erk*-saak die verkeerde indruk geskep dat die gevestigde reg ongeregverdig sektaries is deurdat dit op Christelike uitgangspunte gebaseer is. Daar bestaan ook geen logika in die stelling dat 'n reël teen die openbare beleid is bloot omdat dit nie 'n bekende oorsprong het nie. Ons reg se benadering is net soveel Christelik as wat dit Moslems of inheemsregtelik is – ook in die inheemse reg het die vader geen regte ten opsigte van sy buite-egtelike kind nie (207A – G).

Regter Flemming wys daarop dat die wetgewer moontlik in die toekoms die reg kan wysig. Tot dan is die regsposisie dat die moeder steeds uitsluitlik ouerlike gesag oor haar buite-egtelike kinders het, wat die bevoegdheid insluit om te besluit wie toegang tot die kind het. Indien 'n hof moet oorweeg of daar met die diskresie ingemeng moet word wat die moeder as bewaargewende ouer het, moet in ag geneem word dat die moeder (en nie die hof nie) oor hierdie diskresie beskik, en dat die bevel nie onbillik met die moeder se reg moet inmeng nie. Die maatstaf wat gebruik moet word, is die beste belang van die kind (207J – 208H).

Laastens kritiseer die hof die *Van Erk*-saak op die volgende twee gronde:

Eerstens wys regter Flemming daarop dat dit verkeerd is om aan te voer, soos wat regter Van Zyl doen, dat dit grof onregverdig is dat 'n vader sy buite-egtelike kind moet onderhou terwyl hy nie die kind mag sien of besoek nie. Regter Flemming wys tereg daarop dat die vader se onderhoudsplig bestaan ongeag of dit goed of sleg is dat hy met die kind kontak het. Daar word algemeen aanvaar

dat 'n vader wat sy buite-egtelike kind onderhou, nie iets in ruil daarvoor kan verwag nie (209D – E).

Tweedens kritiseer regter Flemming die gebruik van die woord "booby prize" deur regter Van Zyl om die vader se toegangsreg te beskryf, omdat hierdie woord impliseer dat daar iets aan die vader verskuldig is (209F).

Wat die behoefte betref van die kind om met die vader te bind, is regter Flemming van mening dat 'n saak nooit met vooropgestelde idees benader moet word nie aangesien die feite van een saak nooit met dié van 'n ander ooreenstem nie; dit geld ook die behoefte van 'n kind om te weet wie sy of haar vader is (209G – I).

Buiten die moeder se diskresie oor wie toegang tot die kind mag hê, kyk regter Flemming laastens na die gewilligheid van die vader om 'n huis vir die kind te vestig, of, indien die moeder dit weier, sy finansiële ondersteuning. Verdere faktore om in ag te neem is die *bona fide* belangstelling wat die vader in die kind het en sy gewilligheid om 'n "regte" vader te wees en nie net 'n "tjekboek"-pa nie. Daar moet ook in ag geneem word dat die vader se posisie swakker is indien die moeder met 'n ander man in 'n familie-opset gevestig het (210E – G).

4 Enkele opmerkings oor die beslissing in *S v S*

Die beslissing in *S v S* is in ooreenstemming met die huidige regsposisie. In dié opsig is die kritiek teen *Van Erk v Holmer supra* geregverdig en moet die beslissing verwelkom word. Oorwegings van openbare beleid speel egter 'n belangrike rol in die huidige debat oor die toegangsreg van die vader ten opsigte van sy buite-egtelike kind. Daarom is dit nodig om enkele opmerkings te maak oor sommige van regter Flemming se uitlatings oor openbare beleidsoorwegings.

Regter Flemming merk op dat die huidige regsposisie moontlik 'n manier is waarop die gemeenskap druk uitoefen op die natuurlike vader om die saak ernstig te oorweeg (206H – J). Word hiermee bedoel dat die idee is om die vader te dwing om 'n huwelik te oorweeg? As dit die geval is, is dit jammer dat regter Flemming nie van die standpunt van Eckard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 122 kennis geneem het nie. Sy dui juis aan dat buite-egtelike status nie meer soos vroeër 'n straf is wat volg wanneer geen huwelik gesluit is nie. Vandag is die gedagte dat mense aangemoedig word om te trou wanneer hulle besef dat hulle kinders andersins buite-egtelik gebore sal word, uitgedien (*idem* 124).

Regter Flemming wys daarop dat "there is also a mother's side to the matter" (206F). Dit is beslis waar, maar 'n stelling wat regter Flemming later in die uitspraak maak, noop die gevolgtrekking dat hy hierdeur juis die vader se kant van die saak misken. Hy vra: "Why should the father get any prize? For the joy brought by a drunken one night stand without any emotional involvement? For seduction? Or inadequate safety of technique?" (209F). Stellings soos hierdie dui op die veronderstelling dat alle vaders van buite-egtelike kinders sleg is. Die siening dat alle vaders van buite-egtelike kinders sleg of onbelangstellend is, is onwaar en verouderd (Eckard 1992 *TSAR* 125).

5 Standpunte van regskrywers

Skrywers verskil oor die vraag of 'n vader 'n inherente toegangsreg tot sy buite-egtelike kind behoort te hê en oor moontlike oplossings vir die probleem, maar

hulle is dit eens dat die huidige regsposisie onbevredigend is en dat die Suid-Afrikaanse Regskommissie die aangeleentheid behoort te oorweeg (sien par 7 *infra*).

Sommige skrywers is van oordeel dat die verlening van 'n inherente toegangsreg nie wenslik is nie, maar dat die vader die bevoegdheid moet hê om aansoek te doen om 'n bevel wat aan hom toegangsbevoegdhede ten opsigte van die kind verleen as hy kan bewys dat hy 'n deelnemende ouer (*participating parent*) is (Van Onselen "Tuff – the unmarried fathers' fight" 1991 *De Rebus* 499), of dat hy 'n verantwoordelikheidsin openbaar het deur sy kind te erken (Thomas "Investigation into the legal position of illegitimate children" 1985 *De Rebus* 336), of dat hy 'n *acknowledging father* is wat vrywillig vaderlike pligte op hom neem (Clark en Van Heerden "The legal position of children born out of wedlock" in Burman en Preston-Whyte (eds) *Questionable issue? Illegitimacy in South Africa* (1992) 56), of dat hy bewustelik en vrywillig ouerlike verantwoordelikhede met betrekking tot die kind aanvaar het en daar 'n gevestigde ouer-kind verhouding bestaan (Sonnekus en Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 232; vgl ook Labuschagne "Persoonlikheidsgoedere van 'n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" 1993 *THRHR* 414). Daar is ook diegene wat sterk voel oor die erkenning van 'n inherente toegangsreg (sien Boberg "The sins of the fathers – and the law's retribution" 1988 *BML* 35; Ohannesian en Steyn "To see or not to see? – that is the question" 1991 *THRHR* 254; Eckard 1992 *TSAR* 122).

6 Argumente teen en ten gunste van die verlening van 'n inherente toegangsreg

Verskeie argumente word geopper om die verlening van toegangsregte aan vaders van buite-egtelike kinders te regverdig. Die vernaamste is die volgende:

- Elke kind het 'n moeder en vader nodig vir die ontwikkeling van 'n eie persoonlikheid en identiteit. Kinders wat sonder hulle vaders grootword, openbaar ook die een of ander tyd 'n behoefte om te weet wie hul vaders is (Eckard 1992 *TSAR* 125).

- Vaders wat toegang tot hulle buite-egtelike kinders wil hê, sal hierdie reg meestal nie misbruik nie (Ohannesian en Steyn 1991 *THRHR* 258). Die siening dat alle vaders van buite-egtelike kinders sleg of onbelangstellend is, is 'n verouderde stereotipe siening wat nie met hedendaagse realiteite rekening hou nie (Eckard 1992 *TSAR* 125).

- Die klassifisering van kinders as buite-egtelik was die gevolg van die destydse strewe om die Christelike huwelik aan te moedig en buite-egtelike status was 'n straf wat gevolg het wanneer geen huwelik gesluit is nie (Eckard 1992 *TSAR* 124). Die moontlikheid dat hulle kinders buite-egtelike status sal hê as hulle nie trou nie, oorreed vandag relatief min mense om in die huwelik te tree.

- Burgerlike huwelike in ooreenstemming met Christelike waardes is nie meer die enigste blywende verbintenis tussen man en vrou in Suid-Afrika nie. Die feit dat kinders gebore uit Mohammedaanse, Hindoe of Swart inheemsregtelike huwelike steeds as buite-egtelik geklassifiseer word en sodanige kinders se vaders gevolglik geen toegangsregte het nie, hou nie rekening met hierdie werklikheid nie (*Van Erk v Holmer supra* 648I; Ohannesian en Steyn 1991 *THRHR* 259).

Die vernaamste argumente teen die verlening van 'n inherente toegangsreg aan vaders sluit die volgende in:

- Daar is in Suid-Afrika ernstige risiko's verbonde aan die toeken van outomatiese toegangsregte aan vaders, aangesien die moeder dit moeilik kan vind om toegang te verkry tot 'n hof waar sy sal kan bewys dat die vader 'n bedreiging vir die kind inhou (Clarke en Van Heerden 57). Dié outeurs verwys vermoedelik na finansiële probleme in hierdie verband (soos Sonnekus en Van Westing 1992 *TSAR* 240 vn 50). Sodanige oorwegings kan egter beswaarlik relevant wees in verrigtinge soos hierdie waar die primêre oorweging die kind se beste belang behoort te wees.

- Die verlening van outomatiese toegangsregte aan vaders sal daartoe lei dat die vader wat niks met sy kind te doen wil hê nie, periodiek sy regte kan uitoefen as dit tot sy eie voordeel strek en die gier hom beetpak (Sonnekus en Van Westing 1992 *TSAR* 240). Hierdie probleem kan sekerlik nie heeltemal ontken word nie, maar daar kan tog aanvaar word dat dit eerder in uitsonderingsgevalle as in die reël sal opduik en dat vaders meestal nie hulle toegangsregte sal misbruik nie (sien ook Ohannesian en Steyn 1991 *THRHR* 258).

7 Die Suid-Afrikaanse Regskommissie

Die regskommissie het onlangs die vader se regte ten opsigte van sy buite-egtelike kind oorweeg (*'n Vader se regte ten opsigte van sy buite-egtelike kind* Werkstuk 44 Projek 79 (1993)). Die kommissie het twee konsepwetsontwerpe gepubliseer wat die volgende bepalings oor die vader se toegangsbevoegdhede ten opsigte van sy buite-egtelike kind bevat:

In die eerste wetsontwerp word die huidige posisie behou waarvolgens die moeder van die buite-egtelike kind voogdy en bewaring oor die kind het. Die kind se vader kan toegang tot sodanige kind verkry deur daarom aansoek te doen (kl 1(1)). Die maatstaf is die beste belang van die kind (kl 1(2)) en die hof kan faktore soos die verhouding tussen die ouers onderling en die houding van die kind by die beoordeling van hierdie aansoek in ag neem (kl 1(3)).

Die tweede wetsontwerp verleen aan die vader van 'n buite-egtelike kind 'n reg op redelike toegang tot daardie kind tensy 'n bevoegde hof anders gelas (kl 1(1)). Die hof behou dus die bevoegdheid om die vader se toegangsreg te omskryf, te beperk of weg te neem op aansoek van die moeder van die kind (of enige ander belanghebbende persoon). Die maatstaf is weer eens die beste belang van die kind (kl 1(3)).

8 Gevolgtrekking

Die tyd het beslis aangebreek om 'n outomatiese toegangsreg aan die vader van die buite-egtelike kind te verleen; daarom word die regskommissie se tweede wetsontwerp (sien par 7 *supra*) verkies. Die erkenning van 'n outomatiese toegangsreg sal die onhoudbaarheid van die vader se huidige posisie verlig sonder om die moeder se posisie noodwendig te verswak. As die vader nie sy toegang redelik uitoefen nie, sal die moeder die hof geredelik kan oortuig dat toegang nie in die kind se belang is nie (Eckard 1992 *TSAR* 129).

Die oplossing wat deur sommige outeurs voorgestel word dat net 'n erkennende of deelnemende vader toegang behoort te hê, of dat 'n gevestigde ouerkindverhouding reeds moet bestaan, sal die vader van die buite-egtelike kind

se reeds benarde posisie net verder verswak. 'n Mens kan jou nouliks voorstel hoe 'n vader wat reeds vanuit die staanspoor nie deur die moeder toegelaat is om sy buite-egtelike kind te sien nie, die bestaan van 'n gevestigde ouer-kindverhouding sal kan bewys.

Die beste belang van die kind-maatstaf, reg toegepas, behoort enige verdere besware teen die verlening van 'n outomatiese toegangsreg vir die vader van die buite-egtelike kind te ondervang.

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DIE REG OP PRIVAATHEID: REGSPERSONE, ONREGMATIGHEID EN DIE OPENBARE INLIGTINGSBELANG

Financial Mail (Pty) Ltd v Sage Holdings 1993 2 SA 451 (A)

Die respondente, 'n openbare maatskappy en sy voorsitter, het 'n interdik in die hof *a quo* bekom ten einde die appellante te verbied om 'n artikel in die *Financial Mail* te publiseer op grond daarvan dat die artikel gebaseer was op inligting wat op onregmatige wyse verkry is en lasterlik jeens die respondente was. Dit was gemenesaak dat dele van die artikel verkry is, eerstens van 'n memorandum wat "strictly private and confidential" gemerk was en ten aansien waarvan daar nooit toestemming verleen is dat dit openbaar gemaak mag word nie; en tweedens van bandopnames van telefoongesprekke tussen een van die eerste respondent se direkteure en verskeie buitestanders wat deur middel van 'n ongemagtigde meeluisteringsapparaat bekom is (alhoewel die appellante self nie by die ongeoorloofde meeluistering betrokke was nie).

Een van die belangrikste geskilpunte in verband met die toestaan van die interdik was of die gebruik van die gewraakte inligting deur die appellante in die beoogde artikel onregmatig sou wees. In die hof *a quo* word die interdik toegestaan op grond daarvan dat die respondent se "right to trade and carry on a lawful business" deur die publikasie geskend sou word. Alhoewel die appèlhof die resultaat van die hof *a quo* se beslissing bevestig, verskil hoofregter Corbett oor die juridiese grondslag daarvan. Hy is naamlik van mening, anders as regter Joffe in die hof *a quo*, dat die *reg op privaatheid* as persoonlikheidsreg ook 'n regspersoon toekom (462B – E). Hy laat hierop volg (462E – 463B):

> "I need not essay a definition of the right to privacy. Suffice it to identify two forms which an invasion thereof may take, viz (i) an unlawful intrusion upon the personal privacy of another and (ii) the unlawful publication of private facts about a person (see McQuoid-Mason *The Law of Privacy in South Africa* at 37-9, 86-8, 135 *et seq*, 169 *et seq*; [Neethling, Potgieter and Visser] *Deliktereg* [1992] (*op cit* at 346-7); Neethling *Persoonlikheidsreg* 2 nd ed at 217-34). Of course, not all such intrusions or publications are unlawful. And in demarcating the boundary between lawfulness and

> unlawfulness in this field, the Court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court (cf *Schultz v Butt* 1986 (3) SA 667 (A) at 679B-C; *S v A and Another* 1971 (2) SA 293 (T) at 299C-D; *S v I and Another* 1976 (1) SA 781 (RA) at 788H-789B; *Deliktereg* (*op cit* at 346)). Often, as was pointed out by Joffe J (see reported judgment at 130C-131E), a decision on the issue of unlawfulness will involve a consideration and a weighing of competing interests . . . [I]n a case of the publication in the press of private facts about a person, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the public, if any, to be informed about such facts. In this weighing-up process there are usually a number of factors to be taken into account (see *Persoonlikheidsreg* (*op cit* at 243 *et seq*)). Whether the defendant's competing interest should be regarded as a ground of justification ('regverdigingsgrond' – see *Persoonlikheidsreg* (*op cit* at 237 *et seq*)) which rebuts a *prima facie* unlawfulness or whether it is simply one of the facts to be taken into account in determining unlawfulness in the first place need not now be considered."

Met betrekking tot die onregmatigheidsvraag *in casu*, vervolg die hoofregter, is

> "the fact that the information in question was obtained by means of an unlawful intrusion upon privacy . . . a factor of major significance. In *Persoonlikheidsreg*, Prof Neethling states (at 223):
>
> > 'Dit behoef myns insiens geen betoog nie dat indien 'n persoon kennis van private feite deur 'n onregmatige indringingshandeling bekom, enige openbaarmaking van sodanige feite deur daardie persoon, of trouens enige ander persoon, die benadeelde se reg op privaatheid skend.'
>
> While I agree, with respect, with this as a general proposition, I would be hesitant to hold that it is subject to no exceptions. It might well be that, if in the case of information obtained by means of an unlawful intrusion the nature of the information were such that there were overriding grounds in favour of the public being informed thereof, the Court would conclude that publication of the information should be permitted, despite its source or the manner in which it was obtained."

Die hoofregter se uiteindelike gevolgtrekking is dan ook dat in die afwesigheid van sodanige dringende openbare inligtingsbelang *in casu* – volgens hom (465C – D) sal sodanige geval 'n *rara avis* wees; trouens, hy beklemtoon dat ten einde publikasie te regverdig, "the public interest in favour of publication would have to be very cogent indeed" – die publikasie onregmatig sou wees en dat die interdik daarom toegestaan moet word.

Hoofregter Corbett se uitspraak verdien volle instemming en kan as 'n mylpaal op die gebied van die erkenning en beskerming van die reg op privaatheid in ons reg beskou word. Ons wil nietemin op enkele aspekte van sy uitspraak kommentaar lewer.

1 Die reg op privaatheid van regspersone Die hoofregter onderskryf ons standpunt dat die reg op privaatheid as persoonlikheidsreg, net soos die reg op die goeie naam by laster, regspersone toekom omdat hierdie persoonlikheidsgoedere sonder 'n gevoelskrenking (wat regspersone uiteraard nie kan ervaar nie) geskend kan word (Neethling en Potgieter "Die persoonlikheidsregte van regspersone" 1991 *THRHR* 120 ev; Neethling, Potgieter en Visser *Deliktereg* (1992) 323 – 326; Neethling *Persoonlikheidsreg* (1991) 71 – 77).

Na ons mening het regspersone ook 'n *reg op identiteit*. Identiteit as persoonlikheidsgoed is daardie uniekheid of eieaard van 'n persoon wat hom as 'n bepaalde individu identifiseer en hom sodoende van andere onderskei; identiteit manifesteer sigself by die natuurlike persoon in verskeie *indicia* waaraan

die persoon herken kan word (soos sy naam of foto) en word geskend indien 'n *indicium* gebruik word op 'n wyse wat nie met die ware of eie beeld van die betrokkene te versoen is nie. Uit die aard van die saak het regspersone ook 'n identiteit wat deur analoë *indicia* aangedui word en wat hulle van ander regspersone onderskei (sien *ibid*); en aangesien identiteit deur die vervalsing of verdraaiing van die reghebbende se persoonlikheidsbeeld geskend word en dié skending kan geskied sonder dat die benadeelde daarvan bewus is (dit wil sê sonder 'n gevoelskrenking), behoort dit ook regspersone toe te kom (*ibid*; vgl ook die saak onder bespreking 462C – D).

2 Definisie en wyses van skending van privaatheid Die hoofregter wou nie die reg op privaatheid definieer nie (sien die aanhaling hierbo). Na ons mening is privaatheid 'n individuele lewenstoestand van afsondering van openbaarheid. Hierdie lewenstoestand omsluit al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het (Neethling 34; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384). Privaatheid impliseer 'n afwesigheid van kennisname met die individu of sy persoonlike omstandighede in daardie toestand. Dienooreenkomstig kan privaatheid *slegs* deur 'n ongeoorloofde *kennismaking* met die individu of sy persoonlike sake deur buitestanders geskend word. Sodanige kennismaking kan weer op twee wyses geskied: Enersyds wanneer 'n buitestander self met die individu of sy persoonlike sake kennis maak – hulle kan as *kennisname- of indringingsgevalle* bestempel word. Andersyds wanneer die buitestander derdes laat kennis maak met die individu of sy persoonlike sake wat, alhoewel hulle aan die buitestander self bekend is, steeds privaat is. Hierdie gevalle kan as *kennismededelings- of openbaarmakingsgevalle* beskryf word (sien in die algemeen Neethling 31 – 34; Neethling, Potgieter en Visser 346 – 347).

Hoofregter Corbett sluit hierby aan vir sover hy ook "intrusion" en "publication" as wyses van privaatheidskending identifiseer (462E, hierbo aangehaal). Dit is egter duidelik dat hy hierdie bloot as twee vorme, maar nie as die enigste twee nie, van privaatheidskending beskou. Waarskynlik is sy standpunt in hierdie verband beïnvloed deur 'n skrywer soos McQuoid-Mason (*The law of privacy in South Africa* (1978) hfst 5 6 7 8; sien ook Burchell *Principles of delict* (1993) 199 208 – 211) wat ook die sogenaamde "false light"- en "appropriation"-gevalle in navolging van die Amerikaanse reg as privaatheidskending tipeer. In die lig van bostaande (par 1) is dit egter duidelik dat nie privaatheid nie, maar wel identiteit geskend word deur "publicity which places the plaintiff into a false light in the public eye". Dieselfde is ook waar van "appropriation . . . of the plaintiff's name or likeness" (byvoorbeeld vir advertensiedoeleindes), dog net vir sover sodanige toe-eiening die *vals indruk* skep óf dat die reghebbende toestemming daartoe verleen het, óf dat hy finansiële vergoeding daarvoor ontvang het, óf dat hy die geadverteerde produk, diens of onderneming ondersteun (sien Neethling 38). Die vertroue word uitgespreek dat die appèlhof in die toekoms ter wille van regsekerheid en gesonde regsontwikkeling die onderskeid tussen privaatheid en identiteit sal erken en identiteit as selfstandige persoonlikheidsgoed sal bevestig (vgl *idem* 26 – 27 oor die wetenskaplike en praktiese belangrikheid daarvan om tussen eiesoortige persoonlikheidsgoedere te onderskei).

3 Onregmatigheid van privaatheidskending Hoofregter Corbett (462F – H, hierbo aangehaal) dui tereg aan dat nie alle indringings- en openbaarmakingshandelinge onregmatig is nie, maar dat die onregmatigheid al dan nie van 'n privaatheidskending in die lig van die omstandighede aan die hand van die algemene regsgevoel van die gemeenskap of die *boni mores*-maatstaf beoordeel moet word. Die toepassing van hierdie maatstaf behels basies 'n *ex post facto* afweging van die botsende belange van die betrokke partye – in die onderhawige saak die respondente se privaatheid teenoor die appellante se waarneming van die openbare inligtingsbelang (462I – 463B, hierbo aangehaal). In hierdie verband wou die hoofregter (463A – B, hierbo aangehaal) hom egter nie uitspreek oor die vraag of die openbare inligtingsbelang as regverdigingsgrond dien wat *prima facie* onregmatigheid ophef, dan wel of dit bloot 'n feit is wat in ag geneem moet word ten einde onregmatigheid in die eerste plek te bepaal nie. Na ons mening behoort dit minstens *in casu* geen verskil te maak welke van die twee benaderings gevolg word nie aangesien regverdigingsgronde per slot van sake niks anders is nie as die presisering van die *boni mores*-maatstaf met verwysing na tipiese feitelike omstandighede wat gereeld in die praktyk voorkom; die regsgevoel van die gemeenskap vind dus neerslag in regverdigingsgronde wat as hulpmiddels aangewend word om die afbakeningsproses tussen botsende belange te vergemaklik (Neethling, Potgieter en Visser 66 – 67; Neethling 58). Op grond van die geykte en beproefde regswetenskaplike benadering in hierdie verband (vgl bv die werkswyse van die appèlhof tov die tradisionele regverdigingsgronde by laster: sien *SAUK v O'Malley* 1977 3 SA 394 (A) 401 – 403; *Borgin v De Villiers* 1980 3 SA 556 (A) 571; *May v Udwin* 1981 1 SA 1 (A) 10; *Marais v Richard* 1981 1 SA 1157 (A) 1166 – 1167; *Joubert v Venter* 1985 1 SA 654 (A) 695 – 697; Neethling 139 ev; Neethling, Potgieter en Visser 335 – 339), verkies ons tog om die massapublikasie van private feite as *prima facie* onregmatig aan te sien en daarom die openbare inligtingsbelang as *regverdigingsgrond* te behandel (Neethling 238 – 244 252 ev). Ten einde die aanwesigheid van hierdie regverdigingsgrond te bepaal, kan, soos hoofregter Corbett tereg uitwys (463A, hierbo aangehaal), 'n verskeidenheid faktore in ag geneem word. Die volgende faktore kan onder meer kortliks vermeld word (sien Neethling 253 – 257 vir 'n vollediger uiteensetting; sien ook Burchell 196 – 197):

(a) Die feit dat die eiser 'n *openbare figuur* is;

(b) die feit dat die eiser by 'n *nuuswaardige gebeurtenis* betrokke is;

(c) die *omvang of intensiteit* van die krenkingshandeling;

(d) die feit dat die reghebbende sy privaatheid aan die *risiko* van skending blootstel;

(e) die *motief, gesindheid of bedoeling* waarmee die publikasie geskied;

(f) die *belangrikheid* van die eiser van sy *status* in die samelewing;

(g) die *tydsverloop* tussen die plaasvind van 'n nuuswaardige gebeurtenis en die publikasie daarvan;

(h) die *graad van identifiseerbaarheid* van die persoon wie se privaatheid openbaar gemaak word;

(i) die feit dat die publikasie van private feite *in stryd met 'n hofbevel of statutêre voorskrif* is; en

(j) die feit dat die private feite deur 'n *onregmatige indringingshandeling* bekom is.

Laasgenoemde faktor het, soos duidelik uit die *dictum* hierbo blyk (463E – G), in die onderhawige saak 'n deurslaggewende rol gespeel ten einde die beoogde publikasie van die artikel as onregmatig te brandmerk. In hierdie verband steun die hof ook op die Engelse beslissing *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 waarin sterk klem gelê is op die feit dat die *openbare belang* verg dat vertroulikheid eerbiedig moet word. Die hoofregter laat hierop volg (464F – G):

> "With respect, I would enthusiastically endorse this viewpoint. In my view there is a public interest in preserving confidentiality in regard to private affairs and in discouraging the leaking of private and confidential information, unlawfully obtained, to the media (and others)."

Die premie wat op die openbare belang in die beskerming van privaatheid teen indringing gestel word, blyk voorts duidelik uit die aanname van die Wet op die Verbod op Onderskepping en Meeluistering 127 van 1992. Die wetgewer, as een van die vertolkers van die *boni mores* (*Schultz v Butt supra* 679; Neethling, Potgieter en Visser 37 – 38), het naamlik uitdruklike statutêre beskerming aan die individu se reg op privaatheid verleen deur die ongemagtigde onderskepping van posstukke of telegrafiese of telefoniese mededelings tot misdaad te verklaar. Magtiging vir sodanige onderskepping mag slegs op aansoek verleen word deur 'n *regter* wat deur die Minister van Justisie aangewys is (en nie meer, soos vroeër, deur sekere senior staatsamptenare nie: sien a 118A Wet 44 van 1958; McQuoid-Mason 141 – 142).

In die lig hiervan sal die publikasie van private feite wat deur onregmatige indringingshandelinge bekom is, slegs, soos hoofregter Corbett aandui, in hoogs uitsonderlike omstandighede weens 'n oorheersende openbare belang in inligting ("overriding considerations (grounds) of public interest": 463F – G 465C – D) geregverdig wees. Gevolglik is die standpunt wat in *Persoonlikheidsreg* (1991) 265 gestel word, naamlik dat die openbare inligtingsbelang *nooit* die publikasie van private feite wat deur 'n onregmatige indringingshandeling bekom is, behoort te regverdig nie, te rigied.

(Ten slotte die volgende sydelingse opmerking: dit het ons opgeval dat die appèlhof klaarblyklik nie (altyd) oor die jongste uitgawes van Suid-Afrikaanse regshandboeke beskik nie. 'n Voorbeeld hiervan is die gebruik in hierdie saak van die tweede uitgawe van Neethling se *Persoonlikheidsreg* (1985) terwyl die derde uitgawe reeds in 1991 gepubliseer is (sien ook *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A)). Langs hierdie weg doen ons 'n ernstige beroep op die Departement van Justisie om sorg te dra dat alle afdelings van die hooggeregshof, in besonder die appèlhof, onmiddellik na publikasie van die jongste uitgawes van Suid-Afrikaanse regswerke voorsien word. Versuim in hierdie verband kan vanselfsprekend daartoe lei dat ten onregte nie van die jongste standpunte van skrywers kennis geneem word nie.)

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BOEKE

A GUIDE TO THE MINERALS ACT 1991

deur M KAPLAN en MO DALE

Butterworths Durban 1992; vii en 295 bl

Prys R112,86 (sagteband); R164,16 (hardeband)

In die voorwoord tot die outeurs se kommentaar op die Mineraalwet 50 van 1991, wat op 1 Januarie 1992 in werking getree het, stel hulle twee doelwitte voor oë: eerstens om die radikaal nuwe mineraalregstelsel aan die leser bekend te stel en die leser dienooreenkomstig te heroriënteer; en tweedens om die verskansing ingevolge die oorgangsmaatreëls van die Mineraalwet van regte wat vantevore ingevolge herroepe wetgewing toegeken is, te verduidelik (v). Die outeurs is egter soms geneig om groter klem te lê op die oorgangsmaatreëls as die nuwe maatreëls wat oordragte van regte en bevoegdheidsuitoefening sedert 1 Januarie 1992 beheer.

Die outeurs wys daarop dat die publikasie nie as 'n byvoegsel tot Franklin en Kaplan se bekende *The mining and minerals laws of South Africa* (1982) beskou moet word nie. Die kommentaar op die Mineraalwet moet dus eerder as oorbruggingswerk beskou word totdat 'n nuwe uitgawe van eersgenoemde werk die lig sien. Dit is 'n veilige benadering omrede wysigings aan die Mineraalwet onvermydelik blyk te wees (sien bespreking hieronder),* aanvullende wette daarbenewens gewysig sal moet word (sien 1 – 2) en verdere regulasies nog kragtens artikel 63 van die Mineraalwet te wagte is (sien 3). As gevolg van die privatiseringsgewaad waarin die Mineraalwet geklee is, is dit nie heeltemal vergesog dat die mineraalregstelsel deur 'n toekomstige regering hervorm kan word nie.

Die noodsaaklikheid vir heroriëntering is daaraan te wyte dat die mineraalregstelsel wat grootliks sedert 1871 deur die wetgewer in die Transvaal ontwikkel is en uiteindelik gekulmineer het in (hoofsaaklik) die Wet op Edelgesteentes 73 van 1964, die Wet op Mynregte 20 van 1967, die Wet op Registrasie van Myntitels 16 van 1967, die Aanvullende Wet op Mineraalwette 10 van 1975, die Wet op Beheer van Tieroog 77 van 1977 en die Wet op Kernenergie 92 van 1982, dramaties deur die wetgewer hervorm is. Agt en twintig mineraal- en mynwette is in die geheel herroep. Slegs enkele definisies van die Wet op Myne en Bedrywe 27 van 1956 is behou. Benewens enkele definisies en een hoofstuk is die Wet op Mynregte ook vir alle praktiese doeleindes in die geheel herroep. Artikels van vier ander wette is ook herroep (sien a 68 van die Mineraalwet).

Na melding van die hoofoogmerke van die Mineraalwet wat soos 'n goue draad in hulle kommentaar op die wet aangetref word, naamlik die reëling van (i) die prospektering na, optimale ontginning en benutting van minerale; (ii) die veiligheid en gesondheid van persone betrokke by bedrywe en myne; en (iii) die rehabilitasie van die grond tydens en na prospekteer- en mynwerksaamhede, bespreek die outeurs in hoofstuk 1

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* Let daarop dat die Mineraalwet sedert hierdie resensie gewysig is deur die Mineraalwysigingswet 103 van 1993 (Prok 75 *SK* 15064 van 1993 – 08 – 20) (redakteur).

die nuwe beginsels: (a) Die verskillende klasse minerale wat ingevolge herroepe wetgewing bestaan het, en wat nou verdwyn het; (b) die prospekteer- en mynregte wat kragtens (herroepe) wetgewing in die staat gesetel het, en wat hervestig is in die houers van mineraalregte; (c) die gebruiksregte ten aansien van geproklameerde grond wat in die staat gesetel het, en wat vanweë beëindiging van proklamasie hervestig is in die houers van mineraalregte; (d) die regsposisie ten aansien van minerale in uitskot wat gelykgestel is aan dié van minerale in grond; (e) die staat wat voortaan slegs die uitoefening van mineraalregte ten aansien van alle minerale magtig en nie meer (statutêre) prospekteer- en mynregte aan houers verleen nie; (f) maatreëls omtrent die uitoefening van prospekteer- en mynregte en mynbouveiligheid wat beide in die Mineraalwet vervat word; (g) maatreëls wat gemik is op die bevordering van privatisering van mineraalregte wat steeds in die staat (as private houer) setel; en (h) die eenvormige toepassing van maatreëls wat gemik is op die rehabilitasie van grond (4 – 15).

Die outeurs se bespreking van die beginsels waarmee die leser homself eers moet heroriënteer, is uiters nuttig alvorens die nuwe mineraalregstelsel van naderby bekyk kan word. Die ware impak van die relatief kort Mineraalwet word daarna ook meer duidelik. Hierdie nuwe beginsels kom telkens later na vore. Die verskansing van bestaande regte aan die een kant (16 – 17) en die aansporingsmeganismes om bestaande regte te verminder (18 – 20), word ook ter inleiding kortliks deur die outeurs aangetoon. Deur die wetgewer se twee agterliggende beleidsoorwegings alreeds in die eerste hoofstuk bekend te stel, word die leser in staat gestel om selfs verder te oordeel in welke mate die wetgewer daarin geslaag het om so gou as moontlik die lastige oorgangsituasie te hanteer waarin daar gewerk word met sowel 'n ou as 'n nuwe stelsel sonder om bestaande regte onnodig aan te tas (sien bv a 214 van die Louisiana Mineral Code Wet 50 van 1974 en die kommentaar daarop).

Alhoewel die outeurs hulle daarvan weerhou om 'n waarde-oordeel te vel oor die meriete van die ou stelsel jeens die nuwe stelsel (vi), skroom hulle nie om tekortkominge in die Mineraalwet aan te toon nie. Dit blyk veral in hoofstuk 2 uit hulle bespreking van die definisies van "eienaar" met betrekking tot grond, "houer" met betrekking tot 'n reg op 'n mineraal, "houer" met betrekking tot die reg op 'n mineraal wat in uitskot voorkom, "prospekteer", "myn" en "mineraal" in die Mineraalwet (sien 21 – 33 51). Die ondeurdagte koppeling van artikel 12(1) van die Onteieningswet 63 van 1975 as vergoedingsmaatstaf met artikel 5(3) van die Mineraalwet wat handel oor die vergoedingsbeginsels wat van toepassing is tydens die myn van "gemengde minerale", word ook netjies in hoofstuk 6 deur die outeurs uitgelig (153 – 157). Die absurde gevolge wat intree omdat die anti-fragmentariese bepalings ingevolge artikel 20 van die Mineraalwet (anders as die Aanvullende Wet op Mineraalwette 10 van 1975) ook van toepassing is op eiendomsreg van grond waarvan die mineraalregte nie geskei is nie (sien ook West "Aktekantoorpraktyk: beperking op die verdeling van mineraalregte" 1992 *De Rebus* 88) word soos volg aangetoon:

> "This can create difficulties in regard to townships where the rights to minerals were not severed from the ownership of the land when the township was established. The owners of erven in such townships will be the owners (sic) of the rights to minerals in respect of each erf. Consequently the approval of the Director-General will be required for the registration of transfer of an erf in such township to spouses jointly (not uncommon in respect of residential erven) or to two or more transferees in undivided shares" (148 – 149).

Die wetgewer kan gerus kennis neem van die outeurs se kritiek wat grootliks tekortkominge in wetsopstelling uitlig. Ook word in hoofstuk 4 aangetoon dat die houers van prospekteerregte en mynregte uit hoofde van herroepe wetgewing sedert die inwerkingtreding van die Mineraalwet slegter daaraan toe is as vantevore (sien bv 61 66 67 82). Die verswakte posisie van eienaars van (voormalige) vervreemde staatsgrond of hulle benoemdes word voorts duidelik aangetoon in hoofstuk 5 (127 – 130).

Hoofstuk 3 behandel die administratiewe onderbou van die wet wat basies bestaan uit drie vlakke, naamlik die Minister van Mineraal- en Energiesake en Openbare Ondernemings, die direkteur-generaal en die streekdirekteur.

Die verkryging van gemeenregtelike prospekteer- en mynregte vanaf die houers van mineraalregte asook die wyse waarop owerheidsmagtiging om te prospekteer of te myn sedert die inwerkingtreding van die Mineraalwet bekom moet word, word in hoofstuk 4 behandel. Die behoud van voorgaande regte en magtiging tot bevoegdheidsuitoefening deur houers van prospekteer- en mynregte wat voor inwerkingtreding van die Mineraalwet bestaan het, word ook bespreek. In dié verband is die bespreking van die voortbestaan van prospekteer- en mynregte ingevolge herroepe wetgewing (56 – 73 en 80 – 120, onderskeidelik) uiters nuttig. Hierdie regte sal nog vir 'n geruime tyd voortduur en kennis van die onderliggende regsbeginsels is steeds van kardinale belang. Daar moet ook in gedagte gehou word dat variante van die ou mineraalregstel nog in die sogenaamde onafhanklike tuislande en selfregerende gebiede bestaan (sien verder 3). Reeds in die begin van die hoofstuk word aangetoon dat 'n duidelike onderskeid in die Mineraalwet gemaak word tussen 'n prospekteer- en mynreg aan die een kant en die magtiging om te prospekteer en te myn aan die ander kant (46). Dit is uiters belangrik om hierdie onderskeid te maak insoverre die Mineraalwet slegs die uitoefening van sodanige regte reguleer en nie die verkryging van (gemeenregtelike) prospekteer- en mynregte nie. Verkryging geskied steeds ingevolge die gemenereg en verwante wetgewing (sien Badenhorst en Van Heerden "Prospekteer- en mynboukontrakte ingevolge die Mineraalwet 50 van 1991" 1992 *THRHR* 232; "A comparison between the nature of prospecting leases in terms of the Precious Stones Act 73 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991" 1993 *TSAR* 159).

Hoofstuk 5 skets kortliks die historiese aanloop tot die eienaars van (voormalige) vervreemde staatsgrond (of hulle benoemdes) se statutêre prospekteerregte ten aansien van sodanige grond. Die oorgangsbepalings ingevolge artikel 43 van die Mineraalwet asook die talle tekortkominge daarvan word uitgelig. Die probleme rondom deliktuele beginsels en die kwantifisering van 'n eienaar (of sy benoemde) van vervreemde staatsgrond se skadevergoedingseis uit hoofde van artikel 43(2) van die Mineraalwet, soos uitgelig deur die outeurs, behoort vir die wetgewer stof tot nadenke te wees (130 – 131). Omdat eise van hierdie aard eers (ten minste) vyf jaar na inwerkingtreding van die Mineraalwet te wagte kan wees, word die hoop uitgespreek dat die wetgewer artikel 43(3) weer onder die soeklig sal plaas.

Die bepalings gemik op die optimale ontginning van minerale en die veiligheid en gesondheid van betrokkenes by mynbouwerksaamhede word onderskeidelik in hoofstuk 6 en 7 bespreek. In hoofstuk 8 word ter inleiding die hervestiging van die gebruiksreg van (die vroeëre) geproklameerde grond in die gemeenregtelike houers van mineraalregte aangetoon asook die wyse waarop voornemende prospekteerders of ontginners in die toekoms te werk sal moet gaan om aanvullende gebruiksbevoegdhede ten aansien van die grond te verkry. Die statutêre maatreëls waarkragtens oppervlakteregte verkry kan word, inmenging met prospektering of mynwerksaamhede beperk word, beperkings ten aansien van die benutting van die oppervlakte vir prospektering en mynwerksaamhede opgelê word en verpligtinge tot rehabilitasie van die grond opgelê word, word ten slotte bespreek.

'n Aspek wat kommentaar verdien, is die outeurs se bespreking (30 – 31) van die belangwekkende beslissing van *Finbro Furnishers (Pty) Ltd v The Registrar of Deeds* 1985 4 SA 773 (A). Ons stem nie saam met die gevolgtrekking wat deur die skrywers met betrekking tot die uitspraak gemaak word nie. Eerstens is beslis dat die betekenis van die ongedefinieerde begrip "mineraal" in die Wet op die Registrasie van Aktes 47 van 1937 'n wye betekenis het en dus klip (sand en klei) insluit. *Ex parte Erasmus* 1968 4 SA 778 (T) is dus onvergewerp. Tweedens het die hof die beginsels wat voorheen deur die howe neergelê is vir doeleindes van interpretasie van sessies bevestig en nie verander nie. (Vir 'n verdere bespreking, sien Badenhorst en Van Heerden "Betekenis van die woord mineraal" 1989 *TSAR* 452 453 – 455; "Weer eens die betekenis van die woord mineraal" 1991 *TSAR* 181.)

'n Verdere aspek wat kommentaar verdien, is die outeurs se verwysing na gemeenregtelike "regte" van die mineraalreghouer (sien bv 6 9 51) vir doeleindes van die vasstelling van die omvang van die inhoudsbevoegdhede daarvan. Omrede artikel 5(1) van die

Mineraalwet aan die een kant en artikel 47(1)(e) en (2) aan die ander kant onderskeidelik tot gevolg het dat die inhoud van 'n mineraalreg (voor 1 Januarie 1992) en 'n mynreg (kragtens herroepe wetgewing) gelykgestel word aan 'n mineraalreg ingevolge die gemenereg, ontstaan die vraag wat nou presies die inhoud van sodanige mineraalreg sou wees. Kaplan en Dale beskou selfs artikel 5(1) as 'n "restatement" van die gemenereg (6). Die probleem is egter dat die inhoud van 'n mineraalreg as selfstandige saaklike reg, na analogie met die serwituutfiguur (sien Badenhorst *Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg* (LLD-proefskrif UP 1992) 99 – 103 582 – 592) en deur die identifisering van "prospekteer- en mynregte" as synde (onder andere) die inhoud van 'n mineraalreg deur die onderskeie wetgewers (Badenhorst *idem* 103 – 107), hier te lande begin vorm aanneem het. Benewens die vraag of die vruggebruiker van eiendomsreg van grond ook bevoeg is om minerale te ontgin, bestaan daar egter weinig aanknopingspunte omtrent die inhoud van mineraalregte in die gemenereg (sien in die algemeen Viljoen *The rights and duties of the holder of mineral rights* (LLD-proefskrif Leiden 1975) 5 – 12). Inteendeel, dit blyk dat 'n mineraalreg as afsonderlike en selfstandige saaklike reg nie in die gemenereg voorgekom het nie (Joubert "Die regte op minerale" 1959 *THRHR* 29; Viljoen 1 – 12; Van der Merwe *Sakereg* (1989) 552).

Een benadering in die identifisering van die inhoudsbevoegdhede van 'n mineraalreg sou wees om met verwysing na regspraak (en destydse wetgewing) die inhoud van 'n mineraalreg (ingevolge die gemenereg!) te probeer bepaal. Pogings tot 'n herontginning van die gemeenregtelike bronne het tot dusver nie veel opgelewer nie. Die gewig wat aan die gemenereg as bron van die Suid-Afrikaanse reg toegeken word, is ook reeds besig om te taan (sien in die algemeen Scott "Presidensiële rede" Vereniging van Universiteitsdosente in die Regte (US) 1993-01-18). Alhoewel die leerstuk van subjektiewe regte nie van kritiek ontbloot is nie (sien in die algemeen Van der Walt "The doctrine of subjective rights: a critical reappraisal from the fringes of property law" 1990 *THRHR* 316; Kleyn en Boraine *Silberberg and Schoeman's The law of property* (1992) 12 – 15), sou 'n ander benadering wees om met verwysing na die inhoud van eiendomsreg van grond aan die hand van die leerstuk van subjektiewe regte (en moderne sakeregteorie) te poog om die inhoud van 'n mineraalreg te bepaal (sien verder Badenhorst *Proefskrif* 107 – 146). Bogenoemde artikels van die Mineraalwet bring die hele debat omtrent die aard, kenmerke en inhoud van mineraalregte, soos hier te lande ontwikkel, weer sterk na vore (sien *idem* 574 – 610). Die vasstelling van die inhoudsbevoegdhede van 'n mineraalreg kan in die lig van die Mineraalwet beslis nie meer as 'n blote akademiese oefening afgemaak word nie.

Tydens 'n aansoek om uitreiking van 'n prospekteerpermit moet 'n aansoeker wat nie die houer van mineraalregte is nie oor skriftelike toestemming van die houer van mineraalregte beskik (a 6(1)(b) van die Mineraalwet). Insgelyks moet by uitreiking van 'n ontginningsmagtiging die aansoeker wat nie die houer van die betrokke mineraalregte is nie oor skriftelike toestemming van die houer van mineraalregte beskik (a 9(1)(b) van die Mineraalwet). Ons het reeds vantevore daarop gewys dat die ongedefinieerde begrip "skriftelike toestemming" probleme kan oplewer (sien Badenhorst en Van Heerden 1992 *THRHR* 231). Kaplan en Dale is die volgende mening toegedaan:

> "These 'consents' (which would more properly be called 'rights') would normally be contained in a prospecting contract (in the case of a consent to prospect), or a mineral lease (in the case of a consent to mine)" (47).

Dit is egter so dat in die praktyk die streekdirekteur skriftelike toestemmings in eenvoudige briefvorm wat slegs deur die mineraalreghouer onderteken is, aanvaar. (Met ander woorde, voldoening aan die formaliteitsvoorskrifte van die Wet op Vervreemding van Grond 68 van 1981 en die Algemene Regswysigingswet 50 van 1950, is onderskeidelik nie nodig vir die geldigheid van 'n skriftelike toestemming om te prospekteer of 'n skriftelike toestemming om te myn nie. Die formaliteitsvoorskrifte geld slegs ten aansien van die verkryging van gemeenregtelike prospekteer- of mynregte ingevolge 'n

prospekteerkontrak of 'n mineralehuurkontrak, onderskeidelik.) Die voordeel van hierdie eenvoudige prosedure is dat die staat nie betrokke behoort te raak in die kontraktuele verhoudings tussen kontrakspartye of kontrakte hoef te vertolk ten einde vas te stel of sodanige toestemming wel bestaan nie. (Toegegee, sodanige vasstelling behoort redelik maklik te wees.) Die outeurs aanvaar tereg dat die staat as houer van gemeenregtelike mineraalregte in die Mineraalwet oor dieselfde kam geskeer word as enige ander (oftewel private) houer van mineraalregte (47). In paragraaf 4 3 5 (48) behoort die volgende sin:

> "What are acquired from the state in these instances are however also common law rights of the same nature as the rights obtained from any other mineral right holder",

verstaan te word dat toestemming, soos vervat in 'n prospekteerkontrak of 'n mineralehuurkontrak, genoegsaam is vir doeleindes van die aansoek om uitreiking van 'n prospekteerpermit of 'n ontginningsmagtigting en nie vir doeleindes van die verkryging van gemeenregtelike prospekteer- en mynregte nie. Vir laasgenoemde verkryging word die sluiting van prospekteerkontrakte en mineralehuurkontrakte met die staat as mineraalreghouer voortaan geverg.

Alhoewel die outeurs 'n volledige uiteensetting van gesag sedert die publikasie van Franklin en Kaplan se *The mining and mineral laws of South Africa* oorhou vir 'n nuwe uitgawe van laasgenoemde werk (v), sou ons graag wou weet of daar gesag bestaan vir hulle aanname dat tydens die myn van "gemengde minerale" edelmetale, soos gedefinieer in die Wet op Mynregte, ook sekondêre minerale (indien daarmee onedele minerale bedoel word) insluit (153; sien par 6 12 1 1 vir die verdere implikasies van hierdie siening).

Die publikasie is voorsien van 'n inhoudsopgawe, sakeregister en 'n indeks. 'n Bibliografie ontbreek egter. Die gebruik van kruisverwysings na die Mineraalwet en ander gedeeltes van die publikasie in die teks tesame met voetnotas onderaan die bladsy is bietjie steurend, dog doen nie afbreuk aan die bespreking van statutêre reg nie. Bylaes tot die werk is die "Verdeling van die Republiek in streke vir doeleindes van die Mineraalwet, 1991" (GK R 3082/1991) asook die Mineraalwet, welke bylaes die bruikbaarheid van die werk verhoog.

Die outeurs slaag deurgaans daarin om hulle vooropgestelde doelwitte te bereik en kan gelukgewens word met die daarstelling van 'n standaardwerk wat noodsaaklik blyk te wees vir diegene wat betrokke is by die verskillende fasette van die mynboubedryf, regspraktyk asook die teorie oor mineraalregte. Raadpleging van die publikasie sal veral onontbeerlik wees tydens die moeilike oorgangsfase na 'n nuwe stelsel, hetsy ingevolge die Mineraalwet hetsy ingevolge 'n radikaal ander mineraalregstelsel.

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ENVIRONMENTAL MANAGEMENT IN SOUTH AFRICA

by RF FUGGLE and MA RABIE (eds)

Juta Cape Town Wetton Johannesburg 1992; xlii and 823pp

Price R193,80

Environmental issues are so interwoven in man's relationship with the natural environment that one is scarcely aware of their extent and importance. Perhaps the first major South African introduction to the issues was in *Environmental concerns in South Africa: technical and legal perspectives*, also edited by Professors Fuggle and Rabie. That publication

was very well received, as it gathered together an impressive array of highly qualified commentators to give a comprehensive survey of the major environmental issues of concern to the South Africa of 1983.

Within the brief period of nine years since then, our knowledge and appreciation of the environment have burgeoned, so much so that the editors felt that developments in that period were so substantial that a new book, and not a second edition, was necessary.

Environmental management in South Africa is a monumental work. Fifty-two contributors from 15 major different disciplines are responsible for 31 chapters divided into seven parts.

Part I (chapters 1 – 5), entitled "Elements of environmental management" is an introductory section, dealing with more technical aspects of environmental management. Reasons are given for the deterioration of the environment, environmental problems are classified and an answer is given to the question why we should conserve the environment. From a South African point of view, the development of environmental awareness and an indication of the management of environmental affairs, both from an administrative and a socio-political angle, are sketched in three chapters.

Part II (chapters 6 – 9) introduces the legal aspects, particularly the definition of the concept "environment", the provisions of the most important statute – the Environment Conservation Act 73 of 1989, how environmental law is enforced and implemented, and the position of environmental law within international law.

These two parts, the first from a technical (the best term as opposed to "legal"!) and the second from a legal point of view set the trend for the division of parts III to VI of the book. The first part of each chapter deals with the technical position of the specific subject under discussion, while the second part deals with the legal position. For the reviewer, as a lawyer, the technical aspects are, in most cases, highly informative and interesting and provide the necessary background to and understanding of the regulation of environmental issues. For non-lawyers the technical aspects provide a useful manual for those directly involved in the specific topic under discussion. This review will be concentrating on the legal issues.

The subject of Part III (chapters 10 – 14) is "renewable resources". Under this heading are incorporated soil, plants, wild animals, freshwater systems and marine systems. All these aspects are discussed in great detail, and the legal aspects include all the applicable legislative provisions, their background, implementation and proposals for improvement. A minor criticism here is the choice to discuss the Natal Nature Conservation Ordinance in preference to that of the Transvaal (261 – 268) with reference, for example, to wild animals, since it is in the Transvaal in particular that game farming and hunting are important pastimes.

Part IV (chapters 15-16) – "non-renewable resources" – deals with minerals – terrestrial and offshore. To a lawyer with little knowledge of mining methods, some very relevant discussions and diagrams of the different mining methods are contained in chapter 15, while diagrams accompany the text on the mining of diamonds, oil and gas and other minerals along the South African and Namibian coasts in chapter 16. As far as both terrestrial and offshore minerals are concerned, it is significant that the environmental provisions of the new Minerals Act 51 of 1991 are included and some perspective placed on the repealed legislation.

Part V (chapters 17 – 23) is concerned with control of environmental quality and the issues treated here are air pollution, water pollution, solid waste, pesticides, radiation, noise and environmental health. Besides the technical introductions to these issues, the legal issues are presented comprehensively. What is obvious from the discussions is that the legislative control is, in most cases, inadequate. By including the technical aspects of pollution in whatever form, an opportunity is provided to gain insight into the practical

situation. Consequently, a more meaningful contribution can be made to determine how the inadequacies in the legislation can be rectified.

Part VI (chapters 24 – 29) is titled "Features of particular concern" and includes mountains, rivers, the coastal zone, protected areas, land-use planning and agriculture. The factor which binds together the first three chapters is water. Mountains are valued because they serve as water reservoirs, rivers constitute South Africa's most vital water resource (albeit in short supply) and the coastal zone has important strategic and economic value. As far as protected areas and land-use planning are concerned, these chapters are important because they provide classifications of the numerous legislative provisions that are applicable. On the basis of the classification employed by the International Union for the Conservation of Nature, protected areas in South Africa are categorised and an indication given of the applicable legislation. Physical or land-use planning is also characterised by the numerous statutory controls which are relevant. A useful (the first) classification of land-use planning control legislation is to be found in chapter 28.

Part VII (chapters 30 – 31) concentrates on environmental evaluation. Two chapters are devoted to discussing the most important aspects surrounding the need to assess the environmental consequences of developments. A detailed exposition is given of the IEM procedure – a very useful issue at a time when the IEM is gaining increasing significance. A separate chapter is devoted to the methods and techniques that may be used in the assessment stage of the IEM procedure.

What this publication brings home in no uncertain terms is the central role played by environmental issues in society. What it does even more effectively, is to indicate how successfully those issues are managed.

Environmental management in South Africa is a comprehensive publication. The fact that it brings together the work of 52 authors is no mean achievement. That it does so while retaining a particular style and consistency is remarkable. So many authors collaborating on so many chapters always leaves a major task in the hands of the editors – a task which is very often underrated. They have performed this task very well indeed and need to be congratulated.

With legal materials in particular there is an inherent risk that amendments to the legislation or even new legislation will be passed as a book goes to press. That this publication appeared with so few exclusions is a major achievement. It is always difficult to be completely up to date with the latest amendments and it is unfortunate that some of the provisions of the Environment Conservation Amendment Act 79 of 1992 and the Environment Conservation Second Amendment Act 115 of 1992 could not be included in the work. There is no indication, as is found in most legal works, of the cut-off date of the legal materials. These amendment acts contain important amendments relevant *inter alia* to the determination of a policy for environmental conservation (the amendment of section 2(2) at 104), protected natural environments (the insertion of section 16(1A) – (1B) and (2A) at 701 – 702), special nature reserves (the insertion of section 18(2)(bA) at 702 – 703), the removal of litter (the insertion of section 19A and section 24A – although a note is contained at 522) and the identification of activities which may have a detrimental effect on the environment (the amendment of section 21(3) at 108).

This publication also contains a valuable index to legal materials as well as a subject index. However, I miss a bibliography.

Although its price may deter some from purchasing this work, it may be stated without hesitation that it is worth every cent. I am impressed with this publication – from its content (which contains valuable material not only for the lawyer but also for every non-lawyer who is in any way involved with environmental management) to its appearance which is very pleasing indeed.

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ALCOHOL, EMPLOYMENT AND FAIR LABOUR PRACTICE

deur C ALBERTYN en M McCANN

Juta Kaapstad Wetton Johannesburg 1993; xvi en 252 bl

Prys R98,00 (sagteband)

Hierdie is die eerste omvattende werk deur Suid-Afrikaanse skrywers wat handel oor die onderwerp alkohol en die werkplek. Daar moet met die intrapslag vermeld word dat hierdie werk verwelkom word. Dit kan tot 'n nuttige verwysingsbron oor die onderhawige onderwerp ontwikkel. Daar dien op gelet te word dat 'n aantal aspekte wat in hierdie boek gedek word, hulle oorsprong te danke het aan 'n artikel wat gedurende 1990 deur een van die outeurs gepubliseer is (sien Albertyn "Alcohol problems and unfair labour practices" 1990 *Acta Juridica* 1).

Alvorens 'n boek geëvalueer word, is dit myns insiens belangrik om oor twee aspekte duidelikheid te verkry, naamlik wie dit geskryf het en aan wie dit gerig is. Wat die outeurs aanbetref, word dit met die lees van die buiteblad reeds duidelik dat die werk deur twee persone met uiteenlopende professionele agtergronde geskryf is. Die een is 'n regsgeleerde en die ander 'n spesialis op die gebied van beroepsmedisyne. Wat die kwalifikasies en praktiese ervaring van die skrywers betref, skiet daar kennelik niks mee tekort nie. Die vraag duik egter onwillekeurig op of dit in die lig van die persone se agtergronde moontlik is om 'n samehangende boek oor een onderwerp te skryf.

Wat die teikengroep van die boek aanbetref, word die boek gerig aan diegene "who must grapple with the problems of alcohol and drug abuse at the workplace". Dit sluit personeelbestuurders, vakbondverteenwoordigers, arbeidsregspesialiste en gesondheidsbeamptes in. Dit is geen maklike taak om vir beide 'n personeelbestuurder wat dissiplinêre verhore behartig en 'n gesondheidsbeampte wat 'n siekeboeg of rehabilitasieprogram bedryf 'n boek te skryf wat maklik verteerbaar is nie. Die skrywers het egter nie beoog om 'n streng akademiese werk te publiseer nie. Die doel was eerder om 'n maklik leesbare gids op te stel wat daarop gemik is om probleme in die praktyk te voorkom en op te los. Ten einde die boek meer toeganklik te maak, is daar ook met die aanvang van elke hoofstuk deur middel van 'n grafiese simbool aangedui of die bepaalde hoofstuk die mediese, arbeidsverhoudinge of arbeidsregveld dek.

'n Wye verskeidenheid onderwerpe oor alkohol en die werkplek word deur die werk gedek. Aspekte soos die oorsake, identifisering, gevolge en behandeling van drankprobleme word aangeraak. Tussen hierdie onderwerpe is daar ook sekere regsaspekte verweef, soos die verpligtinge van werkgewers en werknemers, regsaspekte in verband met die identifisering van drankmisbruik, billike dissiplinêre optredes en voorgestelde beleidsooreenkomste.

Die gedeelte van die boek wat oor maatskaplike en mediese aspekte handel, verskaf 'n groot verskeidenheid statistiek. Om maar enkele voorbeelde te noem: Tabelle word verskaf wat die verskillende tipes drank en hulle onderskeie alkoholinhoude weergee (13). Daar is ook 'n grafiek wat die verhouding tussen ongevallegeneigdheid en bloed-alkohol vlakke weerspieël (44). In die geval van groot ondernemings wat oor 'n maatskaplike of mediese afdeling beskik, kan hierdie inligting vir die personeel van nut wees. 'n Mens dink veral aan die mynbedryf waar werkgewers aan groot getalle werknemers verblyf en rekreasiefasiliteite verskaf. Vir kleiner ondernemings waar daar geen persone met 'n mediese agtergrond werksaam is nie, sou hierdie gedeeltes van die boek van relatief min nut en waarde wees.

Die gedeelte van die boek wat die regsaspekte bespreek, verleen 'n gebalanseerde dog kriptiese uiteensetting van die vernaamste regsbeginsels met betrekking tot hierdie onderwerp. Daar word 'n kort uiteensetting gegee van die gemeenregtelike verpligtinge van werkgewers en werknemers. Daar word ook verwys na die wyse waarop dit gewysig is deur die verlening van die onbillike arbeidspraktyk-jurisdiksie aan die nywerheidshof. Melding word ook gemaak van die invloed van die Wet op Masjinerie en Beroepsveiligheid 6 van 1983 en die Ongevallewet 30 van 1941 op die onderwerp alkohol en die werkplek.

Ten einde beter arbeidsverhoudinge te bewerkstellig, word voorgestel dat werkgewers wat met alkoholverwante probleme opgeskeep sit, 'n alkoholbeleid moet ontwikkel. Daar word voorgestel dat dit sinvol sou wees om 'n kollektiewe ooreenkoms ten opsigte van alkohol en die werkplek met werknemers of hulle verteenwoordigers te beding – 'n nuttige voorbeeld van so 'n ooreenkoms is ook in die boek vervat. Dit blyk deurgaans uit die werk dat werkgewers op 'n simpatieke, voorkomende en rehabiliterende wyse, eerder as streng dissiplinêr, ten opsigte van alkoholverwante probleme behoort op te tree.

Alhoewel daar in sekere van die hoofstukke na regshandboeke, artikels in regstydskrifte en talle hofsake verwys word, beskik die werk nie oor 'n register van hierdie bronne nie. Die boek bevat egter 'n omvattende register met verwysings na mediese handboeke en tydskrifartikels. Dit is onduidelik of die outeur wat vir die mediese sy van die boek verantwoordelik was dit bloot belangriker geag het om 'n register van hierdie bronne saam te stel as in die geval van die ander outeur, en of die outeur wat die regsaspekte gedek het van mening was dat die bronne wat hy aangewend het net nie van so 'n omvang was dat dit 'n register regverdig nie. Die afwesigheid van so 'n register is myns insiens egter 'n gemis, aangesien dit tot gevolg kan hê dat die talle voetnotas telkens gesif moet word ten einde 'n spesifieke verwysing op te spoor.

Ten spyte van bogenoemde tekortkoming is die res van die boek se tegniese versorging van 'n hoë standaard. Talle diagramme, grafieke en tabelle word aangewend ten einde statistiek sinvol oor te dra. Inderdaad word hierdie hulpmiddels op 'n keurige wyse deur die outeurs en uitgewer aangebied.

Die outeurs het, in die geheel gesien, daarin geslaag om die onderwerp van die boek op 'n samehangende wyse te dek. Arbeidsregsgeleerdes moet egter nie 'n volledige of in diepte regstudie verwag wanneer die boek aangekoop word nie. Persone wat met alkoholverwante probleme by die werkplek te doen kry, kan hierdie boek gerus aankoop. Die werk is egter nie geskik as voorgeskrewe boek vir regstudente nie.

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HUWELIKSREG-BRONNEBUNDEL
deur L NEIL VAN SCHALKWYK
Juta Kaapstad Wetton Johannesburg 1992; xxii en 425 bl
Prys R101,46 (sagteband)

Huweliksreg-bronnebundel bevat 220 bronne. Dit verskil van die gebruiklike vonnisbundel deurdat nie net regspraak nie maar ook wetgewing en die gemenereg daarin opgeneem is. Die primêre bronne is op datum tot Mei 1992. Die bronne word deurgaans

deur aantekeninge aangevul. In hierdie aantekeninge verwys die outeur waar toepaslik na ander primêre bronne en die menings van regskrywers.

Soos *Personereg-bronnebundel* deur Jordaan en Davel wat ook in 1992 deur Juta uitgegee is, volg hierdie bronnebundel die indeling van *Persone- en familiereg* deur Van der Vyver en Joubert. Die doel van *Huweliksreg-bronnebundel* is onder andere om Van der Vyver en Joubert se *Persone- en familiereg* as voorgeskrewe handboek aan te vul. *Personereg-bronnebundel* het dieselfde oogmerk en dit is dus moontlik dat voorgraadse studente genoemde drie boeke as "studiepakket" vir die persone- en familieregkursus kan gebruik. Die outeur is egter van mening dat "die boek ook alleenstaande sinvol vir nagraadse studente en deur regspraktisyns gebruik kan word" (voorwoord).

Die boek beslaan 425 bladsye en bestaan uit vier hoofstukke (die verlowing, sluiting van die huwelik, gevolge van die huwelik en ontbinding van die huwelik), 'n uiters omvattende inhoudsopgawe, 'n lys van vernaamste aangehaalde werke en 'n bronnelys. Die bronnelys bestaan uit 'n volledige lys van die primêre bronne wat aangehaal word (skrywers, wetgewing en regspraak). Gemeenregtelike skrywers waarna as bronne verwys word, sluit Brouwer, Van Leeuwen en De Groot in. Wetgewing (selfs sekere artikels van die Politieke Ordonnansie van 1580 word in Nederlands aangehaal) word in alfabetiese volgorde in die bronnelys aangedui en nie chronologies nie. Die gebruikersvriendelikheid van die boek word beslis verhoog deurdat die bladsy waarop die artikels van wette wat *verbatim* as bronne aangehaal word, in vetdruk aangedui word. Daar word ook aangedui op watter bladsy daar bloot na die artikel verwys word. Die nommer van die bron word in vierkantige hakies aangedui. Dieselfde geld die lys van skrywers en aangehaalde sake. Die boek bevat ongelukkig nie 'n volledige vonnisregister wat ook vonnisse insluit wat nie as bronne aangehaal word nie, maar waarna in aantekeninge verwys word. In hierdie verband kan miskien kers opgesteek word by Cronjé en Heaton wat wel so 'n vonnisregister in hulle *Vonnisbundel oor die persone- en familiereg* (1990) vervat het.

Artikels uit wette wat as bronne aangehaal word, gaan vergesel van die datum van goedkeuring en die datum van inwerkingtreding van die wet, asook 'n aanduiding van watter teks deur die staatspresident geteken is.

Sake wat aangehaal word, word voorsien van 'n kort feite-opsomming gevolg deur relevante uittreksels uit die uitspraak. Daar kan oor die algemeen geen fout gevind word met die keuse van bronne nie. Met die eerste oogopslag word gewonder oor die weglating van sommige beslissings. Nadere ondersoek van die aantekeninge toon egter dat daar deeglik na alle tersaaklike beslissings verwys word. 'n Voorbeeld hiervan is *B v B* 1983 1 SA 496 (N), die enigste beslissing wat saam met artikel 25(4) van die Huwelikswet 25 van 1961 aangehaal word (74–76). Dit word toegelig deur 'n aantekening waarin die outeur verwys na sake soos *Allcock v Allcock* 1969 1 SA 427 (N), *De Greeff v De Greeff* 1982 1 SA 882 (O) en *Kruger v Fourie* 1969 4 SA 469 (O) (76).

Die aantekeninge wat die aangehaalde primêre bronne vergesel, is besonder volledig. Hierin word nie net die aangehaalde bron toegelig nie, maar daar word ook na ander verbandhoudende aspekte verwys. Die outeur verwys deurgaans na wetgewing, standpunte van skrywers en hofbeslissings. Teenstellende hofbeslissings en standpunte van skrywers word uitgewys. Die aangehaalde bronne en aantekeninge bied telkens 'n besonder volledige uiteensetting van die onderwerp wat bespreek word. Sien in hierdie verband byvoorbeeld die bronne en aantekeninge onder die opskrif "Herverdelingsdiskresie" (par 4 4 1 3 op 319–361). Die boek kan dus beslis alleenstaande deur nagraadse studente en regspraktisyns gebruik word.

'n Punt van kritiek teen die tipografiese uiteensetting van die boek is dat dieselfde lettertipe byna deurgaans gebruik word. Dit is moeilik om die feite-opsomming van die saak te onderskei van die uittreksels uit die uitspraak en die outeur se aantekening. 'n Afwisseling van lettertipes, soos in Jordaan en Davel se *Personereg-bronnebundel* en Cronjé en Heaton se *Vonnisbundel oor die persone- en familiereg*, sou hierdie probleem uitgeskakel het. Die nommering van opskrifte (bv 4 4 4 2 2) is ook verwarrend.

Die enkele punte van kritiek doen geensins afbreuk aan die akademiese gehalte van die boek nie. *Huweliksreg-bronnebundel* slaag ongetwyfeld in sy doel en word vir sowel voor- en nagraadse regstudente as praktisyns en akademici aanbeveel.

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***ACTA JURIDICA* 1991**

Published under the auspices of the Faculty of Law, University of Cape Town

Juta Cape Town Wetton Johannesburg 1991; 146 pp

Price R91,20

This volume of *Acta Juridica* focuses on African customary law and the role it may play under a new dispensation in South Africa. What customary law is; whether it accurately reflects today's evolving practices, especially in the urban areas; what role it should play in the future, and how its norms will measure up in terms of a future bill of rights, are recurring themes in these essays. Since publication, these questions have assumed even greater urgency; yet answers continue to elude us. Thus when draft legislation to eliminate discrimination against women was recently drawn up, the disadvantages suffered by women under customary law were ignored. Nevertheless the essays in this volume, by highlighting the problem areas and suggesting possible solutions, constitute a valuable contribution to the debate. In this collection the very meaning and validity of customary law are debated. It is shown how incongruous were the colonial powers' attempts to record what they considered to be unchanging customary law when by its very nature custom is always in a state of flux. That the process of changing practice continues today, even in the urban areas, is highlighted by Gordon and Burman. We are also constantly reminded that the African people themselves have had insufficient opportunity to express their views on African law.

Family law, not surprisingly, emerges as the chief area of concern. Chanock points out that colonial powers did change customary law in other fields, but that it suited them not to change family law. Nhlapo stresses that issues of family law cannot be separated from women's law, and recalls that the colonial powers saw African women as rightless entities under the control of men.

The chief drawback of the patriarchal family of customary law from the point of view of women and children, is its failure to treat them as individuals with rights, rather than merely as members of a group (see eg Burman, Nhlapo and Murray and Kaganas). While Dhlamini, in particular, and Nhlapo, to a lesser extent, point out the security which the extended family provides for all its members, other contributors such as Chanock, as well as Murray and Kaganas, show that this form of security is no longer appropriate and cannot be relied on in modern society.

Indisputably, once a human rights instrument is introduced here, much customary family law will be found wanting (see Bennett, Bekker). The consensus among the contributors is that there is an urgent need for reform; the crucial question is how such reform is to be tackled. South Africa has until now been understandably reluctant to address thorny issues such as polygyny, even though there are few polygynous marriages today, especially in urban areas (see Bekker, Murray and Kaganas) and even though many women do favour the abolition of polygyny (Murray and Kaganas).

Perhaps the most significant feature of this volume is the plea by several contributors for a revolutionary reform of family law. Thus Bekker states that equality of spouses in the marriage is bottom line for all (4). Bennett believes that a thorough-going enforcement of gender equality would involve a complete overhaul of the present system of customary law. He sees the law of property and succession as being of primary concern, but also contends that within marriage women should have joint powers of decision-making, custody and guardianship rights, and freedom from physical assault (26 – 27). Chanock, too, rejects the traditionalist approach as being unsuitable for South Africa today, and suggests "starting with a principle of discontinuity which would be preferable to carrying further the sad history on which continuity would be based" (64). Nhlapo similarly argues that because society has always had authoritarian practices this is not an excuse to continue them (140). Thus the clear message emerges that the problems cannot be left to resolve themselves in the future; urgent intervention is needed. At the same time, we must not delude ourselves, as Chanock and Gordon demonstrate with reference to the reform of family law in other African countries, that even the unification of family law will provide the answers.

Technically this production seems to be without fault, apart from the second paragraph on page 12 which, it seems, should not have been in small print.

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ENGINEERING CONSTRUCTION CONTRACTS
by A HYMAN
Butterworths Durban 1992; loose leaf
Price R132,00

Engineering construction contracts is a loose-leaf publication intended to aid in the drafting and interpretation of construction contracts. It is modelled on the sixth edition of *General conditions of contract for works of civil engineering construction* (*GCC*) (1990) and as such is particularly suitable for use by parties to such contracts as well as their legal advisers. Practising advocates and attorneys will have limited use for a publication of this nature because they are usually not involved in such matters. Disputes arising from contracts of this nature tend to be resolved in a practical manner or are referred to arbitration/mediation, which means that recourse to the courts is excluded. Although these procedures are more cost effective, the author acknowledges in the preface that the opinions of mediators and the decisions of arbitration tribunals are rarely published and, even when they are, they do not constitute legal precedents. Consequently, the law relating to construction contracts and particularly *GCC*, has not been substantially developed by the courts in recent years. This in turn means that disputes tend to be resolved on an *ad hoc* basis which furthermore may have negative repercussions for legal certainty. Bearing this in mind, a work of this nature will certainly be of assistance to legal laymen involved in the construction industry. It also comes as no surprise, then, that a brief glossary of everyday legal Latin phrases has been included which would not have been present had the work been written primarily for the legal fraternity.

The book is divided into six parts comprising the following: a clause-by-clause analysis of *GCC* (1990); a law summary, dealing with legal aspects of construction contracts;

a summary of remedies available to the employer and contractor; a section on certain relevant statutes and rules; a case law summary and a subject matter index.

The main thrust of this work is contained in the first section in which a reproduction of *GCC* (1990) is presented with a clause-by-clause breakdown and analysis of the contract. Problematic aspects are extracted and discussed, sometimes with reference to the applicable law, while other clauses are simplified and construed for the reader. The author's explanations are on the whole clear, to the point and a useful guide to *GCC*. Engineers and the like will derive particular benefit from a useful work of this nature. There are, however, no exhaustive discussions of legal principles, merely brief expositions of the law applicable in certain instances. At certain points the reader is referred to other sections of the book for amplification. There are no footnotes and the reader will have to resort to original research where detail is required. The fact that the book is not burdened with legal detail makes it all the more attractive to legal laymen, though legal practitioners will find this a shortcoming. Primarily, then, the book serves as a useful practical guide to *GCC* (1990), which almost inevitably means that it has little academic merit.

The second section, titled "law summary", comprises two sections. One (LAWSUM A) deals with the interpretation of contracts and touches on aspects ranging from rules relating to interpretation and construction to short notes on rectification, implied terms and the parol evidence rule. The second (LAWSUM B) deals with aspects of insolvency law such as the effect of insolvency on uncompleted contracts and notice on breach preceding sequestration. Although some may consider this a somewhat motley selection, it does provide some insight into some of the more important day-to-day problems relating to the interpretation of contracts. A common problem, for instance, found in contracts not drawn up by attorneys is blank spaces in *pro forma* contracts that are left uncompleted. The author has succinctly indicated the position in such an instance.

The next section is devoted to remedies, claims and disputes. Once again useful topics are discussed, ranging from common-law remedies available in the event of contractual breach to aspects of arbitration proceedings. The latter is, of course, an essential element of any book relating to construction contracts. Once again the list of topics discussed is by no means exhaustive and the reader may find, for instance, that a form of contractual breach has not been discussed or has been dealt with in insufficient detail.

The final three sections contain, respectively, copies of the Conventional Penalties Act 15 of 1962, the Prescribed Rate of Interest Act 55 of 1975 and the Association of Arbitrators Rules for the Conduct of Arbitrations; a short section on some relevant South African and English case law; and an index.

The author had the advantage of approaching this work from the viewpoint of someone who was involved in the drafting of *GCC* (1990) having been the legal adviser to the committee entrusted with this task. First-hand knowledge of the intended meaning of the various clauses of this contract obviously enabled him to pinpoint possible problem areas. Although this work can be recommended for its intended use, I feel obliged to mention a few shortcomings. As with most publications the odd printing or proof reading error has crept in (see eg LAWSUM A p4 final sentence under Object of interpretation).

What gives greater cause for concern is that the author is at times given to imprecision in three spheres. The first is imprecision of definition. In the glossary of Latin phrases the author defines *mora* as a "legal delay having contractual consequences". The non-jurist could very well understand this as a lawful delay which gives rise to a contract, which is of course nonsense. *Mora* is in fact, in this context, a delay in contractual performance which may eventually amount to contractual breach. The author should be wary of interpretations or definitions which are too loose.

Secondly there is imprecision of expression. In the first section (170) the author states:

> "Save to a limited extent in the case of the Deed of Suretyship the, (*sic*) Pro Formas do not have contractual force in the sense of being forms which the contracting parties are obliged to use or the terms of which are embodied in the actual contract."

All this merely to say that the use of pro formas is not obligatory except to a limited extent in the case of the deed of suretyship. The words "Pro Formas do not have contractual force. . ." serve only to confuse the issue. Although the words are qualified in the second part of the paragraph, they are still meaningless because pro formas never have "contractual force" per se: they are merely guidelines or examples used in the drafting process. Where format and/or content of certain contracts is prescribed by way of statute, this will have to be adhered to, in order to create a valid contract.

Thirdly, there is imprecision in stating the law. The author tends at times to oversimplify the law applicable in a certain instance in his efforts to condense and present certain legal principles simply. For instance, at Rem 5 he says the following about damages for contractual breach:

> "In all these cases the measure of damages is the same, namely, that the loss must be the natural consequence of the breach or must have been a consequence which was within the contemplation of the parties. With regard to the criterion of what the parties may have contemplated Solomon JA said, in Victoria Falls & Transvaal Power Company Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1, at 46:
>
> > Now where the parties to an agreement have expressly stipulated on what compensation is to be made for the loss or injury which may result from a breach of Contract, the courts of law will as a rule give effect to the stipulation. Such compensation may exceed or fall short of the actual damage sustained, but the sum so determined binds the parties to the agreement."

In the first paragraph quoted above the author seems to be referring to the distinction between general and special damages. He omits, however, to mention that while general damages are as a rule claimable, damages which do not flow naturally and generally from a specific form of contractual breach are not and are special damages. He furthermore only describes the contemplation principle and does not refer to the convention principle, even though the latter seems to be favoured by our courts. Then, in the second paragraph, he quotes an excerpt in clarification of the contemplation principle which is nothing but a prime example of the application of the convention principle, where the measure of damages in the event of breach has expressly been included in the contract. To my mind too little information has been recorded and assumptions are made that can be misleading. A clearer more precise exposition of the law would have taken a little more space and presented the reader with a more complete picture.

So too at Rem 23, under implied repudiation, the author gives the following example:

> "[I]f the Employer fails in terms of clause 13 to make the site available the contractor may, despite the remedy which the clause gives him, elect to establish a repudiation at common law with the consequential right to cancel the contract."

Such a failure on the part of the employer should not be associated only with repudiation, since an intention not to perform in terms of the contract, cannot automatically be inferred from conduct. Such an instance would rather point to *mora creditoris* and this has implications other than repudiation. *Mora creditoris*, for instance, does not immediately discharge the debtor from his obligation unless the creditor's refusal is of such a nature that it amounts to a repudiation of the whole contract. Furthermore, responsibility for further delay is shifted onto the creditor regardless of prior *mora debitoris* on the part of the contractor, and the risk of destruction passes to the creditor. Since there may sometimes be a fine line between *mora creditoris* and repudiation under construction contracts, I think that a more detailed discussion of both is warranted.

Finally, a few important decisions should have been discussed in some detail in this work: one such is *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A). Although *GCC* (1990) does to a large extent make provision for remedies I believe that landmark decisions such as this should be dealt with properly for the sake of completeness. Furthermore, relevant case law, in the section devoted to it in the book, is merely referred to by way of the case reference. The names of the cases could easily have been inserted since cases are usually remembered by name and not by reference.

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LABOUR AND EMPLOYMENT LAW

by MJD WALLIS

Butterworths Durban 1993; loose leaf

Price R169,86

This is a loose-leaf work dealing with South African labour and employment law. The section which has been published does not cover the full spectrum of labour law, but is the first part of a staggered project. It deals with the contract of employment and the Basic Conditions of Employment Act 3 of 1983.

In the context of the contract of employment, the author deals with general issues such as formation, parties to the contract and identification of the contract. He then covers the obligations of the parties, the duration and termination of the contract and remedies for breach of contract. The ensuing sections deal with the effects of collective agreements and arbitration on the contract of employment, and the effect of strikes and lock-outs on the employer-employee relationship. Finally, the author discusses the Basic Conditions of Employment Act.

The work also contains a table of cases and a fairly extensive index. It is attractively bound in a maroon folder which allows ample space for future insertions. Sections are divided by means of plastic dividers.

I found the work to be clearly written and understandable. The use of end-notes instead of footnotes results in a text which flows easily. The book is one which will form a worthy addition to one's library, subject however, to two conditions. The first, naturally, is that the project is completed to include the full spectrum of labour law; the second is that it is kept up to date. In the rapidly evolving world of labour law, that alone would put it a step ahead of its competitors.

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One of an individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in corpus, *but it has several facets. It embraces not merely the right of protection against direct or indirect physical aggression or the right against false imprisonment. It comprehends also a mental element* (*per* Hoexter JA in *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 145).